

Nos. 87A16, 86A16, 88A16

N.C. INDUSTRIAL COMMISSION

SUPREME COURT OF NORTH CAROLINA

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No. 87A16

IN THE MATTER OF [REDACTED], by and )  
through [REDACTED] )  
Administratrix of the Estate of [REDACTED] )  
Claim for Compensation Under the North )  
Carolina Eugenics Asexualization and )  
Sterilization Compensation Program )

From the Industrial Commission  
COA15-699

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No. 86A16

IN THE MATTER OF [REDACTED], by and )  
through [REDACTED], Administratrix of the )  
Estate of [REDACTED] Claim for )  
Compensation Under the North Carolina )  
Eugenics Asexualization and Sterilization )  
Compensation Program )

From the Industrial Commission  
COA15-763

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No. 88A16

IN THE MATTER OF [REDACTED] )  
[REDACTED], Claim for Compensation Under )  
the North Carolina Eugenics )  
Asexualization and Sterilization )  
Compensation Program )

From the Industrial Commission  
COA15-829

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**CLAIMANT-APPELLANTS' NEW BRIEF**

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 Asexualization and Sterilization ) COA15-829  
 Compensation Program )

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CLAIMANT-APPELLANTS' NEW BRIEF  
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ISSUE PRESENTED  
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I. Whether the Court of Appeals had jurisdiction over Appellants' constitutional challenge to the requirement under the Eugenics Asexualization and Sterilization Compensation Program, N.C. Gen. Stat. § 143B-426.50(1) that a victim of forced sterilization by the North Carolina Eugenics Board be alive on 30 June 2013 to be eligible for compensation.

STATEMENT OF THE CASE

All three of the Claimant-Appellants in these consolidated cases were forcibly sterilized under orders issued by the North Carolina Eugenics Board. Each properly filed a claim for restitution for that injustice under North Carolina's Eugenics Asexualization and Sterilization Compensation Program, N.C. Gen. Stat. § 143B-426.50 *et seq.*, but were denied compensation because they died before 30 June 2013. (COA15-699 R pp 9-14; COA15-763 R pp 93-94; COA15-829 R pp 50-51).

All Claimant-Appellants pursued their compensation claims and appeal rights for the denial of their claims in accordance with the statutory provisions established by the Eugenics Compensation Program, N.C. Gen. Stat. Act §§ 143B-

426.50 *et seq.* Appellant ██████ who was without benefit of counsel before the Industrial Commission, presented her Equal Protection claim challenging the denial of compensation in a Petition for Writ of Certiorari, which the Court of Appeals granted on 9 November 2015. *In re Hughes*, \_\_ N.C. App. \_\_, \_\_, 785 S.E.2d 111, 116 (2016). Appellant ██████ presented his constitutional claim in his Request for Evidentiary Hearing Before a Deputy Commissioner, which included a request that the Industrial Commission certify the constitutional issue for review by the Court of Appeals. (COA15-829 R p 33). Appellant ██████ also presented her constitutional claim before the Industrial Commission in a Motion to Certify that issue for review by the Court of Appeals. (COA15-763 R p 89). The Commission granted both Appellant ██████ and Appellant ██████ motions in its Final Decisions and Orders, which Appellants timely appealed directly to the Court of Appeals as required under N.C. Gen. Stat. §§ 143B-426.53(f) and 143-293. (COA15-829 R p 53).

On 25 August 2015, the Court of Appeals consolidated these three cases for hearing. During oral argument, the State raised for the first time a contention that the Court of Appeals might not have jurisdiction because of N.C. Gen. Stat. § 1-267.1(a1).<sup>1</sup> On 16 February 2016, the Court of Appeals issued its Decision

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<sup>1</sup> This issue was not mentioned in the State's briefs in the COA. The State takes the exact opposite position in its Petitions for Discretionary Review filed with this Court.



dismissing Claimants' appeals for lack of jurisdiction and remanding them "to the Industrial Commission for transfer to the Superior Court of Wake County" for consideration by a three-judge panel pursuant to N.C. Gen. Stat. §§ 1-267.1(a1) and 1A-1, Rule 42(b)(4). *In re Hughes*, \_\_ N.C. App. at \_\_, 785 S.E.2d at 112. Judge Dillon dissented from the majority opinion filed by Judges Magee and Davis, and Claimant-Appellants timely filed their appeals of right on 11 March 2016. At the same time, Claimant-Appellants also filed Petitions for Discretionary Review seeking to appeal issues not relied up on by the dissent. The State filed cross-appeals and its own Petitions for Discretionary Review on 21 March 2016. This Court denied Claimant-Appellants' Petitions, granted the State's Petitions, and consolidated these appeals on 9 June 2016.

#### STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

In the decision by the Court of Appeals in these matters filed on 16 February 2016, Judge Dillon filed a dissenting opinion. Appellate review is based on N.C. Gen. Stat. § 7A-30 (1) and (2) and N.C. R. App. P. 14.

#### STATEMENT OF THE FACTS

Appellant [REDACTED] was sterilized on 23 January 1963 at the age of 39 under order by the North Carolina Eugenics Board. (COA15-699 R pp 86, 89, 95). At the time, she was married with five children, ages 11, 9, 7, 4, and 1. (COA15-699 R p 83). The "Report of Psychological Examination" included with

the "Petition for Operation of Sterilization or Asexualization" submitted by Wallace H. Kuralt, then Director of Public Welfare of Mecklenburg County, concluded that Mrs. [REDACTED] was "mentally deficient," and that Mr. [REDACTED] previously had tuberculosis and was "mentally deficient" as well. (COA15-699 R p 95). The psychological examiner's opinion was that "any children" the [REDACTED] "have produced or may produce will not exceed the mental level of both parents" and that "sterilization, in the best interest of both the family and society, seems strongly indicated." (COA15-699 R p 95).

Mrs. [REDACTED] died in March 1996. (COA15-699 R p 36). Her daughter, [REDACTED] was subsequently appointed and continues to serve as the Administratrix of [REDACTED]'s Estate. (COA15-699 R pp 16, 80). Ms. [REDACTED] timely filed a claim for compensation pursuant to N.C. Gen. Stat. §§ 143B-426.50 *et seq.* with the Office of the Justice for Sterilization Victims. (COA15-699 R p 74). At the evidentiary hearing before the Industrial Commission, Ms. [REDACTED] testified that Mrs. [REDACTED] was a good mother, and that their family suffered a great deal of pain because of the State's Eugenics program. (COA15-699 R pp 37-38).

Ms. [REDACTED] did not have legal representation throughout the proceedings before the Industrial Commission, which denied her claim for the sole reason that Mrs. [REDACTED] was not alive on 30 June 2013. (COA15-699 R p 9-14). Ms. [REDACTED] timely exercised her right to appeal the Industrial Commission's final decision to

the North Carolina Court of Appeals pursuant to N.C. Gen. Stat. §143B-426.53. Through counsel, she sought review of her Equal Protection claim via a Petition for Writ of Certiorari filed with the North Carolina Court of Appeals on 26 June 2015, which the court granted on 9 November 2015. *In re Hughes*, \_\_ N.C. App. at \_\_, 785 S.E.2d at 116.

\_\_\_\_\_ was involuntarily sterilized under order of the North Carolina Eugenics Board on 23 April 1956 at the age of 14 after giving birth to her daughter. The social worker and medical examiner's justifications for recommending Ms. \_\_\_\_\_ sterilization included "feeble-mindedness and sexual promiscuity." (COA15-763 R pp 7, 10, 15). When she was older, Ms. \_\_\_\_\_ learned what had happened to her and the significance of the surgery. (COA15-763 R p 47). She subsequently drifted into a depression from which she never emerged. (COA15-763 R pp 46-47, 57). She died at the age of 69, still in her depressed state. (COA15-763 R p 57).

Ms. \_\_\_\_\_'s daughter, \_\_\_\_\_, who lived with and was close to Ms. \_\_\_\_\_ until her death, completed the education and training necessary to obtain her certification as a CNA and phlebotomist. (COA15-763 R pp 42-44). Ms. \_\_\_\_\_ worked in factories and then as a phlebotomist and fully supports herself financially. (COA15-763 R pp 43, 44).

Ms. [REDACTED] died on 16 October 2010. (COA15-763 R p 56). Ms. [REDACTED] was subsequently appointed and served as the Administratrix of Ms. [REDACTED]'s Estate. (COA15-763 R p 21). Ms. [REDACTED] timely filed a Eugenics Compensation claim on her deceased mother's behalf with the Office of Justice for Sterilization Victims. (COA15-763 R pp 28, 65, 90). The Industrial Commission determined that Ms. [REDACTED] was involuntarily sterilized under the authority of the Eugenics Board of North Carolina, that her claim was properly filed, and denied her claim for the sole reason that she was not alive on 30 June 2013. (COA15-763 R pp 92-94).

Ms. [REDACTED] challenged the constitutionality of the Industrial Commission's application of N.C. Gen. Stat. § 143B-426.50(1) during the Industrial Commission proceedings via a Motion to Certify the Equal Protection issue to the North Carolina Court of Appeals on 22 October 2014. In its Decision and Order filed 27 April 2015, the Full Commission certified the constitutional question to the North Carolina Court of Appeals. (COA15-763 R pp 94, 95). Appellant timely appealed the Full Commission's denial of her claim to the North Carolina Court of Appeals pursuant to N.C. Gen. Stat. § 143B-426.53. (COA15-763 R p 97).

Appellant [REDACTED] was involuntarily sterilized at the age of 17 on 5 July 1950 under authority of the Eugenics Board of North Carolina because he had been deemed "retarded" by the Granville County Department of Public Welfare. (COA15-829 R p 50). Appellant's mother signed the consent form

authorizing the sterilization procedure under duress, with the understanding that if she did not consent, county authorities would have [REDACTED] removed from the family home and institutionalized. (COA15-829 R p 50). [REDACTED]'s brother, [REDACTED], testified that the sterilization procedure and its aftermath caused his family much stress and anguish. (COA15-829 T p 7). He recounted his mother "crying day and night" and "the stress that everybody was under" because of "what the State had done to [REDACTED]." (COA15-829 T p 8).

Mr. [REDACTED] was appointed [REDACTED]'s legal guardian on 3 February 2000. (COA15-829 R p 51). [REDACTED] died on 12 June 2006, and Mr. [REDACTED] handled all matters related to his death and burial. (COA15-829 R p 51, T p 25). In 2002, four years before his brother's death, Mr. [REDACTED] heard Governor Easley apologize on the State's behalf to eugenics victims and their families, and immediately contacted the Governor's Eugenics Task Force, which, under Executive Order 83 was assigned the duty of recommending "possible methods of forms of compensation" to sterilization victims. (COA15-829 R p 36, T p 21).

Pursuant to N.C. Gen. Stat. § 143B-426.50 *et seq.*, on 9 April 2014 Mr. [REDACTED] filed a claim for compensation with the Office of Justice for Sterilization Victims ("OJSV"). (COA15-829 R pp 2-4). Despite the fact that OJSV knew that [REDACTED] died in 2006, OJSV repeatedly sent Mr. [REDACTED] requests for further documentation to supplement the claim he had filed. (COA15-829 R pp 27-30).

The Industrial Commission concluded that because [REDACTED] was not alive on 30 June 2013, he was “not a qualified recipient pursuant to N.C. Gen. Stat. 143B-426.50-143B-426.57.” (COA15-829 R p 51).

Prior to the Full Commission hearing, Appellant [REDACTED], through counsel, filed a Motion to Certify the present constitutional question to the Court of Appeals. (COA15-829 R p 51). In its Decision and Order, the Commission certified the question for review by the Court of Appeals. (COA15-829 R p 53). Mr. [REDACTED] timely appealed the Commission’s denial of this claim to the Court of Appeals pursuant to N.C. Gen. Stat. § 143B-426.53.

### ARGUMENT

#### I. THE COURT OF APPEALS HAS JURISDICTION TO CONSIDER CLAIMANT-APPELLANTS’ “AS APPLIED” EQUAL PROTECTION CHALLENGE

##### A. The N.C. General Statutes and Rules of Appellate Procedure Provide that the Appellate Jurisdiction of the Court of Appeals is Broad and Authorize the Court to Consider Constitutional Challenges

The Eugenics Compensation Act lays out a unique and detailed statutory scheme for claimants seeking restitution for forced sterilization by the State. An individual was required to file the claim with the Office of Justice for Sterilization Victims, with appropriate supporting documentation, by 30 June 2014. N.C. Gen. Stat. § 143B-426.52. Following submission and verification that the claim was complete, the Act provides that a Deputy Commissioner of the Industrial

Commission make an initial determination of eligibility. N.C. Gen. Stat. § 143B-426.53(b). If the claim was denied, the claimant had the opportunity to submit additional information and request a reconsideration by the Deputy Commissioner. N.C. Gen. Stat. § 143B-426.53(c). If the claim was again rejected, the claimant could request a hearing before the Deputy Commissioner. N.C. Gen. Stat. § 143B-426.53(d). If following the hearing the claim was denied, the Act allows the claimant to file an appeal to the Full Commission. N.C. Gen. Stat. § 143B-426.53(e). Claimants were then provided the right to appeal the decision of the Full Commission to the Court of Appeals. N.C. Gen. Stat. § 143B-426.53(f).

Once properly before the Industrial Commission pursuant to the statutory scheme described above, Claimant-Appellants ██████████ and ██████████ relying on general rules of practice before the Industrial Commission and N.C. Gen. Stat. § 97-86, moved the Commission to certify the constitutional questions presented by their cases to the Court of Appeals. And while the Industrial Commission noted that there is no express parallel to N.C. Gen. Stat. § 97-86 in the Eugenics Compensation Act, it recognized that “in the interests of justice and under its implied judicial powers,” (COA15-763 R p 94; COA15-829 R pp 52-53) these questions were properly preserved and should be presented to the Court of Appeals.

Claimant-Appellants followed the statutory and regulatory scheme specifically prescribed under the Eugenics Compensation Act for raising constitutional issues before the Industrial Commission, and under prior precedents, necessary to have their Equal Protection claims heard by the Court of Appeals. *See Myles v. Lucas & McGowan Masonry*, 183 N.C. App. 665, 665, 645 S.E.2d 143, 143 (2007) ("Where a party appeals a constitutional issue from the Commission and fails to file a petition for certiorari or fails to have the question certified by the Commission, the Court of Appeals is without jurisdiction to consider and rule upon the constitutional question."). They also properly exhausted the administrative process before taking their appeal of right under N.C. Gen. Stat. § 143B-426.53(f) directly to the Court of Appeals. To penalize these appellants now by dismissing their claims and forcing them to begin a separate and unrelated administrative process, after they have dutifully followed all the requirements established to specifically address these unique claims, results in a manifest injustice which is further amplified by the exceptional circumstances these consolidated cases present. Not only does further delay of a decision on the merits harm these three Claimant-Appellants, it causes further delays in final resolution for all Eugenics Compensation Program recipients. They will also be forced to wait even longer for the State to issue final compensation payments, as those cannot issue until all pending appeals are resolved.



Even if Claimant-Appellants had some potentially applicable alternative jurisdictional route, as the dissent points out, “the General Assembly has provided the Court of Appeals with the power ‘to issue . . . writs . . . in the aid of its jurisdiction, or to supervise and control the proceedings of . . . the Industrial Commission.’” *In re Hughes*, \_\_ N.C. App. \_\_, \_\_, 785 S.E.2d 111, 118 (2016) (Dillon, J., dissenting) (quoting N.C. Gen. Stat. § 7A-32(c) (2014)). This Court has made clear that the Court of Appeals’ broad discretion under Rule 2 of the North Carolina Rules of Appellate Procedure to exercise its jurisdiction “to prevent manifest injustice to a party or to expedite decision in the public interest” is limited only by the well-established principle that Rule 2 cannot be used to “create[] an appeal for the appellant and address[] issues not raised or argued” below. *State v. Hart*, 361 N.C. 309, 313, 644 S.E.2d 201, 203 (2007) (“To the extent that the Court of Appeals has interpreted *Steingress*, *Viar*, and *Munn* to require dismissal in every case in which there is a violation of the Rules of Appellate Procedure, we expressly disavow this interpretation.”); *see also Blumenthal v. Lynch*, 315 N.C. 571, 578, 340 S.E.2d 358, 362 (1986) (“[W]hen, as here, issues of importance which are frequently presented to state agencies and the courts require a decision in the public interest, this Court will exercise its inherent residual power or its authority under Rule 2 of the North Carolina Rules of Appellate Procedure and address those

issues though they are not properly raised on appeal.”) (citing Commentary to N.C. R. App. P. 2).

To be clear, Claimant-Appellants are not arguing that the Court can invoke Rule 2 to create jurisdiction where none otherwise exists. Here however, Claimant-Appellants have carefully and faithfully taken the necessary measures to ensure that their claims were properly before the court, by filing a Petition for a Writ of Certiorari (which the court granted) and by seeking certification of the constitutional question by the Industrial Commission (which it granted). Having met these established conditions precedent, there is no justification for the Court to declaim jurisdiction and refuse to consider the merits of these claims.

If ever there were a circumstance to which Rule 2 of the North Carolina Rules of Appellate Procedure should be applied, it is the one presently before this Court. These appeals are *sui generis*, and because of the circumstances and limited precedential impact, are both matters of first impression and last impression. These cases arose from an entirely unique compensation program, the purpose of which is “to make restitution for injustices suffered and unreasonable hardships endured by the asexualization or sterilization of individuals at the direction of the State between 1933 and 1974.” S.B. 421 Gen. Assemb., 2013 Session (N.C. 2013). Like the more than 700 individuals who filed claims by the 30 June 2014 deadline, Claimant-Appellants have been waiting for decades for restitution. They

are now among just 8 individuals awaiting resolution of their claims, while more than 200 recipients of compensation await final payments from the State pending the same resolution.

Given that these appeals concern access to a restitution program to remedy the State's tragic 40+ year-long violation of the most basic human right to procreate and to maintain privacy of one's body, and that hundreds of individuals and their family members—including Claimant-Appellants—who were victimized by that violation await compensation pending resolution of these appeals, the “exceptional circumstances” this Court has held to justify appellate jurisdiction under Rule 2 exist in abundance. *Steingrass v. Steingrass*, 350 N.C. 64, 66, 511 S.E.2d 298, 299 (1999).

B. N.C. Gen. Stat. § 1-267.1 does not apply to this matter

N.C. Gen. Stat. § 1-267.1(a1) does not apply to the present consolidated cases for two reasons. First, because Claimant-Appellants assert that N.C. Gen. Stat. § 143B-426.50(1) is unconstitutional as applied to them; they have not raised a facial challenge to the Act. Second, as the majority states, N.C. Gen. Stat. § 1-267.1(a1) applies only to facial challenges raised in the “complaint or amended complaint” after the statute's effective date, 7 August 2014. The deadline for filing a claim under the Eugenics Compensation Act was 30 June 2014, and each of the Claimant-Appellants filed their claims before that date, so *even if they had made a*

*facial challenge to the constitutionality of the Act*, § 1-267.1(a1) should not apply. Given the detailed, restrictive and comprehensive statutory and regulatory scheme governing eugenics claims, *see* p. 10-11, *supra*, the pursuit (and exhaustion) of those claims through the Industrial Commission and the Court of Appeals constituted a single and unified process that preceded the adoption of N.C. Gen. Stat. § 1-267.1(a1). The majority's conclusion that Appellants' motions to certify the constitutional questions to the Court of Appeals after 7 August 2014 somehow constituted an "amended pleading" that asserted "that an act of the General Assembly is [] facially invalid", *In re Hughes*, \_\_\_ N.C. App. at \_\_\_, 785 S.E.2d at 116 (quoting 2014 N.C. Sess. Laws, ch. 100, § 18B.16(f)), finds no basis in the law, and is undermined by the fact that Appellants challenged the denial of their claims in the manner in which the Eugenics Compensation Act expressly required. The majority holding ignores the exceptional purpose as well as the statutory and administrative process of the Act, and instead attempts to treat these claims like any other "ordinary civil action." *Id.* at 115 (quoting N.C. Gen. Stat. § 143-293). The ruling also ignores the practical reality that Claimant-Appellants would have risked losing their rights under the narrow timelines and process of the Act if they were required to first seek review from a three judge panel (or more realistically, a declaratory judgement, since 1-267.1(a1) did not exist at the time), while also facing the risk of the dismissal of any such action for failing to exhaust

administrative remedies. That neither option makes any sense only further emphasizes the exceptional nature of these claims and the statutory process designed to evaluate them, which Appellants followed scrupulously and which correctly places them before the Court of Appeals.

Appellants' challenge is clearly as-applied rather than facial. They have never contended that there is no set of circumstances under which the Eugenics Compensation Act would be valid. *See State v. Whitaker*, 201 N.C. App. 190, 193, 689 S.E.2d 395, 397 (2009) ("An individual challenging the facial constitutionality of a legislative act must establish that no set of circumstances exists under which the act would be valid."). Appellants have consistently argued that, as applied to them, the 30 June 2013 threshold contained in N.C. Gen. Stat. § 143B-426.50(1) denies them equal protection under the State and Federal Constitution. Indeed, when asked by the Court of Appeals during oral argument whether, if successful, their challenge would require a re-opening of the claim filing period, Claimant-Appellants answered no, that their challenge applied only to them.

Because the Industrial Commission lacked jurisdiction to consider their constitutional claims, Claimants followed the proper procedure to have those as-applied challenges heard: certifying the question for review by the Court of Appeals, and petitioning the Court of Appeals for certiorari. The Commission's decision to certify Appellant's constitutional claims fits squarely within the scheme

contemplated for as-applied constitutional challenges arising during the administrative appeal process. Because theirs is an as-applied constitutional challenge, Claimant-Appellants were required to exhaust the administrative process rather than file a Declaratory Judgement Act claim with a three-judge panel in Wake County Superior Court following the initial denial by the Deputy Commissioner. *See Warrior Coal Co. v. Connors*, 649 F. Supp. 1090, 1094 (W.D. Va. 1986) (“A party bringing a facial challenge to agency rules or regulations may not need . . . to exhaust administrative remedies . . . . But the general rule is that the requirements of finality and exhaustion are not waived with respect to ‘as applied’ challenges, in which the litigant contests the application of the provision to his situation.”). N.C. Gen. Stat. § 143B-426.53(f) provides that a claimant “may appeal the decision of the full Commission to the Court of Appeals within 30 days of the date notice of the decision of the full Commission is given.” N.C. Gen. Stat. § 7A-29(a) provides that “appeal of right lies directly to the Court of Appeals” from any “final order or decision of the . . . North Carolina Industrial Commission.”

Finally, it is an elemental matter of statutory construction that specific provisions targeting a particular issue apply instead of provisions more generally covering the issue. The general jurisdictional provisions of N.C. Gen. Stat. § 1-267.1(a1) do not conflict with and should not control the more specific statutory

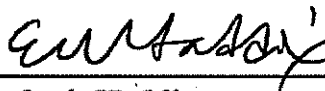
provisions in N.C. Gen. Stat. § 143B-426.53(f). Moreover, allowing the Court of Appeals to be the first panel of judges to consider claimant's constitutional challenge is consistent with the purpose of N.C. Gen. Stat. § 1-267.1, which, as the dissent notes, "was simply [to] provid[e] a procedure whereby a facial challenge would never be left up to a single judge, but always to a panel of jurists." *In re Hughes*, \_\_ N.C. App. at \_\_, 785 S.E.2d at 119 (Dillon, J., dissenting). The majority fails to address that basic, common sense point: that Claimant-Appellants were properly before the three-judge panel to which the specific and detailed controlling statutes had directed them after exhausting their administrative remedies, so that their constitutional challenge to the manner in which the Eugenics Compensation Act had been applied could be resolved.

#### CONCLUSION

For all the reasons set out above, the Court should either remand this case to the Court of Appeals for a decision on the merits of Claimant-Appellants' equal protection claims, or assert the Court's own Rule 2 jurisdiction in the interest of justice and judicial economy, consider those merits, and make a final decision.

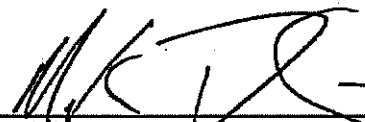
Respectfully submitted this the 11<sup>th</sup> day of July, 2016.

UNC CENTER FOR CIVIL RIGHTS



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Elizabeth Haddix  
NC State Bar No. 25818  
E-mail: [emhaddix@unc.edu](mailto:emhaddix@unc.edu)



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Mark Dorosin  
NC State Bar No. 20935  
E-mail: [dorosin@email.unc.edu](mailto:dorosin@email.unc.edu)  
323 West Barbee Chapel Rd.  
Chapel Hill, NC 27517  
Telephone: (919) 445-0176  
Fax: (919) 843-6748

PRESSLY, THOMAS & CONLEY, PA

Edwin A. Pressly  
NC State Bar No. 7273  
E-mail: [epres@ptc-law.com](mailto:epres@ptc-law.com)  
224 Harrill Street  
Statesville, NC 28677  
Telephone: (704) 871-1989  
Fax: (704) 871-9100

*Attorneys for Claimant-Appellants*




**CERTIFICATE OF SERVICE**

The undersigned certifies that the foregoing document entitled **CLAIMANT-APPELLANTS' NEW BRIEF** was served on the following individual by First Class U.S. Mail, with a courtesy copy by electronic mail.

Marc X. Sneed, Assistant Attorney General  
NC DEPT OF JUSTICE, TORT CLAIMS SECTION  
P.O. Box 629  
114 West Edenton Street  
Raleigh, North Carolina 27602  
E-mail: MSNEED@ncdoj.gov

Date:

7/11/16



**CERTIFICATION OF COMPLIANCE**

Pursuant to Appellate Rule 28(j)(2)(B), the undersigned certifies that  
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**Elizabeth Haddix**  
NC State Bar No. 25818  
323 West Barbee Chapel Rd.  
Chapel Hill, NC 27517  
Telephone: (919) 445-0176  
Fax: (919) 843-6748  
Email: [emhaddix@unc.edu](mailto:emhaddix@unc.edu)