No. 407A21-1 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

QUAD GRAPHICS, INC., Petitioner-Appellee, v. NORTH CAROLINA DEPARTMENT OF REVENUE, Respondent-Appellant.	)	From Wake County No. 20 CVS 7449

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BRIEF OF AMICUS CURIAE NORTH CAROLINA CHAMBER LEGAL INSTITUTE

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BRIEF OF AMICUS CURIAE
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SUMMARY[1]

This case hinges on whether this Court should disregard the United States Supreme Court's decision in *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327 (1944), as the Department of Revenue (the "Department") requests. *Dilworth,* as the Business Court concluded, is controlling and remains good law "[a]bsent contrary authority from the United States Supreme Court." *Quad Graphics, Inc. v. N.C. Dep't of Revenue*, No. 20 CVS 7449, 2021 WL 2584282, at *15 (N.C. Super. Ct. June 23, 2021). The

[1] No person or entity, other than the North Carolina Chamber Legal Institute, its members and its counsel, either directly or indirectly wrote this brief or contributed money for its preparation.

Department nevertheless urges this Court to treat *Dilworth* as obsolete and nonbinding contrary to express instruction from the United States Supreme Court.

For over thirty years, the United States Supreme Court has repeatedly directed the federal and state courts to respect and apply controlling Supreme Court precedent no matter how attenuated those precedents may appear to be as a result of later doctrinal developments.

The North Carolina Chamber Legal Institute (the "Chamber") encourages this Court to follow the Supreme Court's directive. Ignoring direct instructions from the Supreme Court would threaten the stable and orderly legal system upon which the prosperity of the State and its citizens depend. The Chamber finds it troubling that the Department would advocate such a course of action. The Department's recommendation is more troubling when considered in the light of several other recent actions by the Department that ignore legal and constitutional restraints on its power. The Chamber suggests this case is an appropriate opportunity for this Court to restate the importance to our constitutional arrangements of honoring such restraints.

ARGUMENT

I. THE DEPARTMENT ASKS THIS COURT TO DISREGARD GOVERNING SUPREME COURT PRECEDENT

The Department would have this Court disregard *Dilworth* as obsolete. According to the Department, *Dilworth* is no longer good law, because the "formalism" on which its approach to the Commerce Clause is said to rest has fallen out of jurisprudential fashion. The Department asserts that *Dilworth* formalism "has long since been abandoned" (Department's New Brief at 2); that "*Dilworth* is no longer good law" (*id.* at 17); that *Dilworth* "was premised on an arcane approach," is "a dead letter," has "long been repudiated" (*id.* at 32); and is a "zombie precedent" (*id.* at 33).

Likewise, the Amici States assert that *Dilworth* formalism "has long been rejected." Amici States' Brief at 3. Amicus Multistate Tax Commission ("MTC") asserts that *Dilworth* is "irrelevant" and "discredited." MTC Brief at 11, 18.

Thus, the Department and the other Amici all argue the same thing: that although the Supreme Court has never overruled *Dilworth,* it is no longer binding because it embodies a formalism that has been superseded by more flexible approaches. Amicus MTC goes so far as to

state, "[a] prior decision [such as *Dilworth*] is implicitly overruled if based on an analytical framework that is no longer valid." MTC Brief at 2.

The Department and the other Amici advocate a doctrine known as "anticipatory overruling" or "overruling from below." Its proponents view it as an exception to the fixed rule that lower courts must always adhere to the decisions of higher courts and argue it is permissible when a lower court predicts the higher court will no longer follow its own prior decision. *See generally,* M. Kniffin, *Overruling Supreme Court Precedents: Anticipatory Actions by United States Courts of Appeal*, 51 Fordham L. Rev. 53 (1982) and *Note: Courts – Anticipatory Stare Decisis*, 8 Kan. L. Rev. 166, 167 (1959).

The Supreme Court, however, has expressly directed the lower courts not to engage in this practice.

II. THE SUPREME COURT HAS FORBIDDEN ANTICIPATORY OVERRULING

Anticipatory overruling, especially of United States Supreme Court precedents interpreting the federal Constitution, was always a rare occurrence. S*ee, e.g.*, S. Levinson, *On Positivism and Potted Plants: "Inferior" Judges and the Task of Constitutional Interpretation*, 25 Conn.

L. Rev. 843, 851 (1993). Since 1989 it has been expressly forbidden. *See Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477 (1989).

Rodriguez involved a challenge to the validity of the Supreme Court's prior decision in *Wilko v. Swan,* 346 U.S. 427 (1953), which held that agreements to arbitrate claims arising under the Securities Act of 1933 (the "1933 Act") violated that Act's anti-waiver provisions and were unenforceable. In a later case involving an almost identical anti-waiver provision in the Securities Exchange Act of 1934 (the "1934 Act"), the Court disavowed its reasoning in *Wilko* but did not expressly overrule it. *See Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. 220 (1987).

Rodriguez, like *Wilko*, involved an agreement to arbitrate 1933 Act claims. The federal Court of Appeals, predicting the Supreme Court would no longer follow *Wilko* but would instead extend the reasoning of *McMahon* from 1934 Act to 1933 Act claims, treated *Wilko* as no longer binding. *Rodriguez de Quijas v. Shearson/Lehman Bros., Inc.*, 845 F.2d 1296, 1299 (5th Cir. 1988).

On appeal, the Supreme Court expressly overruled *Wilko*, but chastised the lower court for attempting to overrule the decision from below:

> We do not suggest the Court of Appeals on its own authority should have taken the step of renouncing *Wilko*. If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.

Rodriguez, 490 U.S. at 484. Four Justices dissented and would have let *Wilko* stand on *stare decisis* grounds but were even harsher in their criticism of the Court of Appeals, accusing it of engaging in "an indefensible brand of judicial activism." *Id.* at 486. Anticipatory overruling was thus forbidden by a *unanimous* Supreme Court, and even its advocates have conceded its demise. *See generally*, C. Bradford, *Following Dead Precedent: The Supreme Court's Ill-Advised Rejection of Anticipatory Overruling,* 59 Fordham L. Rev. 39 (1990).

Rodriguez has been followed by a line of cases requiring the lower courts to respect Supreme Court decisions no matter how "wobbly" and "moth-eaten" they may be. *State Oil Co. v. Kahn*, 522 U.S. 3, 20 (1997). *See also, United States v. Hatter*, 532 U.S. 557, 567 (2001) ("it is this Court's prerogative alone to overrule one of its precedents"); *Hohn v. United States*, 524 U.S. 236, 252-3 (1998) ("Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether

subsequent cases have raised doubts about their continuing vitality."); and *Agostini v. Felton*, 521 U.S. 203, 237 (1997) ("We do not acknowledge . . . that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent."). One commentator has described the state of the law as follows:

> Where a Supreme Court holding applies to a pending dispute, an inferior court has only one available course of action. It must issue whatever ruling the holding indicates. There is no room for acting on doubts about the precedent's soundness or making predictions about the Supreme Court's eventual change of heart. An inferior court may not even depart from precedents that the Supreme Court has called into question. Absent a formal overruling, Supreme Court decisions remain indefeasibly binding on all inferior tribunals; finding a precedent to be controlling brings the inquiry to its end.

R. Kozel, *The Scope of Precedent*, 113 Mich. L. Rev. 179, 203 (2014).

In response to *Rodriguez,* the lower federal courts have renounced any freedom to ignore a Supreme Court precedent, no matter how doubtful its continuing vitality. *See, e.g., United States v. McDowell*, 745 F.3d 115, 124 (4th Cir. 2014) (despite recent developments, prior Supreme Court decision "remains good law, and we may not disregard it unless and until the Supreme Court holds to the contrary"); *West v. Anne*

Arundel County, 137 F.3d 752, 760 (4th Cir. 1998) (noting "impropriety of preemptively overturning Supreme Court precedent" and that "any decision to revisit [prior precedent] is not ours to make.").

III. *RODRIGUEZ* APPLIES TO STATE APPELLATE COURTS

The Supreme Court has applied *Rodriguez* to state appellate courts as well as to the lower federal courts. In *Bosse v. Oklahoma*, 137 S. Ct. 1 (2016), the Court considered a decision of the Oklahoma Court of Criminal Appeals which disregarded the Supreme Court's decision in *Booth v. Maryland*, 482 U.S. 496 (1987). In that case, the Supreme Court had ruled that the Eighth Amendment prohibits presenting two types of testimony to a capital sentencing jury: certain victim impact evidence and the victim's family members' characterizations and opinions of the crime. Four years later, in *Payne v. Tennessee*, 501 U.S. 808 (1991), the Court held that *Booth* was wrong to conclude that the Eighth Amendment prohibited the victim impact evidence. In *Bosse*, the Oklahoma court held that *Payne* had also "implicitly" overruled *Booth's* ban on the family's characterizations and opinions of the crime. On appeal, the Supreme Court noted that the Oklahoma court had

acknowledged that *Payne* did not *expressly* overrule *Booth* on the family testimony issue and continued:

> That should have ended its inquiry . . . ; the court was wrong to go further and conclude that *Payne* implicitly overruled *Booth* in its entirety . . . . The Oklahoma Court of Criminal Appeals remains bound by *Booth's* prohibition on characterizations and opinion from a victim's family members . . . . unless this Court reconsiders that ban. The state court erred in concluding otherwise.

Bosse, 137 S. Ct at 2.

Bosse makes it abundantly clear that *Rodriguez's* injunction against anticipatory overruling binds this Court. Put simply, the action the Department and the other Amici urge on this Court, that it should ignore controlling United States Supreme Court precedent on a matter of federal Constitutional law because of subsequent doctrinal development, has been expressly enjoined by the Supreme Court itself.[2]

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[2] Amicus MTC's advocacy of overruling from below is based on an Indiana tax court case regarding a prior decision of the Indiana Supreme Court. *See* MTC Brief at 2. The rules of precedence within the Indiana judicial branch have no relevance to whether this Court, or indeed the Indiana Supreme Court, could disregard a controlling decision of the United States Supreme Court.

IV. THE PROHIBITION OF ANTICIPATORY OVERRULING IS BASED ON SOUND POLICY

This Court could follow the Department's urging and ignore both *Dilworth* and *Rodriguez* and suffer no direct sanction harsher than a reversal and perhaps a rebuke from the Supreme Court.[3] However, important prudential considerations counsel respect for the Supreme Court's exclusive prerogative to determine the status of its own precedents. *See generally*, E. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?* 46 Stan. L. Rev. 817, 839-856 (1994); F. Schauer, *Precedent*, 39 Stan. L. Rev. 571, 595-602 (1987). These include ensuring a uniform application of the law across the country.

The Constitution granted the United States Supreme Court appellate jurisdiction over state Supreme Court decisions on federal questions because of "the importance, and even the necessity of *uniformity* of decisions throughout the whole United States, upon all subjects within the purview of the constitution." *Martin v. Hunter's*

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[3] *See, however*, J. Pfander, *One Supreme Court: Supremacy, Inferiority, and the Judicial Power of the United States* 84-87 (2009), arguing that the Inferior Tribunals Clause (Article I, section 8[9]) of the federal Constitution permits the Supreme Court to issue supervisory writs to state courts that ignore Supreme Court precedent in deciding federal questions.

Lessee, 14 U.S. 304, 347-8 (1816) (emphasis in original). If every state Supreme Court could adopt its own interpretation of the Constitution, then the very unity of the nation would be at risk. Permitting state Supreme Courts to treat a controlling United States Supreme Court precedent on a Constitutional matter as a "dead letter," "irrelevant," "discredited," or a "zombie" (to quote the opposing briefs) would run the same risk.

Respecting the Supreme Court's prerogative also would help maintain an orderly system of adjudication. Permitting lower courts to second guess the validity of Supreme Court precedent would lead to "anarchy" within the judicial system. *Hutto v. Davis*, 454 U.S. 370, 375 (1982). *See also United States v. Silverman*, 166 F. Supp. 838, 840 (D. D.C. 1958), *rev'd on other grounds*, 365 U.S. 505 (1961) (warning that anticipatory overruling would lead to a "chaotic situation") and *Family Sec. Life Ins. Co. v. Daniel*, 79 F. Supp. 62, 69 (E.D.S.C. 1948), *rev'd on other grounds,* 336 U.S. 220 (1949) (warning that anticipatory overruling "would bog down the judicial processes . . . in . . . quagmires of uncertainty" and "lay the District Courts open to the gravest public censure"). *See also N. Virginia Reg'l Park Auth. v. U.S. Civ. Serv.*

Comm'n, 437 F.2d 1346, 1350 (4th Cir. 1971) ("Firmness of precedent otherwise could not exist."); *Mahnich v. Southern S.S. Co.*, 321 U.S. 96, 113 (1944) (Roberts, J., dissenting) (anticipatory overruling would cause "the administration of justice [to] fall into disrepute"). *See generally* M. Kniffin, *supra,* at 82-83; E. Caminker, *supra*, at 866.

Anticipatory overruling is also inherently subject to abuse. Inferior courts could easily avoid inconvenient authority "by stretching to circumvent disfavored Supreme Court precedents based on rather flimsy evidence that the Court might overrule them itself." E. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 Tex. L. Rev. 1, 72 (1994). *See also* M. Kniffin, *supra*, at 85.

The very difficulty of the path advocated by the Department also must be stressed. Any undertaking to predict the fate of a precedent at the Supreme Court "would likely amount to no more than a bold but unfruitful venture in speculation." *United States v. Caldwell*, 543 F.2d 1333, 1369-70 (D.C. Cir. 1974). Even proponents of anticipatory overruling acknowledge the practice "ought not even to be considered" if

there is "any significant uncertainty" as to how the Supreme Court will act. M. Kniffin, *supra*, at 80.

Finally, even if a lower court could predict with certainty how the Supreme Court would treat its own prior decision, "it is the prerogative of the Supreme Court to decide not only whether, but when, it will overturn a precedent." M. Kniffin, *supra*, at 86. Anticipatory overruling deprives the Supreme Court of this prerogative as well.

V. ANTICIPATORY OVERRULING IS NOT PERMITTED IN NORTH CAROLINA

Respecting the United States Supreme Court's prerogative to judge the validity of its own precedents is also necessary to preserve this Court's corollary prerogative within the North Carolina judicial branch. The lower courts of this State are bound by this Court's decisions, including those that may be viewed as having been eroded by doctrinal shifts. For instance, this Court has stated that its own inconsistent application of a precedent does not mean the precedent is no longer valid. "A subsequent decision cannot, by mere implication, be held to overrule a prior case unless the principle is directly involved and the inference clear and impelling." *Cole v. Cole*, 229 N.C. 757, 762, 51 S.E.2d 491, 495 (1949). The Court of Appeals has frequently rejected invitations to ignore

this principle. *See, e.g.*, *Mills for DeBlasio v. Durham Bulls Baseball Club, Inc.,* 275 N.C. App. 618, 854 S.E.2d 126 (2020); *State v. Campbell*, 257 N.C. App. 739, 759, 810 S.E.2d 803, 816 (2018); *State v. Kelso*, 187 N.C. App. 718, 722, 654 S.E.2d 28, 31 (2007); *City of Asheville v. State*, 192 N.C. App. 1, 13, 665 S.E.2d 103, 114 (2008); *Kinlaw v. Long Mfg. N.C., Inc.*, 40 N.C. App. 641, 644, 253 S.E.2d 629, 631, *rev'd on other grounds,* 298 N.C. 494, 259 S.E.2d 552 (1979); *Home Mut. Ins. Co. v. Vick*, 17 N.C. App. 106, 108, 193 S.E.2d 322, 324 (1972). As the Court of Appeals stated in *Connette v. Charlotte-Mecklenburg Hosp. Auth.*, 272 N.C. App. 1, 6, 845 S.E.2d 168, 172 (2020):

> We acknowledge that Plaintiffs have presented many detailed policy arguments why the time has come to depart from *Byrd*. . . *Byrd* is a Supreme Court opinion. We have no authority to modify *Byrd's* comprehensive holding simply because times have changed. Only the Supreme Court can do that.

This Court's disregard of *Dilworth* could only serve to weaken its claim to be the sole determiner of the validity of its own prior decisions.

VI. THERE IS NO JUSTIFICATION FOR THE ANTICIPATORY OVERRULING OF *DILWORTH*

Two justifications were traditionally cited for anticipatory overruling: providing justice to a litigant at the lowest judicial level

possible and spurring higher courts to rethink their own precedents. *See, e.g.*, M. Kniffin, *supra*, at 75; and E. Caminker, *Precedent and Prediction supra*, at 860; M. Kelman, *The Force of Precedent in the Lower Courts*, 14 Wayne L. Rev. 3 (1967).

Here, no injustice would befall the Department if this Court adheres to *Dilworth*. The Department merely assessed a sales tax when it should have assessed a use tax. The statutory machinery for collecting the use tax on transactions like those at issue is already established by statute. If the Department had assessed the correct tax from the beginning, then this entire proceeding could have been avoided. Indeed, justice requires that this Court respect *Dilworth.* The taxpayer in this case no doubt structured its arrangements to fall within the scope of that precedent and should not have to spend further time and resources warding off the Department's attempts to salvage a defective audit.

Disregarding *Dilworth* also is not necessary to encourage the Supreme Court to rethink that decision. If this Court believes *Dilworth* should be overturned, then it can make that argument in an opinion that nevertheless respects *Dilworth's* existing vitality. If the Department seeks to resolve the status of *Dilworth*, then this Court can assist the

Department in that project by following *Rodriguez* and paving the way for the Department to take this case to the one tribunal that can resolve the issue.

VII. THE DEPARTMENT'S RECENT ACTIONS

The Department's disregard of Supreme Court precedent, and its urging of this Court to do the same in the teeth of an explicit direction from the Supreme Court not to do so, is troubling on its own terms and appears more troubling when considered in light of some of the Department's other recent actions that have caused very real damage to the State's legal and business reputations.

The first of these, which the United States Supreme Court finally put to an end in 2019, was the Department's attempt to tax a trust whose only connection to the State was the temporary residence here of a contingent income beneficiary who never received distributions from the trust during her time in the State. The Department pursued the case for nine years through the Business Court, the Court of Appeals, this Court and the United States Supreme Court, losing at every level and ultimately calling forth a unanimous Supreme Court decision holding that the Department's actions violated the Due Process Clause of the

Fourteenth Amendment. *N.C. Dep't of Revenue v. Kimberley Rice Kaestner 1992 Fam. Tr.*, 139 S. Ct. 915 (2019).

The second is the Department's ongoing attack on North Carolina's Renewable Energy Tax Credits. In 2018, the Department swept aside years of its own guidance and claimed that hundreds of investors in syndicated Renewable Energy Tax Credit projects were not bona fide partners in their investment partnerships and so were not entitled to the state tax credits those partnerships generated. This tax credit program was established by the General Assembly specifically to encourage investment in renewable energy projects and had succeeded in making North Carolina the nation's second largest producer of solar energy. The Department asserted that Internal Revenue Code provisions never adopted by the General Assembly directly applied to determine the investors' North Carolina tax liabilities, an assertion that directly contradicted this Court's decision in *Fidelity Bank v. N.C. Dep't of Revenue*, 370 N.C. 10, 803 S.E.2d 142 (2017). That decision holds that state adoption of Internal Revenue Code provisions requires a "clear and specific" statutory reference. The Department also asserted the taxpayers' investments were abusive even though they were a direct

response to legislative incentives and had been structured in accordance with the Department's own guidance.

Hundreds of individuals and businesses who acted in good faith to build these renewable energy projects have been ensnared for years in the Department's dragnet. Four of these tax credit cases are currently pending in the Business Court. The Office of Administrative Hearings decision in one of these cases referred to the Department's about-face in its treatment of tax credit investment structures as having been made "inexplicably and perhaps whimsically." *Integon National Insurance Co. v. N.C. Department of Revenue*, Dkt. No. 20 REV 01001, 2021 WL 5400875. The Department's crusade has drawn negative national attention and stands to tarnish the State's reputation for fair dealing and trustworthiness for many years to come. *See, e.g.*,

https://www.forbes.com/sites/patrickgleason/2022/03/28/like-joe-biden-north-carolina-governor-roy-coopers-administration-advances-policies-that-contradict-stated-climate-goals/.

All these errant actions exhibit a disregard for the limits on the Department's power to administer the State's tax laws. In *Kaestner*, the Department disregarded the Due Process Clause limits on its ability to

tax nonresident trusts. In the Renewable Energy Tax Credit cases, the Department ignored its own prior guidance, this Court's holding in *Fidelity Bank*, and the General Assembly's exclusive power to establish state tax policy. In this case, the Department has ignored, and asks this Court to ignore, the exclusive prerogative of the United States Supreme Court to judge the validity of its own precedents on Constitutional questions.

CONCLUSION

The business climate of North Carolina and the economic opportunities that climate provides the citizens of this State depend on a stable and orderly legal system. Such a system requires that each actor within it acknowledge the limitations on its own authority and respect the authority of the other actors within their proper spheres. To preserve a stable and orderly legal system, this Court should respect the Supreme Court's exclusive prerogative to determine the fate of its own precedents and firmly resist the Department's urging to arrogate that power to itself.

Respectfully submitted, this the 21st day of April, 2022.

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CERTIFICATE OF WORD COUNT COMPLIANCE

Pursuant to Rule 28(j) of the North Carolina Rules of Appellate Procedure, I hereby certify that the foregoing brief, which was pared using a 14-point proportionally spaced font with serifs, is less than 3,750 words (excluding covers, captions, indexes, table of authorities, counsel's signature block, certificates of service, this certificate of compliance, and appendixes) as reported by the word-processing software.

This the 21st day of April, 2022.

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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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