

SUPREME COURT OF NORTH CAROLINA

\*\*\*\*\*

DEENA DIECKHAUS, GINA )  
MCALLISTER, BRADY WAYNE )  
ALLEN, JACORIA STANLEY, )  
NICHOLAS SPOONEY and )  
VIVIAN HOOD, each individually )  
and on behalf of all others )  
similarly situated, )

Plaintiffs-Petitioners, )

v. )

BOARD OF GOVERNORS OF )  
THE UNIVERSITY OF NORTH )  
CAROLINA, )

Defendant-Respondent. )

From Orange County

\*\*\*\*\*

**DEFENDANT-RESPONDENT'S RESPONSE TO PETITION FOR  
WRIT OF CERTIORARI**

\*\*\*\*\*

## **INDEX**

TABLE OF CASES AND AUTHORITIES .....	ii
PROCEDURAL AND FACTUAL BACKGROUND .....	3
REASONS WHY WRIT SHOULD NOT ISSUE .....	7
CONCLUSION.....	18
CERTIFICATE OF SERVICE.....	20

## **TABLE OF CASES AND AUTHORITIES**

### Cases:

<i>Bailey v. State</i> , 348 N.C. 130, 500 S.E.2d 54 (1998).....	14
<i>Baxter v. Danny Nicholson, Inc.</i> , 363 N.C. 829, 690 S.E.2d 265 (2010) .....	14
<i>Commonwealth Edison Co. v. United States</i> , 271 F.3d 1327 (Fed. Cir. 2001). ....	16
<i>Dieckhaus v. Bd. of Governors of the Univ. of N.C.</i> , ___ N.C. App. ___, 883 S.E.2d 106 (2023) .....	<i>passim</i>
<i>Helms v. Landry</i> , 201 N.C. App. 590, 689 S.E.2d 245 (2009).	8
<i>In re L.R.</i> , 207 N.C. App. 264, 699 S.E.2d 479 (2010).....	8
<i>In re Snelgrove</i> , 208 N.C. 670, 182 S.E.2d 335 (1935) .....	8
<i>Logan v. Zimmerman Brush Co.</i> , 455 U.S. 222 (1982) .....	12
<i>Matter of T.D.A.</i> , 249 N.C. App. 233, 719 S.E.2d 652 (2016) .....	8
<i>Peaseley v. Virginia Iron, Coal &amp; Coke Co.</i> , 282 N.C. 585, 194 S.E.2d 133 (1973).....	9-10
<i>Peick v. Pension Ben. Guar. Corp.</i> , 724 F.2d 1247 (7th Cir. 1983) .....	17
<i>Reidy v. Whitehart Ass'n, Inc.</i> , 185 N.C. App. 76, 648 S.E.2d 265 (2007) .....	16
<i>Rhyne v. K-Mart Corp</i> , 358 N.C. 160, 594 S.E.2d 1 (2004)..	15
<i>Standley v. Town of Woodfin</i> , 362 N.C. 328, 661 S.E.2d 728 (2008) .....	15

<i>State v. Cozart</i> , 260 N.C. App. 96, 817 S.E. 2d 599 (2018) .....	8, 9
<i>State v. Grundler</i> , 251 N.C. 177, 111 S.E.2d 1 (1959) .....	9
<i>State v. Jones</i> , 269 N.C. App. 440, 838 S.E.2d 686 (2020).....	8
<i>State v. Sullivan</i> , 202 N.C. App. 553, 691 S.E.2d 417 (2010) .....	13-14
<i>United States v. Sec. Indus. Bank</i> , 459 U.S. 70 (1982) .....	17
<i>U.S. Trust Co. of N.Y. v. New Jersey</i> , 431 U.S. 1, 52 L.Ed.2d 92 (1977) .....	14
Statutes:	
N.C. Gen. Stat. § 7A-31(c) .....	3, 10, 12
N.C. Gen. Stat. § 116-1 .....	3, 4
N.C. Gen. Stat. § 116-310 .....	5
N.C. Gen. Stat. § 116-311 .....	<i>passim</i>
N.C. Gen. Stat. § 116-313 .....	6, 15
N.C. Gen. Stat. § 116-143(a).....	4
Rules:	
N.C. R. App. P. 15 .....	7, 12
N.C. R. App. P. 21 .....	7
N.C. R. App. P. 28 .....	17
N.C. R. Civ. P. 12(b)(1) .....	6
N.C. R. Civ. P. 12(b)(2) .....	6
N.C. R. Civ. P. 12(b)(6) .....	6

SUPREME COURT OF NORTH CAROLINA

\*\*\*\*\*

DEENA DIECKHAUS, GINA )  
MCALLISTER, BRADY WAYNE )  
ALLEN, JACORIA STANLEY, )  
NICHOLAS SPOONEY and )  
VIVIAN HOOD, each individually )  
and on behalf of all others )  
similarly situated, )

From Orange County

Plaintiffs-Petitioners )

v. )

BOARD OF GOVERNORS OF )  
THE UNIVERSITY OF NORTH )  
CAROLINA )

Defendant-Respondent. )

\*\*\*\*\*

**DEFENDANT-RESPONDENT'S RESPONSE TO PETITION FOR**  
**WRIT OF CERTIORARI**

\*\*\*\*\*

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Pursuant to Rule 21(d) of the North Carolina Rules of Appellate Procedure, Defendant-Respondent Board of Governors of the University of North Carolina (“Defendant” or the “University of North Carolina”) responds to the Petition for Writ of Certiorari filed by Plaintiffs-Petitioners (“Plaintiffs”) on 18 April 2023. On 17 January 2023, the Court of Appeals issued its decision affirming the dismissal of Plaintiffs’ claims based upon the statutory immunity established by N.C. Gen. Stat. § 116-311. *Dieckhaus v. Bd. of Governors of the Univ. of N.C.*, \_\_\_ N.C. App. \_\_\_, 883 S.E.2d 106 (2023). Ninety days later, well outside the timeframe for filing a petition for discretionary review and with no mention of an explanation for the belated filing, Plaintiffs now ask this Court to review the panel’s decision.

Plaintiffs’ Petition should be denied. Plaintiffs did not file a petition for discretionary review within the time allowed by Rule 15(b) of the North Carolina Rules of Appellate Procedure. Plaintiffs also fail to demonstrate that they filed the Petition without unreasonable delay as required by Rule 21. Plaintiffs do not explain, or even address, why they were not able to timely file a petition for discretionary review in accordance with Rule 15 or why they waited close to two months after the Rule 15 deadline to file this Petition.

Plaintiffs also fail to include a meaningful statement of the reasons why the writ should issue. They do not address the standard for discretionary review enumerated in N.C. Gen. Stat. § 7A-31(c), arguing instead that they disagree with the panel's ruling regarding the constitutionality of N.C. Gen. Stat. § 116-311. Their arguments about why the ruling by the Court of Appeals was wrong are legally incorrect and, in any event, insufficient to support a review.<sup>1</sup>

For these reasons, Defendant requests that Plaintiffs' Petition be denied. In further opposition to Plaintiffs' Petition, Defendant submits as follows:

## **PROCEDURAL AND FACTUAL BACKGROUND**

### **I. Relevant Factual Allegations:**

At all relevant times, Plaintiffs were students, or parents of students, enrolled at one of the constituent institutions of The University of North Carolina. (Am. Compl. ¶¶ 17-29; R pp 51-52). The University of North Carolina is "a public, multi-campus university dedicated to the service of North Carolina and its people." N.C. Gen. Stat. § 116-1. The University of North Carolina encompasses "16 diverse constituent institutions and other

---

<sup>1</sup> Defendant presented other alternative bases for their position that the trial court properly granted the motion to dismiss. Those arguments further support allowing the panel decision to stand.

educational, research, and public service organizations” who share a common mission “to discover, create, transmit, and apply knowledge to address the needs of individuals and society.” *Id.* § 116-1(b).

North Carolina law requires the constituent institutions of The University of North Carolina to collect tuition and fees in amounts set by Defendant. *Id.* § 116-143(a). The tuition and fees are expressly tied to enrollment, assessed prior to each semester, and charged at the *beginning* of each semester. *Id.* (requiring that “each institution shall charge and collect from each student, at the beginning of each semester or quarter, tuition, fees, and an amount sufficient to pay other expenses for the term”).

On or about 23 March 2020, as a result of the sudden onset of COVID-19, North Carolina’s public universities transitioned to fully online instruction for the final weeks of the Spring 2020 semester. On 27 March 2020, North Carolina Governor Roy Cooper issued a mandatory stay-at-home order (Executive Order 121). Educational institutions were exempt from the Order but only to the extent necessary to facilitate remote learning, perform critical research, and engage in essential functions. Exec. Order 121 § 2(17), 34 N.C. Reg. 1903 (Mar. 27, 2020). Notably, while the universities transitioned to online instruction for the final weeks of the semester, students continued at all

times to receive instruction, remain enrolled in school, and receive full course credit for the entire semester.

Although instruction continued, Plaintiffs filed this suit in May 2020 seeking refunds for tuition, fees, and other expenses which they contend they are entitled to recover for the period of several weeks at the end of the semester during which exclusively online instruction was provided. (R pp 5-43). In their Amended Complaint, Plaintiffs asserted breach of contract and unjust enrichment claims against Defendant. (R pp 48-99).

On 25 June 2020, North Carolina's General Assembly enacted Article 37 of Chapter 116 of the North Carolina General Statutes ("An Act to Provide Immunity for Institutions of Higher Education for Claims Related to COVID-19 Closures for Spring 2020"). N.C. Gen. Stat. § 116-310 *et seq.* (the "Immunity Statute") became effective 1 July 2020, and granted universities in North Carolina, including Defendant's constituent institutions, statutory immunity from claims based on actions taken by the universities in the Spring 2020 semester related to COVID-19.

The Immunity Statute applies only to claims arising out of the Spring 2020 academic semester. N.C. Gen. Stat. § 116-311(a)(1). In enacting the statute, the General Assembly declared that: "[i]t is a matter of vital State concern affecting the public health, safety, and welfare that institutions of

higher education continue to be able to fulfill their educational missions during the COVID-19 pandemic without civil liability for any acts or omissions for which immunity is provided.” *Id.* § 116-313. Moreover, the Immunity Statute applies only where the university “offered remote learning options . . . that allowed students to complete the semester coursework.” *Id.* § 116-311(a).

## **II. Procedural History:**

Plaintiffs initiated this action on 22 May 2020. (R pp 5-43). In response to Defendant’s motion to dismiss, Plaintiffs filed an Amended Complaint on 10 December 2020. (R pp 48-99). Defendant thereafter filed a motion to dismiss Plaintiffs’ Amended Complaint pursuant to Rules 12(b)(1), (2), and (6) based upon sovereign immunity, statutory immunity, lack of jurisdiction, failure to state claims for relief, and other grounds. (R pp 100-04).

Plaintiffs did not, in their complaints or any other pleading, contest the constitutionality of the Immunity Statute. Rather, Plaintiffs first raised this issue at the hearing on Defendant’s motion to dismiss on 19 May 2021 (R p 109). On 17 June 2021, the trial court entered an order dismissing Plaintiffs’ claims. (R p 105). Plaintiffs filed a Notice of Appeal on 5 July 2021. (R p 107). On 17 January 2023, a panel of the Court of Appeals unanimously affirmed the dismissal of Plaintiffs’ unjust enrichment and breach of contract claims based upon sovereign immunity and the Immunity Statute, respectively. *Dieckhaus*

*v. Bd. of Governors of the Univ. of N.C.*, \_\_\_ N.C. App. \_\_\_, 883 S.E.2d 106, 122-28 (2023).

## **REASONS WHY WRIT SHOULD NOT ISSUE**

### **I. The Petition was not filed without unreasonable delay.**

The Court of Appeals issued its decision on 17 January 2023. Pursuant to N.C. R. App. P. 15(b), Plaintiffs were required to file a petition for discretionary review no later than 21 February 2023. Plaintiffs simply disregarded this deadline. Instead, almost two months later, on 18 April 2023, Plaintiffs filed the Petition for Writ of Certiorari. In their Petition, Plaintiffs do not explain their failure to file a timely petition for discretionary review. Plaintiffs similarly do not explain why they waited almost two months to file this Petition.

Rule 21 of the North Carolina Rules of Appellate Procedure discusses the issuance of a writ of certiorari when the right to file a petition for discretionary review has been lost for failure to take timely action. N.C. R. App. P. 21(a)(2). The rule specifically states that petitions of this nature must be filed “without unreasonable delay.” *Id.* 21(c). In determining whether to allow a discretionary petition, courts consider not only the length of the delay but also the *reason* for the delay. “The petition for writ of certiorari should demonstrate either diligence in attempting to prosecute an appeal or the lack of an

unreasonable delay in seeking certiorari review.” *In re Snelgrove*, 208 N.C. 670, 671, 182 S.E.2d 335, 336 (1935). In cases where no explanation is provided for the delay, North Carolina’s appellate courts routinely decline to issue writs of certiorari allowing further review. *See e.g. Matter of T.D.A.*, 249 N.C. App. 233, 719 S.E.2d 652 (2016); *In re L.R.*, 207 N.C. App. 264, 699 S.E.2d 479 (2010), *Helms v. Landry*, 201 N.C. App. 590, 689 S.E.2d 245 (2009).

In *State v. Cozart*, 260 N.C. App. 96, 101, 817 S.E. 2d 599, 602 (2018), for example, the court declined to issue a writ of certiorari based upon the defendant’s failure to provide a sufficient explanation for his failure to file a timely appeal. The court stressed that the defendant there had failed to file a proper appeal even though he “had full knowledge and notice of the proper procedure necessary to notice an appeal.” *Id.* In contrast, in *State v. Jones*, 269 N.C. App. 440, 443, 838 S.E.2d 686, 689 (2020), the defendant provided an explanation for his delay in filing a timely appeal which the court deemed sufficient to allow further review despite an untimely appeal. The court there explained “because Defendant evidently did not understand that he had a right to appeal from the violation, and it appears that his trial counsel did not explain this right to him,” the court would exercise its discretion to issue a writ.

Here, Plaintiffs offer *no* explanation for their delay of two months beyond the Rule 15(b) deadline in taking any action to obtain review by this Court.

Plaintiffs have been represented by the same counsel from the outset, and the deadlines for filing appeals and seeking review from this Court are clear. Had a sufficient explanation for Plaintiffs' delay existed, Plaintiffs would have provided it, as they were required to do.

“If this Court routinely allowed a writ of certiorari in every case in which the appellant failed to properly appeal, it would render meaningless the rules governing the time and manner of noticing appeals.” *Cozart*, 260 N.C. App. at 100, 817 S.E.2d at 602 (internal quotations and citations omitted); *see also State v. Ricks*, 378 N.C. 737, 741, 862 S.E.2d 835, 839 (2021) (holding “writ of certiorari is not intended as a substitute for a notice of appeal”). Plaintiffs' Petition fails to comply with Rule 21 and should be denied.

## **II. The Petition does not satisfy the criteria for discretionary review.**

Aside from Plaintiffs' failure to seek timely review, Plaintiffs have not explained the reasons this matter should be reviewed. “Certiorari is a discretionary writ, to be issued only for good and sufficient cause shown.” *State v. Grundler*, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959). This Court “is to review only those cases which have substantial general or legal importance or in which review is necessary to preserve the integrity of precedent established by

this Court.” *Peaseley v. Virginia Iron, Coal & Coke Co.*, 282 N.C. 585, 592, 194 S.E.2d 133, 139 (1973).

Had Plaintiffs filed a timely petition for discretionary review, discretionary review would have been granted only if: (1) the subject matter of the appeal had significant public interest; (2) the case involved legal principles of major significance to the jurisprudence of this State; or (3) the decision of the Court of Appeals appeared likely to conflict with decisions of this Court. N.C. Gen. Stat. § 7A-31(c). The same standard should apply here.

None of the criteria in § 7A-31 justifies further review, and Plaintiffs do not explain why further review is justified in this case.

**a) A conflict does not exist between the ruling below regarding the constitutionality of the Immunity Statute and decisions of this Court.**

In their Petition, Plaintiffs ask this Court to review only the constitutionality of one statute; they do not raise any issues of statutory construction or of the scope of the statute. No argument has been made that the Court of Appeals’ ruling that Plaintiffs did not meet their burden of establishing that the Immunity Statute is unconstitutional conflicts with decisions of this Court.

**b) The court's ruling below regarding the Immunity Statute does not impact a significant public interest.**

Similarly, Plaintiffs' appeal regarding the Immunity Statute does not present a matter of significant public interest. The Petition addresses only the Legislature's reaction to events in the Spring 2020 semester, at the very beginning of COVID-19. The Petition involves only the narrow question of whether the Immunity Statute protects the University in this specific case. And as the Court of Appeals noted below, Plaintiffs' counsel recognizes that this case is limited to its own particular facts and circumstances. He argued to the trial court that he did not "care whether the state and Lenoir-Rhyne or Gardner-Webb try to enforce this immunity on any other students that might run this. I'm concerned about the case that I've brought." *Dieckhaus*, \_\_\_ N.C. App. at \_\_\_, 883 S.E.2d at 124.

**c) The Court of Appeals' ruling regarding the Immunity Statute does not involve legal principles of major significance to the jurisprudence of this State.**

Further review of the court's ruling below is not necessary to protect the jurisprudence of this State. The court below correctly noted that: "The Supreme Court of the United States has long made clear the State remains free" as the General Assembly did here, "to create substantive defenses or

immunities for use in adjudication.” *Id.* at 127 (quoting *Logan v. Zimmerman Brush Co.*, 455 U.S. 222, 432 (1982)).

The panel discussed, in detail, the limited nature of the statutory immunity and how it was tailored for its specific legitimate purpose. The court correctly articulated that:

The immunity statute was a reasonable means of ensuring the quality of education because it allowed the Universities to focus on how to best deliver education online rather than trying to continue in person and expending necessary resources on all the public health measures necessary to achieve that prospect safely. With the benefit of hindsight, there are many different opinions on the effectiveness or wisdom of closures of educational institutions as a response to the COVID-19 pandemic, but this Court need not attempt to resolve these questions as they are not presented in this case. The General Assembly limited the application of N.C. Gen. § 116-311 to the spring semester of 2020 only, and this was the only semester during which the Universities had to deal with an immediate response to the COVID-19 pandemic for students who were already enrolled and on campus with the Governor’s Emergency Directives were issued.

*Id.* at 125-26.

Plaintiffs’ Petition fails to satisfy any of the criteria set forth in N.C. R. App. P. 15 and N.C. Gen. Stat. § 7A-31(c) for discretionary review. Had they filed a petition for discretionary review on a timely basis, it would have been

denied. Plaintiffs have not established any good and sufficient cause for this Court to issue a writ. The writ should be denied.

**d) Plaintiffs' argument that the panel erred in affirming the dismissal of their case based upon the Immunity Statute is without merit and does not justify further review by this Court.**

At most, Plaintiffs argue in their Petition that they are entitled to further review because, in their opinion, the Court of Appeals erred when it rejected Plaintiffs' argument that the Immunity Statute is unconstitutional. Plaintiffs' claim of error should not serve as a basis for granting the Petition.

Even if it were grounds for review, Plaintiffs' argument that the Court of Appeals erred is without merit. The Court of Appeals considered and properly rejected Plaintiffs' arguments about the Immunity Statute. In so doing, the Court of Appeals correctly applied a *de novo* standard and determined that Plaintiffs failed to meet their burden to establish beyond a reasonable doubt that the Immunity Statute was unconstitutional. *Dieckhaus*, \_\_\_ N.C. App. at \_\_\_, 883 S.E. 2d at 122, 128. "In challenging the constitutionality of a statute, *the burden of proof is on the challenger*, and the statute must be upheld unless its unconstitutionality clearly, positively, and unmistakably appears beyond a reasonable doubt or it cannot be upheld on any reasonable ground." *State v. Sullivan*, 202 N.C. App. 553, 555, 691 S.E.2d 417,

419 (2010) (cleaned up); *Baxter v. Danny Nicholson, Inc.*, 363 N.C. 829, 832, 690 S.E.2d 265, 267 (2010) (“[E]very presumption favors the validity of a statute. It will not be declared invalid unless its unconstitutionality be determined beyond reasonable doubt.”).

The Court of Appeals properly rejected Plaintiffs’ constitutional arguments. First, as to Plaintiffs’ claim that the Immunity Statute violates the Contract Clause, U.S. Const. art. I, sec. 10, the court below, focusing on the third prong of the test set forth in *Bailey v. State*, 348 N.C. 130, 140-41, 500 S.E.2d 54, 60 (1998)<sup>2</sup>, correctly determined that any alleged impairment of any purported contractual right<sup>3</sup> was reasonable and necessary to serve an important public purpose. *Dieckhaus*, \_\_\_ N.C. App. at \_\_\_, 883 S.E. 2d at 126. The Immunity Statute expressly states the important public purpose the General Assembly intended to address; the statute explains that “[i]t is a matter of vital State concern affecting the public health, safety, and welfare

---

<sup>2</sup> “In determining whether a contractual right has been unconstitutionally impaired, we are guided by the three-part test set forth in *U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 52 L.Ed.2d 92 (1977). The *U.S. Trust* test requires a court to ascertain: (1) whether a contractual obligation is present, (2) whether the state's actions impaired that contract, and (3) whether the impairment was reasonable and necessary to serve an important public purpose.” *Id.* (cleaned up).

<sup>3</sup> Defendant denies that Plaintiffs have a contractual right to refunds for fees and tuition.

that institutions of higher education continue to be able to fulfill their educational missions during the COVID-19 pandemic without civil liability for any acts or omissions for which immunity is provided.” N.C. Gen. Stat. § 116-313. Moreover, the means chosen—providing short-term statutory immunity from civil liability so long as the institution of higher education’s act or omission was reasonably related to protecting public health, safety, and welfare and the institution “offered remote learning options. . .that allowed students to complete the semester coursework”—was reasonable and necessary to achieve that important public purpose. N.C. Gen. Stat. § 116-311(a)(1)-(4).

Second, as for Plaintiffs’ equal protection challenge, this Court has held that similar statutes must be upheld if “*a plausible policy reason*” exists for the regulation or if the regulation’s chosen solution to a problem “is at least debatable.” *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 181-82, 594 S.E.2d 1, 15-16 (2004) (emphasis added) (citations omitted); *see also Standley v. Town of Woodfin*, 362 N.C. 328, 332, 661 S.E.2d 728, 731 (2008). As explained above, the General Assembly provided a clear public purpose for the Immunity Statute in the statutory scheme itself, and there can be no debate that the purpose and means chosen are rationally related to that purpose.

Third, Plaintiffs' due process challenge also fails. "[S]tatutes may be invalidated on due process grounds only under the most egregious of circumstances." *Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1345-46 (Fed. Cir. 2001). As with Plaintiffs' equal protection challenge, the rational basis test applies. "For a statute to be within the limits set by the federal due process clause . . . all that is required is that the statute serve a legitimate purpose of state government and be rationally related to the achievement of that purpose." *Reidy v. Whitehart Ass'n, Inc.*, 185 N.C. App. 76, 83, 648 S.E.2d 265, 270 (2007). In its decision, the panel below again stressed that the statute granted immunity "to allow the Universities to fulfill their academic missions." *Dieckhaus*, \_\_\_ N.C. App. at \_\_\_, 883 S.E.2d at 127. The court correctly noted further that "there is a rational relationship between the grant of immunity and that goal because immunity freed up the Universities to focus on how to best deliver education online rather than trying to continue in person." *Id.* at \_\_\_, 833 S.E.2d at 128.

Fourth, Plaintiffs have presented no persuasive argument as to how the Immunity Statute could support a finding that the Legislature violated principles of separation of powers. As the court below stated:

Plaintiffs argue § 116-311 unconstitutionally "intrudes upon the separation of powers because it is a law that was passed in response to specific litigation

already pending in the courts with the purposes of directing the courts on how to adjudicate the pending actions.” Plaintiffs provide no other argument, law, or citations to support that argument; the entire argument is that sentence.

*Dieckhaus*, \_\_\_ N.C. App. at \_\_\_, 883 S.E.2d at 128. Plaintiffs thus abandoned this argument below. *See* N.C. R. App. P. 28(b)(6) (“Issues not presented in a party’s brief, or in support of which no reason or argument is stated, will be taken as abandoned.”).

Last, regarding Plaintiffs’ claim that the statute constitutes an unconstitutional taking without just compensation under the Fifth Amendment to the United States Constitution, Plaintiffs presented no authority to support this argument below, and present none in their Petition. *Dieckhaus*, 883 S.E.2d at 128. Under federal law, which governs takings claims under the Fifth Amendment, contractual rights (on which Plaintiffs rely but which Defendant denies exist) are not “property.” *Peick v. Pension Ben. Guar. Corp.*, 724 F.2d 1247, 1276 (7th Cir. 1983) (“This dichotomy between ‘property rights,’ which are protected by the takings clause, and ‘contract rights,’ which are not, was recently reaffirmed by the Supreme Court.” (citing *United States v. Sec. Indus. Bank*, 459 U.S. 70 (1982))).

Accordingly, in addition to being untimely, Plaintiffs’ Petition fails to justify further review by this Court.

**CONCLUSION**

For the reasons above, Defendant-Respondent respectfully requests that the Petition for Writ of Certiorari filed by Plaintiffs-Petitioners be denied.

This the 23<sup>rd</sup> day of May, 2023.

JOSHUA H. STEIN  
ATTORNEY GENERAL

/s/ Kari R. Johnson  
Special Deputy Attorney General  
North Carolina Department of Justice  
Post Office Box 629  
Raleigh, North Carolina 27602  
Direct Phone: 919-716-2923  
State Bar No. 16033  
E-mail: [kjohnson@ncdoj.gov](mailto:kjohnson@ncdoj.gov)

Attorneys for Defendant-Respondent

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

JOSHUA H. STEIN  
ATTORNEY GENERAL

/s/ Laura McHenry  
Special Deputy Attorney General  
N.C. Department of Justice  
Post Office Box 629  
Raleigh, North Carolina 27602-0629  
North Carolina State Bar No. 45005  
Telephone: (919) 716-6532  
E-mail: [LMcHenry@ncdoj.gov](mailto:LMcHenry@ncdoj.gov)

Brooks, Pierce, McLendon,  
Humphrey & Leonard, LLP

/s/ Jim W. Phillips, Jr.  
State Bar. No. 12516  
E-mail: Jphillips@brookspierce.com

/s/ Jennifer K. Van Zant  
State Bar No. 21280  
E-mail: jvanzant@brookspierce.com  
2000 Renaissance Plaza  
230 North Elm Street  
Greensboro, NC 27401  
T: 336-373-8850  
F: 336-232-9132  
Attorneys for Defendant-Respondent

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I have this day served the foregoing Response to Petition for Writ of Certiorari upon Plaintiffs by electronic mail, addressed to their ATTORNEYS OF RECORD as follows:

Blake G. Abbott  
Poullin Willey Anastopoulo, LLC  
E-mail: [blake@akimlawfirm.com](mailto:blake@akimlawfirm.com)

This the 23<sup>rd</sup> day of May, 2023.

Electronically Submitted  
Kari R. Johnson  
Special Deputy Attorney General  
North Carolina Department of Justice  
Post Office Box 629  
Raleigh, North Carolina 27602  
Direct Phone: 919-716-2923  
State Bar No. 16033  
E-mail: [kjohnson@ncdoj.gov](mailto:kjohnson@ncdoj.gov)  
Attorneys for Defendant-Respondent