No. 374P22 TWENTY-FOURTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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TOWN OF BOONE and MARSHALL ASHCRAFT, in his individual capacity as a resident and taxpayer of the Town of Boone, Plaintiffs	)	
v	)	From Watauga County No. 20CVS104 No. COA21-586
WATAUGA COUNTY, TOWN OF SEVEN DEVILS, and TOWN OF BLOWING ROCK, Defendants	)	
and	)	
TOWN OF BEECH MOUNTAIN, Intervenor	)	

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PETITION FOR DISCRETIONARY REVIEW
UNDER G.S. 7A-31
(Filed 20 December 2022)

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No. ____ TWENTY-FOURTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

TOWN OF BOONE and MARSHALL ASHCRAFT,

Plaintiffs,

v.

WATAUGA COUNTY, TOWN OF SEVEN DEVILS, and TOWN OF BLOWING ROCK,

Defendants,

and

TOWN OF BEECH MOUNTAIN,

Intervenor.

From Watauga County

20-CVS-104
COA21-586

****

PETITION FOR DISCRETIONARY REVIEW

****

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Pursuant to N.C. Gen. Stat. § 7A-31 and Appellate Rule 15, Petitioners Town of Boone and Marshall Ashcraft respectfully petition for discretionary review of the Court of Appeals' 15 November 2022 decision. *Town of Boone and Marshall Ashcraft v. Watauga County, Town of Seven Devils, and Town of Blowing Rock*, 2022-NCCOA-778.

INTRODUCTION

This case raises the question whether any town or taxpayer can question county and municipal misconduct when the violations of law are causing millions of dollars of damage.

In North Carolina, the state receives local sales tax dollars, then remits those dollars back to the locales that generated them. Some of the money goes to the county governments, and some goes to units of municipal government, such as cities and towns.

Balancing how much to give to each local government requires a choice. The General Assembly allows this choice to be made from a menu of exactly two methods of distribution: per capita and ad valorem. The state will either remit the sales tax based on the proportion of population living in each part of the county (per capita), or else the state will remit in proportion to the property tax value in each part of the county (ad valorem). Some local governments benefit more under the ad valorem method, and others under the per capita method. The General Assembly has decided that either choice is permitted, but only these choices.

The state allows each county board of commissioners to choose between these two options for the county and the municipalities within the county. For over two decades, the Watauga County Board of Commissioners chose the per capita method, since that method most filled the County's coffers. The

County then realized it could do even better if it concocted a third entrée that the state had not put on the menu. But to pull it off, the County would need cooperation from others.

Unlike the County, the Towns of Blowing Rock, Beech Mountain, and Seven Devils would all receive more sales tax proceeds under the ad valorem method, rather than the per capita method. That result is no surprise, since the populations of those towns are measured in the hundreds, not thousands.

The County approached these towns with an offer: The County would switch to the ad valorem allocation, but only if each of those three towns agreed to pay back to the County most of what it gained from the switch to the ad valorem method. Unsurprisingly, the towns said yes to this kickback scheme.[1] The towns did not come out as much ahead as the General Assembly intended by the ad valorem method, but they still did better than they had under the existing per capita method.

The County, however, realized a windfall. The County leveraged its decision-making power to create a kickback scheme, which routed millions of

[1] Although the Plaintiffs do not claim the kickback scheme is criminal, it is illegal. *See* Kickback, American Heritage Dictionary, https://www.ahdictionary.com/word/search.html?q=kickback ("A return of a percentage of a sum of money already received, typically as a result of pressure, coercion, or a secret agreement."); N.C. Gen. Stat. § 105-472 (leaving no authority for kickbacks).

extra sales tax dollars to itself. By creating its own system of sales tax distribution, different from either of the choices given by the state, the County came out way ahead.

The County's gains came out of Boone's pockets. Since the County's switch to its own home-brewed allocation scheme, Boone has lost out on over $10 million in sales tax revenues. This loss was all caused by the County's illegal allocation scheme. As the record shows, but for the kickback scheme, the County would never have switched from the per capita allocation.

When Boone sued to stop the scheme, it found the courthouse doors closed. Addressing a question of first impression under the tax distribution statute, the Court of Appeals held in an unpublished opinion that Boone lacked standing to question the kickback scheme, even though it had cost Boone over $10 million. The court also found that Marshall Ashcraft, a taxpayer living in Boone, lacked standing. These standing rulings effectively foreclose judicial review of challenges to compliance with N.C. Gen. Stat. § 105-472.

Unfortunately, this case is just the latest from the Court of Appeals to have gotten the law of standing wrong. This Court recently explained that the standing test in North Carolina is distinctly more relaxed than that applied in federal court. *Comm. to Elect Dan Forest v. Emps. Pol. Action Comm.* [hereinafter *EMPAC*], 376 N.C. 55, 2021-NCSC-6, ¶¶ 58-75. Paradoxically,

however, Boone would have had standing for these claims even under the federal standard.

If the decision below stands, it will embolden other counties to enrich themselves to the detriment of their municipalities. The choice between ad valorem and per capita allocation will always create winners and losers. The decision below teaches counties how to create those winners and losers, all the while ensuring that the county itself always wins.

Watauga has flouted the statute's plain language and thus the General Assembly's intent. The General Assembly intended for counties to select from a limited menu, rather than fashion their own dishes. Counties have unlimited discretion to pick either the ad valorem or per capita method, but no discretion for anything else.

Regardless of one's views on the merits, this argument is one worth having. When local governments act outside their delegated authority, our courts have traditionally opened their doors to such claims. Boone and Mr. Ashcraft are entitled to enter the courthouse and be heard.

BACKGROUND

The General Assembly has authorized counties to levy local sales taxes. N.C. Gen. Stat. §§ 105-463 to -538. Once levied, the tax is collected by local retailers, remitted to the North Carolina Department of Revenue, and then returned by the Secretary of Revenue to local governments. (R p 127 ¶ 9.)

Not all the tax revenue is sent back to the county governments. Instead, it is proportioned among the counties and the municipal governments within the counties. Who gets what is decided by either of two formulae. The General Assembly requires the tax dollars be proportioned among the county and municipal governments on either a per capita or ad valorem basis. N.C. Gen. Stat. § 105-472(b). Under the per capita method, as the name suggests, the tax proceeds "shall be distributed to that county and to the municipalities in the county on a per capita basis according to the total population of the taxing county, plus the total population of the municipalities in the county." *Id.* § 105-472(b)(1). The ad valorem method follows property values, so that the sales tax dollars "shall be distributed to that county and the municipalities in the county in proportion to the total amount of ad valorem taxes levied by each on property having a tax situs in the taxing county during the fiscal year next preceding the distribution." *Id.* § 105-472(b)(2).

The choice between the methods creates winners and losers. Local governments with relatively more people generally prefer the per capita method. Local governments with fewer residents, such as towns focused on tourism, usually prefer the ad valorem method.

The General Assembly has assigned the choice of method to the county boards of commissioners: "The board of county commissioners shall, by resolution, *choose one of the following* methods of distribution." *Id.* § 105-472(b)

(emphasis added). The choice is only between the per capita and ad valorem methods. *Id.* The choice allows the county to pick which method of distribution "*shall be in effect in the county*." *Id.* (emphasis added).

From 1987 to 2013, the County chose the per capita method. (R p 129 ¶ 12.) Then, as now, the County government itself receives the greatest amount of sales tax under the per capita method. (R p 129 ¶ 13-14, 130 ¶ 18.)

However, in 2013, the Watauga County Board of Commissioners chose that neither method of distribution would be "in effect" in that county. Instead, the commissioners adopted a resolution ostensibly per N.C. Gen. Stat. § 105-472(b), which created a different method of allocating sales tax revenue among the County and its municipalities. (R p 153.) The resolution purported to select the "ad valorem method," (R p 153), but in reality it did not put either allowed method "in effect" in Watauga County. Instead, the resolution created a different method of allocating sales tax revenue among the County and its municipalities. Under the resolution, the Towns of Beech Mountain, Blowing Rock, and Seven Devils would each receive greater tax revenue. (R pp 130-31, 153.) However, under the same resolution, those three towns would have to forfeit to the County 60% of the extra revenue they received "over and above the amount which would have otherwise been realized under the per capita method." (R p 153.) Several years later, the County required the three towns to increase the kickback to 70%. (R p 133 ¶ 30.)

The County christened its kickback scheme the "Net ad Valorem Tax Method." (R p 155.) Because of the kickback system created by the resolution, neither the per capita nor the ad valorem method has been "in effect in the county." N.C. Gen. Stat. § 105-472(b). Under Watauga's kickback method, the County government annually receives over $1 million more than it would have had it put the ad valorem method into effect in the County. (R p 132 ¶¶ 24-25.) For instance, from 2013 to 2018, the County received $5,692,003 more than it would have under the per capita method, and $7,471,987 more than it would have under the ad valorem method. (R p 132 ¶ 24.) If the County had not received kicked-back funds from these three towns, it would not have changed from the per capita method. (R p 133 ¶ 33.) The kickback element is a but-for cause of the County's change in position. (R p 133 ¶ 33.)

Likewise, the three towns in the kickback scheme have received many millions of dollars more than they would have gotten under the per capita method. (R p 132 ¶ 24.) Take Beech Mountain as an example. From 2014 to 2018, under the per capita method, it would only have received $1,524,972 in sales tax remittance. (R p 155.) Under the ad valorem method, Beech Mountain should have received $7,714,855. (R p 155.) Instead, under the kickback scheme, Beech Mountain paid most of that sales tax as a kickback to the County. (R p 155.) Beech Mountain was left with $3,864,832, which is still

several times better than Beech Mountain would do without the kickback scheme. (R p 155.)

In short, the County's resolution purported both to select the ad valorem method and reject it at the same time. Nothing in N.C. Gen. Stat. § 105-472 allowed the County to adopt such a resolution.

Because the choice of distribution method does not affect the amount of tax remitted to Watauga County as a whole, the County's gains must come from somewhere. The somewhere is Boone. The kickback method of distribution has harmed Boone and Boone's taxpayers. Each year, Boone is losing out on $2 million dollars in tax revenue because of the kickback scheme. (R p 133 ¶ 32.) Boone taxpayers have been damaged because, without those tax dollars, Boone has had to reduce services, delay capital improvements, and raise taxes. (R p 25, 133 ¶ 28.)

Boone and a resident taxpayer, Marshall Ashcraft, sued the County under the Declaratory Judgment Act to stop the kickback scheme and force the County to follow either of the methods mandated by the General Assembly. (R pp 126-27.) The Towns of Beech Mountain, Blowing Rock, and Seven Devils were later joined and aligned with the County as defendants.[2] (R p 121.)

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[2] Beech Mountain was allowed to voluntarily intervene as a defendant. (R pp 43, 92, 111.) The County successfully moved to force Boone to join Seven Devils and Blowing Rock as defendants. (R pp 94, 121.)

In their complaint, Boone and Mr. Ashcraft requested four remedies:

(1) a declaration that the County and towns' tax distribution scheme is unlawful, and that the kickback arrangement is unlawful as well;

(2) a mandatory injunction requiring the County to select either the per capita or ad valorem method, and actually put it into effect throughout the County;

(3) a prohibitory injunction restraining the County from being party to any kickback arrangements or accepting any kickback payments; and

(4) repayment of Boone's lost tax dollars due to the kickback arrangement.

(R p 135 ¶¶ 39-42.)

The County and Defendant Towns moved to dismiss for lack of subject-matter jurisdiction on two grounds. They argued that Boone and Mr. Ashcraft had not alleged an "infringement of a legal right," and, alternatively, that their claims presented a political question. (R pp 178, 181, 184, 187.) The trial court granted their motions and dismissed for lack of subject-matter jurisdiction.[3] (R p 190.)

[3] The judgment stated that it was a dismissal "with prejudice." (R p 190.) A dismissal for lack of subject-matter jurisdiction, however, can only be "without

Boone and Mr. Ashcraft appealed to the Court of Appeals, but that court affirmed in an unpublished opinion. *Town of Boone v. Watauga Cnty.*, 2022-NCCOA-778 (unpublished) [Add. 1-5]. In its opinion, the Court of Appeals addressed only the standing issue, without ruling on the political question doctrine.[4] *Id.* ¶ 17.

The Court of Appeals held that Boone and Mr. Ashcraft failed to prove "the infringement of any legal right protected by Section 105-472" as required by the Declaratory Judgment Act. *Id.* ¶ 17. The court reasoned that the Plaintiffs' "real concern" was not the County's choice of distribution method but the kickback scheme. *Id.* ¶ 15. The court then strayed from the standing

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prejudice." *United Daughters of the Confederacy v. City of Winston-Salem*, 2022-NCSC-143, ¶ 69; *accord id.* ¶ 76 (Newby, C.J., concurring in the result).

[4] The political-question defense is a non-starter because its assertion here is circular. The Defendants argue that the General Assembly has exclusively assigned to the County the decision to choose between the per capita or ad valorem methods. But the question in this case is not whether the County chose between those methods, but whether it could craft a third option. That is not a non-justiciable political question over which the judiciary lacks jurisdiction and competence. Instead, it is a merits question involving statutory interpretation. As such, it falls within the core of the judiciary's responsibility. *See, e.g.*, N.C. Const. art. IV, § 12(1) ("The Supreme Court shall have jurisdiction to review upon appeal any decision of the courts below, upon any matter of law or legal inference."); *In re K.N.*, 381 N.C. 823, 2022-NCSC-88 ¶ 12 ("A question of statutory interpretation is ultimately a question of law for the courts."). What's more, if this case did present a political question, then the Court's earlier consideration of a constitutional attack on N.C. Gen. Stat. § 105-472, which reached the merits, was in error, because the Court should have declined to decide the constitutional question. *See Town of Beech Mountain v. County of Watauga*, 324 N.C. 409, 378 S.E.2d 780 (1989).

inquiry and veered into the merits, holding that section 105-472 does not prohibit the kickback scheme. *Id.* ¶ 16. Thus, the court concluded, Boone and Mr. Ashcraft had not alleged the infringement of a legal right. *Id.* ¶ 17.

In a disturbing twist, the Court found dispositive the fact that—it believed—Boone and Mr. Ashcraft had not challenged the permissibility of the kickback scheme: "Indeed, and crucially, Plaintiffs make no contention the agreements between Defendants or the remittance of funds by Seven Devils, Blowing Rock, and Beech Mountain to Watauga County are otherwise *ultra vires* or impermissible." *Id.* ¶ 16. However, this *is* the Plaintiffs' key contention, as alleged in the verified complaint: "Plaintiffs respectfully request that this Court issue a Declaratory Judgment that the tax distribution scheme adopted by Defendants is unlawful, and that Watauga County's 'payback' agreements with the Other Towns are unauthorized and unlawful." (R p 135 ¶ 39.) If this factor was indeed "crucial" to the holding affirming the trial court, then the Court of Appeals' mischaracterization of the Plaintiffs' position is a crucial error.[5]

[5] Below, the Defendants appeared to suggest that the Plaintiffs did not believe this was the crux of their claim. In support, the Defendants cited to a transcript of a hearing on an unrelated issue (i.e., whether the Defendant Towns had to be joined as parties). That hearing also occurred before the operative complaint was filed. It is the allegation of the operative complaint that the Court of Appeals appears to have missed.

At any rate, the Court concluded that Boone and Mr. Ashcraft were so lacking in any interest in this dispute that they were not entitled to have the trial court declare, one way or the other, whether the County's kickback scheme is legal. *Id.* ¶ 17.

Because there is no argument that anyone besides Boone or a taxpayer could have standing, the opinion of the Court of Appeals immunizes the County's kickback scheme from judicial review altogether. The County's scheme is effectively made legal since no one can challenge it in court.

Boone and Mr. Ashcraft now respectfully petition this Court to review that decision.

REASONS WHY THE PETITION FOR DISCRETIONARY REVIEW SHOULD BE GRANTED

This case readily meets the standards for discretionary review. *See* N.C. Gen. Stat. § 7A-31(c). The decision below is irreconcilable with the standards for standing announced by this Court. By immunizing the County's kickback scheme from judicial review, the courts below abdicated their duty to say what the law is. That abdication costs Boone and its tax-payers dearly. And if the decision below is allowed to stand, it will encourage mischief across our state.

I. The Heightened Standing Standard Applied Below Conflicts with Cases from this Court.

The decision of the Court of Appeals conflicts with recent and historical standing decisions from this Court. *See* N.C. Gen. Stat. § 7A-31 (c)(3). Less than two years ago, this Court rejected the federal standing test and instead adopted a more relaxed standard. *EMPAC*, 2021-NCSC-6, ¶ 82. But the decision below applies a standing test even stricter than that applied in federal court.

A. The opinion below conflicts with *EMPAC*.

This Court recently held that our state's standing jurisprudence is not grounded in any constitutional limitation, nor in separation-of-power principles. *EMPAC*, 2021-NCSC-6, ¶¶ 65, 73. Rather, the standing requirement is merely prudential. *Id.* Even when a litigant asks a court to review the constitutionality of legislation, the point of the prudential standing requirement is simply to ensure that there is enough of the "'concrete adverseness' that 'sharpens the presentation of issues.'" *Id.* ¶ 65.

And when a litigant instead sues under a statute, even that prudential requirement falls away. *Id.* ¶ 71. The question becomes merely whether the plaintiff is the type of person that the legislature has authorized to bring a claim. *Id.* There is no "extra" standing requirement beyond the text of the statute. *Id.* "The existence of the legal right is enough." *Id.*; *see also id.* ¶ 97

(Newby, C.J., concurring) ("Plaintiff has the right to sue under this statute, and neither the North Carolina Constitution nor this Court's precedent limit courts from hearing the case.").

A suit under the Declaratory Judgment Act is just such a cause of action. Precedents from this Court establish that the standing requirement for a declaratory-judgment claim is a genuine dispute between antagonistic litigants, in contrast to a "collusive suit between friendly parties." *Hoke Cnty. Bd. of Educ. v. State*, 2022-NCSC-108, ¶ 335 (Berger, J., dissenting); *accord Button v. Level Four Orthotics & Prosthetics, Inc.*, 380 N.C. 459, 2022-NCSC-19, ¶ 21.

The Court of Appeals did not look to adversity when deciding standing, even though that is the point of the doctrine. The pleadings make plain that Boone and Mr. Ashcraft are as adverse to the Defendants as they can be. Plaintiffs and Defendants are parties with a genuine controversy between them.

The Court of Appeals also failed to adhere to the text of the Declaratory Judgment Act. In the Act, the General Assembly has created standing for "[a]ny person . . . whose rights, status or other legal relations are affected by a statute." N.C. Gen. Stat. § 1-254. The Town of Boone meets this statutory standing requirement. It counts as "any person" because "person" includes "municipal corporations." *Id.* § 1-265. Boone's "rights" and "legal relations"

are "affected by a statute" because N.C. Gen. Stat. § 105-472 affects how (and how much) local sales tax revenue it will receive. The effect here is to the tune of $2 million per year. (R p 132 ¶ 27.)

The analysis is no different for Mr. Ashcraft. He's a "person" too, N.C. Gen. Stat. § 1-265, and his "rights" are "affected" by N.C. Gen. Stat. § 105-472 because the tax revenue distribution method directly affects the government services he receives and the property tax he must pay. (R p 133 ¶ 28.)

The Court of Appeals appears to have eschewed a textual analysis of the Declaratory Judgment Act. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 3 (2012) ("In an age when democratically prescribed texts (such as statutes, ordinances, and regulations) are the rule, the judge's principal function is to give those texts their fair meaning."). It is puzzling to say that these Plaintiffs' interests are not "affected by" N.C. Gen. Stat. § 105-472, yet that is what the Court of Appeals held. *Town of Boone*, 2022-NCCOA-778, ¶ 17 [Add. 4]. Whose interests could be more affected than Boone and its taxpayers? All a litigant must do is plead that it "has sustained a legal or factual injury arising from defendants' actions" to have standing for a "declaratory judgment action." *United Daughters of the Confederacy v. City of Winston-Salem*, 2022-NCSC-143, ¶ 32. It is simply incorrect to say that the Plaintiffs' verified complaint with extensive factual

allegations and exhibits amounted to "nothing more than conclusory statements devoid of any factual or legal support." *Id.* ¶ 33.

It is missing the point to argue, as the Defendants have, that the Plaintiffs' interests aren't "affected" because Boone (and Boone alone) received the $2 million it was due under an actual ad valorem distribution. Such an argument overlooks the causal connection between the wrongful conduct and its injurious effect. The Plaintiffs' claim is that adoption and implementation of the kickback scheme is the wrongful conduct. (R p 135 ¶ 39.) The harm is the loss of tax revenue due to the switch from the per capita method. (R p 133 ¶ 32.) And the causal connection between the two is that, but for the kickback scheme, the County would not have switched distribution methods. (R pp 130 ¶¶ 18-21, 133 ¶ 33.)

Besides turning a blind eye to the plain language of the Declaratory Judgment Act, the Court of Appeals also improperly addressed the merits, albeit in the guise of a standing analysis. *See id.* ¶ 16. The Court stated that N.C. Gen. Stat. § 105-472 "does not address how those funds may be used after distribution." *Id.* But that is a question for the merits, which is "conceptually distinct" from the standing inquiry. *United Daughters of the Confederacy*, 2022-NCSC-143, ¶ 27; *accord Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 800 (2015). The only question for standing is whether the statute affects the Plaintiffs' rights. *See EMPAC*, 2021-

NCSC-6, ¶¶ 71, 82 (explaining that a person has standing to sue under a statute if he or she meets the statutory requirements, regardless of the merits of his claim). The answer to that question is yes.

B. The heightened standing standard applied by the Court of Appeals even conflicts with federal law.

There is no little irony in the decision below. This Court's decision in *EMPAC* emphatically rejected the federal standing requirements as too strict and inconsistent with North Carolina's law and Constitution. *EMPAC*, 2021-NCSC-6, ¶¶ 72-75. Yet, if the Plaintiffs had sued in federal court, they readily would have met the federal standing test.

Under federal law, the standing inquiry primarily asks whether a plaintiff has "suffered an injury in fact that is concrete, particularized, and actual or imminent." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021). Applying this rule, a federal court has found standing and rejected the defendant's no-standing argument in a closely analogous case.

In *New York v. Yellen*, a group of states sued the federal government, arguing that the statutory cap of $10,000 for the deduction of state and local taxes (SALT) violated the federal constitution. 15 F.4th 569, 572 (2d Cir. 2021), *cert. denied*, 142 S. Ct. 1669 (2022). Even though the plaintiff-states lost on the merits, the Second Circuit held that these states unquestionably had standing to make their merits arguments. Turning to Supreme Court

precedent, the court observed that a governmental entity suffers an injury in fact when it demonstrates a "direct injury in the form of a loss of specific tax revenues." *Id.* at 576 (quoting *Wyoming v. Oklahoma*, 502 U.S. 437, 448 (1992)). Standing was easily met because the states estimated the amount of lost tax revenue. *Id.* at 577; *see also, e.g.*, *Orange Cnty. v. N.C. Dep't of Transp.*, 46 N.C. App. 350, 361, 265 S.E.2d 890, 899 (1980) (holding that county had standing because a proposed highway would affect the county's tax base).

This analysis holds here because the record shows that the kickback scheme has cost Boone millions of dollars each year. Attachments to the complaint, created by the County, show how much money Boone has been losing since the County stopped using the per capita method. (R pp 133 ¶ 32, 151-52, 154-56.) The complaint's allegations are consistent with this proof. (R pp 131-32 ¶ 23-24, 133 ¶¶ 31-32.)

Boone's $2 million dollar annual loss is enough. If, under federal law, a single lost dollar constitutes injury in fact, *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 801 (2021), millions of dollars suffice. (R p 133 ¶ 32.)

This disconnect was lost on the Court of Appeals. The gist of *EMPAC* was to lower the state's standing requirements below those applied in federal court. *EMPAC*, 2021-NCSC-6, ¶¶ 72-75. To be sure, by misapplying standing law, the opinion below was not the first. This Court in *EMPAC* criticized

"numerous panels" of the Court of Appeals for ignoring this Court's repeated admonitions not to apply federal standing law. *EMPAC*, 2021-NCSC-6, ¶¶ 72, 74. But even if the Court of Appeals had just applied federal law, it would have arrived at the right result in favor of the Plaintiffs.

C. The Court of Appeals failed to apply the special taxpayer standing precedents from this Court.

The Court of Appeals also violated this Court's teachings in *EMPAC* by giving no weight to Mr. Ashcraft's standing as a taxpayer.

In *EMPAC*, this Court confirmed its prior case law on taxpayer standing, which again contrasts with federal law: "Notably, unlike in federal court, taxpayer status has long served as a basis for challenges alleging the unconstitutional or illegal disbursement of tax funds." *EMPAC*, 2021-NCSC-6, ¶ 62. This has been the law since at least the nineteenth century. *Goldston v. State*, 361 N.C. 26, 30-31, 637 S.E.2d 876, 879-80 (2006). Without taxpayer standing, "taxpayers and property owners who bear the burdens of government would not only be without remedy, but be liable to be plundered whenever irresponsible men might get into the control of the government of towns and cities." *Id.* at 31, 637 S.E.2d at 880 (quoting *Stratford v. City of Greensboro*, 124 N.C. 127, 32 S.E. 394, 396 (1899)).

Here, Mr. Ashcraft has a cognizable stake in this dispute because the Defendants' kickback scheme has imposed a real harm on him and other taxpayers in Boone. As a direct result of the kickback scheme, Mr. Ashcraft now receives fewer government services and higher taxes. (R p 133 ¶ 28.) Those are the precise harms that taxpayer standing recognizes. *See Goldston*, 361 N.C. at 33, 637 S.E.2d at 881 (diminution in public services); *Blinson v. State*, 186 N.C. App. 328, 334, 651 S.E.2d 268, 273-74 (2007) (applying *Goldston* and relying on increased tax burden for taxpayer standing).

Despite the clarity of this Court's precedents, the Court of Appeals reduced Mr. Ashcraft's taxpayer status to nothing. Mr. Ashcraft specifically argued that his taxpayer status created standing. Brief of Plaintiffs-Appellants at 13-14, *Town of Boone v. Watauga County*, 2022-NCCOA-778 (No. COA21-586), 2022 WL 16936367, at *13-14. Yet the Court of Appeals never addressed his standing as a taxpayer, nor consulted this Court's teachings about taxpayer standing. In these failures, the Court of Appeals erred.

* * *

At its core, the law of standing exists to ensure that a real dispute exists, and that the plaintiff has a dog in the fight. *See Goldston*, 361 N.C. at 30, 637 S.E.2d at 879. Boone has millions of dogs in the fight, and Boone's taxpayers feel the pain of the Defendants' misconduct in the same way, since the harm to Boone is ultimately borne by its taxpayers.

II. The Decision Below Emboldens Lawlessness.

The decision below, if left standing, will likely have pernicious effects throughout the state. Because the opinion shielded the County's misconduct by denying standing to the County's victims, the opinion allows other counties to seize the opportunity to enrich themselves at the expense of some of their municipalities. The Court's error on the standing law harms the state's jurisprudence. *See* N.C. Gen. Stat. § 7A-31(c)(2).

The practical effect is vast: billions of dollars of local sales tax dollars are remitted to local governments each year. Connor Crews, *N.C. Court of Appeals Addresses a Dispute Over Local Sales and Use Tax Distributions:* Town of Boone v. Watauga County, Coates' Canons N.C. Local Gov't L. (Nov. 22, 2022), https://unc.live/3YwqBr5. How those dollars should be distributed is a matter of great public interest. *See* N.C. Gen. Stat. § 7A-31(c)(1).

Although the opinion below is unpublished, it is the only opinion by a North Carolina appellate court on this issue of first impression. Watauga's brainchild will no doubt be treated throughout the state as a blueprint for counties to treat and mistreat their municipalities. As the North Carolina School of Government noted in its coverage of the decision below, the opinion "may have precedential value in a future dispute involving G.S. 105-472." Connor Crews, *N.C. Court of Appeals Addresses a Dispute Over Local Sales*

and Use Tax Distributions: Town of Boone v. Watauga County, Coates' Canons N.C. Local Gov't L. (Nov. 22, 2022), https://unc.live/3YwqBr5.

Despite the incentives to follow Watauga's lead, it may be that some counties will stay their hand and follow the common good instead of self-interest. But the experience in Watauga—especially now that it's been blessed by the Court of Appeals—is likely to prove irresistible. The facts of this case show why. Under the kickback scheme, the Watauga County government is receiving more than $1 million per year in sales tax revenue than the General Assembly permits under either the ad valorem or per capita method. (R p 132 ¶ 25.)

Although it gave the choice of distribution method to the county governments, the General Assembly never intended the counties to use that power to enrich themselves. The legislature wanted one of its two distribution methods to be "in effect in the county." N.C. Gen. Stat. § 105-472(b). But when a county creates a kickback scheme, neither method is actually "in effect in the county." *Id.*

The Plaintiffs' only remedy to check this misconduct is judicial review. The County will keep following its self-interest. The Defendant Towns will keep making their kickback payments. The Department of Revenue has no enforcement power to stop the scheme. *See* N.C. Gen. Stat. 105-472. The

ballot box is no remedy because the County has aggregated a majority to oppress a minority.

The Plaintiffs' last remedy is this petition. Boone and Mr. Ashcraft are not asking this Court to agree with their interpretation of N.C. Gen. Stat. 105-472. They seek only their day in court.

ISSUES TO BE BRIEFED

1. Watauga County created a kickback scheme with some of its municipalities to circumvent statutory limitations imposed by the General Assembly. The County's kickback scheme costs the Town of Boone $2 million in sales tax revenue every year. Does Boone have standing to challenge the kickback scheme as illegal?

2. The County's kickback scheme also harmed Boone's taxpayers by causing a decrease in public services and an increase in property taxes. Mr. Ashcraft is a Boone taxpayer harmed in just this way. Does Mr. Ashcraft have standing to challenge the kickback scheme as illegal?

Respectfully submitted, this the 20th day of December, 2022.

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No. ____ TWENTY-FOURTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

TOWN OF BOONE and MARSHALL ASHCRAFT,

Plaintiffs,

v.

WATAUGA COUNTY, TOWN OF SEVEN DEVILS, and TOWN OF BLOWING ROCK,

Defendants,

and

TOWN OF BEECH MOUNTAIN,

Intervenor.

From Watauga County
20-CVS-104
COA21-586

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879 S.E.2d 396 (Table)
Unpublished Disposition

Court of Appeals of North Carolina.

TOWN OF BOONE and Marshall Ashcraft, in his individual capacity as a resident and taxpayer of the town of Boone, Plaintiffs,
v.
WATAUGA COUNTY, Town of Seven Devils, and Town of Blowing Rock, Defendants, and Town of Beech Mountain, Intervenor.

No. COA21-586
|
Filed November 15, 2022

Appeal by Plaintiffs from Order entered 23 March 2021 by Judge Gary M. Gavenus in Watauga County Superior Court. Heard in the Court of Appeals 6 April 2022. Watauga County, No. 20CVS104

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HAMPSON, Judge.

Factual and Procedural Background

***1** ¶ 1 Town of Boone (Boone) and Marshall Ashcraft (Ashcraft) (collectively, Plaintiffs) appeal from the trial court's Order granting Motions to Dismiss this action for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the North Carolina Rules of Civil Procedure filed by County of Watauga (Watauga County), Town of Seven Devils (Seven Devils), Town of Blowing Rock (Blowing Rock) and Town of Beech Mountain (Beech Mountain) (collectively, Defendants [1]). The Record before us tends to reflect the following:

1 Beech Mountain is not a named defendant but is rather an intervenor in this case. However, at least for purposes of this appeal, Beech Mountain is aligned with the named defendants. On appeal to this Court, the parties to this case caption Beech Mountain as a defendant in their appellate filings and refer generally to "Defendants" as including Beech Mountain. For ease of reading, and solely for purposes of this appeal, we include Beech Mountain under our term "Defendants".

¶ 2 N.C. Gen. Stat. § 105-472 authorizes North Carolina counties that have adopted a local sales and use tax to choose how the North Carolina Department of Revenue—which collects and allocates those taxes to the counties—distributes those taxes between the counties and their municipalities either on a per capita or an ad valorem basis. Under the per capita method, "[t]he net proceeds of the tax collected in a taxing county shall be distributed to that county and to the municipalities in the county on a per capita basis according to the total population of the taxing county, plus the total population of the municipalities in the county." N.C. Gen. Stat. § 105-472(b)(1) (2021). Under the ad valorem method, "[t]he net proceeds of the tax collected in a taxing county shall be distributed to that county and the municipalities in the county in proportion to the total amount of ad valorem taxes levied by each on property having a tax situs in the taxing county during the fiscal year next preceding the distribution." N.C. Gen. Stat. § 105-472(b)(2).

¶ 3 In 2013, the Watauga County Board of Commissioners adopted a resolution choosing the ad valorem method for purposes of distributing local sales tax proceeds between

the county and its municipalities. Prior to 2013, Watauga County had elected to have these local sales tax proceeds distributed on a per capita basis. The result of choosing the ad valorem method of distribution was to reduce the amount of funds distributed by the Secretary of Revenue to Watauga County itself while increasing the amount of funds distributed to Seven Devils, Blowing Rock, and Beech Mountain. The amount of funds distributed to Boone decreased.

¶ 4 In adopting the resolution electing the ad valorem method, however, Watauga County also entered into separate agreements with the three municipalities—Seven Devils, Blowing Rock, and Beech Mountain. Under these agreements, Seven Devils, Blowing Rock, and Beech Mountain each agreed to pay a portion of the local sales taxes distributed to them to Watauga County as part of their budget process. Boone, however, was excluded from these agreements.

***2** ¶ 5 On 20 February 2020, almost seven years later, Plaintiffs filed a Complaint against Watauga County alleging Watauga County had acted in violation of N.C. Gen. Stat. § 105-472 by choosing the ad valorem distribution method in 2013 and continuing to use that method while also operating under the agreements with Seven Devils, Blowing Rock and Beech Mountain. The gist of the allegations of Plaintiffs' Complaint was that Section 105-472 only authorized two local sales tax distribution methods—ad valorem or per capita —and Watauga County's adoption of the ad valorem method combined with its agreements with the three municipalities created a third hybrid local sales tax distribution that was neither per capita nor a true ad valorem distribution. Thus, Plaintiffs asserted, Watauga County was in violation of Section 105-472. Plaintiffs sought declaratory and injunctive relief against Watauga County and, additionally, monetary damages.

¶ 6 On 21 May 2020, the trial court entered an Order, upon consent of the parties, permitting Beech Mountain to intervene in the lawsuit. On 26 May 2020, Plaintiffs filed an amended complaint including Beech Mountain as intervenor. Both Watauga County and Beech Mountain, respectively, filed Answers and Motions to Dismiss, including motions pursuant to N.C.R. Civ. P. 12(b)(1), contending Plaintiffs lacked standing to sue in that they failed to show any injury in fact and the matter involved a political question not redressable by the courts.

¶ 7 On 30 September 2022, the trial court entered an order determining Blowing Rock and Seven Devils were both necessary parties to the action and requiring Plaintiffs to join them in this action or be subject to dismissal. Plaintiffs did so by issuance of summonses to those two municipalities in October 2020. Plaintiffs filed a Second Amended Verified Complaint filed 9 December 2020 naming Seven Devils and Blowing Rock as party-defendants.

¶ 8 Defendants subsequently each filed Motions to Dismiss pursuant to Rule 12(b)(1) alleging Plaintiffs lacked standing and the trial court lacked subject-matter jurisdiction over this matter on the bases Plaintiffs had failed to allege the infringement of a legal right and that this action was barred by the political question doctrine. On 23 March 2021, the trial court entered its Order granting Defendants' Motions to Dismiss and dismissed Plaintiffs' lawsuit. The trial court concluded:

> Plaintiffs lack standing because they have failed to identify a legal right at stake and have failed to identify any infringement of a legal right. Therefore, the Court does not have subject-matter jurisdiction to decide their claims. In addition, the Court concludes that the Plaintiffs' claims fail under the political-question doctrine. Therefore, for this additional reason, the Court does not have subject-matter jurisdiction to decide their claims.

On 14 April 2021, Plaintiffs timely filed written Notice of Appeal from the trial court's 23 March 2021 Order.

Issue

¶ 9 The dispositive issue on appeal is whether Plaintiffs have shown the infringement of a legal right under N.C. Gen. Stat. § 105-472 through Watauga County's adoption of an ad valorem method for the distribution of local sales taxes to confer standing on Plaintiffs to bring this action and to provide the trial court subject-matter jurisdiction.

Analysis

¶ 10 The trial court in this case dismissed this action for lack of subject-matter jurisdiction under Rule 12(b)(1) on the basis Plaintiffs lacked standing to bring this action and, additionally, on the basis Plaintiffs' lawsuit raised a non-justiciable political question. With respect to standing, Plaintiffs contend the trial court erred in dismissing this action arguing the North Carolina Declaratory Judgment Act provides them standing to declare their rights and the lawfulness of Watauga County's actions under N.C. Gen. Stat. § 105-472. Plaintiffs submit that they "seek a declaratory judgment proclaiming Watauga County's adoption of [a] hybrid sales tax distribution framework to be outside of that which is permitted under [N.C. Gen. Stat.] § 105-472."

***3** ¶ 11 "Standing is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction." *Neuse River Found., Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 113, 574 S.E.2d 48, 51 (2002) (quotation marks omitted). "If a party does not have standing to bring a claim, a court has no subject matter jurisdiction to hear the claim." *Estate of Apple v. Commercial Courier Express Inc.*, 168 N.C. App. 175, 177, 607 S.E.2d 14, 16 (2005). "As the party invoking jurisdiction, plaintiffs have the burden of proving the elements of standing." *Blinson v. State*, 186 N.C. App. 328, 333, 651 S.E.2d 268, 273 (2007). Standing may properly be challenged by a 12(b)(1) motion to dismiss. *See Fuller v. Easley*, 145 N.C. App. 391, 395, 553 S.E.2d 43, 46 (2001) ("[s]tanding concerns the trial court's subject matter jurisdiction and is therefore properly challenged by a Rule 12(b)(1) motion to dismiss."). "The standard of review on a motion to dismiss under Rule 12(b)(1) is *de novo*." *Fairfield Harbour Prop. Owners Ass'n, Inc. v. Midsouth Golf, LLC*, 215 N.C. App. 66, 72, 715 S.E.2d 273, 280 (2011).

¶ 12 The North Carolina Supreme Court recently clarified, under North Carolina law, standing exists when a party alleges the infringement of a legal right under a valid cause of action. *Comm. to Elect Dan Forest v. Emps. Pol. Action Comm.*, 2021-NCSC-6, 376 N.C. 558. There, in relevant part, the Supreme Court explained:

> When a person alleges the infringement of a legal right arising under a cause of action at common law, a statute, or the North Carolina Constitution, however, the legal injury itself gives rise to standing. The North Carolina Constitution confers standing to sue in our courts on those who suffer the infringement of a legal right, because "every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law." N.C. Const. art. I, § 18, cl. 2. Thus, when the legislature exercises its power to create a cause of action under a statute, even where a plaintiff has no factual injury and the action is solely in the public interest, the plaintiff has standing to vindicate the legal right so long as he is in the class of persons on whom the statute confers a cause of action.

Id. ¶ 82.

¶ 13 Here, Plaintiffs contend the North Carolina Declaratory Judgment Act provides standing to bring their action against Watauga County. Specifically, Plaintiffs point to N.C. Gen. Stat. § 1-254 of the Act which provides:

> *Any person* interested under a deed, will, written contract or other writings constituting a contract, or *whose rights, status or other legal relations are affected by a statute*, municipal ordinance, contract or franchise, *may have determined any question of construction or validity arising under* the instrument, *statute*, ordinance, contract, or franchise, *and obtain a declaration of rights, status, or other legal relations thereunder.*

N.C. Gen. Stat. § 1-254 (emphasis added). As a general matter, under this statute, the Declaratory Judgment Act does provide Plaintiffs a cause of action for declaratory judgment under proper circumstances.

¶ 14 Plaintiffs assert they are seeking a declaratory judgment that, under N.C. Gen. Stat. § 105-472, Watauga County not be permitted to enter into agreements with Seven Devils, Blowing Rock, and Beech Mountain to receive funds from those municipalities from their local sales tax distributions. Section 105-472, however, governs how the North Carolina Department of Revenue is to allocate and distribute local sales taxes. Subsection (a) requires the Secretary of Revenue to allocate the net proceeds of local sales taxes to the county in which it was collected. N.C. Gen. Stat. § 105-472(a). Subsection (b) directs how the Secretary is to distribute allocated funds between a county and its municipalities.

N.C. Gen. Stat. § 105-472(b). Subsection (b) provides: "The Secretary shall divide the amount allocated to each taxing county among the county and its municipalities in accordance with the method determined by the county." *Id.* The statute directs counties to adopt a resolution electing either the ad valorem method or the per capita method for distribution. *Id.* The statute further sets out the timing and process for a county to follow in adopting the resolution and delivering the resolution to the Secretary and, also, what happens if a county does not timely adopt or deliver the resolution:

> ***4** The board of county commissioners in each taxing county shall, by resolution adopted during the month of April of each year, determine which of the two foregoing methods of distribution shall be in effect in the county during the fiscal year following the succeeding fiscal year. In order for the resolution to be effective, a certified copy of it must be delivered to the Secretary in Raleigh within 15 calendar days after its adoption. If the board fails to adopt a resolution choosing a method of distribution not then in effect in the county, or if a certified copy of the resolution is not timely delivered to the Secretary, the method of distribution then in effect in the county shall continue in effect for the following fiscal year. The method of distribution in effect on the first of July of each fiscal year shall apply to every distribution made during that fiscal year.

N.C. Gen. Stat. § 105-472(b).

¶ 15 Here, Plaintiffs' real concern is not Watauga County's choice of the ad valorem distribution method—although they have a clear preference for the per capita method—but rather the agreements between Watauga County and the municipal defendants. Plaintiffs acknowledge they have no right to compel Watauga County to elect a particular method of distribution. Indeed, it is not clear Plaintiffs have any right to compel *any* resolution electing a distribution method—as in the absence of a new resolution, the Secretary simply continues to distribute the local sales tax proceeds under the existing method. Indeed, Plaintiffs do not contend the resolution has not been timely adopted or delivered to the Secretary. Plaintiffs also make no contention the Secretary has not distributed the funds correctly or in non-compliance with the statute.

¶ 16 N.C. Gen. Stat. § 105-472, however, addresses how the Department of Revenue is to distribute the funds between a county and the municipalities, how the county is to determine which distribution method is to be used, and how to inform the Secretary of that determination to effectuate the distribution of funds. It does not address how those funds may be used after distribution. Nor does it address any relationship between the county and municipalities beyond the Secretary's distribution of funds. As such, specifically in the context of the allegations in this case, Plaintiffs are not parties whose "rights, status or other legal relations are affected by" Section 105-472. *See* N.C. Gen. Stat. § 1-254. Indeed, and crucially, Plaintiffs make no contention the agreements between Defendants or the remittance of funds by Seven Devils, Blowing Rock, and Beech Mountain to Watauga County are otherwise *ultra vires* or impermissible. [2]

2 For instance, in their Reply Brief to this Court, Plaintiffs assert they "have continuously maintained that the gravamen of this action is whether Watauga County exceeded the General Assembly's grant of authority by intentionally circumventing the tax revenue distribution methods authorized in N.C.G.S. § 105-472(b). The Defendant-Municipalities have no authority under N.C.G.S. § 105-472(b), and therefore it is not their actions that Plaintiffs have challenged." Plaintiffs further articulate the issue they present in their lawsuit as "has Watauga County acted unlawfully and exceeded its statutory authority under N.C.G.S. § 105-472(b)?"

¶ 17 Thus, Plaintiffs have not shown the infringement of any legal right protected by Section 105-472. Therefore, in the context of the allegations in this case, because Plaintiffs are not parties whose "rights, status or other legal relations are affected by" Section 105-472, Plaintiffs are not parties entitled to bring a declaratory judgment action under N.C. Gen. Stat. § 1-254. Consequently, Plaintiffs do not have standing to bring this action and the trial court properly dismissed Plaintiffs' action for lack of subject-matter jurisdiction pursuant to Rule 12(b)(1) of the Rules of Civil

Procedure. Because we conclude the trial court properly dismissed Plaintiffs' suit on this basis, we do not reach the issue of whether this action was otherwise barred by the political question doctrine.

Conclusion

***5** ¶ 18 Accordingly, for the foregoing reasons, we affirm the trial court's 23 March 2021 Order dismissing Plaintiffs' Second Amended Complaint.

AFFIRMED.

Report per Rule 30(e).

Judges DILLON and MURPHY concur.

All Citations

879 S.E.2d 396 (Table), 2022 WL 16936367, 2022-NCCOA-778

No. 374P22 TWENTY-FOURTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

TOWN OF BOONE, a North Carolina Municipal Corporation, and MARSHALL ASHCRAFT,	)	
Plaintiffs-Petitioners,	)	
v.	)	From Watauga County No. COA21-586
COUNTY OF WATAUGA, TOWN OF SEVEN DEVILS, TOWN OF BLOWING ROCK, and TOWN OF BEECH MOUNTAIN,	)	
Defendants-Respondents.	)	

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RESPONSE TO PETITION FOR DISCRETIONARY REVIEW

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No. 374P22 TWENTY-FOURTH DISTRICT

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TOWN OF BOONE, a North Carolina Municipal Corporation, and MARSHALL ASHCRAFT,	)	
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Defendants-Respondents.	)	

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RESPONSE TO PETITION FOR DISCRETIONARY REVIEW

****

INTRODUCTION

The petition seeks review of the Court of Appeals' unpublished, unanimous decision affirming the dismissal of this case for a reason that the petition avoids discussing: The Plaintiffs repeatedly conceded away their case before the trial court until it was dismissed, and then, after engaging new counsel on appeal, argued the opposite to the Court of Appeals—a classic example of waiver, and, indeed, a tactic barred by the invited-error doctrine. *See* N.C. R. App. P. 10(a)(1); *see also, e.g.*, *Plantation Bldg. of Wilmington, Inc. v. Town of Leland*, 379 N.C. 55, 56, 2021-NCSC-122, ¶ 3; *infra* at 12–16.

The Court of Appeals saw this appellate flip-flopping for what it was. And so the panel (Hampson, J., with Dillon and Murphy, J.J.) appropriately decided the case on the briefs and affirmed the trial court in an unpublished opinion that spans barely a few pages. *See* Pet. Add. 1 (attaching 4-page copy).

That succinct, unpublished opinion does not break any new ground. Rather, it illustrates the well-settled rule that shapeshifting theories of a case will not be tolerated. *See* N.C. R. App. P. 10(a)(1); *Plantation Bldg. of Wilmington*, 379 N.C. at 56, 2021-NCSC-122, ¶ 3 (collecting cases and reaffirming that "[a] party to a suit should not be allowed to change his position with respect to a material matter in the course of litigation"); Elizabeth Brooks Scherer & Matthew Nis Leerberg, North Carolina Appellate Practice and Procedure § 4.01 (2019) ("North Carolina's appellate courts do not allow

appellate counsel the benefit of hindsight to re-litigate the issues on appeal."). Without this rule, litigants could do what the Plaintiffs did here: argue one thing to the trial court and then, after losing on those grounds, argue something different (or in this case, the opposite) on appeal.

Nevertheless, with the benefit of a third, new set of counsel, the Plaintiffs seek discretionary review of an unpublished decision holding them to the consequences of what they repeatedly and forcefully argued to the trial court.[1]

But even setting aside their waiver issues, the Plaintiffs' arguments fall short. Applying the section 7A-31 criteria alone, there is no basis for further review of the Court of Appeals' unpublished decision, which faithfully applies this Court's precedent to the unique facts of the Plaintiffs' repeated concessions. *See infra* at 17–23. Moreover, as described below, the Plaintiffs have a remedy at the ballot box—the same remedy that they have successfully availed themselves of for decades. Further still, while these claims would fail on the merits, there are literally thousands of potential plaintiffs who could have standing to pursue the underlying challenge that the Plaintiffs attempted

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[1] After the trial court dismissed this lawsuit, the Plaintiffs engaged a new set of counsel for the appeal. After the Court of Appeals affirmed, the Plaintiffs engaged another new set of appellate counsel to pursue their petition for discretionary review. To be clear, the Plaintiffs' new appellate counsel were not responsible for the tactical decisions made in the trial court that resulted in waiver and invited error.

to improperly launch here—just not these particular Plaintiffs who, among other things, waited seven years to file this lawsuit, conceded away their case to the trial court, and then tried to argue the opposite on appeal.

The petition should be denied.

FACTUAL BACKGROUND

This lawsuit by the Town of Boone and one of its residents alleges in sensationalistic fashion that Watauga County and the Towns of Beech Mountain, Blowing Rock, and Seven Devils engaged in an "illegal sales tax distribution scheme." (R p 135 ¶ 38). The reality, however, as the complaint reveals, is that this case amounts to a local political debate going back 35 years.

The local political debate involves the distribution of revenues derived from sales and use taxes in Watauga County. Local sales and use taxes in North Carolina are collected by retailers and remitted to the North Carolina Department of Revenue. *See* N.C. Gen. Stat. § 105-472. The Department then distributes the net proceeds of those collected taxes on a monthly basis to each county and the municipalities located in the county. *Id.* This distribution is made in accordance with the method—*ad valorem* or *per capita*—chosen by each county's board of commissioners, a decision that rests in the commissioners' legislative discretion. *Id.*

The *ad valorem* method allocates revenues to the "county and the municipalities in the county in proportion to the total amount of *ad valorem* taxes levied by each," including the "*ad valorem* taxes levied by the county or municipality in behalf of a taxing district"—including, for example, the local fire districts within Watauga County. *Id.*

The *per capita* method allocates revenues to the "county and to the municipalities in the county on a *per capita* basis according to the total population of the taxing county, plus the total population of the municipalities in the county." *Id.*

A Decades-Long, "Messy, Local Political Squabble"

As the Plaintiffs acknowledged in their complaint, Watauga County's decision of which distribution method to adopt has been the subject of political discourse for decades. From 1987 until 2013, Watauga County chose the *per capita* method. (R p 129 ¶ 12). During these years, Beech Mountain and Blowing Rock "petitioned the Watauga County Commissioners on several occasions to change the local sales tax distribution to the *ad valorem* method," because it would "greatly benefit those communities." (R p 129 ¶ 13). But they were unsuccessful. (R p 129 ¶ 14). So for 25 years, Beech Mountain and Blowing Rock lost the political debate, while Boone repeatedly emerged as the political winner. (R p 130 ¶ 15).

In 2013, however, the County decided that it was time for other municipalities in Watauga County to enjoy the benefits that Boone had enjoyed for so long, and it changed the method of distribution to *ad valorem*. (R p 130 ¶ 16). Significantly, the County's decision meant that those benefits would extend to the County's local fire districts, which do not receive sales tax allocations under the *per capita* method but do receive distributions under the *ad valorem* method—a worthy cause that the County considered in its legislative judgment, as documents attached to the complaint confirm.[2] (R pp 151–52). So after 25 years of the local fire districts getting nothing, the Watauga County Commissioners in their legislative discretion decided that their local fire districts should receive some distributions too. (R pp 151–52).

But with the shoe on the other foot, this time the political overtures came from Boone. (R p 133 ¶ 29). Frustrated that its 25-year streak as the political winner had come to an end, Boone began "regularly appeal[ing]" to Watauga County to change the method back to *per capita*. (R p 133 ¶ 29). These political

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[2] *Compare* N.C. Gen. Stat. § 105-472(b)(2) ("Each county and municipality receiving a distribution of the proceeds of the tax levied under this Article shall in turn immediately share the proceeds with each district in behalf of which the county or municipality levied ad valorem taxes in the proportion that the district levy bears to the total levy of the county or municipality."), *with* § 105-472(b)(1) (omitting such a provision).

appeals even included "pleas from the Town of Boone's Mayor at a public meeting." (R p 130 ¶ 16, n.1).

In short, as the Plaintiffs acknowledged to the trial court, the issue in this case is "a messy, local political squabble and has been for a long time." (T. Rule 12(b)(1) Hearing, Mar. 17, 2021 p 42:18–23); *see also id.* ("And that is true. It has been and it is a local political squabble.").

To be sure, "local political squabbles"—in particular, "messy" ones—are meant to be resolved at the ballot box, not in a courtroom. When Boone failed in its attempts at political persuasion, however, it left its ballot-box remedy behind, and, instead, sought to foist this "messy, local political squabble" on the judicial branch.

Boone Takes its Political Dispute to the Courts

On February 20, 2020, approximately *seven years* after Watauga County changed the method of distribution, Boone filed this lawsuit. Boone recruited a former member of its Town Council, Marshall Ashcraft, to join as a co-plaintiff. As the tenor of their lawsuit shows, Boone and Mr. Ashcraft were frustrated that Boone had enjoyed its preferred method of distribution for only 25 of the past 33 years instead of all 33 years.

Using terminology that the Court might expect to find in a RICO lawsuit, Boone and Mr. Ashcraft accused Watauga County and the Towns of Beech

Mountain, Blowing Rock, and Seven Devils of engaging in an "illegal sales tax distribution scheme."[3] (R p 135 ¶ 38). Without any factual basis whatsoever, Boone and Mr. Ashcraft further accused the public servants who serve on the Watauga County Board of Commissioners of operating with "specific intent . . . to [do] harm." (R p 135 ¶ 38).

Similarly, Boone and Mr. Ashcraft characterized resolutions by the Towns of Blowing Rock, Beech Mountain, and Seven Devils—resolutions in which those towns' elected councils determined that it was appropriate to remit a portion of their revenues to Watauga County in recognition of the County's commitment to "address issues within the community to the mutual benefit of the citizens of both the Town[s] and Watauga County" (R pp 157–62)—as an "illegal 'payback' sales tax distribution scheme." (R p 133 ¶ 30).

Initially, Boone did not include the other towns as parties to the case. Beech Mountain intervened, but that left Blowing Rock and Seven Devils absent from the litigation. (R p 92). Watauga County contested Boone's failure to join the remaining towns as necessary parties, and on September 30, 2020, the trial court ordered that "the Plaintiffs shall have 30 days from this date to

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[3] The petition also refers to the method of distribution as "illegal." Pet. at 3, 4, 24. In circular fashion, the petition reaches that conclusion by using the word "kickback" (a word that no one other than the Plaintiffs has used) then pointing to a dictionary definition of the word "kickback" that includes the word "illegal." *Id.* at 3 n.1.

bring the Town of Blowing Rock and the Town of Seven Devils into this action as necessary party defendants or the Court will dismiss the action." (R p 121). Two months later, the Plaintiffs amended their complaint to add Blowing Rock and Seven Devils as Defendants. (R pp 126–63).

The Defendants then moved to dismiss the second amended complaint under Rule 12(b)(1) on two grounds: lack of standing and the political-question doctrine. (R pp 178–89).

The Trial Court Correctly Dismisses this Lawsuit

The Defendants' motions to dismiss pointed out that the Plaintiffs lacked standing for at least two reasons.

First, the Plaintiffs failed to identify any "legal right" at stake. *Comm. to Elect Dan Forest v. EMPAC*, 376 N.C. 558, 2021-NCSC-6, ¶ 82. They did not (and could not) allege the existence of any "legal right" because what they wanted—for the County to switch from the *ad valorem* method back to *per capita*—is not a legal right that they had in the first place. That right belongs only to the elected county commissioners in North Carolina's 100 counties, because the General Assembly granted each county's commissioners the absolute legislative discretion to choose the sales-tax distribution method they deem desirable. *See* N.C. Gen. Stat. § 105-472(b). The statute does not set out factors for the county commissioners to weigh in determining which method is

best for their particular county or why it may be so.[4] Rather, as described more fully below, the decision is purely a discretionary legislative decision—a decision that does not belong to the Plaintiffs here, much less belongs to them as a "legal right."

Second, the Plaintiffs lacked standing under *EMPAC* for another reason: They did not—and could not—allege the "*infringement* of a legal right." *EMPAC*, 2021-NCSC-6, ¶ 82 (emphasis added). Their complaint admitted that for every year since 2013 (the year that Watauga County changed the distribution method), Boone received 100 percent of what it was entitled to receive under the *ad valorem* method. In fact, the complaint explicitly conceded that Boone's "local sales tax receipts [were] calculated on the *ad valorem* rather than the *per capita* method . . . for [the] 2013-2014 fiscal year and . . . each year thereafter." (R pp 131–32 ¶ 23). In other words, the complaint *admitted* that Boone received every penny of what it was entitled to

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[4] Municipalities within a county are not entitled to a vote on the outcome, much less a legal right to secure any particular outcome. Nor does the statute provide a private cause of action for challenging the outcome, as the General Assembly has done in various other contexts. *See EMPAC*, 2021-NCSC-6, ¶ 82 (recognizing the infringement of a legal right where the General Assembly created a private cause of action for violations of a statute). Instead, the General Assembly left total and complete legislative discretion to counties across the state to choose the statutory method they see fit, for whatever reasons they see fit. *See* N.C. Gen. Stat. § 105-472(b).

receive under the statute—a concession that only further confirmed there was no "infringement of a legal right." *EMPAC*, 2021-NCSC-6, ¶ 82.

In addition to these reasons why the Plaintiffs lacked standing under *EMPAC*, the Defendants also pointed out that the political-question doctrine barred this lawsuit in light of how it was pled and argued. Those grounds for dismissal are set forth more fully below. *See infra* at 24–29.

Watauga County's Senior Resident Superior Court Judge, the Honorable Gary M. Gavenus, granted the Rule 12(b)(1) motions on both grounds: lack of standing and the political-question doctrine. The Plaintiffs appealed.

The Court of Appeals' Unpublished Decision

After determining that oral argument was unnecessary to resolve the appeal, the Court of Appeals unanimously affirmed Judge Gavenus' dismissal in a short, unpublished decision. The Court correctly focused on how the Plaintiffs chose to argue this case (i.e., their waiver and concessions), noting that "crucially, Plaintiffs make no contention the agreements between Defendants or the remittance of funds by Seven Devils, Blowing Rock, and Beech Mountain to Watauga County are otherwise ultra vires or impermissible." Pet. Add. 4.

That description of the Plaintiffs' arguments was charitable. As described below, the Plaintiffs did more than just waive their arguments. They

conceded away their case before the trial court, then tried to argue the opposite on appeal—circumstances that should preclude discretionary review.

REASONS THE PETITION SHOULD BE DENIED

I. The waiver rule and the invited-error doctrine preclude yet another round of appellate review.

A case that suffers from waiver problems and similar invited-error defects has no place on this Court's limited, discretionary docket. *See* Scherer & Leerberg, North Carolina Appellate Practice and Procedure § 19.07 (discussing how a case is a "poor" candidate for discretionary review if the "petitioner waived the issue"). That is the case here.

As the Plaintiffs acknowledge, their burden before the trial court was to establish "the infringement of a legal right"—a "legal injury [that] gives rise to standing." *EMPAC*, 2021-NCSC-6, ¶ 82. But as described above, they admitted in their complaint that Boone received every penny of what it was entitled to receive under the statute—a concession confirming that there was no "infringement of a legal right." *EMPAC*, 2021-NCSC-6, ¶ 82.

Likewise, the complaint itself doomed any attempt by Mr. Ashcraft to claim standing as a resident of Boone and Watauga County. (R p 127 ¶ 2). As to Boone, Mr. Ashcraft made no argument whatsoever that Boone "unlawfully used" his tax dollars to his injury; as to Watauga County, Mr. Ashcraft conceded in the complaint that Watauga County gave Boone 100 percent of

what it was entitled to receive, thus confirming that Watauga County did not unlawfully use any of his tax dollars. (R pp 131–32 ¶ 23).[5]

With those arguments dispatched by the Plaintiffs' own admissions, all that remained was the notion that somehow, even though the Plaintiffs received every penny of what they were entitled to receive, they could challenge the resolutions adopted by Beech Mountain, Blowing Rock, and Seven Devils. (R p 153). But the Plaintiffs repeatedly disavowed that notion before the trial court, and they did so with affirmative arguments and remarkable concessions:

- "In this case, the Court does not need to decide any issues concerning Blowing Rock and Seven Devils. It does not need to even consider whether those towns acted lawfully or not lawfully . . . . We don't allege that Blowing Rock, Seven Devils, or Beech Mountain did not have authority to enter into the agreements, or the resolutions, that they did with the County." (T. Rule 12(b)(7) Hearing, Sept. 30, 2020 p 10:13–25 (emphasis added)).

- "[The resolutions involving the towns are] not the gist of the argument here . . . . The agreements, while they would be collateral damage, so to speak, to a decision in favor of the plaintiffs in this case, they are not the gist of what's at issue." *Id.* at 9:1–16.

- "The claims the plaintiffs have asserted are entirely against Watauga County . . . . So the Court does not have to ascertain or settle the rights of Blowing Rock and Seven Devils in order to decide and grant relief in this case." *Id.* at 11:4–9.

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[5] Although Mr. Ashcraft may not approve of Watauga County accepting funds from other towns in which he does not live, he only *benefitted* as a Watauga County taxpayer when the County received that additional revenue, as did all Watauga County residents who benefited from the County receiving the additional revenue.

- "This is not a lawsuit that is primarily aimed at the agreements that would amount to gentlemen's agreements, so to speak. . . . This is a case that's focused on the authority of Watauga County under the tax distribution statute." *Id.* at 8:2–9.

In fact, not only did the Plaintiffs affirmatively argue to the trial court that they weren't contesting the validity of the other towns' resolutions (*id.* at 10:13–25), but they also made a concession that foreclosed any theory of "legal injury" one could possibly imagine: They told the trial court that Watauga County "could have actually entered into the same type of agreement *with Boone* instead of the other towns and benefited itself that way." *Id.* at 9:9–12 (emphasis added).

At no point during the hearing on the motion to dismiss did the Plaintiffs attempt to walk back those representations. Instead, they waited until after their case was dismissed and up on appeal.

After representing to the trial court that the Plaintiffs "don't allege that Blowing Rock, Seven Devils, or Beech Mountain did not have authority to enter into the agreements, or the resolutions, that they did with the County," the Plaintiffs then proceeded to argue to the Court of Appeals—as they do in their petition—that these same resolutions are the very linchpin of the case, contending that these resolutions "resulted in creation of a hybrid distribution scheme." Pl.'s COA Br. at 7; *see also, e.g.*, Pet. at 4 (arguing that the resolutions are the "but for" cause under the Plaintiffs' theory); Pet. at 8 (same); Pet. at 17

(arguing that the "adoption and implementation" of the resolutions was the "wrongful conduct" at issue).

At the Court of Appeals, the Plaintiffs could not even utter the first few words of their argument without attacking those resolutions—the same resolutions that they repeatedly asked the trial court to wall off from its analysis. *See, e.g.*, Pl.'s COA Br. at 6 (opening substantive argument entitled "Watauga County, Through Agreements With Blowing Rock, Seven Devils, And Beech Mountain, Established A Modified *Ad Valorem* Sales Tax Distribution Framework") (emphasis added)); *see also, e.g.*, *id.* at 16 ("Watauga County, through its agreements with the defendant towns, developed an illegal sales tax distribution scheme[.]") (emphasis added)). Likewise, in their brief to the Court of Appeals and again in their petition, the Plaintiffs characterized these resolutions as "kickback[s]" (*id.* at 7) and "side agreements" (*id.* at 4), having apparently forgotten that they told the trial court these resolutions were so unassailable that Watauga County "could have actually entered into the same type of agreement *with Boone* instead of the other towns." (T. Rule 12(b)(7) Hearing, Sept. 30, 2020 p 9:9–12 (emphasis added)).

After repeatedly making these representations to the trial court, the Plaintiffs were precluded from reversing course and trying their hand at the opposite theory on appeal. As this Court has held time and time again, and as the Court of Appeals' decision reflects, shapeshifting theories of a case will not

be tolerated, particularly when appellants seeks to blame the trial court for a result that they induced—a tactic that violates the invited-error doctrine.[6]

In sum, this is a case where the complaint's admissions combined with the Plaintiffs' affirmative, repeated, and forceful representations to the trial court resulted in dismissal. Under those unique, fact-specific circumstances, which the petition does not and cannot deny, both the waiver rule and the invited-error doctrine preclude a second round of appellate review. For that reason alone, the petition should be denied. *See* Scherer & Leerberg, North Carolina Appellate Practice and Procedure § 19.07 (discretionary review is unwarranted when the "petitioner waived the issue").

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[6] *See, e.g.*, *United Daughters of the Confederacy*, 2022-NCSC-143, ¶ 35, n.8 (applying "the longstanding rule that 'issues and theories of a case not raised below will not be considered on appeal'" (quoting *Westminster Homes, Inc. v. Town of Cary Zoning Bd. of Adjustment*, 354 N.C. 298, 309, 554 S.E.2d 634, 641 (2001))); *Plantation Bldg. of Wilmington*, 379 N.C. at 56, 2021-NCSC-122; *Piazza v. Kirkbride*, 372 N.C. 137, 165, 827 S.E.2d 479, 498 (2019) (applying invited-error doctrine and reaffirming that "[a] party may not complain of action which he induced" (quoting *Frugard v. Pritchard*, 338 N.C. 508, 512, 450 S.E.2d 744, 746 (1994))); Scherer & Leerberg, North Carolina Appellate Practice and Procedure § 4.01 ("North Carolina's appellate courts do not allow appellate counsel the benefit of hindsight to re-litigate the issues on appeal . . . . To repeat an oft-quoted error-preservation maxim: the 'law does not permit parties to swap horses between courts in order to get a better mount' on appeal.").

II. In addition to the waiver and invited-error defects, the Court of Appeals' unpublished decision does not satisfy the criteria for discretionary review.

A. The Court of Appeals' unpublished decision faithfully tracks this Court's precedent.

The petition's primary argument is that the unpublished decision here conflicts with *EMPAC*. This argument fails in several respects.

First and foremost, even a cursory review of the unpublished decision confirms that it faithfully tracks, rather than conflicts, with *EMPAC*. It expressly relies on and follows *EMPAC*, then applies *EMPAC*'s test word-for-word to the Plaintiffs' arguments, noting the Plaintiffs' concessions. *See* Slip. Op. at 7–11 (quoting and applying *EMPAC*); *see also id.* at 11 n.2 (quoting the Plaintiffs' concessions). Nothing about that simple, verbatim application of *EMPAC* to the Plaintiffs' fact-specific waiver problems breaks new ground.

In addition, although the Court of Appeals did not have the benefit of this Court's 16 December 2022 decision in *United Daughters of the Confederacy*, that more recent decision only further supports the unpublished decision here. As this Court held in *United Daughters of the Confederacy*, a plaintiff lacks standing when it makes concessions (¶ 30) and admissions (¶ 35) that undercut its attempt to meet its burden under *EMPAC*. *See United Daughters of the Confederacy v. City of Winston-Salem*, 2022-NCSC-143, ¶¶ 30, 35; *see also id.* ¶ 76 (Newby, J., concurring) (reaffirming that "bare allegations

. . . are insufficient to establish standing"). Here, as described above, the concessions and admissions were far worse than in *United Daughters of the Confederacy*: The Plaintiffs here affirmatively argued one thing to the trial court and then tried to argue the opposite to the Court of Appeals—all the while blaming the trial judge, who, like the Court of Appeals, merely accepted the Plaintiffs' representations at face value.

Notably, the petition does not discuss *EMPAC* in great detail, even as it attempts to manufacture a conflict with *EMPAC*. As for *United Daughters of the Confederacy*, the petition makes only brief mentions of the decision even though it is the last word from this Court on standing and was issued the week before the petition was filed. Instead, the petition looks to other decisions that discuss another, separate requirement for standing that has never been raised or disputed here: adversity. Pet. at 14–15. The petition then treats the test for standing as if it has only one component: adversity.

It would certainly be convenient for these Plaintiffs (and countless others) if mere adversity alone checked the box for standing, but as this Court reaffirmed a few weeks ago, that has never been the law. *See United Daughters of the Confederacy*, 2022-NCSC-143, ¶ 32 ("Plaintiff's arguments rest upon a fundamental misunderstanding of the law of standing . . . [P]laintiff appears to believe that by simply filing a declaratory action and asserting that there

was an 'actual controversy between the parties' relating to the identity of the monument's owner, it has made a sufficient showing to establish standing.").

After all, the parties in *United Daughters of the Confederacy* were as "adverse" as one could possibly imagine—litigants in a "fight" (*id.* ¶ 31) over a Confederate monument—and yet that "adversity" was insufficient by itself to establish standing. *Id.* Rather, as the Court explained, and as the petition here overlooks, a plaintiff cannot invoke the jurisdiction of the judicial branch by simply saying that they are "adverse" to the defendant—a burden that no plaintiff would ever fail to meet. *Id.* ¶ 32.

For each of these reasons, the Plaintiffs' attempt to manufacture a conflict with this Court's precedent fails.

B. The Plaintiffs' remaining arguments are unavailing.

The Plaintiffs make several other arguments, none of which justify discretionary review.

First, the Plaintiffs argue that the Court of Appeals' unpublished decision conflicts with federal law. As a threshold matter, a conflict with federal law is no basis for discretionary review. *See* N.C. Gen. Stat. § 7A-31. But even if it was, the succinct, unpublished decision of the Court of Appeals did not create a federal-state schism.

The gist of the Plaintiffs' argument here is their mistaken interpretation of a Second Circuit case. Pet. at 18–19 (citing *New York v. Yellen*, 15 F.4th 569, 572 (2d Cir. 2021), *cert. denied*, 142 S. Ct. 1669 (2022)). Yet the Plaintiffs did not offer that interpretation—or even cite the case at all—before either the trial court or the Court of Appeals. *See United Daughters of the Confederacy*, 2022-NCSC-143, ¶ 35 n.8 ("[G]iven that plaintiff did not advance this argument before the Court of Appeals, it is not permitted do so for the first time before this Court.").

Regardless, the far-afield concepts of this federal case—a unique case addressing a multi-state cohort's challenge to a federal tax law under the 16th Amendment and related federalism principles—have no bearing on North Carolina's standing jurisprudence.[7] Even more fundamentally, because federal appellate procedure condemns waiver and invited error just like North Carolina appellate procedure does, the result here would have been the same in federal court. *See, e.g.*, *AG Sys., Inc. v. United Decorative Plastics Corp.*, 55

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[7] The Second Circuit's standing analysis in *Yellen* "turn[ed] solely on whether the Plaintiff States ha[d] sufficiently alleged an injury in fact" for purposes of Article III, and, after examining the states' allegations, it answered in the affirmative. 15 F.4th at 576. Setting aside the fact that the Second Circuit applied *federal* standing principles, which Boone's petition reminds us are inapplicable here (Pet. at 20), the plaintiffs in *Yellen* alleged the direct infringement of well-established legal rights under the Constitution. *Id.* at 574–75. In stark contrast, the Plaintiffs here did not allege the infringement of any legal (much less constitutional) right. *See supra* at 12–13.

F.3d 970, 972 (4th Cir. 1995) ("We have never held in this court that an appeal may lie from an invited error."); *Muth v. United States*, 1 F.3d 246, 250 (4th Cir. 1993) ("As this court has repeatedly held, issues raised for the first time on appeal generally will not be considered.").

Next, the Plaintiffs claim that there is some pressing need for this Court to straighten out the law of standing after *EMPAC*.[8] Not so. The Court's decision in *EMPAC* was clear and straightforward, and both this Court and the Court of Appeals have repeatedly applied it in the past two years since it was issued—three times by this Court[9] and four times by the Court of Appeals.[10] Add to that the fact that this Court further clarified *EMPAC* just a few weeks ago in *United Daughters of the Confederacy* and allowed

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[8] The petition states that the Court of Appeals misapprehended the law of standing *before* EMPAC (Pet. at 19–21), but it offers no evidence—nor is there any—that the Court of Appeals has been consistently misapplying the law of standing in the two years *since EMPAC*.

[9] *See Harper v. Hall*, 380 N.C. 317, 354, 2022-NCSC-17, ¶ 96; *United Daughters of the Confederacy*, 2022-NCSC-143, ¶ 26; *McMillan v. Blue Ridge Cos., Inc.*, 379 N.C. 488, 496, 2021-NCSC-160, ¶ 20.

[10] See *Fearrington v. City of Greenville*, 282 N.C. App. 218, 2022-NCCOA-158, ¶ 25; *Bio-Medical Applications of N.C. Inc. v. N.C. Department of Health and Human Services*, 282 N.C. App. 413, 2022-NCCOA-199, ¶ 13; *Soc'y for Hist. Pres. of Twentysixth North Carolina Troops, Inc. v. City of Asheville*, 282 N.C. App. 700, 2022-NCCOA-218, ¶ 14; *NAACP v. State*, 2022-NCCOA-236, ¶ 20.

discretionary review in another post-*EMPAC* standing case[11] set for briefing in early 2023. In short, this Court's discretionary docket is not in need of yet *another* case about standing, particularly when it comes in the form of an unpublished decision plagued by waiver and invited-error issues.

Next, the Plaintiffs briefly point to the "significant public interest" criteria as a basis for discretionary review. *See* N.C. Gen. Stat. § 7A-31(c)(1). The Plaintiffs are in no position to claim a "significant public interest" in this case after waiting nearly seven years to file it. Regardless, the only public interest the petition can point to is a single blog post. And even then, the blog's author points out that the Court of Appeals' decision "does not constitute binding legal authority" and merely "confirms at least one thing that we already knew"; the blog also notes that unlike Mr. Ashcraft, who does not live in any of the defendant towns, "[a] resident of [those other towns] may have [ ] standing" to bring the challenge that the Plaintiffs attempted here.[12] Those points only undermine the petition.

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[11] *See Soc'y for Hist. Pres. of Twentysixth North Carolina Troops, Inc.*, 282 N.C. App. 700, 2022-NCCOA-218, ¶ 14, allowing review, No. 123PA22, 2022 WL 17729468 (Dec. 13, 2022).

[12] *See* Connor Crews, *N.C. Court of Appeals Addresses a Dispute Over Local Sales and Use Tax Distributions:* Town of Boone v. Watauga County, Coates' Canons N.C. Local Gov't L. (Nov. 22, 2022), https://unc.live/3YwqBr5.

Lastly, the Plaintiffs speculate that the Court of Appeals' succinct, unpublished decision will cause "lawlessness." Pet. at 22. But in reality, the only practical consequence of this unpublished decision is that litigants may think twice before arguing one thing to the trial court and then arguing the opposite to the Court of Appeals. *See supra* at 12–16. Moreover, the Plaintiffs continue to overlook the practical reality that there are literally thousands of potential plaintiffs who could have taxpayer standing to bring this lawsuit if they were to proceed properly and not concede away their case the way these Plaintiffs did—namely, taxpayers in Beech Mountain, Blowing Rock, or Seven Devils. The trial court appears to have understood that, too. *See* T. Rule 12(b)(1) Hearing, March 17, 2021 pp 17:16–25, 62:16–23. The problem for Mr. Ashcraft, though, is that he doesn't live in any of those towns, so even under the most open-ended theory of taxpayer standing imaginable, he can't challenge those towns' use of their taxpayer dollars.[13] *Cf. United Daughters of the Confederacy*, 2022-NCSC-143, ¶ 75 (Newby, C.J., concurring) (plaintiff

[13] For that same reason, because Mr. Ashcraft does not live in Beech Mountain, Blowing Rock, or Seven Devils, he did not (and could not) allege in the complaint that he has made a demand of those municipalities "to institute proceedings" or that "a demand on such authorities would be useless"—another requirement that must be met to confer subject-matter jurisdiction on the Court. *See United Daughters of the Confederacy*, 2022-NCSC-143, ¶ 35.

lacked standing where "there is no indication . . . that any members of plaintiff's organization reside in Winston-Salem or Forsyth County").

For these reasons, there is simply no basis for discretionary review.

III. The Court of Appeals' unpublished decision is supported by additional, alternate grounds for upholding the trial court: the political-question doctrine.

As noted above, in addition to the Plaintiffs' lack of standing, the trial court held that this lawsuit would still fail for lack of subject-matter jurisdiction for another reason: It asked the judicial branch to wade into a political question that the General Assembly has expressly committed to the legislative discretion of local elected officials.

The Court of Appeals did not need to reach this issue because it resolved the case by way of the Plaintiffs' concessions. Meanwhile, the petition glosses over this issue in a footnote. *See* Pet. at 11 n.4. But these additional grounds for affirming the trial court would lead to the same result reached by the Court of Appeals—yet another reason that discretionary review is unwarranted.

As this Court has explained, the political-question doctrine is a doctrine of judicial restraint. It "excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution" by political actors. *Common Cause v. Forest*, 269 N.C. App. 387, 395, 838 S.E.2d 668, 675 (2020) (quoting *Cooper v. Berger*, 370

N.C. 392, 407–08, 809 S.E.2d 98, 107 (2018)). The doctrine prevents courts from resolving these questions because it would "usurp" a power "reserved to the exclusive consideration of a different political tribunal." *In re Alamance Cnty. Court Facilities*, 329 N.C. 84, 95–96, 405 S.E.2d 125, 130 (1991).

The most common application of the political-question doctrine is where lawsuits challenge certain powers that a constitution (state or federal) expressly commits to either the executive or legislative branches. *See, e.g.*, *Common Cause*, 269 N.C. App. at 395, 838 S.E.2d at 675. With respect to local governments, however, the North Carolina Constitution also contains an express commitment of legislative power that implicates the political-question doctrine: It states that the General Assembly may give local governments, including "counties," such powers—including legislative powers—as the General Assembly "may deem advisable." N.C. Const. art. VII, § 1.[14]

Consistent with this constitutional provision, the political-question doctrine bars lawsuits, like this one, that challenge the discretionary legislative decisions of local officials. *See Marriott v. Chatham Cnty.*, 187 N.C. App. 491, 494–95, 654 S.E.2d 13, 16–17 (2007) (affirming dismissal of

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[14] That constitutional provision provides: "The General Assembly . . . except as otherwise prohibited by this Constitution, may give such powers and duties to counties, cities and towns, and other governmental subdivisions as it may deem advisable." N.C. Const. art. VII, § 1.

challenge to decision that "constitute[d] a legislative function" of county commissioners and warning that an order intruding into that decision was both "unavailable and inappropriate" because it would have "violate[d] the doctrine of separation of powers").

Here, this lawsuit asked the judicial branch for relief that the political-question doctrine forbids. The Plaintiffs asked the trial court to wade into a purely discretionary legislative decision that the General Assembly expressly committed to locally elected county commissioners across the state. *See* N.C. Gen. Stat. § 105-472(b); N.C. Const. art. VII, § 1. Under these circumstances, intruding into the province of the Watauga County Commissioners' legislative decision making would violate the political-question doctrine.

The extraordinary, inappropriate nature of the Plaintiffs' request is even more apparent when considered against the factual allegations of their complaint, which retell the story of over three decades of intense political debate about which method the elected County Commissioners, in their legislative discretion, should choose. *See supra* at 5–7 (describing the history of this political debate as alleged in the complaint). Unsurprisingly, with each change in the method of distribution, the political winners were pleased, and the political losers lobbied for change—a classic feature of our political process.

All of this decades-long political debate, including and especially Boone's lobbying of local politicians before resorting to litigation, illustrates a

fundamental point about the issue that Boone is attempting to foist upon the Court: This is an inherently *political* issue that raises age-old questions about how to distribute finite government resources. And here, our General Assembly has made clear that the local elected officials at the county level are the ones who must answer those questions and grapple with the political debate, not the judiciary. To be sure, if the General Assembly had wanted the judiciary to intervene in this inherently political matter, it would have created a private cause of action for dissatisfied plaintiffs to sue the counties and, moreover, provided a legal standard in the statute for the judiciary to apply. The General Assembly knows how to do this, of course, and it does so all the time. *See, e.g.*, *EMPAC*, 2021-NCSC-6, ¶ 83. But it chose not to do so here.

That decision by the General Assembly to leave absolute legislative discretion with locally elected county commissioners and omit a private cause of action was undoubtedly the wiser course, at least from the perspective of ensuring judicial restraint. As both this Court and the Court of Appeals have cautioned, "the judiciary 'has no power, and is not capable if it had the power' of substituting its own judgment for that of [elected] officials charged with making [ ] discretionary decisions." *Richmond Cnty. Bd. of Educ. v. Cowell*, 254 N.C. App. 422, 429, 803 S.E.2d 27, 32 (2017) (quoting *Alamance Cnty. Court Facilities*, 329 N.C. at 101, 405 S.E.2d at 134)). To the extent that those discretionary legislative decisions create political winners and losers—for

example, when Boone won the political debate for 25 years, or when Boone lost the political debate in the years preceding this lawsuit—"the remedy lies not with the courts, but at the ballot box." *Id.*

After all, if Watauga County residents (including those in Boone, like Mr. Ashcraft) do not like the County Commissioners' choices, then they have the opportunity to vote for different Commissioners. Indeed, Boone has the political strength to protect its interests at the ballot box, as evidenced by 25 straight years of achieving its desired political outcome at the expense of the other towns and the local fire districts—fire districts that some might argue deserve those funds at least as much as Boone. In addition, Boone has political options at the state level. Nothing would stop it from pursuing a political remedy by approaching its local delegation of elected representatives. But the remedy for Boone is not, as it might wish, for the judiciary to command local elected officials to cast their vote a certain way—a remedy that is "unavailable and inappropriate." *Marriott*, 187 N.C. App. at 495, 654 S.E.2d at 17.

In sum, as the Plaintiffs admit, this lawsuit is an attempt to force the judiciary to resolve a "messy, local political squabble"—a decades-long, political tug of war, where losers become winners, winners become losers, and losers become winners again when the political winds shift. These situations are precisely what the political-question doctrine is designed for: keeping the judiciary out of a "political squabble," particularly a "messy, local" one.

For this additional reason, which stands as another basis for affirming the trial court, discretionary review is particularly unwarranted. Under the political-question doctrine, the Plaintiffs' remedy is at the ballot box, where it has been for more than three decades.

ADDITIONAL ISSUES

If discretionary review is allowed, the Defendants would seek to present the following issues:

(1) Did the complaint's admissions and the Plaintiffs' representations to the trial court support the conclusion that they lacked standing?

(2) Are the Plaintiffs' arguments on appeal barred by the waiver rule and the invited-error doctrine?

(3) Did the trial court correctly dismiss this lawsuit under the political-question doctrine?

CONCLUSION

The petition should be denied.

Respectfully submitted the 3rd day of January, 2023.

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I certify that all of 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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CERTIFICATE OF SERVICE

I certify that, in accordance with Appellate Rule 26(c), I have served a copy of the foregoing by e-mail to the following:

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This the 3rd day of January, 2023.

s/ Andrew H. Erteschik
Andrew H. Erteschik

IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-778

No. COA21-586

Filed 15 November 2022

Watauga County, No. 20CVS104

TOWN OF BOONE and MARSHALL ASHCRAFT, in his individual capacity as a resident and taxpayer of the town of Boone, Plaintiffs,

v.

WATAUGA COUNTY, TOWN OF SEVEN DEVILS, and TOWN OF BLOWING ROCK, Defendants, and TOWN OF BEECH MOUNTAIN, Intervenor.

Appeal by Plaintiffs from Order entered 23 March 2021 by Judge Gary M. Gavenus in Watauga County Superior Court. Heard in the Court of Appeals 6 April 2022.

Meade Law, PLLC, by Allison M. Meade, and Sumrell Sugg, P.A., by Scott C. Hart and Frederick H. Bailey, III, for Plaintiffs-Appellants.

Poyner Spruill LLP, by Andrew H. Erteschik and John Michael Durnovich, and Eggers, Eggers, Eggers & Eggers, PLLC, by Stacy C. Eggers IV, for Defendant-Appellee Town of Beech Mountain.

Di Santi Watson Capua Wilson & Garrett, PLLC, by Anthony S. di Santi and Andrea Capua, and Womble Bond Dickinson (US) LLP, by Bradley O. Wood, for Defendant-Appellee Watauga County.

Deal, Moseley & Smith, LLP, by Allen C. Moseley, for Defendant-Appellee Town of Blowing Rock.

Angle, Rupp & Rupp, P.A., by Robert B. Angle, Jr., for Defendant-Appellee Town of Seven Devils.

HAMPSON, Judge.

Factual and Procedural Background

¶ 1 Town of Boone (Boone) and Marshall Ashcraft (Ashcraft) (collectively, Plaintiffs) appeal from the trial court's Order granting Motions to Dismiss this action for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the North Carolina Rules of Civil Procedure filed by County of Watauga (Watauga County), Town of Seven Devils (Seven Devils), Town of Blowing Rock (Blowing Rock) and Town of Beech Mountain (Beech Mountain) (collectively, Defendants[1]). The Record before us tends to reflect the following:

¶ 2 N.C. Gen. Stat. § 105-472 authorizes North Carolina counties that have adopted a local sales and use tax to choose how the North Carolina Department of Revenue—which collects and allocates those taxes to the counties—distributes those taxes between the counties and their municipalities either on a per capita or an ad valorem basis. Under the per capita method, "[t]he net proceeds of the tax collected in a taxing county shall be distributed to that county and to the municipalities in the county on a per capita basis according to the total population of the taxing county,

[1] Beech Mountain is not a named defendant but is rather an intervenor in this case. However, at least for purposes of this appeal, Beech Mountain is aligned with the named defendants. On appeal to this Court, the parties to this case caption Beech Mountain as a defendant in their appellate filings and refer generally to "Defendants" as including Beech Mountain. For ease of reading, and solely for purposes of this appeal, we include Beech Mountain under our term "Defendants".

plus the total population of the municipalities in the county." N.C. Gen. Stat. § 105-472(b)(1) (2021). Under the ad valorem method, "[t]he net proceeds of the tax collected in a taxing county shall be distributed to that county and the municipalities in the county in proportion to the total amount of ad valorem taxes levied by each on property having a tax situs in the taxing county during the fiscal year next preceding the distribution." N.C. Gen. Stat. § 105-472(b)(2).

¶ 3 In 2013, the Watauga County Board of Commissioners adopted a resolution choosing the ad valorem method for purposes of distributing local sales tax proceeds between the county and its municipalities. Prior to 2013, Watauga County had elected to have these local sales tax proceeds distributed on a per capita basis. The result of choosing the ad valorem method of distribution was to reduce the amount of funds distributed by the Secretary of Revenue to Watauga County itself while increasing the amount of funds distributed to Seven Devils, Blowing Rock, and Beech Mountain. The amount of funds distributed to Boone decreased.

¶ 4 In adopting the resolution electing the ad valorem method, however, Watauga County also entered into separate agreements with the three municipalities—Seven Devils, Blowing Rock, and Beech Mountain. Under these agreements, Seven Devils, Blowing Rock, and Beech Mountain each agreed to pay a portion of the local sales taxes distributed to them to Watauga County as part of their budget process. Boone, however, was excluded from these agreements.

¶ 5 On 20 February 2020, almost seven years later, Plaintiffs filed a Complaint against Watauga County alleging Watauga County had acted in violation of N.C. Gen. Stat. § 105-472 by choosing the ad valorem distribution method in 2013 and continuing to use that method while also operating under the agreements with Seven Devils, Blowing Rock and Beech Mountain. The gist of the allegations of Plaintiffs' Complaint was that Section 105-472 only authorized two local sales tax distribution methods—ad valorem or per capita—and Watauga County's adoption of the ad valorem method combined with its agreements with the three municipalities created a third hybrid local sales tax distribution that was neither per capita nor a true ad valorem distribution. Thus, Plaintiffs asserted, Watauga County was in violation of Section 105-472. Plaintiffs sought declaratory and injunctive relief against Watauga County and, additionally, monetary damages.

¶ 6 On 21 May 2020, the trial court entered an Order, upon consent of the parties, permitting Beech Mountain to intervene in the lawsuit. On 26 May 2020, Plaintiffs filed an amended complaint including Beech Mountain as intervenor. Both Watauga County and Beech Mountain, respectively, filed Answers and Motions to Dismiss, including motions pursuant to N.C.R. Civ. P. 12(b)(1), contending Plaintiffs lacked standing to sue in that they failed to show any injury in fact and the matter involved a political question not redressable by the courts.

¶ 7 On 30 September 2022, the trial court entered an order determining Blowing Rock and Seven Devils were both necessary parties to the action and requiring Plaintiffs to join them in this action or be subject to dismissal. Plaintiffs did so by issuance of summonses to those two municipalities in October 2020. Plaintiffs filed a Second Amended Verified Complaint filed 9 December 2020 naming Seven Devils and Blowing Rock as party-defendants.

¶ 8 Defendants subsequently each filed Motions to Dismiss pursuant to Rule 12(b)(1) alleging Plaintiffs lacked standing and the trial court lacked subject-matter jurisdiction over this matter on the bases Plaintiffs had failed to allege the infringement of a legal right and that this action was barred by the political question doctrine. On 23 March 2021, the trial court entered its Order granting Defendants' Motions to Dismiss and dismissed Plaintiffs' lawsuit. The trial court concluded:

> Plaintiffs lack standing because they have failed to identify a legal right at stake and have failed to identify any infringement of a legal right. Therefore, the Court does not have subject-matter jurisdiction to decide their claims. In addition, the Court concludes that the Plaintiffs' claims fail under the political-question doctrine. Therefore, for this additional reason, the Court does not have subject-matter jurisdiction to decide their claims.

On 14 April 2021, Plaintiffs timely filed written Notice of Appeal from the trial court's 23 March 2021 Order.

Issue

¶ 9 The dispositive issue on appeal is whether Plaintiffs have shown the infringement of a legal right under N.C. Gen. Stat. § 105-472 through Watauga County's adoption of an ad valorem method for the distribution of local sales taxes to confer standing on Plaintiffs to bring this action and to provide the trial court subject-matter jurisdiction.

Analysis

¶ 10 The trial court in this case dismissed this action for lack of subject-matter jurisdiction under Rule 12(b)(1) on the basis Plaintiffs lacked standing to bring this action and, additionally, on the basis Plaintiffs' lawsuit raised a non-justiciable political question. With respect to standing, Plaintiffs contend the trial court erred in dismissing this action arguing the North Carolina Declaratory Judgment Act provides them standing to declare their rights and the lawfulness of Watauga County's actions under N.C. Gen. Stat. § 105-472. Plaintiffs submit that they "seek a declaratory judgment proclaiming Watauga County's adoption of [a] hybrid sales tax distribution framework to be outside of that which is permitted under [N.C. Gen. Stat.] § 105-472."

¶ 11 "Standing is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction." *Neuse River Found., Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 113, 574 S.E.2d 48, 51 (2002) (quotation marks omitted). "If a party does not have standing to bring a claim, a court has no subject matter jurisdiction to hear

the claim." *Estate of Apple v. Commercial Courier Express Inc.*, 168 N.C. App. 175, 177, 607 S.E.2d 14, 16 (2005). "As the party invoking jurisdiction, plaintiffs have the burden of proving the elements of standing." *Blinson v. State*, 186 N.C. App. 328, 333, 651 S.E.2d 268, 273 (2007). Standing may properly be challenged by a 12(b)(1) motion to dismiss. *See Fuller v. Easley*, 145 N.C. App. 391, 395, 553 S.E.2d 43, 46 (2001) ("[s]tanding concerns the trial court's subject matter jurisdiction and is therefore properly challenged by a Rule 12(b)(1) motion to dismiss."). "The standard of review on a motion to dismiss under Rule 12(b)(1) is *de novo*." *Fairfield Harbour Prop. Owners Ass'n, Inc. v. Midsouth Golf, LLC*, 215 N.C. App. 66, 72, 715 S.E.2d 273, 280 (2011).

¶ 12 The North Carolina Supreme Court recently clarified, under North Carolina law, standing exists when a party alleges the infringement of a legal right under a valid cause of action. *Comm. to Elect Dan Forest v. Emps. Pol. Action Comm.*, 2021-NCSC-6, 376 N.C. 558. There, in relevant part, the Supreme Court explained:

> When a person alleges the infringement of a legal right arising under a cause of action at common law, a statute, or the North Carolina Constitution, however, the legal injury itself gives rise to standing. The North Carolina Constitution confers standing to sue in our courts on those who suffer the infringement of a legal right, because "every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law." N.C. Const. art. I, § 18, cl. 2. Thus, when the legislature exercises its power to create a cause of action under a statute, even where a plaintiff has no factual injury and the action is solely in the public interest, the plaintiff has standing to vindicate

> the legal right so long as he is in the class of persons on whom the statute confers a cause of action.

Id. ¶ 82.

¶ 13 Here, Plaintiffs contend the North Carolina Declaratory Judgment Act provides standing to bring their action against Watauga County. Specifically, Plaintiffs point to N.C. Gen. Stat. § 1-254 of the Act which provides:

> *Any person* interested under a deed, will, written contract or other writings constituting a contract, or *whose rights, status or other legal relations are affected by a statute*, municipal ordinance, contract or franchise, *may have determined any question of construction or validity arising under* the instrument, *statute*, ordinance, contract, or franchise, *and obtain a declaration of rights, status, or other legal relations thereunder*.

N.C. Gen. Stat. § 1-254 (emphasis added). As a general matter, under this statute, the Declaratory Judgment Act does provide Plaintiffs a cause of action for declaratory judgment under proper circumstances.

¶ 14 Plaintiffs assert they are seeking a declaratory judgment that, under N.C. Gen. Stat. § 105-472, Watauga County not be permitted to enter into agreements with Seven Devils, Blowing Rock, and Beech Mountain to receive funds from those municipalities from their local sales tax distributions. Section 105-472, however, governs how the North Carolina Department of Revenue is to allocate and distribute local sales taxes. Subsection (a) requires the Secretary of Revenue to allocate the net proceeds of local sales taxes to the county in which it was collected. N.C. Gen. Stat.

§ 105-472(a). Subsection (b) directs how the Secretary is to distribute allocated funds between a county and its municipalities. N.C. Gen. Stat. § 105-472(b). Subsection (b) provides: "The Secretary shall divide the amount allocated to each taxing county among the county and its municipalities in accordance with the method determined by the county." *Id.* The statute directs counties to adopt a resolution electing either the ad valorem method or the per capita method for distribution. *Id.* The statute further sets out the timing and process for a county to follow in adopting the resolution and delivering the resolution to the Secretary and, also, what happens if a county does not timely adopt or deliver the resolution:

> The board of county commissioners in each taxing county shall, by resolution adopted during the month of April of each year, determine which of the two foregoing methods of distribution shall be in effect in the county during the fiscal year following the succeeding fiscal year. In order for the resolution to be effective, a certified copy of it must be delivered to the Secretary in Raleigh within 15 calendar days after its adoption. If the board fails to adopt a resolution choosing a method of distribution not then in effect in the county, or if a certified copy of the resolution is not timely delivered to the Secretary, the method of distribution then in effect in the county shall continue in effect for the following fiscal year. The method of distribution in effect on the first of July of each fiscal year shall apply to every distribution made during that fiscal year.

N.C. Gen. Stat. § 105-472(b).

¶ 15 Here, Plaintiffs' real concern is not Watauga County's choice of the ad valorem distribution method—although they have a clear preference for the per capita

method—but rather the agreements between Watauga County and the municipal defendants. Plaintiffs acknowledge they have no right to compel Watauga County to elect a particular method of distribution. Indeed, it is not clear Plaintiffs have any right to compel *any* resolution electing a distribution method—as in the absence of a new resolution, the Secretary simply continues to distribute the local sales tax proceeds under the existing method. Indeed, Plaintiffs do not contend the resolution has not been timely adopted or delivered to the Secretary. Plaintiffs also make no contention the Secretary has not distributed the funds correctly or in non-compliance with the statute.

¶ 16 N.C. Gen. Stat. § 105-472, however, addresses how the Department of Revenue is to distribute the funds between a county and the municipalities, how the county is to determine which distribution method is to be used, and how to inform the Secretary of that determination to effectuate the distribution of funds. It does not address how those funds may be used after distribution. Nor does it address any relationship between the county and municipalities beyond the Secretary's distribution of funds. As such, specifically in the context of the allegations in this case, Plaintiffs are not parties whose "rights, status or other legal relations are affected by" Section 105-472. *See* N.C. Gen. Stat. § 1-254. Indeed, and crucially, Plaintiffs make no contention the agreements between Defendants or the remittance of funds by Seven Devils, Blowing

Rock, and Beech Mountain to Watauga County are otherwise *ultra vires* or impermissible.[2]

¶ 17 Thus, Plaintiffs have not shown the infringement of any legal right protected by Section 105-472. Therefore, in the context of the allegations in this case, because Plaintiffs are not parties whose "rights, status or other legal relations are affected by" Section 105-472, Plaintiffs are not parties entitled to bring a declaratory judgment action under N.C. Gen. Stat. § 1-254. Consequently, Plaintiffs do not have standing to bring this action and the trial court properly dismissed Plaintiffs' action for lack of subject-matter jurisdiction pursuant to Rule 12(b)(1) of the Rules of Civil Procedure. Because we conclude the trial court properly dismissed Plaintiffs' suit on this basis, we do not reach the issue of whether this action was otherwise barred by the political question doctrine.

Conclusion

¶ 18 Accordingly, for the foregoing reasons, we affirm the trial court's 23 March 2021 Order dismissing Plaintiffs' Second Amended Complaint.

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[2] For instance, in their Reply Brief to this Court, Plaintiffs assert they "have continuously maintained that the gravamen of this action is whether Watauga County exceeded the General Assembly's grant of authority by intentionally circumventing the tax revenue distribution methods authorized in N.C.G.S. § 105-472(b). The Defendant-Municipalities have no authority under N.C.G.S. § 105-472(b), and therefore it is not their actions that Plaintiffs have challenged." Plaintiffs further articulate the issue they present in their lawsuit as "has Watauga County acted unlawfully and exceeded its statutory authority under N.C.G.S. § 105-472(b)?"

AFFIRMED.

Judges DILLON and MURPHY concur.

Report per Rule 30(e).