NO. 277PA22 THIRD JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

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| MELVA LOIS BANKS GRAY, as Administratrix of THE ESTATE OF STEVEN PHILIP WILSON,<br><br>Plaintiff-Appellee,<br><br>v.<br><br>EASTERN CAROLINA MEDICAL SERVICES, PLLC; GARY LEONHARDT, M.D., in his official and individual capacities; MARK CERVI, M.D., in his official and individual capacities; CAROL LEE KEECH, a.k.a. CAROL LEE OXENDINE, in her official and individual capacities; DONNA MCLEAN, D.N.P., F.N.P.-B.C., in her official and individual capacities; CHARLES RAY FAULKNER, R.N., in his official and individual capacities; KIMBERLY JORDAN, R.N., in her official and individual capacities; and JACQUELINE LYMON, L.P.N., in her official and individual capacities,<br><br>Defendants-Appellants. | **From Pitt County** |

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# BRIEF OF THE JOHN LOCKE FOUNDATION AS AMICUS CURIAE IN SUPPORT OF DEFENDANT-APPELLANT DONNA MCLEAN

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BRIEF OF THE JOHN LOCKE FOUNDATION
AS AMICUS CURIAE IN SUPPORT OF
DEFENDANT-APPELLANT DONNA MCLEAN

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## QUESTION PRESENTED

I. Whether Rule 702(d) of the North Carolina Rules of Evidence permits specialist physicians to offer testimony on the standard of care applicable to non-physicians providing primary care.

## STATEMENT OF INTEREST[1]

Founded in 1990, the John Locke Foundation ("Locke") advocates state-based policies to encourage competition and innovation for the benefit of North Carolinians. With regard to health care, Locke advocates reforms that would expand access, improve quality, and lower the cost of receiving care.

Locke's interest in this case stems specifically from its support for legislation that would grant full practice authority—i.e., the right to open an operate a practice without a supervising physicianto—to Advanced Practice Registered Nurses ("APRNs"), a category that includes Certified Registered Nurse Anesthetists ("CPRNs"), Certified Registered Nurse anesthetists, Certified Nurse Midwives ("CNMs"), Clinical Nurse Specialists ("CNSs"), and Nurse Practitioners ("NPs") like Donna McLean. Such legislation would allow ARPNs to treat patients to the full extent of their clinical training and without physician oversight, and that, in turn,

[1] No person or entity other than the undersigned amicus curiae and its counsel, directly or indirectly, either wrote this brief or contributed money for its preparation.

would go a long way towards solving the primary care shortage affecting millions of North Carolinians.

This Court's interpretation of Rule 702(d) of the North Carolina Rules of Evidence may determine whether those benefits are realized. A loose reading of Rule 702(d) that fails to protect APRNs from ill-informed, unfair, or hostile testimony in medical malpractice cases would discourage them from forming independent practices in underserved communities. On the other hand, a narrow interpretation that affords APRNs protections that are comparable to those afforded to physicians will benefit all North Carolinians—and especially *rural* North Carolinians—by encouraging the formation of independent practices and thereby making medical services less expensive and more accessible. Locke therefore has a strong interest in the outcome of this case as it pertains to Rule 702(d).

## ARGUMENT

### I. Granting Full Practice Authority to Advanced Practice Registered Nurses ("APRNs") Will Benefit Millions of North Carolinians by Making Medical Services Less Expensive and More Accessible.

North Carolina suffers from a primary care shortage. Last year, the North Carolina Office of Rural Health identified ninety-three counties in our state with a shortage of primary care providers. *Primary Care—Health Professional Shortage Areas (HPSA)*, N.C. Dep't of Health & Hum. Servs., Off. of Rural Health (Mar. 18,

2022), https://www.ncdhhs.gov/media/9357/download (last accessed Feb. 13, 2023). One-fifth of North Carolinians—more than *two million* people—currently lack meaningful access to primary care. Jordan Roberts, *Scope-of-Practice Reform*, *in* John Locke Foundation, North Carolina Policy Solutions 106, 106 (2022), available at https://www.johnlocke.org/wp-content/uploads/2021/11/Policy-Solutions-2022-John-Locke-Foundation-1.pdf.

APRNs can help North Carolina meet the need for additional primary care practitioners. A 2018 report issued jointly by the United States Departments of Health and Human Services, the United States Department of the Treasury, and the United States Department of Labor noted that APRNs "can safely and effectively provide some of the same healthcare services as physicians." *Reforming America's Healthcare System Through Choice and Competition* 33 (Dec. 3, 2018), available at https://www.hhs.gov/sites/default/files/Reforming-Americas-Healthcare-System-Through-Choice-and-Competition.pdf. NPs, for example, possess "graduate-level clinical knowledge and training to provide patient care directly. They assess patients' medical history, diagnose ailments, order lab work, and prescribe medications." Jordan Roberts, *Scope-of-Practice Reform*, *in* John Locke Foundation, North Carolina Policy Solutions 106 (2022).

APRNs can and do provide many of the same services provided by physicians, and at lower cost. Moreover, policy experts have long recognized that APRNs can provide services *at the same level of quality as* physicians. U.S. Congress, Office of Technology Assessment, *Nurse Practitioners, Physician Assistants, and Certified Nurse-Midwives: A Policy Analysis* 19 (1986), available at https://ota.fas.org/reports/8615.pdf [hereinafter OTA *Policy Analysis*] ("NPs generally resolve patients' acute problems as well as physicians, and the functional status of patients treated by NPs and physicians is equivalent.").

A diverse coalition of legislators and organizations, including the John Locke Foundation, advocates addressing this need by expanding the role of our state's growing population of physician assistants and APRNs. In recent years, the General Assembly has considered legislation to ease outdated restrictions on APRNs' practices and grant them full practice authority. H.B. 149, 2021 Gen. Assemb., Reg. Sess. (N.C. 2021); H.B. 185, 199 Gen. Assemb., Reg. Sess. (N.C. 2019). Last session, the General Assembly came close to approving such a measure, and a similar measure will probably be taken up during the current session.

For now, state law requires that NPs with independent practices establish collaborative practice agreements with a supervising physician. Those agreements outline patient management and describe how the providers will interact with each

other. Perhaps because of their rigorous training and licensing requirements, NPs are not required by law to be in the same geographic location as the supervising physician, and they are required to meet only twice a year. Jordan Roberts, *Scope-of-Practice Reform*, 106 (2022).

Currently, practical realities impose geographical restrictions on NPs, and prevent them from "extending their reach into underserved areas." *Id.* at 107 (2022). Consider the case of an NP operating an independent practice. If that NP's supervising physician were to move out of state or join a hospital system that prohibits outside collaborative practice agreements, the NP would need to find another supervising physician, which could mean shutting down operations at the clinic until a new collaborative practice agreement had been reached. If no alternative supervising physician could be found, the clinic would have to shut down permanently. Under either scenario the costs to the provider and to his or her patients would be substantial. For that reason, many NPs are hesitant to establish independent clinics in the first place.

The General Assembly may remove the obstacles described above in the current legislative session—and given the national trend regarding APRN independence, and the importance of maintaining a modern and efficient health care system in North Carolina—it will almost certainly do so eventually. Unfortunately,

the outcome of this case could erect a new obstacle of its own. This Court's Interpretation of Rule 702(d) May Determine the Extent to Which the Benefits Described Above Are Realized.

## II. This Court's Interpretation of Rule 702(d) May Determine the Extent to Which the Benefits Described Above Are Realized.

### A. A Loose Interpretation of Rule 702(d) Will Discourage APRNs from Opening and Operating Independent Practices in Underserved Regions of North Carolina.

Taken as a whole, it is clear that an important purpose of Rule 702 is to ensure congruity between expert witnesses and health care providers in malpractice lawsuits. Rules 702(b) and Rule 702(c) are very clear on that point. Unfortunately, Rule 702(d) is ambiguous and could be interpreted in a way that would allow a specialist physician against an APRN in general practice. When the current language was adopted in 1995 and nurses were very much under the thumb of the physicians who supervised them, that may not have mattered much. As explained above, however, it matters much more now. The role of nurses in the health care system has expanded considerably over the past three decades, and it will expand still further in the years to come. It is important, therefore, for the Court to remove the ambiguity and do so in a way that is consistent with the current facts on the ground..

A loose interpretation of Rule 702(d) that permits specialist physicians to provide expert testimony against APRNs in general practice would be inappropriate

and deleterious in many ways. It would be inconsistent with the letter and the spirit of Rule 702 as a whole. It would undervalue the training and specialization of APRNs and fail to reflect the independent role they play in a modern health care system.

Such an interpretation would also be unfair to APRNs in both judicial and legislative proceedings. The greatest resistance to full-practice-authority legislation has come from physicians. *See generally* Lucille Sherman, *100 NC Lawmakers Signed onto a Health Care Bill. Then Donors Started Calling*, News & Observer (Apr. 4, 2021), available at https://www.newsobserver.com/news/politics-government/article250287935.html (explaining how physicians and lobbyists for physician groups have pressured key lawmakers to block legislation affording full practice authority to APRNs). If this Court reads Rule 702(d) to permit physicians to qualify as experts with only minimal professional contact with APRNs, Rule 702(d) would effectively permit backdoor resistance to legislative reforms.

From Locke's perspective, however, the worst consequence of a loose interpretation of Rule 702(d) is that, by failing to afford them protection against ill-informed, unfair, and hostile testimony that is comparable to the protection afforded to physicians, such an interpretation would discourage APRNs forming and

operation independent practices and prevent North Carolina from enjoying the full benefits of APRN independence.

### B. A Narrow Interpretation of Rule 702(d) Will Encourage APRNs to Open and Operate Independent Practices in Underserved Regions of North Carolina.

A narrow interpretation of Rule 702(d) would limit its application to the specific requirement under Rule 702(b)a. that experts and those against whom they testify must practice the same profession. In every other particular it would ensure that the congruity requirements apply, not just to physicians, but to APRNs as well. Such an interpretation would be appropriate and beneficial in many ways.

Such an interpretation would be consistent with the letter and the spirit of Rule 702 as a whole. It would also reflect the expanded role that—thanks to their levels of training and specialization—APRNs can and should play in a modern health care system.

As noted above, APRNs are not the nurses of yesteryear. See generally Connette ex rel. Gillette v. Charlotte-Mecklenburg Hosp. Auth., 382 N.C. 57, 876 S.E.2d 420 (2022) (describing "the evolution of the nursing industry"). Failure to interpret Rule 702(d) in a way that ensures APRNs are adequately protected against ill-informed, unfair, or hostile expert witnesses underestimates the degree of independence APRNs already have, even under outdated collaborative practice

agreements, and it would certainly underestimate the independence they are likely o have in the near future.

APRNs have adequate training to perform many of the same functions as physicians, and tdo so with little or no oversight. Twenty-four states and Washington, D.C., have already granted full practice authority to NPs. Jordan Roberts, *Scope-of-Practice Reform*, 106 (2022), and North Carolina will probably soon follow their example.

A narrow application of the text of Rule 702(d), would also make adjudication involving APRNs fairer by discouraging backdoor resistance from hostile physicians with little or no experience working with APRNs. Physicians who work directly with APRNs are far more likely to understand—and respect—the latters' capabilities. OTA *Policy Analysis*, *supra*, at 21. Due to regulatory restrictions on APRNs' practices, physician-APRN collaboration typically happens only within the category of practice—either because the physician supervises the APRN or works alongside the APRN to provide treatment. A physician without such experience is unlikely to know enough about typical practices among APRNs to provide reliable expert testimony.

Finally, by clarifying the rules and providing APRNs with adequate protections against ill-informed, unfair, and hostile testimony, a narrow

interpretation of Rule 702(d) will inspire confidence in the legal system among APRNs and encourage them to open and operate independent practices in underserved regions of North Carolina.

This Court should interpret and apply Rule 702(d) in a manner consistent with the skill and training that APRNs possess. Physicians accused of malpractice, whether specialists or general practitioners, are entitled to have a physician from the same type of practice testify to the standard of care. N.C.G.S. § 8C-1, Rules 702(b)–(c). APRNs perform many of the same tasks as physicians and are regulated by the same body. The evidentiary standard for qualifying standard-of-care experts should not be relaxed simply because these professionals hold different titles.

## CONCLUSION

Exposure to ill-informed, unfair, or hostile expert testimony in medical malpractice claims can undermine efforts to expand primary care access to millions of rural North Carolinians. Rule 702 should, by its plain language, prevent such testimony. By establishing clear and reasonable standards for the qualification of experts pursuant to Rule 702—and by interpreting Rule 702(d) in a way that affords APRN defendants protections that are generally comparable to those afforded to physicians—this Court can ensure that APRNs are ready and willing to solve the primary care shortage in North Carolina.

Respectfully submitted this 15th day of February, 2022.

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