No. 280P22 FIFTEEN-A DISTRICT

SUPREME COURT OF NORTH CAROLINA

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KODY KINSLEY, in his official Capacity as SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES	)	
v	)	From Alamance County No. 20CVS1001 No. COA21-428
ACE SPEEDWAY RACING, LTD., AFTER 5 EVENTS, LLC, 1804-1814 GREEN STREET ASSOCIATES LIMITED PARTNERSHIP, JASON TURNER, and ROBERT TURNER	)	

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PETITION FOR DISCRETIONARY REVIEW
UNDER G.S. 7A-31
(Filed 6 September 2022)

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INDEX

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Session Law

Executive Orders

Other Authorities

No. _____ FIFTEEN-A JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

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KODY H. KINSLEY, in his official capacity as SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Plaintiff-Appellant,

v.

ACE SPEEDWAY RACING, LTD., AFTER 5 EVENTS, LLC, 1804-1814 GREEN STREET ASSOCIATES LIMITED PARTNERSHIP, JASON TURNER, and ROBERT TURNER,

Defendants-Appellees.

From Alamance County
COA No. 21-428

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PETITION FOR DISCRETIONARY REVIEW

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TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Secretary Kody Kinsley respectfully files this petition for discretionary review. Review by this Court is appropriate because the subject matter of this appeal has significant public interest, the appeal involves legal principles of major significance, and the decision below conflicts with decisions of this Court. N.C. Gen. Stat. § 7A-31(c)(1)-(3).

INTRODUCTION

This appeal concerns whether the State can be subject to claims for financial damages for taking steps to protect public health during the worst pandemic in a century.

In the spring of 2020, the world shut down. Experts predicted that, absent significant policy interventions, Covid-19 would infect four-in-five Americans within months, overwhelm our nation's medical system, and cause millions of deaths.[1] Governments had to quickly decide how to blunt the virus's advance. Like leaders across the country, Governor Cooper issued executive orders that sought to slow the spread of Covid-19 at a time when

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[1] *See* Neil Ferguson et al., *Report 9: Impact of Non-Pharmaceutical Interventions (NPIs) to reduce COVID-19 Mortality and Healthcare Demand* 7, Imperial College of London (Mar. 16, 2020), https://doi.org/10.25561/77482.

there were no effective treatments for the disease. Among other things, the executive orders limited how many spectators could attend sporting events. Based on the best information available at the time, Covid-19 was understood to spread when large groups of people assembled for long periods of time in close proximity, especially in environments where crowds would sing or cheer and therefore expel respiratory droplets.

But the owner of Ace Speedway, an Alamance County racetrack, proclaimed that Ace would defy the law and hold large racing events. Over the course of three weekends, thousands of people attended a series of races at the speedway.

To protect the public from further harm, the Secretary of the Department of Health and Human Services issued an imminent-hazard abatement order that required Ace to close until it agreed to abide by the executive order. The Secretary did so under authority granted by the General Assembly, and in line with the best available information about Covid-19. After Ace again refused to comply, the Secretary sought and obtained an injunction in Alamance County Superior Court requiring compliance with the abatement order.

Ace claims that this order violated its constitutional rights. And because the order's restrictions have long expired, Ace now seeks money damages for the alleged violation. The Secretary moved to dismiss Ace's claims on the basis of sovereign immunity, but the trial court denied the motion as to two of Ace's claims. The Court of Appeals affirmed.

This case warrants this Court's review. The decision below marks a sharp departure from this Court's well-established precedent. And if allowed to stand, the decision below would hamstring the government's ability to effectively address future public-health crises.

BACKGROUND

A. Ace repeatedly violates mass-gathering limits as Covid-19 spreads.

The Covid-19 pandemic has been the worst public-health crisis that our country has faced in a century. The virus has now killed more than a million Americans.[2] North Carolina has not been spared from Covid-19's heavy toll: Although the State's response to the pandemic has been

[2] *See* Centers for Disease Control & Prevention, *COVID Data Tracker*, https://bit.ly/3RiZ9ZC (accessed Sept. 5, 2022).

especially effective at protecting North Carolinians from the virus,[3] Covid-19 has still resulted in the largest drop in average life expectancy that North Carolina has ever recorded.[4]

Two years ago, long before the first vaccines or effective therapeutic treatments were developed, Governor Cooper issued a series of executive orders to slow the virus's spread. Those orders imposed temporary limits on "mass gatherings" held in "confined indoor or outdoor space[s]," such as racetracks. Exec. Order No. 141, § 7.A.1, 34 N.C. Reg. 2360, 2370 (May 20, 2020). The orders explained that the risk of Covid-19 transmission was especially great when crowds assembled in close quarters over long periods of time. *Id.* at 2361. So, to limit transmission of the virus, the orders limited attendance at spectator events and directed local officials to ensure compliance. *Id.* at 2372-73.

North Carolina was hardly alone in these efforts. At this early stage of the pandemic, states across the nation similarly limited attendance at

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[3] *See* Adam McCann, *Safest States During COVID-19*, WalletHub (Aug. 25, 2022), https://bit.ly/3APXFz2, (finding that North Carolina has had the second most effective response to Covid-19 among the fifty states).

[4] See Teddy Rosenbluth, *Life Expectancy Dropped Substantially in NC Due to COVID-19, Drug Overdoses*, The News & Observer (Sept. 1, 2022), https://bit.ly/3RvdAJK.

outdoor racetracks.[5] And federal public-health guidance emphasized at the time that large "sporting event[s]" posed a particularly high risk of spreading the virus. Centers for Disease Control & Prevention, *Considerations for Events and Gatherings* (June 12, 2020), available at https://wapo.st/3EvnBAd. "Large in-person gatherings" with attendees "from outside the local area"—like auto races—were understood to pose the very "[h]ighest risk" of transmission. *Id.* Based on this consensus, nearly all major sporting leagues—including outdoor sports—voluntarily cancelled events or conducted events with no spectators. For example, Major League Baseball delayed the start of its 2020 season and barred fans from attending regular season games.[6] Minor League Baseball canceled its 2020 season entirely.[7]

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[5] *See, e.g.*, Ga. Exec. Order 06.11.20.01, §§ II(7), IX (June 11, 2020) (barring venues from hosting "automotive . . . entertainment" before "in-person patrons"), https://bit.ly/3brOKru; Va. Exec. Order 65, § 10(d), 36 Va. Reg. Regs. 2398, 2402 (June 22, 2020), https://bit.ly/3nLlVvI (prohibiting "spectators or members of the public" from attending events at "outdoor racetracks"); S.C. Exec. Order 2020-37, § 1(A)(1), (2), 44-6 S.C. Reg. 21, 24 (June 26, 2020), https://bit.ly/2ZAgE1Q (ordering racetracks and spectator sporting venues to remain closed).

[6] Victoria Albert, *Major League Baseball Will Allow Fans to Attend World Series in Person*, CBS News (Oct. 1, 2020), https://cbsn.ws/3BhA8IP.

[7] R.J. Anderson, *Minor League Baseball Cancels 2020 Season; Here's What it Means for Prospects and Teams*, CBS Sports (July 1, 2020), https://bit.ly/3TNOZ56.

Venues across North Carolina took similar precautions.[8] But in May of 2020, Ace Speedway's owner proclaimed that, in his view, Covid-19 was not dangerous. (R p 16) As a result, he announced that Ace would violate the executive orders that placed capacity restrictions on sporting events. He declared that Ace would "race and . . . have people in the stands," "unless [the State could] barricade the road." (R pp 16, 115) True to his word, Ace held races on May 23rd and May 30th with thousands of spectators in attendance. (R pp 17-18, 46-50, 115-16)

After the race on May 30th, the sheriff of Alamance County publicly stated that his office would not enforce the executive order. (R pp 18, 116) The Governor's legal counsel then wrote to Ace and Alamance County officials. (R pp 18-19, 116) He explained that Ace was violating the executive order; that its races were endangering public health; and that, should races continue as planned, the Governor would "take further action to protect the health and safety of the people of Alamance County and North Carolina." (R pp 19, 52-55, 116) Despite this warning, Ace held another race on June 6th—its third in violation of the executive order. (R pp 19, 116)

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[8] Neil Cotiaux, *NC Events, Venues Hit Pause in Face of Coronavirus*, Carolina Public Press (March 16, 2020), https://bit.ly/3BfHuwm.

B. The Secretary takes action to protect public health.

Shortly thereafter, the Secretary issued an abatement order that required Ace to stop hosting races until it complied with mass-gathering limits. (R pp 21, 117) Under section 130A-20 of our Public Health Law, the Secretary "may order" property owners "to abate [an] imminent hazard" that poses a serious risk to public health. N.C. Gen. Stat. §§ 130A-2(3), 130A-20(a).[9]

The Secretary's order explained that, under present conditions, holding another race with a large crowd was "likely to cause . . . an immediate threat of serious adverse health effects." (R p 61) The order noted that, in the three months since the pandemic had started, more than 1,000 North Carolinians had already died from Covid-19—including 23 in Alamance County, where Ace Speedway is located. (R p 57) And the "high rate of [Covid-19] tests coming back positive" in Alamance County was a particularly "troubling" sign of community spread. (R pp 57-58) For these

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[9] Effective January 1, 2023, local health directors will bear sole responsibility for determining whether "specific identified property" poses an imminent hazard, whereas the Secretary "shall have the authority to determine that a class or category of property uses presents a statewide imminent hazard." *See* An Act to Make Base Budget Appropriations, S.L. 2021-180, § 19E.6(d), 2021 N.C. Sess. Laws 180.

reasons, the Secretary ordered Ace to suspend racing until it developed a plan to adhere to the capacity limits in the executive order. (R pp 63-64)

Ace did not comply with the abatement order. (R pp 21-22, 117-18) Anticipating that Ace would hold more races in the near future and thereby continue to threaten the public health, the Secretary then sought injunctive relief in Alamance County Superior Court. R pp 9-26; *see* N.C. Gen. Stat. § 130A-18(a). The trial court granted a temporary restraining order and then held a hearing on the Secretary's motion for a preliminary injunction. (R pp 75-80, 86)

C. The trial court issues a preliminary injunction against Ace.

At the preliminary-injunction hearing, Ace argued that it should not be required to comply with the abatement order because enforcing the order would supposedly violate our state constitution in two ways.

First, Ace argued that the Secretary's order denied Ace its right to earn a living under the constitution's fruits-of-labor and law-of-the-land clauses. (R S pp 482-87) The trial court, however, held that the Secretary had not violated that right, because the abatement order was "based in science and medicine" and there was a "sound and reasoned basis to restrict the number

of spectators at events held at large entertainment and sporting venues like ACE Speedway." (R p 103)

Second, Ace argued that the order violated the constitution's equal-protection clause because the Secretary had not ordered other racetracks to close. (R pp 490-91) But as the trial court recognized, the Secretary had only acted against Ace after it had "repeatedly violated" the executive orders, and only after local officials made it clear they were unwilling to enforce those orders. (R pp 98-101) At the time the court ruled, these conditions were unique to Ace; no other speedway had regularly flouted capacity limits without intervention by local officials. Later, when local officials let another speedway repeatedly violate the executive orders, the Secretary filed an abatement order and enforcement action against that speedway as well. *See Cohen v. Carteret Cnty. Speedway, Inc.*, No. 20 CVS 852 (Carteret Cnty. Super. Ct. Sept. 17, 2020).[10]

The trial court therefore enjoined Ace from conducting races while the case proceeded. (R pp 86-105) Ace sought a stay of the trial court's order

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[10] The existence of that lawsuit is subject to judicial notice. *See West v. G.D. Reddick, Inc.*, 302 N.C. 201, 202-03, 274 S.E.2d 221, 223 (1981) (courts can judicially notice court records to assess a pleading's sufficiency).

from the Court of Appeals, but that Court denied its request. Order, No. P20-389 (N.C. Ct. App. Aug. 6, 2020). Ace chose not to seek a stay from this Court, thereby allowing the injunction to remain in effect.

D. The trial court denies the Secretary's motion to dismiss Ace's counterclaims.

Ace then asserted several counterclaims for monetary damages against the Secretary. Renewing its earlier arguments, Ace claimed that the Secretary's actions had violated its rights to earn a living and to equal protection. (R pp 126-29)

Several weeks later, the Governor issued a new executive order that loosened the capacity limits on outdoor gatherings. *See* Exec. Order No. 163, § 9(4), 35 N.C. Reg. 713, 732 (Sept. 4, 2020). That action automatically caused the abatement order to expire, and the preliminary injunction to dissolve. (R pp 64, 104, 137-38) Accordingly, the Secretary voluntarily dismissed the claims against Ace. (R pp 137-39)

Still, Ace continued to pursue its counterclaims. The Secretary moved to dismiss those claims on the basis of sovereign immunity. (R pp 149-90) Following a hearing, the trial court ruled that Ace's right-to-earn-a-living and selective-enforcement claims could proceed. (R p 191)

E. The Court of Appeals upholds the trial court's decision.

The Secretary appealed, arguing that sovereign immunity barred both of Ace's counterclaims. Br. at 16-37. Sovereign immunity shields state officials against constitutional claims that are not "colorable." *Deminski v. State Bd. of Educ.*, 377 N.C. 406, 2021-NCSC-58, ¶ 17. In other words, sovereign immunity applies unless a party alleges "facts sufficient to support an alleged violation of a right protected by the State Constitution." *Id.*[11]

Under that standard, the Secretary argued, neither of Ace's claims are "colorable" as alleged. First, the Secretary argued that Ace's right-to-earn-a-living claim fails because the abatement order passes rational-basis review—the standard used to evaluate public-health regulations that limit commercial activity. Br. at 17-30. And second, the Secretary argued that Ace had failed to adequately allege either of the two elements of a selective-enforcement claim: (1) that it had been "singled out" for prosecution (2) in "bad faith." Br. at 30-37.

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[11] A trial court's decision to grant or deny a motion to dismiss based on sovereign immunity affects a substantial right and is therefore immediately appealable. *See, e.g.*, *State ex rel. Stein v. Kinston Charter Academy*, 379 N.C. 560, 2021-NCSC-163, ¶ 23; N.C. Gen. Stat. § 7A-27(b)(3)(a) (authorizing interlocutory appeals from orders that affect "a substantial right").

The Court of Appeals disagreed, and therefore affirmed the trial court's order denying the Secretary's motion to dismiss. 2022-NCCOA-524, ¶ 3.

The Court first addressed Ace's "admittedly novel" claim for "government intrusion on its right to earn a living." *Id.* ¶ 27. It declined to consider any "factual data surrounding the Covid-19 pandemic at the time the Abatement Order was issued," despite acknowledging its authority to do so. *Id.* ¶ 29 (quoting *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 182, 594 S.E.2d 1, 16 (2004)). And it made no mention of the rational-basis test. Instead, the Court "[p]resum[ed]" that—contrary to public-health officials' expert judgment at the time—Ace's own precautionary measures "were sufficient to combat the spread of COVID-19" and allowed the claim to proceed. *Id.*

The Court then turned to Ace's selective-enforcement claim. *Id.* ¶ 30. The Court began by holding that Ace had sufficiently alleged that it had been "singled out" among "many speedways" that held races in violation of the executive orders. *Id.* ¶ 35. It did so even though the Secretary had informed the Court that the Secretary had actually filed abatement actions against other similarly situated venues. Br. at 34 n.14. As to the "bad faith" element of Ace's claim, the Court noted that in *State v. Davis*, it had previously held that "no constitutional violation occur[s]" when the State prosecutes

"individuals who," like Ace, "publicly assert privileges" to break the law. 96 N.C. App. 545, 550, 386 S.E.2d 743, 745 (1989); *see* 2022-NCCOA-524, ¶ 38. The Court recognized that *Davis* was "similar to" this case, but nevertheless concluded that *Davis* was distinguishable "based upon the relevant stage of the proceedings." 2022-NCCOA-524, ¶ 39. The Court therefore held that Ace had sufficiently pleaded "bad faith." *Id.* ¶ 39.

Having affirmed the denial of the Secretary's motion to dismiss, the Court of Appeals then remanded the case back to the trial court for an "examination of the facts surrounding the COVID-19 pandemic" and the State's response. *Id.* ¶ 29.

REASONS WHY CERTIFICATION SHOULD ISSUE

Section 7A-31 of the General Statutes allows this Court to certify a decision of the Court of Appeals for discretionary review when the decision "appears likely to be in conflict" with one of this Court's decisions, when the decision's "subject matter . . . has significant public interest," or when the decision "involves legal principles of major significance." N.C. Gen. Stat. § 7A-31(c). All three of these of these criteria are satisfied here.[12]

[12] "[F]ailure to certify would [also] cause a delay in final adjudication which would probably result in substantial harm." N.C. Gen. Stat. § 7A-31(c).

I. The Decision of the Court of Appeals on Ace's Right-to-Earn-a-Living Claim Warrants Discretionary Review.

With respect to Ace's right-to-earn-a-living-claim, review is warranted for two reasons.

First, the decision below is squarely at odds with this Court's precedent. N.C. Gen. Stat. § 7A-31(c)(3). This Court has long held that public-health regulations are subject to rational-basis review. Specifically, the fruits-of-labor and law-of-the-land clauses "have been consistently interpreted to permit the state, through the exercise of its police power, to regulate economic enterprises[,] provided the regulation is rationally related to a proper governmental purpose." *Poor Richard's, Inc. v. Stone*, 322 N.C. 61, 64, 366 S.E.2d 697, 699 (1988).

Under that deferential standard, a regulation will be upheld so long as it "bear[s] some rational relationship to a conceivable legitimate interest of government." *White v. Pate*, 308 N.C. 759, 766-67, 304 S.E.2d 199, 204 (1983). And in considering whether a rational basis for a regulation exists, courts are

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Because sovereign immunity "is an immunity from suit rather than a mere defense to liability," it is "effectively lost if a case is erroneously permitted to go to trial." *Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 338, 678 S.E.2d 351, 354 (2009) (cleaned up).

not limited to reviewing the allegations in a complaint, but rather "take judicial notice" of whatever considerations "could have . . . persuaded" a governmental decisionmaker that the regulation was needed. *Rhyne*, 358 N.C. at 182, 594 S.E.2d at 16 (citing *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981)).

In the decision below, however, the Court of Appeals did not consider any of the Secretary's proffered justifications for the abatement order. Instead, the Court credited Ace's assertion that its own safety precautions rendered the Secretary's actions unnecessary. On this basis, the Court allowed the case to proceed to discovery. 2022-NCCOA-524, ¶ 29.

That is not how rational-basis review works. Courts routinely resolve claims about rationality at the outset of litigation. *See, e.g.*, *Town of Beech Mountain v. Cnty. of Watauga*, 324 N.C. 409, 414, 378 S.E.2d 780, 783-84 (1989) (motion to dismiss); *Affordable Care, Inc. v. N.C. State Bd. of Dental Exam'rs*, 153 N.C. App. 527, 535-40, 571 S.E.2d 52, 58-62 (2002) (motion for judgment on the pleadings). In doing so, of course, they accept as true a complaint's factual allegations about what the government has done. But because the rationality of such an action turns on whether a court "can *envision* some rational basis" for it, there is no need for the factual

development that typically occurs in discovery and at trial. *Liebes v. Guilford Cnty. Dep't of Pub. Health*, 213 N.C. App. 426, 430, 713 S.E.2d 546, 550 (2011).

There are many ways courts can identify a rational basis. For instance, a court might look to the explanations that the government offers in a regulation's preamble. *See, e.g.*, *In re N.C. Pesticide Bd.*, 349 N.C. 656, 671-72, 509 S.E.2d 165, 175-76 (1998) (relying on regulation's preamble to conclude that its purpose was "legitimate"). Or a court might take notice of whether similar rules exist in other jurisdictions. *See, e.g.*, *Rhyne*, 358 N.C at 182, 594 S.E.2d at 16 (holding that law was rational because "other states had already enacted" similar laws). Indeed, correctly applying this Court's precedents, the Court of Appeals has often used these familiar tools to uphold actions as rational before a case proceeds to discovery.[13]

Those same facts supporting rationality are present here. In its preamble, the abatement order noted that, based on the information

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[13] *See, e.g.*, *Singleton v. N.C. Dep't of Health & Human Servs.*, 2022-NCCOA-412, ¶¶ 42-45 (holding that enforcement of a law was rational in light of "legislative findings" detailing how the law "affects the public welfare" and ongoing debates about similar laws in states across the country); *Huntington Props., LLC v. Currituck Cnty.*, 153 N.C. App. 218, 231, 569 S.E.2d 695, 704 (2002); *Affordable Care*, 153 N.C. App. at 532, 535-40, 571 S.E.2d at 57-62.

available, "stadiums, arenas, and racetracks" posed a "greater risk for the spread of COVID-19" because they were places where large numbers of people gathered in "close physical contact for an extended period," "cheer[ ]," and "yell[ ]." (R p 59) And as discussed above, the Secretary's actions were consistent with measures taken in many other states, as well as federal public-health guidance at that time. *See supra* pp 5-6.

The Court of Appeals refused to acknowledge these justifications, as this Court's precedents require. *See* 2022-NCCOA-524, ¶¶ 23-29. This sharp departure from well-established law calls for review.

Second, review is also warranted because the Court of Appeals' holding concerns an issue of significant public interest. N.C. Gen. Stat. § 7A-31(c)(1). The decision below would require the State to engage in costly and time-consuming litigation and could potentially expose the State to considerable financial damages based on actions that its officials took to protect public health during the pandemic. The prospect of such litigation and potential damages will significantly hinder the State's efforts to address future public-health crises.

The decision below creates the possibility that juries could impose considerable monetary liability on the State for performing one of its most

important duties: preventing the spread of disease. *See State v. Hay*, 126 N.C. 999, 1001-03, 35 S.E. 459, 460-61 (1900). Over the course of the pandemic, state and local officials in North Carolina took steps similar to those taken across the country to mitigate the extraordinary threat posed by the spread of COVID-19. These measures were not taken lightly. But facing a once-in-a-century pandemic, our public-health officials acted on the best available information to protect the health and lives of North Carolinians. It is estimated that their efforts averted millions of cases and saved untold lives.[14]

If juries could impose damages on the State for taking these actions, the State could face staggering financial liability. During the pandemic, nearly every business found its operations affected to some degree. Indeed, many other businesses have also filed lawsuits seeking damages because they argue that the State did too much to protect public health during the pandemic, including two cases that are presently on appeal. *See, e.g.*, *Howell*

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[14] *See generally*, Solomon Hsiang et al., *Effect of Large-Scale Anti-Contagion Policies on the COVID-19 Pandemic*, 584 Nature 263, 266 (2020), https://go.nature.com/3x01T6m (estimating that early policy interventions prevented 4.8 million additional cases of Covid-19 in the United States by April 6, 2020).

v. Cooper, No. 22-571 (N.C. Ct. App.); *N.C. Bar & Tavern Ass'n v. Cooper*, No. 20 CVS 6358 (Wake Cty. Super. Ct.) (notice of appeal filed).

Furthermore, the Court of Appeals' holding that the rationality of the government's response to the pandemic turns on issues of fact raises the prospect that juries could also hold the State liable for doing *too little* to address the pandemic. After all, the State has also been sued numerous times during the pandemic because it allegedly took *insufficient* steps to protect public health. *See, e.g.*, *Alston v. Univ. of N.C. Sys.*, No. 20 CVS 8913 (Wake Cnty. Super. Ct.) (arguing that UNC's decision to hold some in-person classes during the pandemic violated its employees' rights). Thus, by remanding this case for an "examination of the facts surrounding the Covid-19 pandemic," the Court of Appeals has created a risk that different juries could impose ruinous liability on the State both for doing too much and too little to protect public health. 2022-NCCOA-524, ¶ 29.

The decision below will also chill the State's ability to proactively address future health crises. Our Constitution and the General Assembly have vested executive officials with the authority to make policy decisions about what steps should be taken to respond to such crises. The legislature recently amended these statutes—by, for example, requiring Council of State

approval for certain steps that the Governor and the Secretary could previously take unilaterally. *See* 2021 N.C. Sess. Laws 180. If the decision below were allowed to stand, however, public-health officials may hesitate to respond to emergencies effectively. Any steps that juries view as mistakes—with the benefit of hindsight, years after the crisis had subsided—could expose the State to crippling damages, chilling effective government decision making.

By extension, the decision below also calls into question the State's authority to tackle everyday public-health and safety matters. For example, the General Assembly has empowered public-health officials to close restaurants thought to have caused food poisoning. N.C. Gen. Stat. § 130A-23(d). And to protect our elderly, the Secretary has the authority to suspend the licenses of adult-care homes and immediately relocate the residents to a safe environment. *Id.* § 131D-2.7(c). According to the Court of Appeals, these commonplace measures that limit business activity could subject the State to lawsuits for damages whenever a jury believes that policy decisions made by government officials lacked sufficient justification.

For all these reasons, the Court of Appeals' holding that Ace's right-to-earn-a-living claim should proceed warrants this Court's review.

II. The Decision of the Court of Appeals on Ace's Selective-Enforcement Claim Also Warrants Discretionary Review.

The Court of Appeals' decision to let Ace's selective-enforcement claim proceed also satisfies the criteria for discretionary review. The decision below could profoundly disrupt the State's ability to enforce its laws. As a result, it has significant public interest and involves legal principles of major significance. *See* N.C. Gen. Stat. § 7A-31(c)(1), (2).

Ace expressly alleged that its owner publicly vowed to break a law because he disagreed with it. (R pp 16, 115, 128) For example, Ace's owner stated that he was going to break the law because the "racing community wants to race" and was "sick and tired of the politics" concerning a disease that was not "killing" anyone, except a small number of people. (R pp 16, 115, 128)

Based on these allegations, Ace argued that it was impermissibly "singled out . . . for enforcement" in violation of our State's equal-protection clause. (R p 142) The Court of Appeals agreed that Ace had sufficiently alleged that the Secretary "singled its racetrack out for enforcement in bad faith," thus stating a colorable selective-enforcement claim. 2022-NCCOA-524, ¶ 39. If allowed to stand, that holding would have serious consequences for law enforcement far beyond this case.

In practical effect, the decision below permits persons to lay the groundwork for a selective-enforcement claim simply by declaring their intent to break the law before doing so. If it were possible to prove bad faith simply because the government enforced a law after someone stated that he was opposed it, the consequences would be profound. *See id.* Anyone could be immunized for violating the law merely by declaring that they planned to act unlawfully before following through on that promise.

This Court has never addressed whether these facts can support a selective-prosecution claim. But the Court of Appeals' holding that they can simply cannot be correct.

For example, in *Wayte v. United States*, the U.S. Supreme Court considered whether the federal government could, consistent with federal equal-protection and free-speech principles, prosecute "those who report themselves as having violated the law." 470 U.S. 598, 600-02 (1985). There, a young man declined to register for the draft and then mailed letters to the government stating that he had chosen not to register. *Id.* at 601. When the government indicted him as a draft dodger, the man argued that he had been unconstitutionally "targeted" for being a "vocal opponent[ ]" of the draft—the same argument that Ace makes here. *Id.* at 604.

The Supreme Court rejected this defense, reasoning that, were it to prevail, "the Government could not constitutionally prosecute" someone who informed the government that he or she would break the law. *Id.* at 614. "On principle," the Supreme Court explained, such a holding would "allow any criminal to obtain immunity from prosecution simply by reporting himself and claiming that he did so in order to 'protest' the law." *Id.*

Our Court of Appeals reached a similar conclusion in *State v. Davis*—a decision that is irreconcilable with the decision below. There, the State prosecuted "an outspoken critic of the North Carolina personal income tax system" for failing to pay taxes. 96 N.C. App. at 550, 386 S.E.2d at 745. The defendant asserted a selective-enforcement defense, claiming that he had only been "singled out . . . for prosecution because of his vocal stand against paying income taxes." *Id.* But the Court held that, even if the State *had* "singled out [the defendant] for prosecution" because of his opposition to taxes, "no constitutional violation [would have] occurred." *Id.* As the Court of Appeals explained, when the State prosecutes "individuals who publicly assert privileges" to break the law, it acts not on "an impermissible basis" but on its "legitimate interest" in deterring noncompliance with the law. *Id.*

Thus, the decision below risks frustrating the State's ability to enforce its laws, including in criminal prosecutions. The Court of Appeals' selective-prosecution holding also warrants this Court's review.

ISSUES TO BE BRIEFED

If the Court allows the petition, the Secretary will present the following issues:

1. Did the Court of Appeals err by affirming the denial of the Secretary's motion to dismiss Ace's right-to-earn-a-living claim?
2. Did the Court of Appeals err by affirming the denial of the Secretary's motion to dismiss Ace's selective-enforcement claim?

CONCLUSION

The Secretary respectfully requests that this Court grant discretionary review of the judgment below.

Respectfully submitted, this 6th day of September, 2022.

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N.C. R. App. P. 33(b) Certification: I certify that the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

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This 6th day of September, 2022.

/s/ Electronically submitted
Ryan Y. Park

CONTENTS OF APPENDIX

IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-524

No. COA21-428

Filed 2 August 2022

Alamance County, No. 20 CVS 1001

KODY H. KINSLEY, in his official Capacity as SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, Plaintiff,

v.

ACE SPEEDWAY RACING, LTD., AFTER 5 EVENTS, LLC, 1804-1814 GREEN STREET ASSOCIATES LIMITED PARTNERSHIP, JASON TURNER, and ROBERT TURNER, Defendants.

Appeal by Plaintiff from order entered 12 January 2021 by Judge John M. Dunlow in Alamance County Superior Court. Heard in the Court of Appeals 8 March 2022.

Solicitor General Ryan Y. Park, by Assistant Solicitor General Nicholas S. Brod and Solicitor General Fellow Zachary W. Ezor, and Attorney General Joshua H. Stein, by Assistant Attorney General John P. Barkley, for Plaintiff-Appellant.

Kitchen Law, PLLC, by S.C. Kitchen, for Defendants-Appellees.

Jeanette K. Doran for amicus curiae North Carolina Institute for Constitutional Law.

GRIFFIN, Judge.

¶ 1 This case makes us consider the use of overwhelming power by the State against the individual liberties of its citizens and how that use of power may be

challenged. The people of North Carolina recognized the importance of this balance in ratification of our Constitution in 1868. The challenged act here involves the closing of a business by a cabinet secretary. Plaintiff Kody H. Kinsley,[1] in his official capacity as Secretary of the North Carolina Department of Health and Human Services, issued an order of abatement to close a racetrack. The Secretary issued the abatement order only after the Governor's use of an executive order and his direct request to local law enforcement to close the track failed.

¶ 2 Amidst the onset of the COVID-19 pandemic, the Governor issued executive orders placing restrictions on the rights of the people of North Carolina to gather. The Secretary appeals from the trial court's order denying his motion to dismiss two counterclaims brought by Defendants Ace Speedway Racing, Ltd, its affiliates, and its owners. Ace's counterclaims propose that the Governor's orders were enforced upon them without justification and without equal protection of law. Ace's counterclaims are constitutional claims alleging (1) executive orders issued by the Governor in response to the COVID-19 pandemic were an unlawful infringement on Ace's right to earn a living as guaranteed by our Constitution's fruits of labor clause, and (2) the Secretary's enforcement actions against Ace under the executive order

[1] Secretary Mandy K. Cohen originally filed this appeal in her capacity as Secretary of the North Carolina Department of Health and Human Services. She has since been succeeded by Secretary Kinsley. We substitute Secretary Kinsley as party to this appeal in accordance with N.C. R. App. P. 38(c).

constituted unlawful selective enforcement. The Secretary argues Ace failed to present colorable constitutional claims, and therefore failed to overcome the Secretary's sovereign immunity from suit.

¶ 3 In this appeal, we are asked to decide whether Ace has presented colorable constitutional claims for which our courts could provide a remedy. We hold that Ace pled each of its constitutional claims sufficiently to survive the Secretary's motion to dismiss. We affirm the trial court's order.

I. Factual and Procedural Background

¶ 4 Ace operates ACE Speedway in Alamance County as a racetrack, hosting car races with a maximum audience seating capacity of around 5,000 people. To feasibly host a race and pay its staff of roughly forty-five employees, Ace needs "around a thousand fans" to attend each race.

¶ 5 In March 2020, the COVID-19 virus began spreading across the United States. State governments across the country began to impose restrictions on their citizens' right to gather, conduct public activities, and engage in in-person means of commerce. On 20 May 2020, pursuant to emergency directive authority granted by N.C. Gen. Stat. § 166A-19.30, Governor Roy Cooper issued Executive Order 141 decreeing, in relevant part, that "mass gatherings" were temporarily prohibited in North Carolina. Exec. Order No. 141, 34 N.C. Reg. 2360 (May 20, 2020). Order 141 defined "mass gatherings" as "an event or convening that brings together more than ten (10) people

indoors or more than twenty-five (25) people outdoors at the same time in a single confined indoor or outdoor space, such as an auditorium, stadium, arena, or meeting hall." *Id.*

¶ 6 The mass gathering prohibition in Order 141 nullified Ace's ability to hold economically feasible racing events at ACE Speedway. On 22 May 2020, the Burlington Times-News published an article featuring statements from Defendant Jason Turner, an owner of ACE Speedway, regarding the restrictions in Order 141 and his plans to nonetheless hold races at ACE Speedway. The article quoted Turner as follows:

> I'm going to race and I'm going to have people in the stands. . . . And unless they can barricade the road, I'm going to do it. The racing community wants to race. They're sick and tired of the politics. People are not scared of something that ain't killing nobody. It may kill .03 percent, but we deal with more than that every day, and I'm not buying it no more.

Ace followed through on Turner's statement and began to hold races during the summer of 2020.

¶ 7 Ace held its first race of the season at ACE Speedway on 23 May 2020. The event drew an audience of approximately 2,550 spectators. On 15 May 2020, a week before the first race, Ace met with local health and safety officials. Ace and the local officials agreed upon health precautions for its events, including contact tracing, temperature screenings, social distancing in common areas, and reduced and

distanced audience seating arrangements. With each of its health precautions in place, Ace held races on May 23, May 30, and June 6, hosting over 1,000 spectators at each event.

¶ 8 On 30 May 2020, before that afternoon's race, the Governor's office requested that Alamance County Sheriff Terry Johnson personally ask Ace to stop holding racing events in violation of Order 141. The Sheriff relayed the Governor's message and informed Ace that they could face sanctions if they did not comply. After Ace held the race on May 30, the Sheriff publicly stated that he would not take any further actions to enforce Order 141. On 5 June 2020, the Governor's office sent a letter to the Sheriff and Ace, once again advising that Ace was conducting racing events in violation of Order 141 and potentially subject to sanctions. Ace held its third race on June 6, the following day.

¶ 9 On 8 June 2020, the Secretary issued an order demanding that Ace abate further mass gatherings at ACE Speedway. This Abatement Order explained that Ace had "operated openly in contradiction of the restrictions and recommendations in [Order 141,]" and, therefore, "immediate action" was necessary to prevent "increased exposure to thousands of people attending races at ACE Speedway, and thousands more who may be exposed to COVID-19 by family members, friends, and neighbors who have attended or will attend races at ACE Speedway." The Abatement Order instructed Ace to close its facilities until the expiration of Order 141, or until such

time as Ace developed a plan to host events in full compliance with Order 141's mass gathering restrictions. The Abatement Order also required Ace to "notify the public by 5:00 p.m. on [9 June 2020] that its upcoming races and other events . . . [were] cancelled[,]" and to notify DHHS by 5:00 p.m. on June 9 that it had complied. Ace declined to close its facilities or provide timely notice to the public and DHHS as required by the Abatement Order.

¶ 10 On 10 June 2020, the Secretary filed a complaint, motion for temporary restraining order, and motion for preliminary injunction seeking to enforce the terms of the Abatement Order. On 11 June 2020, Judge D. Thomas Lambeth, Jr., entered an order granting the Secretary's temporary restraining order and "enjoined [Ace] from taking any action to conduct or facilitate a stock car race or other mass gathering at ACE Speedway[.]" On 10 July 2020, following a hearing on the matter, Judge Lambeth entered an order granting the Secretary's motion for preliminary injunction and enjoining Ace "from taking any action prohibited by the Abatement Order[.]"

¶ 11 On 25 August 2020, Ace filed its answer to the Secretary's complaint and its own counterclaims, including the two constitutional claims at issue in this appeal: (1) infringement upon Ace's right to earn a living and (2) selective enforcement of Order 141 against Ace.

¶ 12 On 4 September 2020, the Governor issued Executive Order 163, which replaced Order 141 and loosened Order 141's mass gathering restrictions to allow a

total of fifty people in outdoor gatherings. The Secretary voluntarily dismissed his complaint in this matter against Ace because the terms of the Abatement Order were moot and no longer enforceable as written. Ace did not dismiss its counterclaims.

¶ 13 On 2 December 2020, the Secretary moved to dismiss Ace's counterclaims, arguing that each counterclaim was barred by sovereign immunity from suit. The trial court heard arguments on the justiciability of each claim. In January 2021, Judge John M. Dunlow entered an order (the "Denial Order") denying the Secretary's motion to dismiss each of Ace's constitutional claims.[2] The Secretary filed notice of appeal from the Denial Order on 17 February 2021.

II. Analysis

¶ 14 The matter before us on appeal is whether the trial court erred by denying the Secretary's motion to dismiss Ace's two constitutional counterclaims on grounds of sovereign immunity from suit.

A. Timeliness of Appeal

¶ 15 We first address the timeliness of the Secretary's appeal from the denial of his motion to dismiss Ace's counterclaims. Ace moves to dismiss the Secretary's appeal

---

[2] On 12 November 2020, Ace amended its counterclaims to assert three additional counterclaims. Following the hearing on justiciability, the trial court dismissed each additional counterclaim. Ace does not appeal the dismissal of these three counterclaims.

On 11 February 2021, Ace filed a motion for entry of default judgment against the Secretary. The trial court entered default judgment against the Secretary, but, following a hearing on the matter, allowed the Secretary's motion to set aside default.

on grounds that the Secretary's notice of appeal was untimely because he failed to comply with the terms of Rule 3(c) of the North Carolina Rules of Appellate Procedure.

¶ 16 "The provisions of Rule 3 are jurisdictional, and failure to follow the rule's prerequisites mandates dismissal of an appeal." *Bailey v. State*, 353 N.C. 142, 156, 540 S.E.2d 313, 322 (2000) (citation omitted). Rule 3(c) dictates that a party to a civil action "must file and serve a notice of appeal . . . within thirty days after entry of judgment [or order] if the party has been served with a copy of the judgment [or order] within the three-day period [after the order is entered]." N.C. R. App. P. 3(c)(1). Alternatively, if service was not made within three days, the party must file and serve a notice of appeal "within thirty days after service upon the party of a copy of the judgment." N.C. R. App. P. 3(c)(2). Effective service of a court document must include a certificate of service showing "the date and method of service or the date of acceptance of service and shall show the name and service address of each person upon whom the paper has been served." N.C. R. Civ. P. 5(b1). In the absence of properly effected service, the thirty-day period within which the party must file its appeal begins to run from the date the party obtained actual notice of the order. *Brown v. Swarn*, 257 N.C. App. 417, 421, 810 S.E.2d 237, 239 (2018) ("[W]here evidence in the record shows that the appellant received actual notice of the [order] more than thirty days before noticing the appeal, the appeal is not timely.").

¶ 17 Here, the record shows that the trial court entered the Denial Order on either 15 or 19 January 2021. The file stamp on the Denial Order is unclear and difficult to read. The record includes a certificate of service for the Denial Order filed on 15 January 2021. However, the trial court determined during the hearing to set aside entry of default against the Secretary that the package mailed to the Secretary containing the Denial Order did not include a copy of the certificate of service. The record does not indicate that the Secretary ever received the certificate of service for the Denial Order. Without a certificate of service, the Secretary never received effective service initiating the thirty-day period to file notice of appeal. Instead, the Secretary received actual notice of the Denial Order when he received the mailed package. Therefore, the thirty-day period to file notice of appeal from the Denial Order was tolled until February 4, only thirteen days before the Secretary filed a timely notice of appeal. This Court has jurisdiction over the Secretary's appeal.

¶ 18 The Secretary moved to dismiss Ace's claims under Rules 12(b)(1), 12(b)(2), and 12(b)(6) of the North Carolina Rules of Civil Procedure, arguing the basis of sovereign immunity for each. The trial court denied the Secretary's motion in full. Nonetheless, the Secretary's arguments on appeal contend only that Ace failed to adequately plead its constitutional claims. We will therefore consider only whether Ace has properly pled claims for relief under Rule 12(b)(6). N.C. R. Civ. P. 12(b)(6) (allowing a party to defend a claim by contending the claimant "[f]ail[ed] to state a

claim upon which relief can be granted").

¶ 19 An appeal from the denial of a motion to dismiss is interlocutory, and ordinarily not ripe for immediate appellate review unless the appeal affects a substantial right. *Turner v. Hammocks Beach Corp.*, 363 N.C. 555, 558, 681 S.E.2d 770, 773 (2009). "This Court has consistently held that the denial of a [Rule 12(b)(6)] motion to dismiss based upon the defense of sovereign immunity affects a substantial right and is thus immediately appealable." *Richmond Cnty. Bd. of Educ. v. Cowell*, 225 N.C. App. 583, 586, 739 S.E.2d 566, 568 (2013) (citation, brackets, and quotation marks omitted). The Secretary's appeal is properly before this Court, and Ace's motion to dismiss the Secretary's appeal is denied.[3]

B. Review of Constitutional Claims and Sovereign Immunity

¶ 20 "This Court reviews a trial court's decision to grant or deny a motion to dismiss based upon the doctrine of sovereign immunity using a de novo standard of review." *State ex rel. Stein v. Kinston Charter Acad.*, 379 N.C. 560, 2021-NCSC-163, ¶ 23. "When reviewing a [Rule 12(b)(6)] motion to dismiss, an appellate court considers whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory." *Deminski on behalf of C.E.D. v. State Bd. of Educ.*, 377 N.C. 406, 2021-NCSC-58, ¶ 12. (citations and

[3] The Secretary also filed a petition for writ of certiorari in the event that his appeal was deemed untimely. We dismiss the Secretary's petition as moot.

quotation marks omitted). North Carolina's rules of pleading require that a complaint "state enough to give the substantive elements of a *legally recognized claim*." *New Hanover Cnty. Bd. of Educ. v. Stein*, 380 N.C. 94, 2022-NCSC-9, ¶ 32.

¶ 21 "As a general rule, the doctrine of governmental, or sovereign[,] immunity bars actions against . . . the state, its counties, and its public officials sued in their official capacity." *Bunch v. Britton*, 253 N.C. App. 659, 666, 802 S.E.2d 462, 469 (2017) (citation omitted). However, our Courts have "held that the doctrine of sovereign immunity cannot stand as a barrier to North Carolina citizens who seek to remedy violations of their rights guaranteed by the Declaration of Rights of our Constitution." *Id.* (summarizing the North Carolina Supreme Court's holding in *Corum v. Univ. of N.C. Through Bd. of Governors*, 330 N.C. 761, 786, 413 S.E.2d 276, 292 (1992). "[W]hen there is a clash between . . . constitutional rights and sovereign immunity, the constitutional rights must prevail." *Corum v. Univ. of N.C. Through Bd. of Governors*, 330 N.C. 761, 786, 413 S.E.2d 276, 292 (1992).

> [T]his Court has long held that when public officials invade or threaten to invade the personal or property rights of a citizen in disregard of law, they are not relieved from responsibility by the doctrine of sovereign immunity even though they act or assume to act under the authority and pursuant to the directions of the State.

Id.

C. Fruits of Their Labor Clause

¶ 22 Ace's first constitutional claim alleges infringement of its "inalienable right to earn a living" under Article I, sections 1 and 19 of the North Carolina Constitution. Article I states:

> Section 1. The equality and rights of persons.
>
> We hold it to be self-evident that all persons are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, *the enjoyment of the fruits of their own labor*, and the pursuit of happiness.
>
> . . .
>
> Sec. 19. Law of the land; equal protection of the laws.
>
> 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. No person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin.

N.C. Const. art. 1, §§ 1, 19 (emphasis added). The right to "enjoyment of the fruits of their own labor" joined the enumeration of each North Carolina citizen's inalienable rights as part of revisions to the Constitution in 1868. *See* N.C. Const. of 1868. The drafters believed that, in the wake of slavery, no man could truly be free in this state without the right to both liberty and to reap the benefits of what he sowed. *See* Albion W. Tourgée, An Appeal to Caesar 244 (1884). North Carolinians have long valued and recognized the dignity of work.

¶ 23 With this in mind, the addition of a right to the fruits of one's labor to the North Carolina Constitution sought to increase the floor of protections granted by similar provisions in the United States federal constitution. U.S. Const. amend. XIV, § 1 (protecting citizens' rights to "life, liberty, or property" with due process of law). Since then, our courts have construed North Carolina citizens' right to the "fruits of their labor" to be synonymous with their "right to earn a living" in whatever occupation they desired. *See State v. Harris*, 216 N.C. 746, 759, 6 S.E.2d 854, 863 (1940) ("[T]he power to regulate a business or occupation does not necessarily include the power to exclude persons from engaging in it"). "The right to work and to earn a livelihood is a property right that cannot be taken away except under the police power of the State in the paramount public interest for reasons of health, safety, morals, or public welfare." *Roller v. Allen*, 245 N.C. 516, 518, 96 S.E.2d 851, 854 (1957). "'The right to conduct a lawful business or to earn a livelihood is regarded as fundamental.'" *Id.*, 245 N.C. at 518–19, 96 S.E.2d at 584 (citation omitted). "Arbitrary interference with private business and unnecessary restrictions upon lawful occupations are not within the police powers of the State." *State v. Warren*, 252 N.C. 690, 693, 114 S.E.2d 660, 663–64 (1960).

¶ 24 To effectively plead government intrusion on a constitutional right, the claimant's pleadings must show: (1) a state actor violated the claimant individual's constitutional rights; (2) the claim alleged substantively presents a "colorable"

constitutional claim; and (3) no adequate state remedy exists apart from a direct claim under the Constitution. *Deminski*, 2021-NCSC-58, ¶¶ 15–18.

¶ 25 Here, Ace's first claim alleged:

> 124. This counterclaim is brought against the [Secretary] in [his] official capacity as [he] was acting at all time relevant hereto as the Secretary of the North Carolina Department of Health and Human Services.
>
> 125. The [Abatement Order] is based on a violation of the Mass Gathering limits imposed by [Order 141] which required [Ace] to cease operating.
>
> 126. [Order 141 and the Abatement Order] deprive [Ace] of [its] inalienable right to earn a living as guaranteed by Art. I, sec. 1 and 19, of the North Carolina Constitution.
>
> . . .
>
> 129. [Order 141] and the [Secretary's Abatement Order] based on [Order 141] are unconstitutional as applied to [Ace] as neither the [Secretary] nor the Governor of the State possess the authority to deprive [Ace] of [its] right to pursue an ordinary vocation and earn a living.
>
> 130. The [Secretary] does not have sovereign immunity as this counterclaim is brought directly under the Declaration of Rights of the North Carolina Constitution.
>
> 131. [Ace does] not have an adequate state remedy, and therefore, there is a direct cause of action against the [Secretary] for the violation of [Ace's] rights as guaranteed by Art. I, sec. 1 and 19, of the North Carolina Constitution.

¶ 26 Ace pled that its rights were violated by the Secretary in his official capacity as a state actor. Ace also pled its lack of an alternative, adequate state remedy

through which it could seek relief. We agree that Ace has no other avenue to seek relief for the Secretary's allegedly improper enforcement apart from a direct action under the Constitution.

¶ 27 Ace has also pled a colorable, though admittedly novel, claim for government intrusion on its right to earn a living. It is well-established that the fruits of their labor clause applies when our government, most often the legislature, enacts a scheme of legislation or regulation that purports to protect the public from undesirable actors within occupations. *See Poor Richard's, Inc. v. Stone*, 322 N.C. 61, 65, 366 S.E.2d 697, 699 (1988) (concerning legislation regarding manufacture of goods for military use); *Warren*, 252 N.C. at 695, 114 S.E.2d at 665 (1960) (concerning licensure legislation for real estate brokers); *State v. Ballance*, 229 N.C. 764, 51 S.E.2d 731 (1949) (concerning legislation creating licensure requirements for photographers). Likewise, our courts have more recently held that the clause also applies when a government employer denies a state employee due process with respect to the terms and procedures of his or her employment. *See Mole' v. City of Durham*, 279 N.C. App. 583, 2021-NCCOA-527, ¶ 29, *disc. rev. granted, Mole v. City of Durham*, 868 S.E.2d 851 (N.C. 2022); *Tully v. City of Wilmington*, 370 N.C. 527, 535–36, 810 S.E.2d 208, 215 (2018) ("Article I, Section 1 also applies when a governmental entity acts in an arbitrary and capricious manner toward one of its employees by failing to abide by promotional procedures that the employer itself put

in place."). It naturally follows that actions taken by other non-legislative state actors, whether elected officials or unelected bureaucrats, may run afoul of a citizen's right to the fruits of his own labor when they arbitrarily interfere with occupations, professions, or the operation of business.

¶ 28 The core principle behind the fruits of their labor clause is that government "'may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations.'" *Cheek v. City of Charlotte*, 273 N.C. 293, 296, 160 S.E.2d 18, 21 (1968) (quoting *Lawton v. Stell*, 152 U.S. 133, 137 (1894)). The present case involves enforcement action taken under the authority of an executive order issued by the Governor, rather than laws promulgated by the legislature. The intended purpose of the Governor's order was not to regulate a particular occupation or business enterprise, but the direct and intended purpose of the Abatement Order was to cease the operation of a business. It cannot be denied that the scope and breadth of the Abatement Order restricted or otherwise interfered with the lawful operation of a business serving the public.

¶ 29 The Secretary argues that Ace's first claim should be decided at the 12(b)(6) stage as a matter of law. To this end, the Secretary contends that this Court may take judicial notice of factual data surrounding the COVID-19 pandemic at the time the Abatement Order was issued, which will unequivocally support the Secretary's

decisions. *See Rhyne v. K-Mart Corp.*, 358 N.C. 160, 182, 594 S.E.2d 1, 16 (2004) (stating this Court may consider all matters before the state actor as well as matters of which it may take judicial notice when reviewing constitutionality). We disagree. Ace pled that the Abatement Order was the foundational authorization to force Ace to cease operating its racetrack and that the was Order unconstitutional as applied to Ace. An examination of the facts surrounding the COVID-19 pandemic at a later stage of trial may show that Ace's precautionary measures to manage contact tracing of its attendees; install plexiglass, touchless thermometers, six-feet distance markers, and screening booths; and to initiate vigilant cleaning procedures—all in consult with local health officials—were sufficient to combat the spread of COVID-19 within an open-air racetrack in Alamance County. Presuming these facts in favor of Ace as the non-movant, the reasonableness of an "imminent hazard" as justification for the Secretary's actions can be questioned. We hold that Ace adequately pled that the Secretary, through his Abatement Order, deprived Ace of its constitutional right to the fruits of one's own labor and, therefore, sovereign immunity cannot bar Ace's claim. *Deminski*, 2021-NCSC-58, ¶ 21.

D. Selective Enforcement

¶ 30 Ace's second constitutional claim alleges that the Secretary's Abatement Order, levied against Ace and no other speedways, ran afoul of Article 1, section 19's decree that "[n]o person shall be denied the equal protection of the laws[.]" N.C.

Const. art. 1, § 19. Through its second claim, Ace once again sufficiently pleads a constitutional challenge to the Secretary's method of enforcing Order 141.

¶ 31 Selective enforcement of the law by the State is barred by an individual's right to equal protection when enforcement is based upon an arbitrary classification. *State v. Garner*, 340 N.C. 573, 588, 459 S.E.2d 718, 725 (1995) (citations omitted). "Such arbitrary classifications include prosecution due to a defendant's decision to exercise his statutory or constitutional rights." *Id.* (citing *United States v. Goodwin*, 457 U.S. 368, ___ (1982)); *Roller*, 245 N.C. at 518, 96 S.E.2d at 854 (stating right to earn a living is a constitutional right). Our Supreme Court has set out the two-part test for selective enforcement as (1) a singling out of the defendant for (2) discriminatory, invidious reasons:

> The generally recognized two-part test to show discriminatory selective prosecution is (1) the defendant must make a *prima facie* showing that he has been singled out for prosecution while others similarly situated and committing the same acts have not; (2) upon satisfying (1) above, he must demonstrate that the discriminatory selection for prosecution was invidious and done in bad faith in that it rests upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights.

State v. Howard, 78 N.C. App. 262, 266–67, 337 S.E.2d 598, 601–02 (1985) (citations omitted). "Mere laxity in enforcement does not satisfy the elements of a claim of selective or discriminatory enforcement in violation of the equal protection clause."

Grace Baptist Church of Oxford v. City of Oxford, 320 N.C. 439, 445, 358 S.E.2d 372, 376 (1987). Rather, the claimant must show that a state actor applied the law with "a pattern of conscious discrimination" evidencing administration "with an evil eye and an unequal hand." *Id.* (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 373–74 (1886)) (some citations omitted).

¶ 32 Ace's claim alleged:

> 136. Many speedways in addition to ACE Speedway have been conducting races with fans in attendance without any enforcement action by the [Secretary].
>
> 137. [Ace was] singled out by the Governor for enforcement after comments . . . made by Defendant Robert Turner[] were made public.
>
> 138. The Governor took the unusual step of having a letter sent to the Sheriff of Alamance County directing him to take action against [Ace].
>
> 139. [Ace is] informed and believe that no other [s]peedway has been the subject of an Order of Abatement of Imminent Hazard by the [Secretary].
>
> 140. [Ace is] informed and believe[s] that the [Abatement Order] was issued by the [Secretary] . . . due to the statements of Defendant Robert Turner and not because a true Imminent Hazard exists.
>
> 141. The issuance of the [Abatement Order] violates the equal protection rights of [Ace] as guaranteed by Article I, Section 19 of the North Carolina Constitution.
>
> 142. The [Secretary] does not have sovereign immunity as this counterclaim is brought directly under the Declaration

> of Rights of the North Carolina Constitution.
>
> 143. [Ace does] not have an adequate state remedy, and therefore, there is a direct cause of action against the [Secretary] for the violation of [Ace's] rights as guaranteed by Art. I, sec. 19, of the North Carolina Constitution.

¶ 33 Ace once again pleads that its rights were violated by the Secretary in his official capacity as a state actor, and that it has no avenue for redress other than an action under the Constitution.

¶ 34 With respect to whether Ace's substantive claim is colorable, the Secretary argues that Ace failed to plead both (1) that it was "singled out" for prosecution while "similarly situated" to other raceways, and (2) that the Secretary acted invidiously in "bad faith." The Secretary's argument places special emphasis on Ace's failure to track specific language in pleading its claim. We have held that a party need not use magic words to plead the substantive elements of its claim. *See Feltman v. City of Wilson*, 238 N.C. App. 246, 253–54, 767 S.E.2d 615, 621 (2014); s*ee also State v. Dale*, 245 N.C. App. 497, 504, 783 S.E.2d 222, 227 (2016) ("This notice pleading has replaced the use of 'magic words' and allows for a less exacting standard, so long as the defendant is properly advised of the charge against him or her."). A pleading is sufficient "if it gives sufficient notice of the events or transactions which produced the claim to enable the adverse party to understand the nature of it and the basis for it, to file a responsive pleading, and—by using the rules provided for obtaining pretrial

discovery—to get any additional information he may need to prepare for trial." *Sutton v. Duke*, 277 N.C. 94, 104, 176 S.E.2d 161, 167 (1970) ("Under the 'notice theory' of pleading contemplated by [N.C. R. Civ P.] 8(a)(1), detailed fact-pleading is no longer required.").

¶ 35 The Secretary's argument fails. Ace pled "enough to give the substantive elements of a *legally recognized claim*" for selective enforcement. *See Stein*, 2022-NCSC-9, ¶ 32. Ace effectively pled that it was among a class of "many speedways" that similarly conducted races with fans in attendance during the period where such actions were banned by Order 141. Ace further pled that Governor Cooper and the Secretary "singled out" Ace for enforcement by directing the Sheriff to take action against Ace and, when that failed, by issuing the Abatement Order against Ace alone. Finally, Ace's complaint pled its belief that it was singled out for enforcement in response to Defendant Turner's statements to the press "and not because a true Imminent Hazard exist[ed,]" as the Secretary asserted in the Abatement Order. These pleadings, taken as true, sufficiently allege bad faith enforcement of Order 141 against Ace alone.

¶ 36 The Secretary contends that Ace's pled discriminatory reason for his enforcement of Order 141—retaliation for statements made to the press critiquing Order 141—is insufficient to plead selective enforcement. The Secretary cites *State v. Davis*, 96 N.C. App. 545, 550, 386 S.E.2d 743, 745 (1989), for support. In *Davis*,

following his conviction for tax-related offenses, the defendant argued on appeal that he was selectively prosecuted based upon "invidious discrimination" because he belonged to a political group that routinely and openly protested personal income tax laws. *Id.* at 548–49, 386 S.E.2d at 744. This Court ruled that the defendant's evidence at trial failed to show more than a tenuous relationship between his association with the anti-tax political group and the State's decision to prosecute him instead of any number of other citizens who failed to file their tax returns. Therefore, the defendant could not show he was "singled out" for prosecution. *Id.* at 549, 386 S.E.2d at 744–45.

¶ 37 Further, and most relevant to the present case, the Court held that the defendant presented "a feckless argument that the statutes he was charged under [were] unconstitutional as applied to him because selection for his prosecution was impermissibly based on an attempt to suppress his first amendment right of free speech." *Id.* at 549, 386 S.E.2d at 745. Even assuming that the defendant was singled out for his vocal protest of income taxes, the Court found no invidiousness or bad faith because "such prosecutions, predicated in part upon a potential deterrent effect, serve a legitimate interest in promoting more general tax compliance." *Id.* at 550, 386 S.E.2d at 745.

¶ 38 The facts of *Davis* are similar to the facts of the present case. Ace pleads that it was selected for enforcement by the Secretary because its owner was outspokenly

critical of Order 141. The Secretary asserts that Ace must fail for the same reason the defendant's argument failed in *Davis*: regardless of possible alternative reasons for enforcement, singling out outspoken individuals has a strong deterrent effect upon those who are similarly situated and choose similar courses of action.

¶ 39 The present case must be distinguished from *Davis* based upon the relevant stage of the proceedings. The Court in *Davis* reached its holding following appellate review of evidence admitted during a full trial, and after determining that any effort to reduce the defendant's speech was, at most, an equal and alternative purpose to deterrence of criminal conduct. Here, we are tasked only with determining whether Ace has sufficiently pled the substantive elements of its claim. Ace has pled that the Secretary acted based solely upon an effort to silence its opposition to Order 141, and not based upon any alternative, legitimate state interest. The resolution of this question is not before us at this time. Ace has sufficiently pled that the Secretary singled its racetrack out for enforcement in bad faith for the invidious purpose of silencing its lawful expression of discontent with the Governor's actions. Therefore, sovereign immunity cannot bar Ace's claim.

III. Conclusion

¶ 40 We hold that Ace pled colorable claims for infringement of its right to earn a living and for selective enforcement of the Governor's orders sufficient to survive the Secretary's motion to dismiss.

AFFIRMED.

Judges CARPENTER and GORE concur.

No. 280P22 FIFTEEN-A JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

KODY H. KINSLEY, in his official capacity as SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, Plaintiff-Appellant, v. ACE SPEEDWAY RACING, LTD., AFTER 5 EVENTS, LLC, 1804-1814 GREEN STREET ASSOCIATES LIMITED PARTNERSHIP, JASON TURNER, and ROBERT TURNER, Defendants-Appellees.	)	From Alamance County COA No. 21-428

****

RESPONSE TO PETITION FOR DISCRETIONARY REVIEW
(Defendants–Appellees After 5 Events, LLC, Jason Turner, and Robert Turner)

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INDEX

TABLE OF CASES AND AUTHORITIES

No. 280P22 FIFTEEN-A JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

KODY H. KINSLEY, in his official capacity as SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, Plaintiff-Appellant, v. ACE SPEEDWAY RACING, LTD., AFTER 5 EVENTS, LLC, 1804-1814 GREEN STREET ASSOCIATES LIMITED PARTNERSHIP, JASON TURNER, and ROBERT TURNER, Defendants-Appellees.	)	From Alamance County COA No. 21-428

****

RESPONSE TO PETITION FOR DISCRETIONARY REVIEW
(Defendants–Appellees After 5 Events, LLC, Jason Turner, and Robert Turner)

****

TO THE HONORABLE SUPREME COURT
OF NORTH CAROLINA:

Defendants–Appellees, After 5 Events, LLC, Jason Turner, and Robert Turner, respectfully respond to the Petition for Discretionary Review filed by the Plaintiff–Appellant. In opposition to the Petition, Defendants–Appellees show the following:

FACTS

ACE Speedway is a race track located in Alamance County. It has a seating capacity of around 5,000 spectators. (Doc. Ex. p. 183, ln. 17). Three races were conducted in 2020 prior to the institution of this action. The attendance for the three races was: May 23 – 2,550 spectators; May 30 – a little over 1,600; June 6 – 1,200. (R. S. p. 463, ln. 17-25). The break even point for the racetrack is around 1,000 spectators. (Doc. Ex. p. 178). There are 45 people employed to put on a race. (Doc. Ex. 178, ln. 12-13).

Prior to the first race, Defendant–Appellee, Jason Turner, met with "stakeholders", including the Alamance County Health Director, Sheriff Terry Johnson, and a member from DHHS, among others. At this meeting, Defendant–Appellee Turner received a tentative guidance document for conducting the races from the Health Director. The document was based on a

template from the Department of Health and Human Services. (Doc Ex. pp. 169-170). In conducting the races, these Defendants–Appellees by and large complied with the guidance document. (Doc. Ex. p. 179, ln. 17-22). The precautions set forth in the guidance document and carried out by the Defendants–Appellees included contact tracing by way of a sign in roster; plexiglass being installed at concession stand windows; use of touchless thermometers to check temperatures; screening questions placed at entrances; six feet markers were placed at common areas, concession stands, fuel stations, and tire stations to maintain social distancing; announcements were made over the PA system to remind people to keep social distancing; hand sanitizer was provided at all common spaces; and commonly used surfaces and hand washing stations were disinfected with a bleach mixture. (Doc. Ex. 179-185).

As of June 15, 2020, there were 295 active cases of COVID-19 in Alamance County. (Doc. Ex. p. 161, ln. 22). Twelve people were in the hospital with none in the hospital in Alamance County. (Doc. Ex. p. 162, ln. 4-6; Doc. Ex. p. 163, ln. 16-18). From the beginning of the outbreak of COVID-19, there had been 34 COVID-19 related deaths in Alamance County as of June 15, 2020. 29 of those deaths had been in a nursing home. (Doc. Ex. p. 165, ln. 3-10). No cases of COVID-19 in Alamance County were linked to any races held at ACE Speedway.

(R. S. p. 437, ln. 20-24). The population of Alamance County is approximately 166,000 people. (R. S. pp. 445, ln. 25 – 446, ln. 3).

The basis of the Complaint in this action is a violation of the mass gathering limits of 25 persons in outdoor arenas which was part of Executive Order 141 issued by Gov. Cooper. (R.p. 16, ¶'s 26-27; R.p. 137). After the issuance of this Executive Order, Defendant–Appellee, Jason Turner, made several critical comments to the press regarding the Governor's Executive Order. (Doc. Ex. p. 195, ln. 14-20). These comments were made a part of the basis for the lawsuit by the Plaintiff–Appellant. They are reflected in paragraphs 28, 29, and 30 of the Complaint. (R.p. 16-17).

After these comments, the Governor became personally involved with shutting down ACE Speedway. On May 30 while on the way to meet with these Defendants–Appellees, a person from Gov. Cooper's Office called Sheriff Johnson. The Sheriff explained that he was on his way to the racetrack to meet with these Defendant–Appellees. (Doc. Ex. p. 143, ln. 2–11). Sheriff Johnson then met with these Defendants–Appellees at the request of Gov. Cooper and requested that they call off the race which was scheduled. (R.p. 18, ¶ 31). Gov. Cooper, through his counsel, sent a letter to the Sheriff and Chairman of the Board of Commissioners explaining that holding races with more than 25 spectators in

attendance was in violation of Executive Order 141. (R.p. 18, ¶ 35; R.p. 52).

Sheriff Terry Johnson has been in law enforcement for 49 years, and has been sheriff of Alamance County for 19 years. (Doc. Ex. p. 152, ln. 16-19). In his 49 years of law enforcement, this is the first time he received a letter from the Governor requesting an investigation of a particular business. (Doc. Ex. p. 153, ln. 13-17).

Major Jackie Fortner of the Alamance County Sheriff's Office conducted an investigation of ACE Speedway. (Doc. Ex. p. 197; Doc. Ex. p. 142, ln. 2-8). In addition to ACE Speedway conducting races, several other race tracks held races at the same time as ACE Speedway. These include Piedmont Drag Strip in Guilford County, 311 racetrack in Stokes County, some tracks in Wake County, and Dixie Speedway. (Doc. Ex. p. 149, ln. 5-18). No Order of Abatement was issued for these other tracks by the Plaintiff–Appellant. (R.p. 142, ¶ 139). Sheriff Johnson publicly stated that he refused to take any further action to enforce Executive Order 141 against ACE Speedway. (R.p. 61, ¶ 5.8).

These Defendants were singled out for enforcement by the Governor and the Plaintiff due to the comments made by Defendant–Appellee, Jason Turner, to the media. (R.p. 142, ¶ 137).

The Order of Abatement, by its own terms, would continue in effect until

"the expiration of Executive Order No. 141..." (R.p. 64). The Complaint of the Plaintiff–Appellant was dismissed with prejudice after Executive Order 141 expired, and not because of an abatement of an imminent health hazard. (R.p. 137).

BACKGROUND

A. ACE Speedway violates Executive Order 141.

There is no question that ACE Speedway violated the Governor's Executive Order 141 which limited attendance at the Speedway to 25 spectators. There was no medical basis for such a limitation in an outdoor venue which seats over 5000 people. Since the minimum number of spectators needed to break even on a race was around 1000 spectators, the executive order had the effect of ordering the race track to shut down.

However, prior to holding the races in violation of the Executive Order, the Turners meet with the local Health Department and an employee of the Plaintiff in order to receive a guidance document outlining the extensive steps needed to carry on a race in a safe manner during the Covid outbreak. ACE Speedway complied with this guidance from the Health Department and the State DHHS. The only issue identified by the Plaintiff is that the racetrack did not comply with the artificial limit of 25 spectators in the 5000 seat outdoor venue.

B. The Secretary Issues the Order of Abatement.

As stated in the Petition for Discretionary Review, an Order of Abatement may issue to an owner or operator of a property when "...an imminent hazard exists..." N.C. Gen. Stat. § 130A-20. An imminent hazard exists when there is "a situation that is likely to cause an immediate threat to human life, an immediate threat of serious physical injury, [or] an immediate threat of serious adverse health effects..." N.C. Gen. Stat. § 130A-2.

As a factual matter, there was no imminent hazard in operating ACE Speedway with a capacity over 25 spectators. There is no evidence that anyone contracted Covid by attending races at ACE Speedway before or after the issuance of the Order of Abatement. In fact, there were few cases of Covid in Alamance County at the time of the issuance of the Order of Abatement. Out of a population of 166,000, there were only 295 total cases.

It has also been established as a matter of law that an imminent health hazard did not exist. The Plaintiff in this case took a voluntary dismissal with prejudice. A voluntary dismissal with prejudice is a final judgment on the merits. *Smith v. Polsky*, 251 N.C. App. 589, 595, 796 S.E.2d 354, 359 (2017). It acts the same as if the action had been prosecuted to a final adjudication. *Riviere v. Riviere*, 134 N.C. App. 302, 306, 517 S.E.2d 673, 676 (1999). When there is a

filing of a voluntary dismissal with prejudice, the party concedes that none of the grounds for relief are present. *Id.*

In a case such as the one presently before the Court, where injunctive relief is sought, a voluntary dismissal of a complaint is equivalent to a finding that the defendant was wrongfully enjoined. *M. Blatt Co. v. Southwell*, 259 N.C. 468, 472, 130 S.E.2d 859, 862 (1963). Therefore, there has been a legal concession that there was not an imminent health hazard existing.

Further, as indicated in the Petition for Discretionary Review and in the voluntary dismissal filed by the Plaintiff, the Order of Abatement and the resulting civil action were both brought to enforce Executive Order 141, not to abate an imminent health hazard. The Order of Abatement provided by its own terms that it would continue until Executive Order 141 expired. Had the Order of Abatement truly been issued because of an imminent health hazard, there would have been no reason to take a voluntary dismissal when the Executive Order expired. The Order of Abatement would have continued until the health hazard no longer existed.

The issuance of an Order of Abatement shutting down a business in order to enforce an executive order was wrongful. N.C. Gen. Stat. § 166A-19.30(d) provides that the violation of an executive order issued by the Governor is a misdemeanor. An executive order cannot be enforced by an order of abatement.

As this Court has previously stated, "the general rule is that where a statute creates a liability where none existed before and denominates a violation of its provisions a misdemeanor, and prescribes remedies for its enforcement, such remedies are usually regarded as exclusive..." *Moose v. Barrett*, 223 N.C. 524, 527, 27 S.E.2d 532, 534 (1943).

C. The Trial Court Issued a Preliminary Injunction Against ACE Speedway.

The Appellant's citation to the findings of the trial court in a preliminary injunction is misplaced. The ruling granting the preliminary injunction is not only not binding on this Court, it is not a "proper matter for consideration". *Gene's, Inc. v. City of Charlotte*, 259 N.C. 118, 121, 129 S.E.2d 889, 891 (1963).

Further, the findings in an order from a preliminary injunction hearing are "'not authoritative as '" the law of the case, "'for any other purpose, and the judgment or order [is] not *res adjudicata* on'" final hearings." *Childress v. Yadkin Cty*., 186 N.C. App. 30, 43, 650 S.E.2d 55, 64–65 (2007), *quoting, Schloss v. Jamison*, 258 N.C. 271, 276, 128 S.E.2d 590, 594 (1962).

D. The Trial Court Denies the Secretary's Motion to Dismiss ACE's counterclaims.

The Appellant in this section of its Petition admits that the reason the Order of Abatement was issued was because of the Governor's Executive Order, not

because of an imminent health hazard. The Appellant alleges that the abatement order expired immediately on the Governor rescinding his prior order. If the Order of Abatement was based on an imminent health hazard, then it would terminate when the health hazard ceased to exist, not when the Governor decided to rescind an Executive Order. The trial court correctly denied the Appellant's Motion to Dismiss the Counterclaims of these Appellees.

E. The Court of Appeals properly upheld the trial court's decision.

The Appellant in its Petition argues that the constitutional claims of the Appellees are not colorable because they would not pass a rational–basis review. This Court has previously held that sovereign immunity does not bar a claim based on the violation of the Declaration of Rights section of the North Carolina Constitution. *Corum v. Univ. of N. Carolina Through Bd. of Governors,* 330 N.C. 761, 785-786, 413 S.E.2d 276, 291-292 (1992). In order to survive a motion to dismiss, a party does need to plead a colorable claim. "[T]he claim must present facts sufficient to support an alleged violation of a right protected by the State Constitution." *Deminski on behalf of C.E.D. v. State Bd. of Educ*., 2021-NCSC-58, ¶ 17, 377 N.C. 406 (2021). The Court of Appeals properly performed an analysis of the facts pleaded in this case, and concluded that a colorable claim had been stated under the Constitution.

The Appellant argues that the Court of Appeals failed to analyze the pleadings using a rational–basis test. This test is alleged by the Appellant to be proper to review "public–health regulations." Appellant cites no cases in which such a review is conducted for an Order of Abatement. This appeal does not involve the validity of a public health regulation, but instead the improper use of an order of abatement to enforce an executive order.

As to the selective enforcement claim of the Appellees, the Appellant raises the issue that it had filed another case against a race track. However, there is nothing in the Record on Appeal concerning this case. It was raised, as indicated by the Appellant, in its Court of Appeals brief in a footnote. Further, it is unclear why this case is similar to the case at bar. The Appellant states on page 10 of its Petition that the case was filed on September 17, 2020. On the next page, of the Petition, the Appellant states that the mass gathering limit which formed the basis of the Order of Abatement against ACE speedway was lifted by Executive Order 163 on September 4, 2020.

This Court has held that there is sufficient evidence to show a constitutional violation when a deprivation of plaintiffs' freedom of speech was the moving force behind an injunction closing a business. *Moore v. City of Creedmoor*, 345 N.C. 356, 366–67, 481 S.E.2d 14, 21 (1997). This is what happened in the present case.

The Appellees spoke out in the press against the Executive Orders of the Governor. The Governor became personally involved and contacted the Alamance County Sheriff. The Sheriff had never had this happen in his 49 years in law enforcement. Further, the Sheriff had an investigation conducted by his office, and determined that there were several other race tracks in the area which were conducting races. Since the State was not taking action against those tracks, the Sheriff refused to charge the Appellees with violating the Executive Order of the Governor.

REASONS WHY CERTIFICATION SHOULD NOT ISSUE

I. The Decision of the Court of Appeals does not Warrant Discretionary Review.

A. Prior Court Precedent.

The decision of the Court of Appeals in this case is in keeping with long held precedent of this Court. As stated above, this is not a case challenging a public health regulation. It is a case challenging the Secretary ordering the closing of an ordinary business in order to improperly enforce an executive order by the governor.

This Court has held on many occasions that the State, including the Secretary, cannot order a person to keep from engaging in an ordinary vocation.

This is what was done in this case. As stated in *State v. Harris*, 216 N.C. 746, 6 S.E.2d 854, 863 (1940), "[w]hile many of the rights of man, as declared in the Constitution, contemplate adjustment to social necessities, some of them are not so yielding. Among them the right to earn a living must be regarded as inalienable." *In accord*, *King v. Town of Chapel Hill*, 367 N.C. 400, 408, 758 S.E.2d 364, 371 (2014) (quoting *Harris*, and recognizing fundamental right to "earn a livelihood"). *See also, State v. Ballance*, 229 N.C. 764, 770, 51 S.E.2d 731, 735 (1949) (legislature cannot deny right to maintain themselves and their families); *Roller v. Allen*, 245 N.C. 516, 525, 96 S.E.2d 851, 859 (1957) (police power "must not invade personal and property rights guaranteed and protected by" Constitution). Further, as stated in *Harris*, the right to engage in an ordinary vocation is "the principal purpose of the Constitution itself." *Harris,* S.E.2d at 863. The Secretary in this case did not issue a regulation, he issued a prohibition on engaging in an ordinary vocation.

At this stage of the litigation, all that is needed to deny the motion to dismiss is for these Appellees to have pleaded a colorable claim that there is a violation of the right to earn a living guaranteed by Art. I, sec. 1 of the North Carolina Constitution. As the decision below shows, this was done, and the decision of the trial court was properly upheld.

B. Significant Public Interest.

This case does not involve significant public interest. The State of Emergency issued by the Governor has expired, and the outcome of this case will not effect any current laws, regulations, or executive orders. As noted by the Appellant, the law under which the Governor's executive order which was attempted to be enforced by the Order of Abatement has been amended. 2021 Session Laws 180.

Further, there does not appear to be a large number of lawsuits pending challenging actions taken by the State during the Covid pandemic. The Appellant lists only two cases, *Howell v. Cooper,* No. 22-571 (N.C. Ct. App.) and *N.C. Bar & Tavern Ass'n v. Cooper*, No. 20 CVS 6358 (Wake Cty. Super. Ct.) (Notice of appeal filed). Neither of these cases involve the issuance of an order of abatement.

The Appellant further argues that there could be additional suits during a pandemic for the State doing too little or too much to protect the public health. Neither of these questions are presented by this appeal. This case involves the violation of a constitutional right by the State in improperly issuing an order of abatement precluding the Appellees from engaging in an ordinary vocation.

The Appellant also argues that based on sovereign immunity, a case should not be permitted for the violation of a constitutional right as it could have a

chilling effect on the State, and that the State could face staggering financial liability for its unconstitutional actions. These concerns have previously been rejected by this Court.

Sovereign immunity does not bar an action based on a violation of the Declaration of Rights. As stated in *Corum v. Univ. of N. Carolina Through Bd. of Governors,* 330 N.C. 761, 413 S.E.2d 276 (1992):

> The doctrine of sovereign immunity cannot stand as a barrier to North Carolina citizens who seek to remedy violations of their rights guaranteed by the Declaration of Rights. It would indeed be a fanciful gesture to say on the one hand that citizens have constitutional individual civil rights that are protected from encroachment actions by the State, while on the other hand saying that individuals whose constitutional rights have been violated by the State cannot sue because of the doctrine of sovereign immunity.
>
> It is also to be noted that individual rights protected under the Declaration of Rights from violation by the State are constitutional rights. Such constitutional rights are a part of the supreme law of the State. *State ex rel. Martin v. Preston*, 325 N.C. 438, 385 S.E.2d 473 (1989). On the other hand, the doctrine of sovereign immunity is not a constitutional right; it is a common law theory or defense established by this Court as hereinabove set forth. Thus, when there is a clash between these constitutional rights and sovereign immunity, the constitutional rights must prevail.

Id., N.C. at 785–86, S.E.2d at 291–92.

Violation of constitutional rights stated in the Declaration of Rights of the Constitution, such as the two Constitutional claims set forth by these

Defendants–Appellees, may be brought against the State. The ability to bring an action for the violation of the Constitution includes the awarding of monetary damages for these constitutional violations. *Corum*, N.C. at 785, S.E.2d at 291.

II. The Decision of the Court of Appeals on ACE's Selective Enforcement Claim does not Warrant Discretionary Review.

The decision by the Court of Appeals is in accord with prior Supreme Court precedent, and does not have significant public interest. As indicated *supra,* this Court has held that there is sufficient evidence to show a constitutional violation when a deprivation of plaintiffs' freedom of speech was the moving force behind an injunction closing a business. *Moore v. City of Creedmoor*, 345 N.C. 356, 366–67, 481 S.E.2d 14, 21 (1997).

The Appellees have pleaded the deprivation of their freedom of speech was the moving factor behind the Order of Abatement closing their business. The Appellant in his Complaint alleged that part of his cause of action was the statements of the Appellees criticizing the Governor's executive orders. They are reflected in paragraphs 28, 29, and 30 of the Complaint. Following the statements by the Appellees, the Governor's office took the unprecedented action of sending a letter to the Sheriff at the Governor's direction, directing him to take action against Ace Speedway. The Governor's Office then called the Sheriff to be sure

that he was in fact directing the race track to close. The Sheriff testified that he had not received such a letter from another Governor in his 49 years of law enforcement. At this same time, many other race tracks were operating without involvement of the Governor's office and without an Order of Abatement being issued. These racetracks include Piedmont Drag Strip in Guilford County, 311 racetrack in Stokes County, some tracks in Wake County, and Dixie Speedway. The reason for the Order of Abatement being issued was not due to an imminent health hazard, but was due to one of these Appellees criticizing the Governor's action in the press.

These facts go far beyond simply complaining to the press in order to be "immunized for violation the law" as alleged by the Appellant. These actions by the Governor and the Secretary show an intentional decision to shut a business based on the exercise of free speech rights, and not because of the violation of the law. One can only believe that this type of targeting by the chief executive of the State is such a rare occasion as not to implicate legal principals of major significance.

CONCLUSION

These Appellees, After 5 Events, LLC, Jason Turner, and Robert Turner, respectfully request that this Court deny discretionary review of the judgment

below.

Respectfully submitted, this the 13th day of September, 2022.

KITCHEN LAW, PLLC

/s/ S. C. Kitchen

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CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served the foregoing document in accordance with N.C. R. App. P. 26(c) in the following manner:

( ) by causing a copy of same to be placed in an official depository under the exclusive care and custody of the United States Postal Service, postage prepaid, first class, addressed to the following:

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This the 13th day of September, 2022.

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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-524

No. COA21-428

Filed 2 August 2022

Alamance County, No. 20 CVS 1001

KODY H. KINSLEY, in his official Capacity as SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, Plaintiff,

v.

ACE SPEEDWAY RACING, LTD., AFTER 5 EVENTS, LLC, 1804-1814 GREEN STREET ASSOCIATES LIMITED PARTNERSHIP, JASON TURNER, and ROBERT TURNER, Defendants.

Appeal by Plaintiff from order entered 12 January 2021 by Judge John M. Dunlow in Alamance County Superior Court. Heard in the Court of Appeals 8 March 2022.

Solicitor General Ryan Y. Park, by Assistant Solicitor General Nicholas S. Brod and Solicitor General Fellow Zachary W. Ezor, and Attorney General Joshua H. Stein, by Assistant Attorney General John P. Barkley, for Plaintiff-Appellant.

Kitchen Law, PLLC, by S.C. Kitchen, for Defendants-Appellees.

Jeanette K. Doran for amicus curiae North Carolina Institute for Constitutional Law.

GRIFFIN, Judge.

¶ 1 This case makes us consider the use of overwhelming power by the State against the individual liberties of its citizens and how that use of power may be

challenged. The people of North Carolina recognized the importance of this balance in ratification of our Constitution in 1868. The challenged act here involves the closing of a business by a cabinet secretary. Plaintiff Kody H. Kinsley,[1] in his official capacity as Secretary of the North Carolina Department of Health and Human Services, issued an order of abatement to close a racetrack. The Secretary issued the abatement order only after the Governor's use of an executive order and his direct request to local law enforcement to close the track failed.

¶ 2 Amidst the onset of the COVID-19 pandemic, the Governor issued executive orders placing restrictions on the rights of the people of North Carolina to gather. The Secretary appeals from the trial court's order denying his motion to dismiss two counterclaims brought by Defendants Ace Speedway Racing, Ltd, its affiliates, and its owners. Ace's counterclaims propose that the Governor's orders were enforced upon them without justification and without equal protection of law. Ace's counterclaims are constitutional claims alleging (1) executive orders issued by the Governor in response to the COVID-19 pandemic were an unlawful infringement on Ace's right to earn a living as guaranteed by our Constitution's fruits of labor clause, and (2) the Secretary's enforcement actions against Ace under the executive order

[1] Secretary Mandy K. Cohen originally filed this appeal in her capacity as Secretary of the North Carolina Department of Health and Human Services. She has since been succeeded by Secretary Kinsley. We substitute Secretary Kinsley as party to this appeal in accordance with N.C. R. App. P. 38(c).

constituted unlawful selective enforcement. The Secretary argues Ace failed to present colorable constitutional claims, and therefore failed to overcome the Secretary's sovereign immunity from suit.

¶ 3 In this appeal, we are asked to decide whether Ace has presented colorable constitutional claims for which our courts could provide a remedy. We hold that Ace pled each of its constitutional claims sufficiently to survive the Secretary's motion to dismiss. We affirm the trial court's order.

I. Factual and Procedural Background

¶ 4 Ace operates ACE Speedway in Alamance County as a racetrack, hosting car races with a maximum audience seating capacity of around 5,000 people. To feasibly host a race and pay its staff of roughly forty-five employees, Ace needs "around a thousand fans" to attend each race.

¶ 5 In March 2020, the COVID-19 virus began spreading across the United States. State governments across the country began to impose restrictions on their citizens' right to gather, conduct public activities, and engage in in-person means of commerce. On 20 May 2020, pursuant to emergency directive authority granted by N.C. Gen. Stat. § 166A-19.30, Governor Roy Cooper issued Executive Order 141 decreeing, in relevant part, that "mass gatherings" were temporarily prohibited in North Carolina. Exec. Order No. 141, 34 N.C. Reg. 2360 (May 20, 2020). Order 141 defined "mass gatherings" as "an event or convening that brings together more than ten (10) people

indoors or more than twenty-five (25) people outdoors at the same time in a single confined indoor or outdoor space, such as an auditorium, stadium, arena, or meeting hall." *Id.*

¶ 6 The mass gathering prohibition in Order 141 nullified Ace's ability to hold economically feasible racing events at ACE Speedway. On 22 May 2020, the Burlington Times-News published an article featuring statements from Defendant Jason Turner, an owner of ACE Speedway, regarding the restrictions in Order 141 and his plans to nonetheless hold races at ACE Speedway. The article quoted Turner as follows:

> I'm going to race and I'm going to have people in the stands. . . . And unless they can barricade the road, I'm going to do it. The racing community wants to race. They're sick and tired of the politics. People are not scared of something that ain't killing nobody. It may kill .03 percent, but we deal with more than that every day, and I'm not buying it no more.

Ace followed through on Turner's statement and began to hold races during the summer of 2020.

¶ 7 Ace held its first race of the season at ACE Speedway on 23 May 2020. The event drew an audience of approximately 2,550 spectators. On 15 May 2020, a week before the first race, Ace met with local health and safety officials. Ace and the local officials agreed upon health precautions for its events, including contact tracing, temperature screenings, social distancing in common areas, and reduced and

distanced audience seating arrangements. With each of its health precautions in place, Ace held races on May 23, May 30, and June 6, hosting over 1,000 spectators at each event.

¶ 8 On 30 May 2020, before that afternoon's race, the Governor's office requested that Alamance County Sheriff Terry Johnson personally ask Ace to stop holding racing events in violation of Order 141. The Sheriff relayed the Governor's message and informed Ace that they could face sanctions if they did not comply. After Ace held the race on May 30, the Sheriff publicly stated that he would not take any further actions to enforce Order 141. On 5 June 2020, the Governor's office sent a letter to the Sheriff and Ace, once again advising that Ace was conducting racing events in violation of Order 141 and potentially subject to sanctions. Ace held its third race on June 6, the following day.

¶ 9 On 8 June 2020, the Secretary issued an order demanding that Ace abate further mass gatherings at ACE Speedway. This Abatement Order explained that Ace had "operated openly in contradiction of the restrictions and recommendations in [Order 141,]" and, therefore, "immediate action" was necessary to prevent "increased exposure to thousands of people attending races at ACE Speedway, and thousands more who may be exposed to COVID-19 by family members, friends, and neighbors who have attended or will attend races at ACE Speedway." The Abatement Order instructed Ace to close its facilities until the expiration of Order 141, or until such

time as Ace developed a plan to host events in full compliance with Order 141's mass gathering restrictions. The Abatement Order also required Ace to "notify the public by 5:00 p.m. on [9 June 2020] that its upcoming races and other events . . . [were] cancelled[,]" and to notify DHHS by 5:00 p.m. on June 9 that it had complied. Ace declined to close its facilities or provide timely notice to the public and DHHS as required by the Abatement Order.

¶ 10 On 10 June 2020, the Secretary filed a complaint, motion for temporary restraining order, and motion for preliminary injunction seeking to enforce the terms of the Abatement Order. On 11 June 2020, Judge D. Thomas Lambeth, Jr., entered an order granting the Secretary's temporary restraining order and "enjoined [Ace] from taking any action to conduct or facilitate a stock car race or other mass gathering at ACE Speedway[.]" On 10 July 2020, following a hearing on the matter, Judge Lambeth entered an order granting the Secretary's motion for preliminary injunction and enjoining Ace "from taking any action prohibited by the Abatement Order[.]"

¶ 11 On 25 August 2020, Ace filed its answer to the Secretary's complaint and its own counterclaims, including the two constitutional claims at issue in this appeal: (1) infringement upon Ace's right to earn a living and (2) selective enforcement of Order 141 against Ace.

¶ 12 On 4 September 2020, the Governor issued Executive Order 163, which replaced Order 141 and loosened Order 141's mass gathering restrictions to allow a

total of fifty people in outdoor gatherings. The Secretary voluntarily dismissed his complaint in this matter against Ace because the terms of the Abatement Order were moot and no longer enforceable as written. Ace did not dismiss its counterclaims.

¶ 13 On 2 December 2020, the Secretary moved to dismiss Ace's counterclaims, arguing that each counterclaim was barred by sovereign immunity from suit. The trial court heard arguments on the justiciability of each claim. In January 2021, Judge John M. Dunlow entered an order (the "Denial Order") denying the Secretary's motion to dismiss each of Ace's constitutional claims.[2] The Secretary filed notice of appeal from the Denial Order on 17 February 2021.

II. Analysis

¶ 14 The matter before us on appeal is whether the trial court erred by denying the Secretary's motion to dismiss Ace's two constitutional counterclaims on grounds of sovereign immunity from suit.

A. Timeliness of Appeal

¶ 15 We first address the timeliness of the Secretary's appeal from the denial of his motion to dismiss Ace's counterclaims. Ace moves to dismiss the Secretary's appeal

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[2] On 12 November 2020, Ace amended its counterclaims to assert three additional counterclaims. Following the hearing on justiciability, the trial court dismissed each additional counterclaim. Ace does not appeal the dismissal of these three counterclaims.

On 11 February 2021, Ace filed a motion for entry of default judgment against the Secretary. The trial court entered default judgment against the Secretary, but, following a hearing on the matter, allowed the Secretary's motion to set aside default.

on grounds that the Secretary's notice of appeal was untimely because he failed to comply with the terms of Rule 3(c) of the North Carolina Rules of Appellate Procedure.

¶ 16 "The provisions of Rule 3 are jurisdictional, and failure to follow the rule's prerequisites mandates dismissal of an appeal." *Bailey v. State*, 353 N.C. 142, 156, 540 S.E.2d 313, 322 (2000) (citation omitted). Rule 3(c) dictates that a party to a civil action "must file and serve a notice of appeal . . . within thirty days after entry of judgment [or order] if the party has been served with a copy of the judgment [or order] within the three-day period [after the order is entered]." N.C. R. App. P. 3(c)(1). Alternatively, if service was not made within three days, the party must file and serve a notice of appeal "within thirty days after service upon the party of a copy of the judgment." N.C. R. App. P. 3(c)(2). Effective service of a court document must include a certificate of service showing "the date and method of service or the date of acceptance of service and shall show the name and service address of each person upon whom the paper has been served." N.C. R. Civ. P. 5(b1). In the absence of properly effected service, the thirty-day period within which the party must file its appeal begins to run from the date the party obtained actual notice of the order. *Brown v. Swarn*, 257 N.C. App. 417, 421, 810 S.E.2d 237, 239 (2018) ("[W]here evidence in the record shows that the appellant received actual notice of the [order] more than thirty days before noticing the appeal, the appeal is not timely.").

¶ 17 Here, the record shows that the trial court entered the Denial Order on either 15 or 19 January 2021. The file stamp on the Denial Order is unclear and difficult to read. The record includes a certificate of service for the Denial Order filed on 15 January 2021. However, the trial court determined during the hearing to set aside entry of default against the Secretary that the package mailed to the Secretary containing the Denial Order did not include a copy of the certificate of service. The record does not indicate that the Secretary ever received the certificate of service for the Denial Order. Without a certificate of service, the Secretary never received effective service initiating the thirty-day period to file notice of appeal. Instead, the Secretary received actual notice of the Denial Order when he received the mailed package. Therefore, the thirty-day period to file notice of appeal from the Denial Order was tolled until February 4, only thirteen days before the Secretary filed a timely notice of appeal. This Court has jurisdiction over the Secretary's appeal.

¶ 18 The Secretary moved to dismiss Ace's claims under Rules 12(b)(1), 12(b)(2), and 12(b)(6) of the North Carolina Rules of Civil Procedure, arguing the basis of sovereign immunity for each. The trial court denied the Secretary's motion in full. Nonetheless, the Secretary's arguments on appeal contend only that Ace failed to adequately plead its constitutional claims. We will therefore consider only whether Ace has properly pled claims for relief under Rule 12(b)(6). N.C. R. Civ. P. 12(b)(6) (allowing a party to defend a claim by contending the claimant "[f]ail[ed] to state a

claim upon which relief can be granted").

¶ 19 An appeal from the denial of a motion to dismiss is interlocutory, and ordinarily not ripe for immediate appellate review unless the appeal affects a substantial right. *Turner v. Hammocks Beach Corp.*, 363 N.C. 555, 558, 681 S.E.2d 770, 773 (2009). "This Court has consistently held that the denial of a [Rule 12(b)(6)] motion to dismiss based upon the defense of sovereign immunity affects a substantial right and is thus immediately appealable." *Richmond Cnty. Bd. of Educ. v. Cowell*, 225 N.C. App. 583, 586, 739 S.E.2d 566, 568 (2013) (citation, brackets, and quotation marks omitted). The Secretary's appeal is properly before this Court, and Ace's motion to dismiss the Secretary's appeal is denied.[3]

B. Review of Constitutional Claims and Sovereign Immunity

¶ 20 "This Court reviews a trial court's decision to grant or deny a motion to dismiss based upon the doctrine of sovereign immunity using a de novo standard of review." *State ex rel. Stein v. Kinston Charter Acad.*, 379 N.C. 560, 2021-NCSC-163, ¶ 23. "When reviewing a [Rule 12(b)(6)] motion to dismiss, an appellate court considers whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory." *Deminski on behalf of C.E.D. v. State Bd. of Educ.*, 377 N.C. 406, 2021-NCSC-58, ¶ 12. (citations and

[3] The Secretary also filed a petition for writ of certiorari in the event that his appeal was deemed untimely. We dismiss the Secretary's petition as moot.

quotation marks omitted). North Carolina's rules of pleading require that a complaint "state enough to give the substantive elements of a *legally recognized claim*." *New Hanover Cnty. Bd. of Educ. v. Stein*, 380 N.C. 94, 2022-NCSC-9, ¶ 32.

¶ 21 "As a general rule, the doctrine of governmental, or sovereign[,] immunity bars actions against . . . the state, its counties, and its public officials sued in their official capacity." *Bunch v. Britton*, 253 N.C. App. 659, 666, 802 S.E.2d 462, 469 (2017) (citation omitted). However, our Courts have "held that the doctrine of sovereign immunity cannot stand as a barrier to North Carolina citizens who seek to remedy violations of their rights guaranteed by the Declaration of Rights of our Constitution." *Id.* (summarizing the North Carolina Supreme Court's holding in *Corum v. Univ. of N.C. Through Bd. of Governors*, 330 N.C. 761, 786, 413 S.E.2d 276, 292 (1992). "[W]hen there is a clash between . . . constitutional rights and sovereign immunity, the constitutional rights must prevail." *Corum v. Univ. of N.C. Through Bd. of Governors*, 330 N.C. 761, 786, 413 S.E.2d 276, 292 (1992).

> [T]his Court has long held that when public officials invade or threaten to invade the personal or property rights of a citizen in disregard of law, they are not relieved from responsibility by the doctrine of sovereign immunity even though they act or assume to act under the authority and pursuant to the directions of the State.

Id.

C. Fruits of Their Labor Clause

¶ 22 Ace's first constitutional claim alleges infringement of its "inalienable right to earn a living" under Article I, sections 1 and 19 of the North Carolina Constitution. Article I states:

> Section 1. The equality and rights of persons.
>
> We hold it to be self-evident that all persons are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, *the enjoyment of the fruits of their own labor*, and the pursuit of happiness.
>
> . . .
>
> Sec. 19. Law of the land; equal protection of the laws.
>
> 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. No person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin.

N.C. Const. art. 1, §§ 1, 19 (emphasis added). The right to "enjoyment of the fruits of their own labor" joined the enumeration of each North Carolina citizen's inalienable rights as part of revisions to the Constitution in 1868. *See* N.C. Const. of 1868. The drafters believed that, in the wake of slavery, no man could truly be free in this state without the right to both liberty and to reap the benefits of what he sowed. *See* Albion W. Tourgée, An Appeal to Caesar 244 (1884). North Carolinians have long valued and recognized the dignity of work.

¶ 23 With this in mind, the addition of a right to the fruits of one's labor to the North Carolina Constitution sought to increase the floor of protections granted by similar provisions in the United States federal constitution. U.S. Const. amend. XIV, § 1 (protecting citizens' rights to "life, liberty, or property" with due process of law). Since then, our courts have construed North Carolina citizens' right to the "fruits of their labor" to be synonymous with their "right to earn a living" in whatever occupation they desired. *See State v. Harris*, 216 N.C. 746, 759, 6 S.E.2d 854, 863 (1940) ("[T]he power to regulate a business or occupation does not necessarily include the power to exclude persons from engaging in it"). "The right to work and to earn a livelihood is a property right that cannot be taken away except under the police power of the State in the paramount public interest for reasons of health, safety, morals, or public welfare." *Roller v. Allen*, 245 N.C. 516, 518, 96 S.E.2d 851, 854 (1957). "'The right to conduct a lawful business or to earn a livelihood is regarded as fundamental.'" *Id.*, 245 N.C. at 518–19, 96 S.E.2d at 584 (citation omitted). "Arbitrary interference with private business and unnecessary restrictions upon lawful occupations are not within the police powers of the State." *State v. Warren*, 252 N.C. 690, 693, 114 S.E.2d 660, 663–64 (1960).

¶ 24 To effectively plead government intrusion on a constitutional right, the claimant's pleadings must show: (1) a state actor violated the claimant individual's constitutional rights; (2) the claim alleged substantively presents a "colorable"

constitutional claim; and (3) no adequate state remedy exists apart from a direct claim under the Constitution. *Deminski*, 2021-NCSC-58, ¶¶ 15–18.

¶ 25 Here, Ace's first claim alleged:

> 124. This counterclaim is brought against the [Secretary] in [his] official capacity as [he] was acting at all time relevant hereto as the Secretary of the North Carolina Department of Health and Human Services.
>
> 125. The [Abatement Order] is based on a violation of the Mass Gathering limits imposed by [Order 141] which required [Ace] to cease operating.
>
> 126. [Order 141 and the Abatement Order] deprive [Ace] of [its] inalienable right to earn a living as guaranteed by Art. I, sec. 1 and 19, of the North Carolina Constitution.
>
> . . .
>
> 129. [Order 141] and the [Secretary's Abatement Order] based on [Order 141] are unconstitutional as applied to [Ace] as neither the [Secretary] nor the Governor of the State possess the authority to deprive [Ace] of [its] right to pursue an ordinary vocation and earn a living.
>
> 130. The [Secretary] does not have sovereign immunity as this counterclaim is brought directly under the Declaration of Rights of the North Carolina Constitution.
>
> 131. [Ace does] not have an adequate state remedy, and therefore, there is a direct cause of action against the [Secretary] for the violation of [Ace's] rights as guaranteed by Art. I, sec. 1 and 19, of the North Carolina Constitution.

¶ 26 Ace pled that its rights were violated by the Secretary in his official capacity as a state actor. Ace also pled its lack of an alternative, adequate state remedy

through which it could seek relief. We agree that Ace has no other avenue to seek relief for the Secretary's allegedly improper enforcement apart from a direct action under the Constitution.

¶ 27 Ace has also pled a colorable, though admittedly novel, claim for government intrusion on its right to earn a living. It is well-established that the fruits of their labor clause applies when our government, most often the legislature, enacts a scheme of legislation or regulation that purports to protect the public from undesirable actors within occupations. *See Poor Richard's, Inc. v. Stone*, 322 N.C. 61, 65, 366 S.E.2d 697, 699 (1988) (concerning legislation regarding manufacture of goods for military use); *Warren*, 252 N.C. at 695, 114 S.E.2d at 665 (1960) (concerning licensure legislation for real estate brokers); *State v. Ballance*, 229 N.C. 764, 51 S.E.2d 731 (1949) (concerning legislation creating licensure requirements for photographers). Likewise, our courts have more recently held that the clause also applies when a government employer denies a state employee due process with respect to the terms and procedures of his or her employment. *See Mole' v. City of Durham*, 279 N.C. App. 583, 2021-NCCOA-527, ¶ 29, *disc. rev. granted, Mole v. City of Durham*, 868 S.E.2d 851 (N.C. 2022); *Tully v. City of Wilmington*, 370 N.C. 527, 535–36, 810 S.E.2d 208, 215 (2018) ("Article I, Section 1 also applies when a governmental entity acts in an arbitrary and capricious manner toward one of its employees by failing to abide by promotional procedures that the employer itself put

in place."). It naturally follows that actions taken by other non-legislative state actors, whether elected officials or unelected bureaucrats, may run afoul of a citizen's right to the fruits of his own labor when they arbitrarily interfere with occupations, professions, or the operation of business.

¶ 28 The core principle behind the fruits of their labor clause is that government "'may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations.'" *Cheek v. City of Charlotte*, 273 N.C. 293, 296, 160 S.E.2d 18, 21 (1968) (quoting *Lawton v. Stell*, 152 U.S. 133, 137 (1894)). The present case involves enforcement action taken under the authority of an executive order issued by the Governor, rather than laws promulgated by the legislature. The intended purpose of the Governor's order was not to regulate a particular occupation or business enterprise, but the direct and intended purpose of the Abatement Order was to cease the operation of a business. It cannot be denied that the scope and breadth of the Abatement Order restricted or otherwise interfered with the lawful operation of a business serving the public.

¶ 29 The Secretary argues that Ace's first claim should be decided at the 12(b)(6) stage as a matter of law. To this end, the Secretary contends that this Court may take judicial notice of factual data surrounding the COVID-19 pandemic at the time the Abatement Order was issued, which will unequivocally support the Secretary's

decisions. *See Rhyne v. K-Mart Corp.*, 358 N.C. 160, 182, 594 S.E.2d 1, 16 (2004) (stating this Court may consider all matters before the state actor as well as matters of which it may take judicial notice when reviewing constitutionality). We disagree. Ace pled that the Abatement Order was the foundational authorization to force Ace to cease operating its racetrack and that the was Order unconstitutional as applied to Ace. An examination of the facts surrounding the COVID-19 pandemic at a later stage of trial may show that Ace's precautionary measures to manage contact tracing of its attendees; install plexiglass, touchless thermometers, six-feet distance markers, and screening booths; and to initiate vigilant cleaning procedures—all in consult with local health officials—were sufficient to combat the spread of COVID-19 within an open-air racetrack in Alamance County. Presuming these facts in favor of Ace as the non-movant, the reasonableness of an "imminent hazard" as justification for the Secretary's actions can be questioned. We hold that Ace adequately pled that the Secretary, through his Abatement Order, deprived Ace of its constitutional right to the fruits of one's own labor and, therefore, sovereign immunity cannot bar Ace's claim. *Deminski*, 2021-NCSC-58, ¶ 21.

D. Selective Enforcement

¶ 30 Ace's second constitutional claim alleges that the Secretary's Abatement Order, levied against Ace and no other speedways, ran afoul of Article 1, section 19's decree that "[n]o person shall be denied the equal protection of the laws[.]" N.C.

Const. art. 1, § 19. Through its second claim, Ace once again sufficiently pleads a constitutional challenge to the Secretary's method of enforcing Order 141.

¶ 31 Selective enforcement of the law by the State is barred by an individual's right to equal protection when enforcement is based upon an arbitrary classification. *State v. Garner*, 340 N.C. 573, 588, 459 S.E.2d 718, 725 (1995) (citations omitted). "Such arbitrary classifications include prosecution due to a defendant's decision to exercise his statutory or constitutional rights." *Id.* (citing *United States v. Goodwin*, 457 U.S. 368, ___ (1982)); *Roller*, 245 N.C. at 518, 96 S.E.2d at 854 (stating right to earn a living is a constitutional right). Our Supreme Court has set out the two-part test for selective enforcement as (1) a singling out of the defendant for (2) discriminatory, invidious reasons:

> The generally recognized two-part test to show discriminatory selective prosecution is (1) the defendant must make a *prima facie* showing that he has been singled out for prosecution while others similarly situated and committing the same acts have not; (2) upon satisfying (1) above, he must demonstrate that the discriminatory selection for prosecution was invidious and done in bad faith in that it rests upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights.

State v. Howard, 78 N.C. App. 262, 266–67, 337 S.E.2d 598, 601–02 (1985) (citations omitted). "Mere laxity in enforcement does not satisfy the elements of a claim of selective or discriminatory enforcement in violation of the equal protection clause."

Grace Baptist Church of Oxford v. City of Oxford, 320 N.C. 439, 445, 358 S.E.2d 372, 376 (1987). Rather, the claimant must show that a state actor applied the law with "a pattern of conscious discrimination" evidencing administration "with an evil eye and an unequal hand." *Id.* (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 373–74 (1886)) (some citations omitted).

¶ 32 Ace's claim alleged:

> 136. Many speedways in addition to ACE Speedway have been conducting races with fans in attendance without any enforcement action by the [Secretary].
>
> 137. [Ace was] singled out by the Governor for enforcement after comments . . . made by Defendant Robert Turner[] were made public.
>
> 138. The Governor took the unusual step of having a letter sent to the Sheriff of Alamance County directing him to take action against [Ace].
>
> 139. [Ace is] informed and believe that no other [s]peedway has been the subject of an Order of Abatement of Imminent Hazard by the [Secretary].
>
> 140. [Ace is] informed and believe[s] that the [Abatement Order] was issued by the [Secretary] . . . due to the statements of Defendant Robert Turner and not because a true Imminent Hazard exists.
>
> 141. The issuance of the [Abatement Order] violates the equal protection rights of [Ace] as guaranteed by Article I, Section 19 of the North Carolina Constitution.
>
> 142. The [Secretary] does not have sovereign immunity as this counterclaim is brought directly under the Declaration

> of Rights of the North Carolina Constitution.
>
> 143. [Ace does] not have an adequate state remedy, and therefore, there is a direct cause of action against the [Secretary] for the violation of [Ace's] rights as guaranteed by Art. I, sec. 19, of the North Carolina Constitution.

¶ 33 Ace once again pleads that its rights were violated by the Secretary in his official capacity as a state actor, and that it has no avenue for redress other than an action under the Constitution.

¶ 34 With respect to whether Ace's substantive claim is colorable, the Secretary argues that Ace failed to plead both (1) that it was "singled out" for prosecution while "similarly situated" to other raceways, and (2) that the Secretary acted invidiously in "bad faith." The Secretary's argument places special emphasis on Ace's failure to track specific language in pleading its claim. We have held that a party need not use magic words to plead the substantive elements of its claim. *See Feltman v. City of Wilson*, 238 N.C. App. 246, 253–54, 767 S.E.2d 615, 621 (2014); s*ee also State v. Dale*, 245 N.C. App. 497, 504, 783 S.E.2d 222, 227 (2016) ("This notice pleading has replaced the use of 'magic words' and allows for a less exacting standard, so long as the defendant is properly advised of the charge against him or her."). A pleading is sufficient "if it gives sufficient notice of the events or transactions which produced the claim to enable the adverse party to understand the nature of it and the basis for it, to file a responsive pleading, and—by using the rules provided for obtaining pretrial

discovery—to get any additional information he may need to prepare for trial." *Sutton v. Duke*, 277 N.C. 94, 104, 176 S.E.2d 161, 167 (1970) ("Under the 'notice theory' of pleading contemplated by [N.C. R. Civ P.] 8(a)(1), detailed fact-pleading is no longer required.").

¶ 35 The Secretary's argument fails. Ace pled "enough to give the substantive elements of a *legally recognized claim*" for selective enforcement. *See Stein*, 2022-NCSC-9, ¶ 32. Ace effectively pled that it was among a class of "many speedways" that similarly conducted races with fans in attendance during the period where such actions were banned by Order 141. Ace further pled that Governor Cooper and the Secretary "singled out" Ace for enforcement by directing the Sheriff to take action against Ace and, when that failed, by issuing the Abatement Order against Ace alone. Finally, Ace's complaint pled its belief that it was singled out for enforcement in response to Defendant Turner's statements to the press "and not because a true Imminent Hazard exist[ed,]" as the Secretary asserted in the Abatement Order. These pleadings, taken as true, sufficiently allege bad faith enforcement of Order 141 against Ace alone.

¶ 36 The Secretary contends that Ace's pled discriminatory reason for his enforcement of Order 141—retaliation for statements made to the press critiquing Order 141—is insufficient to plead selective enforcement. The Secretary cites *State v. Davis*, 96 N.C. App. 545, 550, 386 S.E.2d 743, 745 (1989), for support. In *Davis*,

following his conviction for tax-related offenses, the defendant argued on appeal that he was selectively prosecuted based upon "invidious discrimination" because he belonged to a political group that routinely and openly protested personal income tax laws. *Id.* at 548–49, 386 S.E.2d at 744. This Court ruled that the defendant's evidence at trial failed to show more than a tenuous relationship between his association with the anti-tax political group and the State's decision to prosecute him instead of any number of other citizens who failed to file their tax returns. Therefore, the defendant could not show he was "singled out" for prosecution. *Id.* at 549, 386 S.E.2d at 744–45.

¶ 37 Further, and most relevant to the present case, the Court held that the defendant presented "a feckless argument that the statutes he was charged under [were] unconstitutional as applied to him because selection for his prosecution was impermissibly based on an attempt to suppress his first amendment right of free speech." *Id.* at 549, 386 S.E.2d at 745. Even assuming that the defendant was singled out for his vocal protest of income taxes, the Court found no invidiousness or bad faith because "such prosecutions, predicated in part upon a potential deterrent effect, serve a legitimate interest in promoting more general tax compliance." *Id.* at 550, 386 S.E.2d at 745.

¶ 38 The facts of *Davis* are similar to the facts of the present case. Ace pleads that it was selected for enforcement by the Secretary because its owner was outspokenly

critical of Order 141. The Secretary asserts that Ace must fail for the same reason the defendant's argument failed in *Davis*: regardless of possible alternative reasons for enforcement, singling out outspoken individuals has a strong deterrent effect upon those who are similarly situated and choose similar courses of action.

¶ 39 The present case must be distinguished from *Davis* based upon the relevant stage of the proceedings. The Court in *Davis* reached its holding following appellate review of evidence admitted during a full trial, and after determining that any effort to reduce the defendant's speech was, at most, an equal and alternative purpose to deterrence of criminal conduct. Here, we are tasked only with determining whether Ace has sufficiently pled the substantive elements of its claim. Ace has pled that the Secretary acted based solely upon an effort to silence its opposition to Order 141, and not based upon any alternative, legitimate state interest. The resolution of this question is not before us at this time. Ace has sufficiently pled that the Secretary singled its racetrack out for enforcement in bad faith for the invidious purpose of silencing its lawful expression of discontent with the Governor's actions. Therefore, sovereign immunity cannot bar Ace's claim.

III. Conclusion

¶ 40 We hold that Ace pled colorable claims for infringement of its right to earn a living and for selective enforcement of the Governor's orders sufficient to survive the Secretary's motion to dismiss.

AFFIRMED.

Judges CARPENTER and GORE concur.