

SUPREME COURT OF NORTH CAROLINA

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DORIS GRIFFIN LAND and )  
ELLIOTT LAND, )

Plaintiffs-Respondents, )

v. )

From Pitt County

KORI B. WHITLEY, M.D.; )  
PHYSICIANS EAST, P.A. d/b/a )  
GREENVILLE OB/GYN; PITT )  
COUNTY MEMORIAL )  
HOSPITAL, INC. d/b/a VIDANT )  
MEDICAL CENTER; PITT )  
COUNTY MEMORIAL )  
HOSPITAL, INC. d/b/a VIDANT )  
SURGICENTER, )

No. COA23-250

Defendants-Petitioners. )

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BRIEF OF *AMICI CURIAE*  
NORTH CAROLINA CHAMBER LEGAL INSTITUTE *ET AL.*

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Lawyers for Civil Justice, Civil Justice Reform Group & U.S. Chamber Institute for Legal Reform, *Litigation Cost Survey of Major Companies* (2010),  
[https://www.uscourts.gov/sites/default/files/litigation\\_cost\\_survey\\_of\\_major\\_companies\\_0.pdf](https://www.uscourts.gov/sites/default/files/litigation_cost_survey_of_major_companies_0.pdf)..... 18

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[https://governor.nc.gov/documents/files/eo117-  
covid-19-prohibiting-mass-gathering-and-k12-  
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N.C. Governor’s Office,  
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pen](https://governor.nc.gov/documents/files/eo118/open)..... 5

N.C. Governor’s Office,  
Exec. Order No. 121, “Stay at Home Order and  
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Mar. 27, 2020,  
[https://governor.nc.gov/documents/files/eo121-  
stay-home-order-3/open](https://governor.nc.gov/documents/files/eo121-stay-home-order-3/open) ..... 6

N.C. Healthcare Ass’n,  
*The State of Healthcare in North Carolina:  
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[https://www.ncha.org/wp-  
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Report.pdf](https://www.ncha.org/wp-content/uploads/2023/01/NCHA-2022-Impact-Report.pdf). ..... 15

N.C. Health Prof'ls. Data Sys.,  
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*Amici* identified below encourage the Court to grant Defendants’ Petition for Discretionary Review (“Petition”).<sup>1</sup>

*Amici* are the North Carolina Chamber Legal Institute, NCHA, Inc. d/b/a North Carolina Healthcare Association, and North Carolina Chapter of the American Society for Healthcare Risk Management. A full description of *amici*’s respective interests in this case is included in the Appendix.

## **INTRODUCTION**

The decision below concerns the Emergency or Disaster Treatment Protection Act, N.C. Gen. Stat. § 90-21.130 *et seq.* (the “Emergency Act”), legislation passed unanimously by the General Assembly at the height of the COVID-19 pandemic. The decision below undermines this vital legislation and threatens to do the same to other critically important legal immunities.

The Court should certify the decision below for discretionary review because it could materially impair one of the largest sectors of North Carolina’s economy, businesses in other industries, and individuals,

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<sup>1</sup> No person or entity, other than *amici*, their members and their counsel, either directly or indirectly wrote this brief or contributed money for its preparation.

which and who depend on the legal immunities established by the State's lawmakers to promote the State's public health, economic prosperity, and social welfare.

The decision also implicates significant legal issues. The State's jurisprudence, grounded in fundamental separation of powers and rule of law principles, requires that courts give fidelity to the laws passed by the State's elected lawmakers. All the more so where, as here, a law was passed unanimously during a time of crisis, only a few days following its introduction. The decision below belies these core jurisprudential principles.

Further, the decision conflicts with established North Carolina case law interpreting legal immunity statutes. It eviscerates the protections afforded by the Emergency Act's "good faith" element (an element found in many other immunity statutes), while also splitting from this Court's *Meyer v. Walls* decision requiring allegations of gross negligence to have at least a modicum of factual support to overcome legal immunity.

Finally, if left unresolved, North Carolina's health care facilities and providers — and its businesses and citizens more generally — will suffer substantial harm. They will be saddled with unwarranted legal

risk created by cases with artificially inflated settlement values, as well as highly burdensome litigation expenses that the Emergency Act is meant to prevent. These undermine, rather than promote, the State's health, safety, economic prosperity, and social welfare.

### **NATURE OF AMICI'S INTEREST**

Health care is a substantial and essential part of North Carolina's business community. Broadly defined, it is the State's largest sector by employment and accounts for a substantial proportion of the State's overall economy.

The liability protections in the Emergency Act and similar statutes are of critical importance to *amici*, who believe the Emergency Act's legal immunity, and other immunity statutes, should be applied fairly, consistently, and in accordance with their plain meaning.

*Amici* are concerned that the Court of Appeals misapplied the Emergency Act, and did so in a manner that not only conflicts with the plain language of the statute and established case law, but also infringes on the policymaking authority of the General Assembly. The issues raised in the decision below reach far beyond the individual parties in this case. They implicate bedrock jurisprudential principles, including

the fundamentally separate roles that lawmakers and courts play in this State's governance.

### **STATEMENT OF ISSUES**

Whether the Petition establishes the grounds for this Court's review of the decision below pursuant to N.C. Gen. Stat. § 7A-31(c) because:

1. The Court of Appeals improperly amended the Emergency Act to include a strict causation requirement absent from the text of the Act and contrary to its purpose;
2. The Court of Appeals' interpretation of the Emergency Act radically departs from well-settled authority regarding the burden of alleging bad faith in cases involving legal immunity;
3. The Court of Appeals applied an incorrect pleading standard for allegations of gross negligence in cases involving legal immunity.

### **BACKGROUND**

#### **A. Factual Background**

Recall the outset of the COVID-19 pandemic, in 2020, when the events in this case took place. North Carolina's first COVID-19 case was

identified in early March.<sup>2</sup> Days later, Governor Cooper declared a state of emergency.<sup>3</sup> Within weeks, the number of confirmed cases in North Carolina skyrocketed.<sup>4</sup> The federal government issued a nationwide state of emergency.<sup>5</sup> Schools and businesses closed their doors.<sup>6</sup> Makeshift field hospitals were proposed to treat patients.<sup>7</sup> Lifesaving ventilators and

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<sup>2</sup> N.C. Dep’t Health & Human Servs., “North Carolina Identifies First Case of COVID-19,” Mar. 3, 2020, <https://www.ncdhhs.gov/news/press-releases/2020/03/03/north-carolina-identifies-first-case-covid-19>.

<sup>3</sup> N.C. Governor’s Office, Exec. Order No. 116, “Declaration of a State of Emergency to Coordinate Response and Protective Actions to Prevent the Spread of COVID-19,” Mar. 10, 2020, <https://governor.nc.gov/documents/executive-order-no-116>.

<sup>4</sup> N.C. Dep’t Health & Human Servs., Covid-19 Dashboard, <https://covid19.ncdhhs.gov/dashboard>.

<sup>5</sup> Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak, Proclamation 9994, 85 Fed. Reg. 15,337 (Mar. 13, 2020).

<sup>6</sup> N.C. Governor’s Office, Exec. Order No. 117, “Prohibiting Mass Gatherings and Directing the Statewide Closure of K-12 Public Schools To Limit the Spread of COVID-19,” Mar. 14, 2020, <https://governor.nc.gov/documents/files/eo117-covid-19-prohibiting-mass-gathering-and-k12-school-closure>;

N.C. Governor’s Office, Exec. Order No. 118, “Limiting Operations of Restaurants and Bars and Broadening Unemployment Insurance Benefits in Response to COVID-19,” Mar. 17, 2020, <https://governor.nc.gov/documents/files/eo118/open>.

<sup>7</sup> Emma Way & Katie Peralta Soloff, *Atrium and Novant plan a massive field hospital at UNC Charlotte to handle surge of COVID-19 patients*, Axios (Apr. 2, 2020), <https://www.axios.com/local/charlotte/2020/04/02/atrium-and-novant-plan-a-massive-field->

masks were in short supply.<sup>8</sup> Travel outside the home was largely prohibited.<sup>9</sup> And the number of cases, hospitalizations, and deaths continued to rise.

Previously unfamiliar terms came to dominate the public discourse: “PPE.” “CDC Guidelines.” “Alpha variant.” “Fomite transmission.” “Aerosolize.” “Antigen.” “Pandemic.” “Healthcare heroes.” “Essential workers.”

No one knew quite how the disease spread, how dangerous it was, or whether things would ever return to normal. It was a time of tremendous fear and grave uncertainty.

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[hospital-at-unc-charlotte-to-handle-surge-of-covid-19-patients-213552.](https://www.wcnc.com/article/news/health/coronavirus/nurses-moved-to-action-due-to-mask-shortage/275-afcd4513-089b-4898-b729-58512952fe2b)

<sup>8</sup> Nathan Morabito, *‘I don’t want to be the cause’ | North Carolina nurse resigns amid PPE shortage*, WCNC, Apr. 1, 2020, <https://www.wcnc.com/article/news/health/coronavirus/nurses-moved-to-action-due-to-mask-shortage/275-afcd4513-089b-4898-b729-58512952fe2b>.

<sup>9</sup> Remarks by President Trump, Vice President Pence, and Members of the Coronavirus Task Force in Press Briefing, Mar. 29, 2020, <https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-vice-president-pence-members-coronavirus-task-force-press-briefing-14/>; N.C. Governor’s Office, Exec. Order No. 121, “Stay at Home Order and Strategic Directions for North Carolina in Response to Increasing COVID-19 Cases,” Mar. 27, 2020, <https://governor.nc.gov/documents/files/eo121-stay-home-order-3/open>.

## **B. The Emergency Act**

Faced with this emerging crisis, North Carolina’s lawmakers took decisive action. An “enormous response” was required to ensure patients were treated during this public health emergency. It was a “matter of vital State concern.” “Broad protections” were needed.

The General Assembly used those words when passing the Emergency Act *unanimously*, only four days following its introduction. Its purpose was clear. Health care facilities and providers needed to stay open and fully operational, without being encumbered by allegations of negligence for decisions made in response to the COVID-19 emergency. Our healthcare heroes were already risking their lives to fight the virus. Without this legal immunity, their livelihoods would have been risked, too.

The Emergency Act provides legal immunity for health care facilities and providers. Subsection 90-21.133(a) provides complete immunity in civil cases against claims of ordinary negligence, with three provisos.

*First*, the immunity applies to any “health care facility,” “health care provider,” or “entity that has legal responsibility for the acts or

omissions of a health care provider” that “arrang[es] for or provid[es] health care services during the period of the COVID-19 emergency declaration.” *See* N.C. Gen. Stat. § 90-21.133(a), (a)(1).

*Second*, the entity’s “arrangement or provision of health care services” must be “impacted, directly or indirectly,” by (a) “a health care facility, health care provider, or entity’s decisions or activities in response to or as a result of the COVID-19 pandemic” or (b) “the decisions or activities, in response to or as a result of the COVID-19 pandemic, of a health care facility or entity where a health care provider provides health care services.” *See* N.C. Gen. Stat. § 90-21.133(a)(2).

*Third*, the entity must act in “good faith.” *See* N.C. Gen. Stat. § 90-21.133(a)(3).

The legal immunity conferred by the Act is not without limits. Subsection 90-21.133(b) provides an exception to the prior subsection’s immunity provision “if the harm or damages were caused by an act or omission constituting gross negligence, reckless misconduct, or intentional infliction of harm.”

The General Assembly’s stated purpose in passing the Emergency Act was to “broadly protect[] the health care facilities and health care



providers in this State from liability.” N.C. Gen. Stat. § 90-21.131. It expressly directed that the Emergency Act “shall be liberally construed to effectuate its public health emergency purpose.” N.C. Gen. Stat. § 90-21.134.

### **C. Other Immunity Statutes**

While the pandemic impacted North Carolina’s health care community most acutely, all in the State were deeply affected. As a result, the General Assembly passed other statutes with similar immunity provisions applicable in other contexts.

Essential businesses and emergency responders were afforded immunity with respect to claims from customers or employees who contracted COVID-19. N.C. Gen. Stat. § 66-470 *et seq.*

The COVID-19 Liability Safe Harbor provides immunity to businesses from liability for acts or omissions resulting in the contraction of COVID-19. N.C. Gen. Stat. § 99E-70 *et seq.*

North Carolina’s schools and institutions of higher education received immunity for acts and omissions “reasonably related to protecting the public health, safety, or welfare” during the COVID-19 emergency. N.C. Gen. Stat. § 115C-567.10 *et seq.*; § 116-310 *et seq.*

Owners and operators of community swimming pools received immunity for claims resulting from transmission of COVID-19 after they began to reopen in the late summer of 2020. N.C. Gen. Stat. § 99E-80 *et seq.*

Each of these immunity statutes has features similar to the Emergency Act, such as a “good faith” element or “gross negligence” exception. N.C. Gen. Stat. §§ 66-470 (“gross negligence” exception); 99E-71(a) (“gross negligence” exception); 115C-567.11 (“bad faith” exception); 116-311 (“bad faith” exception); 99E-81(b) (“gross negligence” exception).

And there are many other statutes beyond the COVID-19 emergency context with similar attributes. Most notably, North Carolina’s “good Samaritan” law provides immunity to volunteers rendering first aid or emergency health care treatment to a person who is unconscious, ill or injured, subject to a “gross negligence” exception, which serves to promote the State’s social welfare. *See* N.C. Gen. Stat. § 90-21.14. Also, the North Carolina Nonprofit Corporation Act provides immunity for volunteer directors and officers, subject to a “good faith” exception, which serves to promote the State’s social welfare by removing

a barrier to citizen service to the State's nonprofit organizations.<sup>10</sup> *See* N.C. Gen. Stat. § 55A-8-60(a)(3).

\* \* \*

The State's lawmakers determined that — in their judgment — the Emergency Act's legal immunity was warranted. For courts to second guess their policy decision when persons' recollections of the crisis have faded runs afoul of core jurisprudential principles in which the State's governance is rooted. Effectively, the Court of Appeals' decision alters the rules of the game relied upon by all participants and unwinds the result achieved by emergency, unanimous legislative action.

### **ARGUMENT**

Three separate, independently sufficient reasons justify the Court's review of the decision below.

I. This immunity is a matter of significant public interest. *See* N.C. Gen. Stat. § 90-21.131 ("The rendering of treatment to patients during such a public health emergency is a matter of vital State concern."). The Court of Appeals' strict causation requirement (*Land*, slip

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<sup>10</sup> This immunity is of particular relevance to NCCLI and NCHA (themselves North Carolina nonprofit corporations).

op. at 14–16) is found nowhere in the Emergency Act’s text, undermining the Act’s vital protections for the health care community.

In reaching its decision, the Court of Appeals jeopardizes similar legal immunity provisions. This will adversely affect these other immunity protections long after the expiration of the period for bringing any claims affected by the COVID-19 immunities, resulting in a perpetual “cloud” over these other immunity protections.

The lower court disregarded the General Assembly’s policy judgment about the scope of the Emergency Act’s immunity in favor of its own, thereby implicating fundamental jurisprudential principles, including the need for this State’s courts to apply the General Assembly’s policy decisions faithfully and impartially, and for ensuring the State’s citizens are governed by a clear and consistent law. This Court’s review is therefore warranted. *See* N.C. Gen. Stat. §§ 7A-31(c)(1), (2).

II. The decision below incorrectly interprets the Emergency Act’s “good faith” element to create a split in Court of Appeals authority about the burden of alleging bad faith in cases involving legal immunities. *Land*, slip op. at 16. Reconciling this conflict is necessary not only to effectuate the Emergency Act’s legal immunity, but also because the

same “good faith” element is found in many other legal immunity provisions besides the Emergency Act. *See supra* pp. 9–11. This Court’s review is therefore warranted. *See* N.C. Gen. Stat. §§ 7A-31(c), (c)(1).

III. The decision below conflicts with *Meyer v. Walls*, which holds that a complaint’s conclusory allegations of gross negligence are insufficient to circumvent legal immunity. 347 N.C. 97, 114, 489 S.E.2d 880, 890 (1997). “Gross negligence” exceptions similar to the Emergency Act’s are found in dozens of other immunity statutes applicable to all manner of businesses and individuals and that — unlike the Emergency Act — are not time-limited to the specific period corresponding to the COVID-19 emergency. Without this Court’s review, the decision below will have far-reaching consequences beyond the health care context. This Court’s review is therefore warranted. N.C. Gen. Stat. §§ 7A-31(c), (c)(1), (c)(3).

**I. The Court of Appeals improperly imposed a strict causation requirement absent from the Emergency Act’s text and contrary to its purpose.**

The decision below states that N.C. Gen. Stat. § 90-21.133(a)(2) requires “a causal link between the impact of COVID-19 and Ms. Land’s care or treatment.” *Land*, slip. op. at 14. But the Emergency Act’s plain

language does not include or suggest this strict causation requirement. Rather, it grants legal immunity much more broadly, whenever “the arrangement or provision of health care services is impacted, directly or indirectly” by an entity’s “decisions or activities in response to or as a result of the COVID-19 pandemic.” N.C. Gen. Stat. § 90-21.133(a)(2). In practice, this protection is remarkably broad: precisely the legislature’s expressed intention. *See* N.C. Gen. Stat. § 90-21.131.

The Court of Appeals’ departure from the Emergency Act’s text is clear legal error. *See Utilities Comm. v. Edmisten, Atty. General*, 291 N.C. 451, 465, 232 S.E.2d 184, 192 (1977) (holding that where statutory language is clear and unambiguous, courts must give such language its plain and definite meaning). “The law is what the law says,” *Bank One Chicago, N.A. v. Midwest Bank & Tr. Co.*, 516 U.S. 264, 279, (1996) (Scalia, J., concurring in part), not what a court reviewing it four years later thinks it ought to mean. This State’s courts must apply the laws as written, not as they wish them to be. *State v. Verrier*, 173 N.C. App. 123, 130, 617 S.E.2d 675, 680 (2005) (“It is outside the realm of this Court’s function as the judiciary to modify statutory law. That role is reserved for the legislature.”); *Pavelic & LeFlore v. Marvel Entertainment Group*,

*Div. of Cadence Industries Corp.*, 493 U.S. 120, 126 (1989) (a court’s “task is to apply the text, not to improve upon it.”).

Imposing this extra-textual requirement also runs afoul of the Emergency Act’s command that its legal immunity should “broadly protect[]” health care facilities and providers and be “liberally construed.” N.C. Gen. Stat. §§ 90-21.131, .134; *see also K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 319 (1988) (Scalia, J., concurring in part) (finding it “inconceivable” to interpret a statute in a manner that deviated from its plain language and frustrated its purpose).

The consequences of the decision below reach far beyond the individual parties in this suit. North Carolina’s hospitals and health systems generate \$40 billion annually in gross domestic product.<sup>11</sup> They are one of the top 10 employers in 92 out of 100 counties. *Id.* at 6. Over 515,000 jobs are supported by hospitals and health systems, comprising

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<sup>11</sup> See N.C. Healthcare Ass’n, *The State of Healthcare in North Carolina: 2022 Impact Report* at 6, 21-29, January 2023, <https://www.ncha.org/wp-content/uploads/2023/01/NCHA-2022-Impact-Report.pdf>.

8% of the State's workforce. *Id.* More than 226,000 licensed health care providers in this State will be impacted by this decision.<sup>12</sup>

Furthermore, the Court of Appeals' derogation of the Emergency Act's plain language is anathema to some of the State's most fundamental, longstanding jurisprudential traditions, including separation of powers principles establishing the role the State's judiciary should (not) play in dictating public policy and the rule of law's requirement of fair notice. In North Carolina, "[t]he legislature is the great and chief department of government. It alone is created to express the will of the people." *Wilson v. Jordan*, 124 N.C. 683, 701, 33 S.E. 139, 150 (1899) (Clark, J., dissenting); *see also* Note, *Textualism as Fair Notice*, 123 Harv. L. Rev. 542, 557-561 (2009) (describing rule of law basis for textualist statutory interpretation); *cf.* Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (2d ed. 1986).

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<sup>12</sup> N.C. Health Prof'ls. Data Sys., Program on Health Workforce Research and Policy, Cecil G. Sheps Ctr. for Health Servs. Research, Univ. N.C., Mar. 18, 2024, <https://nchealthworkforce.unc.edu/interactive/supply/>.



**II. The Court of Appeals’ interpretation of the Emergency Act creates a split in authority regarding the burden of alleging bad faith in cases involving legal immunity.**

The two-sentence discussion of the Emergency Act’s “good faith” element in the decision below strips the health care community of the Act’s legal protection. *Land*, slip op. at 16. Here, too, the Court of Appeals’ interpretation of the Act conflicts with its “broad protection” and “liberal construction” requirements. N.C. Gen. Stat. §§ 90-21.131, .134.

The decision also creates a split in Court of Appeals authority. *Shannon v. Testen*<sup>13</sup> addressed a legal immunity statute that includes a “good faith” element similar to the Emergency Act’s. *See* 243 N.C. App. 386, 777 S.E.2d 153 (2015). *Shannon* holds that a plaintiff challenging legal immunity must allege facts suggesting bad faith to survive dismissal under Rule 12. *Id.* at 390–392, 777 S.E.2d at 156–157. As *Shannon* shows, “good faith” provisions are commonly used in legal immunity statutes.

The uncertainty created by the decision below is readily apparent. Consider the Nonprofit Corporation Act. To bypass its legal immunity,

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<sup>13</sup> *Shannon* was cited extensively in the parties’ briefing but was not cited in the decision below.

*Shannon* requires well-pleaded factual allegations suggesting an officer or director acted in bad faith. The decision below does not. Instead, it would permit ordinary negligence claims (perhaps with a conclusory “bad faith” label tacked on) to proceed to costly, burdensome discovery.

Litigation costs are significant,<sup>14</sup> but they are only the start. These cases’ settlement value will be artificially inflated. The cost of director and officer liability insurance will increase. Most fundamentally, citizens will be disincentivized from participating in the State’s organizations promoting charitable, religious, political, and social welfare goals — the very purpose of granting legal immunity in the first place.

The practical effect of the decision below is that legal immunity from ordinary negligence can be easily circumvented by a court uncomfortable with the statutorily compelled result. And unlike the Emergency Act, the Nonprofit Corporation Act and other statutes with similar “good faith” elements do not include the same time limitations, meaning the effects of the decision below will not be cabined to the

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<sup>14</sup> See Lawyers for Civil Justice, Civil Justice Reform Group & U.S. Chamber Institute for Legal Reform, *Litigation Cost Survey of Major Companies* (2010) at 2–3, [https://www.uscourts.gov/sites/default/files/litigation\\_cost\\_survey\\_of\\_major\\_companies\\_0.pdf](https://www.uscourts.gov/sites/default/files/litigation_cost_survey_of_major_companies_0.pdf) (finding that discovery costs have increased rapidly).

extraordinary circumstances addressed by the Emergency Act. Without this Court's review, the harm caused by the decision below will spread much further, indefinitely.

**III. The decision below conflicts with *Meyer v. Walls* by applying an incorrect pleading standard for allegations of gross negligence in cases involving legal immunity.**

Review is appropriate because the decision below conflicts with binding Supreme Court authority that requires factual support for allegations of gross negligence in immunity cases. *See Meyer v. Walls*, 347 N.C. 97, 114, 489 S.E.2d 880, 890 (1997) (“However, we note that a conclusory allegation that a public official acted willfully and wantonly should not be sufficient, by itself, to withstand a Rule 12(b)(6) motion to dismiss. *The facts alleged in the complaint must support such a conclusion.*”) (emphasis added).

While the decision below pays lip service to *Meyer's* legal standard without citing that case (*see Land*, slip op. at 17), it certainly did not apply it. Rather, it recited allegations of “negligent care” and then held that a conclusory assertion that such negligent care was “careless, reckless, and grossly negligent” was sufficient to survive dismissal. *Id.*

For the same reasons described above (*see supra* p. 17–19), this decision will nullify the Emergency Act’s legal immunity, and threatens to do the same to the immunities provided in many other statutes with similar “gross negligence” exceptions. *See* Petition, App’x at App.50–App.53 (collecting statutes). Consider just two examples of statutes affected by the decision below. N.C. Gen. Stat. § 83A-13.1 confers immunity to architects who volunteer their services in times of emergency. N.C. Gen. Stat. § 89C-19.1 does the same for engineers. If these professionals were to make an innocent mistake while volunteering during an emergency, they would expose themselves, their families, and their business partners to financial ruin.

Without this Court’s review, the immunity conferred in the Emergency Act and many other statutes would be nullified. Needlessly so.

### **CONCLUSION**

There is no “moving on” from COVID-19. Its indelible effects are now etched into society and history, including in individuals’ personal and professional lives. Yet during its most challenging moments, our lawmakers, with broadly divergent political and policy views, came

together to enact laws designed to preserve, as much as possible, free enterprise and the provision of critical services — particularly health care services — in the face of paralyzing uncertainty. Now, some four years later, the Court of Appeals unilaterally has compromised the protections afforded by clear legislative action. Left undisturbed, the decision below will disincentivize the collective action of the business community during the next crisis, the very result the General Assembly sought to avoid. And it will permanently undermine other critically important legal immunities unrelated to COVID-19.

*Amici* respectfully request that the Petition be granted.

Respectfully submitted, this the 19th day of March, 2024.

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N.C. R. App. P. 33(b) Certification:

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**CERTIFICATE OF SERVICE**

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This the 19th day of March, 2024.

By: /s/ Derek A. Sutton  
Derek A. Sutton



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**APPENDIX**

**IDENTIFICATION OF *AMICI CURIAE***

**North Carolina Chamber Legal Institute** (“NCCLI”) is a North Carolina nonprofit corporation affiliated with the North Carolina Chamber, also a North Carolina nonprofit corporation, organized to promote and improve North Carolina’s business and economic development climate.

**NCHA, Inc. d/b/a North Carolina Healthcare Association** (“NCHA”) is a nonprofit association that advocates for 130 member hospitals and health systems in North Carolina. NCHA’s membership represents more than 95% of the hospitals in the State. NCHA’s members provide a broad range of health care services in hospital and post-acute settings, such as outpatient clinics, nursing homes, home health, and hospice, treating an average of 6 million patients annually.

**North Carolina Chapter of the American Society for Healthcare Risk Management** (“NCASHRM”) is an unincorporated association of Healthcare Risk Managers and those with an interest in healthcare risk management. NCASHRM is affiliated with the American Society for Healthcare Risk Management, which is a professional

membership group of the American Hospital Association, an Illinois nonprofit corporation. Organized in 1980, NCASHRM's members actively seek to promote safe patient care and continually redesign our processes to protect healthcare assets for a sustainable healthcare future. NCASHRM offers education, networking and advocacy for Healthcare Risk Managers. NCASHRM is joining in this Motion as an *amicus* solely for itself, and not on behalf of or for American Society for Healthcare Risk Management or American Hospital Association.