No. 318P23

No. _____ JUDICIAL DISTRICT 11A

SUPREME COURT OF NORTH CAROLINA

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HARNETT COUNTY BOARD OF EDUCATION, Petitioner-Appellant, v. RETIREMENT SYSTEMS DIVISION, DEPARTMENT OF STATE TREASURER, Respondent-Appellee.	)	From Harnett County COA 22-750

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PETITION FOR DISCRETIONARY REVIEW
UNDER N.C. GEN. STAT. § 7A-31(C)

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TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Under N.C. Gen. Stat. § 7A-31(c) and Rule 15(a) of the North Carolina Rules of Appellate Procedure, Petitioner Harnett County Board of Education ("Board") respectfully petitions this Court to certify for discretionary review the judgment of the Court of Appeals filed on 17

October 2023 in this case, on the grounds that the subject matter of this case involves legal principles of major significance to the jurisprudence of this State and raises issues of significant public interest.

INTRODUCTION

In April of 2020, this Court held that the Retirement System was required to engage in the rulemaking provisions of the Administrative Procedure Act ("APA") in order to adopt a "cap factor," a critical component of the statutory formula used by the Retirement System in determining whether an employer must pay an "additional contribution" to fund a state employee's retirement pursuant to N.C. Gen. Stat. § 135-5(a3). *Cabarrus Cnty. Bd. of Educ. v. Dep't of State Treasurer, Ret. Sys. Div.*, 374 N.C. 3, 21, 839 S.E.2d 814, 826 (2020). In so holding, this Court recognized that the adoption of the cap factor is not simply a "ministerial act" but, rather, a "substantive decision" of great "magnitude." *Id.* at 21-22, 839 S.E.2d at 826. Accordingly, this Court held that the cap factors previously set by the Retirement System without engaging in the rulemaking process were invalid.[1] *Id.* at 3, 839 S.E.2d at 814.

[1] Subsequently, the General Assembly amended the statute so that future cap-factor calculation would not be subject to the rule-making provisions of the APA. *See* 2021 N.C. Sess. Laws ch. 70 § 3.2.

If left standing, the Court of Appeals' decision below will render this Court's Decision in *Cabarrus County* essentially meaningless. The Court of Appeals' opinion rubber stamps a perfunctory approach to rulemaking that fails to substantially comply with the APA. Even more troubling, the opinion below permits the Retirement System to correct its error of assessing employers with an invalid cap factor by simply retroactively applying a later-adopted cap factor to the same assessment. This retroactive application of the cap factor conflicts with North Carolina case law and interferes with the vested rights and liabilities of employers.

This appeal involves legal principles of major significance to the jurisprudence of this State for two reasons: First, it implicates the minimum requirements for rulemaking under the APA, which applies to all administrative agencies adopting regulations throughout our State. Second, it undermines the long-standing presumption against retroactive application of statutes and regulations. Finally, this appeal has significant public interest because of the disproportionate burden imposed on public school systems by the contribution-based benefit cap legislation at issue.

For these reasons, this case merits discretionary review by this Court.

STATEMENT OF FACTS

In July of 2014, the North Carolina General Assembly enacted the "Fiscal Integrity Act of 2014," S.L. 2014-88. This law established a "contribution-based benefit cap" ("CBBC") on state employee pensions paid by the Retirement System. Specifically, if the pension owed to the retiree by law exceeds the benefit cap, that retiree's last employer is required to pay an "additional contribution" to "restore the member's retirement allowance to the pre-cap amount." N.C.G.S. § 135-8(f)(2)(f). The Retirement System is required to adopt a "contribution-based benefit cap factor" as part of a statutory formula for determining whether an employer must pay an "additional contribution" to fund an employee's retirement. N.C.G.S. § 135-5(a3).

In October of 2014, the Retirement System's Board of Trustees adopted a cap factor of 4.8 and adopted a new cap factor of 4.5 in October of 2015. In April of 2017, the Retirement System determined that the Board owed $197,805.61 to fund the retirement of its former superintendent, who had retired in 2016, and sent an invoice to the Board

demanding payment for that amount. The Board paid the assessment in full.

Meanwhile, four school boards challenged the cap factors, arguing that the Retirement System was required to adhere to the rulemaking requirements under the APA in order to validly adopt a cap factor. The superior court, Court of Appeals, and this Court ultimately agreed with this argument, holding that the cap factors adopted in 2014 and 2015 were invalid because they were not established through rulemaking. *Cabarrus Cnty. Bd. of Educ. v. Dep't of State Treasurer, Ret. Sys. Div.*, 374 N.C. 3 (2020). The Board subsequently sought a refund of the assessment from the Retirement System, and the Superior Court, Wake County, ordered that the Retirement System issue a refund to the Board pursuant to this Court's ruling in *Cabarrus County* that the cap factor used to calculate the assessment was invalid.

Nonetheless, during litigation of the *Cabarrus County* case, the Retirement System had initiated the rulemaking process and in 2018 adopted a new cap factor. The Retirement System then, in December of 2020, used this newly-adopted cap factor to retroactively levy another assessment on the Board for $197,805.61, more three years after the

employee had retired. The Board requested that the Retirement System withdraw the assessment, arguing that it could not retroactively apply a newly-adopted cap factor rule to issue an assessment for a retirement that occurred more than three years ago when the cap factor in effect at the time of retirement had been declared invalid. In February of 2021, the Retirement System issued a final agency decision denying this request.

The Board timely filed a Petition for a Contested Case Hearing in the Office of Administrative Hearings, arguing (1) the Retirement System failed to comply with the requirements of the APA in adopting the new cap factor, and (2) the cap factor was improperly applied retroactively against the Board. Following briefing and cross motions for summary judgment, the ALJ issued a Final Decision granting summary judgment to the Retirement System. The Board then filed a Petition for Judicial Review of the Final Decision with the Superior Court, Harnett County. That court affirmed the ALJ's Final Decision, concluding that there were no issues of material fact and that the Retirement System was entitled to judgment as a matter of law.

The Board timely filed a Notice of Appeal with the Court of Appeals. Following briefing and oral argument, that court held that the cap factor was adopted in substantial compliance with the APA and that the cap factor was not retroactively applied against the Board.

REASONS WHY CERTIFICATION SHOULD ISSUE

The Court of Appeals erroneously held that the Retirement System substantially complied with the APA in adopting the cap factor at issue in this case and that the cap factor adopted in 2018 was not unlawfully retroactively applied to the Board. Discretionary review should be allowed because this case implicates significant legal principles, including the minimum requirements for rulemaking under the APA, which apply universally to all administrative agencies adopting regulations throughout our State, and the long-standing presumption against retroactive application of statutes and regulations. The Court of Appeals decision also conflicts with this Court's well-settled precedent. Finally, the highly disproportionate burden imposed on our public schools by anti-pension spiking legislation is a matter of significant public interest. Discretionary review should therefore be allowed to address matters crucial to the public interest, clarify legal principles of

major significance, and prevent the Court of Appeals' erroneous interpretations of the law from infecting our lower courts going forward.

I. This Case Implicates Indispensable Minimum Rulemaking Procedures Applicable to all Administrative Agencies Promulgating Regulations Throughout the State.

The purpose of the APA is to provide "a uniform system of administrative rule making and adjudicatory procedures" applicable to all administrative agencies. N.C.G.S. § 150B-1(a) (2021). Importantly here, "[a] rule is not valid unless it is adopted in substantial compliance with [Chapter 150B]." N.C.G.S. § 150B-18. "The necessary procedures for substantial compliance are outlined in G.S. § 150B-21.2[.]" *Jackson v. N.C. Dep't of Hum. Res.*, 131 N.C. App. 179, 184 (1998). This statute provides, *inter alia*, that prior to adopting a permanent rule the agency must (1), "[w]hen required by G.S. 150B-21.4, prepare and obtain a fiscal note for the proposed rule" and (2) "comply with the requirements of G.S. 150B-19.1."

Requirement (1) mandates that, for any rule that will have a substantial economic impact, the agency must prepare a fiscal note and analyze the economic impact of the rule by "[d]escrib[ing] the persons who would be subject to the rule and the type of expenditures these

persons would be required to make." N.C.G.S. § 150B-21.4 (b1)(3). With respect to requirement (2), "[a]n agency shall seek to reduce the burden upon those persons or entities who must comply with the rule" and "shall consider at least two alternatives" to any proposed rule that will have a substantial economic impact. N.C.G.S. § 150B-19.1(a)(2), (f). The Retirement System followed none of these required procedures in adopting a cap factor.

A. The Court of Appeals decision absolved the Retirement System of its obligation to analyze the substantial economic impact of a proposed rule under the APA.

If a proposed rule will have a "substantial economic impact," the APA requires the agency to conduct an analysis of the rule's impact that, among other things, "describe[s] the persons who would be subject to the proposed rule and the type of expenditures these persons would be required to make." N.C.G.S. § 150B-21.4(b1)(3). Substantial economic impact is defined as an "aggregate financial impact on all persons affected of at least one million dollars in a 12-month period." N.C.G.S. § 150B-21.4(b1). According to the Retirement System's own Fiscal Impact Analysis, by the end of 2016 alone, "school systems had incurred $2.8 million . . . or 41% of all [contribution-based benefit cap] liabilities, *the*

largest share among agencies affected by the legislation." (R. 29 (emphasis added)). Thus, the Retirement System cannot, and did not, dispute that the proposed cap factor rule would have a substantial economic impact. Nonetheless, the Retirement System did not conduct the statutorily-required analysis and therefore did not substantially comply with the APA.

The Court of Appeals held that it was sufficient for the Retirement System to describe the impact of the rule on employers generally, including the types of employers that would be affected by the rule. This contravenes the plain language of the statute. The APA does not allow an agency to simply note the projected cumulative cost to all employers subject to the rule. Rather, the agency must "describe the *persons* who would be subject to the proposed rule and the type of expenditures *these persons* would be required to make." N.C.G.S. § 150B-21.4(b1)(3) (emphasis added). The Retirement System failed to analyze the impact of the proposed rule on *any* individual employer, much less the impact on individual school boards who are most affected by the proposed rule. [2]

[2] The Court of Appeals also noted that the Retirement System included the cumulative cost to all school boards in its fiscal note. However, the statute clearly requires some level of individual analysis, and the Retirement System utterly failed to analyze the impact of the rule on any individual person or entity.

If the Court of Appeals' ruling stands, agencies will be permitted to forego the substantive analysis required under the APA for financially burdensome rules and instead simply note that the rule will be expensive for employers generally. If this were the intent of the General Assembly, it is difficult to discern why it would require any analysis at all. This Court should grant review to clarify the minimum requirements applicable to rules that will have a substantial economic impact.

B. The Court of Appeals decision allows the Retirement System, and other State agencies, to ignore the statutory obligation to reduce the burden on affected parties and consider less onerous alternatives.

The APA also mandates that agencies proposing a rule "shall seek to reduce the burden upon those persons or entities who must comply with the rule" and "shall consider at least two alternatives" to any rule that will have a substantial economic impact. N.C.G.S. § 150B-19.1(a)(2), (f). Here, the Retirement System neither sought to reduce the burden on school boards, nor considered any individual alternatives before adopting the cap factor rule.

As explained during public hearing and in written comments, local school boards depend entirely on state funds and local appropriations from boards of county commissioners. In order to afford the large

assessments levied by the Retirement System, local school boards have to allocate funding away from education and instead send it to the Retirement System. There is no evidence in the record that the Retirement System considered this onerous burden on our public schools at all, much less sought to reduce it.

With respect to alternatives, the Retirement System relied on its actuary's analysis from October of 2015 to argue that it considered individual alternatives to the proposed rule in 2018. This Court has already determined that mere ratification of an actuary's analysis, especially one from three years ago, is insufficient under the APA. *Cabarrus Cnty. Bd. of Educ. v. Dep't of State Treas., Ret. Sys. Div.*, 374 N.C. 3, 21 (2020) ("A careful analysis of the relevant statutory provisions makes it clear that the adoption of a cap factor is not a ministerial act in which the Board of Trustee's does nothing more than ratify the actuary's recommendation."). Rather, this Court noted "the importance of the additional analytical steps" required under the APA, particularly for rules "of the apparent magnitude of this one." *Id.* at 22.

Despite this Court's admonition, the Court of Appeals approved of the Retirement System's lackadaisical approach to its obligations under

the APA. *Harnett Cnty. Bd. of Educ. v. Ret. Sys. Div.*, 2023 WL 6814791 at *7 (concluding that the Retirement System substantially complied with the APA by relying on "the same actuarial information and presentations from consultants used to determine the original 2015 cap-factor prior to the Cabarrus County litigation"). Moreover, even in the materials used to determine the 2015 cap factor, there is no discussion of any of the burdens imposed on school systems by the proposed rule or ways to reduce those burdens, either in the actuary's report, presentations to the Board of Trustees, or otherwise.

Ultimately, the Court of Appeals allowed the Retirement System to simply recycle outdated reports and recommendations from 2015 in adopting the 2018 cap factor. There is no evidence in the record that the Retirement System considered the substantial economic burdens imposed on public schools, methods to reduce those burdens, or individual alternatives. If this Court does not grant review, agencies will be authorized to ignore these minimum requirements of the APA.

II. The Court of Appeals Decision Undermines the Long-Standing Presumption Against Retroactive Application of Statutes and Regulations.

North Carolina courts have "maintain[ed] a longstanding presumption against retroactive application of legislation." *McKiver v. Murphy-Brown, LLC,* 980 F.3d 937, 955 (4th Cir. 2020) (citing *Vanderbilt v. Atl. Coast Line R.R. Co.*, 188 N.C. 568 (1924)). "The application of a statute is deemed retroactive 'when its operative effect is to alter the legal consequences of conduct or transactions completed prior to its enactment.'" *Fogleman v. D&J Equip. Rental, Inc.*, 111 N.C. App. 228, 231-32, 431 S.E.2d 849, 851 (1993) (quoting *Gardner v. Gardner*, 300 N.C. 715, 718, 268 S.E.2d 468, 471 (1980)). Because of the "strong" presumption against retroactive application, "[a] statute will not be construed to have retroactive effect unless that intent is clearly expressed or arises by necessary implication from its terms." *In re Mitchell's Will*, 285 N.C. 77, 79-80, (1974).

A. The Court of Appeals decision calls into question the application of retroactivity analysis and conflicts with prior decisions of this Court.

The decision of the Court of Appeals acknowledges the presumption against retroactive application yet nevertheless holds that the application of a cap factor more than three years after the employee's retirement in this case is not an impermissible retroactive application

because the statute states that it applies to "every service retirement allowance . . . for members who retire on or after January 1, 2015." N.C. Gen. Stat. § 135-5(a3). *Harnett Cnty. Bd. of Educ. v. Ret. Sys. Div.*, 2023 WL 6814791 at *19. This conclusion reflects the Court of Appeals' misunderstanding of the role of the cap factor, which determines not just the amount of an assessment but *whether a particular retirement is even subject to* an "additional contribution" under the statute. In the Court of Appeals' view, because the employee at issue retired in 2017, at a time when the Board knew the employee's retirement *could theoretically* be subject to the contribution-based benefit statute, the Retirement System's *reassessment* of the Board three years later in 2020 was not impermissibly retroactive, even though there was no valid cap factor in place in 2017 at the time the employee retired. The Court's reasoning here completely ignores the fact that the cap factor is inextricable from a determination of liability under the statute. In the absence of a valid cap factor in 2017, the pension cap calculation simply could not be performed.

The Court of Appeals reasoning also contradicts prior case law requiring that a retroactive application be "clearly expressed." *In re Mitchell's Will*, 285 N.C. at 79-80. While the statute indicates it applies

to retirements after 2015, nothing in the statute clearly expresses that cap factors may be applied retroactively to calculate whether an assessment is owed and the amount of an assessment. The General Assembly is always presumed [to] . . . act[] with full knowledge of prior and existing law," *Mitchell v. Boswell*, 274 N.C. App. 174, 181, 851 S.E.2d 646, 652 (2020)—a presumption that "includes the common law," *Dickson v. Rucho*, 366 N.C. 332, 341, 737 S.E.2d 362, 369 (2013), and therefore the presumption against retroactive application of statutes and regulations. Contrary to prior case law and the equitable concerns that are inherent in the presumption against retroactivity, the Court of Appeals simply assumes that the cap factor can be applied retroactively because the statute as a whole applies to retirement after 2015.

This conclusion is inconsistent with long-standing principles regarding retroactive applications of statues and regulations. *See McKiver*, 980 F.3d at 955 (citing *Vanderbilt*, 188 N.C. 568) (holding that courts should not "give a statute retroactive construction 'unless the words used are so clear, strong and imperative that no other meaning can be annexed to them or unless the intention of the Legislature cannot be otherwise satisfied.'"); *see also Fogleman*, 111 N.C. App. at 231, 431

S.E.2d at 851 (holding that a statute will be construed to apply prospectively "unless it is clear that the legislature intended that the law be applied retroactively.").

Finally, when the General Assembly wishes to do so, it knows how to draft language to provide for the retroactive application of provisions of pension cap legislation. *See* S.L. 2021-72, s. 2.1(d) ("This section is effective when this act becomes law and expires July 1, 2022. This section applies retroactively to retirements occurring on or after January 1, 2019."). Yet no such provision permitting retroactive application of the cap factor in the CBBC calculation is contained in N.C. Gen. Stat. § 135-5(a3).

B. The Court of Appeals failed to acknowledge the fact that retroactive application of the cap factor interfered with the Board's vested rights and liabilities, contrary to prior case law and long-standing principles.

In considering whether retroactive application of a statute is permissible, "[t]he proper question" is whether such application "will interfere with rights which had vested or liabilities which had accrued at the time [the statute] took effect." *State ex rel. Lee v. Penland-Bailey Co.*, 50 N.C. App. 498, 503, 274 S.E.2d 348, 352 (1981). The Court of Appeals concluded that the Board had no liability and no vested rights in 2017

because "[n]o liability accrued until the Retirement System—applying a valid cap factor—calculated and invoiced the additional contribution owed as required under the statute." *Harnett Cnty. Bd. of Educ. v. Ret. Sys. Div.*, 2023 WL 6814791 at *20. By this logic, all enrolled employers with employees retiring after 2015 are on notice of theoretical potential liability under the CBBC statute, and the Retirement System is permitted—at any later date when it deems ready to set a new cap factor—to assess an employer for a retirement that happened years prior. This result flouts principles of fundamental fairness and should not be the law.

By its very definition, applying a later-adopted cap factor to retroactively impose liability on an employer in this way alters the employer's right not to pay an additional contribution for a particular retirement. *See, e.g., Wood v. J. P. Stevens & Co.*, 297 N.C. 636, 650, 256 S.E.2d 692, 701 (1979) (noting that once an employer's liability accrued by virtue of an employee's "disablement," the law applied should be the law in effect at the time of the disablement, and a newly passed statute could not be applied to an earlier disablement); *Bolick v. Am. Barmag Corp.*, 306 N.C. 364, 371, 293 S.E.2d 415, 420 (1982) ("When a statute

would have the effect of destroying a vested right if it were applied retroactively, it will be viewed as operating prospectively.").

Here, prior to 21 March 2019, there was no lawful rule setting the cap factor, and thus no valid mechanism for the Retirement System to calculate the CBBC for retirements occurred on or after January 1, 2015. Because of this, although the pension cap statute provided notice that employers could theoretically be responsible for additional contributions under the burden-shifting scheme of the statute, no specific employer—including the Board—could have actual notice of either the existence or the extent of their individual liability. Only in 2018, after the Retirement System properly adopted a cap factor rule through formal rulemaking as required by this Court, could it conduct the CBBC analysis called for by the pension cap statute. As a result, the Retirement System's application of the cap factor rule in 2020 to the 2016 retirement at issue in this case "interfere[d] with . . . liabilities which had accrued at the time [the rule] took effect." *Penland-Bailey Co.*, 50 N.C. App. at 503, 274 S.E.2d at 352.

The presumption against retroactive application of statutes reflects inherent equity issues that are important to the legal jurisprudence of this state. Given the potential implications of the Court of Appeals

decision on retroactivity analysis going forward, this Court should grant review to clarify the level of specificity required for a statute to apply retroactively and when retroactive application interferes with a vested right or liability.

III. The Disproportionate Financial Burden Imposed on Public Schools by Anti-Pension Spiking Legislation is a Matter of Significant Public Interest.

One of the most important functions of our State government is to provide citizens with a public education. N.C. Const. Art. I, Sec. 15 ("The people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right."). Accordingly, legal issues affecting the public school system deserve thorough and careful consideration by our courts. In this case, millions of dollars otherwise devoted to public education hang in the balance. According to the Retirement System's own Fiscal Impact Analysis, by the end of 2016 alone, "schools systems had incurred $2.8 million . . . or 41% of all [contribution-based benefit cap] liabilities, *the largest share among agencies affected by the legislation*." (R. 29 (emphasis added)).

Anti-pension spiking legislation requires our public school boards to take precious resources devoted to providing an education for North

Carolina students and instead use them to shore up the balance sheet of the Retirement System. While this may seem an ordinary, albeit unfortunate, feature of government affairs, the impact on the everyday citizen's interest in public education is nothing short of extraordinary. Indeed, the impact of this legislation perhaps hits hardest in our rural communities with more limited resources, such as Harnett County. Due to the significant financial impact of this litigation on public schools in our State, the public deserves reasoned and careful consideration by this Court of the issues presented in this case.

ISSUES TO BE BRIEFED

In the event that the Court allows this Petition for Discretionary Review, Petitioner intends to present the following issues:

1. Whether the Court of Appeals erred in holding that the Retirement System adopted a cap factor in substantial compliance with the APA.
2. Whether the Court of Appeals erred in holding that the cap factor was not impermissibly retroactively applied to the Board.

CONCLUSION

For the reasons set forth above, Petitioner respectfully requests that this Court allow discretionary review of its appeal.

RESPECTFULLY SUBMITTED, this 21st day of November 2023.

THARRINGTON SMITH, L.L.P.

/s/ Patricia R. Robinson
Patricia R. Robinson
N.C. State Bar No. 50960
150 Fayetteville Street, Suite 1900
Post Office Box 1151
Raleigh, North Carolina 27602-1151
Telephone: (919) 821-4711
Facsimile: (919) 829-1583
probinson@tharringtonsmith.com
Attorneys for Petitioner-Appellant

I certify that the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

THARRINGTON SMITH, L.L.P.

/s/ Joshua E. Renz
Joshua E. Renz
N.C. State Bar No. 57536
150 Fayetteville Street, Suite 1900
Post Office Box 1151
Raleigh, North Carolina 27602-1151
Telephone: (919) 821-4711

Facsimile: (919) 829-1583
jrenz@tharringtonsmith.com
Attorneys for Petitioner-Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **PETITION FOR DISCRETIONARY REVIEW** was served on the Respondent-Appellee in this action by email and by placing it in the U.S. mail, addressed to:

Ryan Y. Park
Solicitor General
Olga E. Vysotskaya de Brito
Special Deputy Attorney General
North Carolina Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602
Email:
rpark@ncdoj.gov
ovysotskaya@ncdoj.gov
Attorneys for Respondent-Appellee

This this the 21st day of November 2023.

THARRINGTON SMITH, L.L.P.

/s/ Patricia R. Robinson
Patricia R. Robinson
N.C. State Bar No. 50960
Joshua E. Renz
N.C. State Bar No. 57536
150 Fayetteville Street, Suite 1900
Post Office Box 1151
Raleigh, North Carolina 27602-1151
Telephone: (919) 821-4711
Facsimile: (919) 829-1583

Email:
probinson@tharringtonsmith.com
jrenz@tharringtonsmith.com
Attorneys for Petitioner-Appellant