NO. COA 15-1381 TENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

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GILBERT BREEDLOVE and THOMAS HOLLAND, Plaintiffs-Appellants, v. MARION R. WARREN, in his Official capacity as Director of the N.C. Administrative Office of the Courts, and the NORTH CAROLINA ADMINISTRATIVE OFFICE OF THE COURTS, Defendants-Appellees.	)	From Wake County 15 CVS 4434

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PLAINTIFFS-APPELLANTS' BRIEF

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PLAINTIFFS-APPELLANTS' BRIEF

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ISSUES PRESENTED

I. Did the trial court err in dismissing Plaintiffs' Complaint pursuant to Rule 12(b)(1) of the North Carolina Rules of Civil Procedure for lack of standing because Defendants do not nominate, appoint, remove, or supervise magistrates when Defendants published and distributed two memos in October 2014 to the entire North Carolina court system, including to those who do nominate, appoint, remove, and supervise magistrates, dictating that a magistrate must participate in a same-sex

marriage ceremony without regard to the impact that might have on any magistrate's ability to exercise his or her religious beliefs?

II. Did the trial court err in dismissing Plaintiffs' Complaint pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure for failure to state a claim as a matter of law when Plaintiffs' alleged that Defendants' actions violated Plaintiffs' rights under the North Carolina Constitution?

STATEMENT OF THE CASE

On April 6, 2015, Plaintiffs filed suit against Defendants in Wake County Superior Court alleging claims under N.C.G.S. § 1-253 and Article I Sections 13 and 19 of the North Carolina Constitution. (R pp 2-42). They asked that court to find that Defendants had violated Plaintiffs' constitutional rights and that Defendants compensate Plaintiffs for any damages suffered, including reinstatement, compensation for back pay and benefits, and declaratory and injunctive relief to these effects. (R pp 27-28).

On May 11, 2015, Defendants filed a motion to dismiss pursuant to Rule 12(b)(1), (2), (5), and (6) of the North Carolina Rules of Civil Procedure. (R pp 43-45). On July 15, 2015, Wake County Superior Court Judge George B. Collins, Jr. heard oral arguments on Defendants' motion in open court. The Superior Court dismissed the case pursuant to Rules 12(b)(1) and 12(b)(6) of the North Carolina Rules of Civil Procedure, and a judgment to this effect was entered on September 19, 2015. (R pp 86-87).

Plaintiffs filed a Notice of Appeal in Wake County Superior Court on October 12, 2015. The record was settled by default on December 14, 2015. Plaintiffs filed the appeal on December 22, 2015, and the clerk docketed the case on the same day. Plaintiffs filed a Petition for Discretionary Review with the North Carolina Supreme Court on January 6, 2016, which is still pending as of this filing. Plaintiffs now timely file this brief.

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

This appeal is from a final judgment and is pursuant to N.C.G.S. § 7A-27(b)(1).

STATEMENT OF FACTS

Plaintiffs Breedlove and Holland served as magistrates from Swain and Graham Counties, respectively. Both men have sincerely practiced their Christian religion as an integral part of their lives for several decades. (R pp 11-13).

In the autumn of 2014, rulings from the United States Supreme Court and Fourth Circuit Court of Appeals established that states within the Fourth Circuit cannot prevent a same-sex couple from marrying, nor can they fail to recognize an otherwise lawful marriage of a same-sex couple from a different state. *See* Schaefer v. Bostic, 760 F.3d 352, review denied, 135 S. Ct. 308 (2014); Bostic v. Schaefer, No. 14-1167, 2014 WL 4960335 (4th Cir Oct. 6, 2014).

On October 13, 2014, the Director of the Administrative Office of the Courts (hereinafter "Director" and "AOC," respectively)[1] issued a memorandum under his name (the "Interim Guidance Memo") to all of North Carolina's Magistrates, Chief District Court Judges, and Elected Clerks. (R p 30). In this Interim Guidance Memo, the Director stated that magistrates should begin immediately conducting marriage ceremonies for same-sex couples, and that such marriage ceremonies should not be delayed while awaiting further clarification from higher courts. Id. The Director cited no authority pursuant to which he issued this memorandum. The Director claimed that he issued this memorandum due to "a sufficient number of requests for guidance given the recent federal ruling on same-sex marriages," but provided no specific examples of any such requests. (R p 30).

On October 14, 2014, at the Director's direction, the AOC issued a memorandum (the "Same-Sex Marriages Memo") to all North Carolina Superior Court Judges, Chief District Judges, District Court Judges, Clerks of Superior Court, and Magistrates. (R pp 32-33). Like with the Interim Guidance Memo, the AOC offered no authority pursuant to which it published this document. In the Same-Sex Marriages Memo, the AOC addressed whether a magistrate could refuse to participate in a same-sex marriage ceremony. The AOC stated that a magistrate's refusal to marry a same-sex couple would "[violate] the equal

[1] The "Interim Guidance Memo" was actually issued by then-AOC Director John Smith, who was sued in his official capacity only. Judge Marion Warren has since taken over as the Director and has therefore been substituted.

protection clause of the U.S. Constitution" and further "would constitute a violation of the oath and a failure to perform a duty of the office." Id.

The AOC also addressed what would happen if a magistrate refused to participate in a same-sex marriage ceremony. The AOC stated, "that refusal is grounds for suspension or removal from office, as well as potential criminal charges." (R p 33). It went on to say that North Carolina case law "makes clear that this criminal provision remains enforceable in addition to the procedures for suspension and removal under G.S. 7A-173." Id.

The AOC further stated that the reason that a magistrate might refuse to participate in a same-sex marriage ceremony does not in any way affect the matter. (R p 34). Thus, the AOC claimed that a magistrate could not assert religious belief as a reason to refuse to participate in a same-sex marriage ceremony. The AOC provided no exemption to this policy nor did it provide for reasonable accommodations for magistrates in its Same-Sex Marriages Memo.

The AOC reemphasized its position in a November 5, 2014 letter to Senator Phil Berger, President Pro Tempore of the North Carolina Senate. (R pp 36-38). Senator Berger asked the AOC Director to "revise the [Same-Sex Marriages Memo]." (R p 36). The Senator further asserted that "[the AOC's] guidance...violated Title VII's protections of religion in the workplace, and that

[the AOC and its Director] are required to make reasonable accommodations to judicial officials as employees." Id.

The Director did not respond by saying that the AOC lacks authority over magistrates, and that this was therefore not his decision to make. Rather, he doubled down on his position and stated that "our magistrates are affirmatively bound by those rulings in exercising their official powers," and that the AOC issued the memorandum to "magistrates and all court officials who nominate, appoint, and supervise magistrates" in order to ensure that they are "aware of the potential consequences for failure to comply with the injunction and follow the law." (R pp 37-38). Nevertheless, Defendants would later claim that, notwithstanding the Memos' references to criminal prosecution, civil penalties, and other potential discipline, "the memorandum issued by [the AOC] did not constitute a mandate to magistrates or their nominating or appointing officials." (R p 44). At no point in either letter did the Director or the AOC assert that they do not supervise magistrates.

Both Plaintiffs sought accommodations so that they would not be forced to choose between violating their religious beliefs by participating in a same-sex marriage ceremony on the one hand or resigning their positions as magistrates on the other. (R pp 20-21). Such an accommodation would have been possible, as evidenced by the legislature's subsequent passage of a law allowing magistrates to

opt out of performing marriage ceremonies. *See* N.C.G.S. § 51-5.5(a); N.C.G.S. § 14-230(b). Plaintiffs would have agreed to a similar accommodation allowing them to not participate in any marriage ceremonies, same-sex or otherwise, if Defendants had allowed such an accommodation. (R pp 21-22, 81). Defendants made no effort to offer any such accommodation, or *any other* accommodation. (R pp 36-38). Thus, Plaintiffs reasonably understood that, based on Defendants' directives, they faced a choice of either violating their religious beliefs or losing their jobs. Facing this choice, Plaintiffs resigned under duress.

On April 6, 2015, Plaintiffs filed suit in Wake County Superior Court alleging violations of their religious liberties under Article I Sections 13 and 19 of the North Carolina Constitution. (R pp 9-42). On September 19, 2015, the Superior Court dismissed the case pursuant to Rules 12(b)(1) and (6) based largely upon its finding that "the defendants have no power to nominate, appoint, remove, or otherwise control magistrates, nor do the defendants have the power to institute criminal prosecutions against magistrates for failure to perform their duties." (R pp 86-87). Plaintiffs appealed.

STANDARD OF REVIEW

In evaluating a dismissal pursuant to 12(b)(6) and 12(b)(1), the Court of Appeals conducts a *de novo* review. Welch Contracting Inc. v. N.C. Dept. of Transportation, 175 N.C. App. 45 (2005). The question on review is "whether, as a

matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory." Block v. Cnty. of Person, 141 N.C. App. 273, 277 (2000).

ARGUMENT

I. THE TRIAL COURT ERRED IN DISMISSING PLAINTIFFS' COMPLAINT FOR LACK OF STANDING BECAUSE PLAINTIFFS HAVE BEEN HARMED BY DEFENDANTS' EXERTIONS OF AUTHORITY

A. Defendants have authority over magistrates and exerted that authority, which forced Plaintiffs to forfeit their religious liberties and resign under reasonable fear of termination or prosecution.

North Carolina courts must be "open" to "every person for an injury done him in his lands goods, person, or reputation," and such injured persons "shall have remedy by due course of law." N.C. Const. Art. I § 18. As a general matter, the North Carolina Constitution confers standing on those who suffer harm. Mangum v. Raleigh Bd. of Adjustment, 362 N.C. 640, 642 (2008). "The gist of the question of standing is whether the party seeking relief has alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." Blinson v. State, 186 N.C. App. 328, 334 (2007), *quoting* Goldston v. State, 361 N.C. 26, 30 (2006). For example, a plaintiff has standing to challenge a legislative enactment where "the litigant has suffered, or is likely to suffer, a direct injury as a result of the law's enforcement."

Stephenson v. Bartlett, 358 N.C. 219, 226 (2004), *quoting* Maines v. City of Greensboro, 300 N.C. 126, 130-31 (1980).

Plaintiffs have been injured by Defendants' actions and so have standing. Not only do Plaintiffs have a "personal stake in the outcome of the controversy" due to Defendants' exertions of authority and the harm to Plaintiffs caused thereby, but they further have an intimate spiritual stake in the outcome. Blinson at 334. The trial court's focus on the fact that Defendants do not "hire, fire, or supervise" magistrates is simply misplaced. (R p 86-87). Similar to how litigants have standing to challenge the "enforcement" of a "legislative enactment" where they allege a violation of their constitutional rights, Plaintiffs have standing to challenge the actions of Defendants where those actions have allegedly infringed upon Plaintiffs' constitutionally protected religious liberties. Stephenson v. Bartlett, 358 N.C. at 226.

Plaintiffs have standing to bring their claims against Defendants because (1) Defendants are in a position of practical and actual authority over Plaintiffs, (2) Defendants exerted authority over North Carolina magistrates, including Plaintiffs, and (3) Plaintiffs reasonably resigned under duress due to Defendants' exertions of authority, thus forfeiting their religious liberties due to force or threat of force. In sum, Defendants caused harm to Plaintiffs by depriving them of the full enjoyment of their religious liberties under the North Carolina Constitution. For the purposes

of a 12(b)(1) motion to dismiss, the proper inquiry is whether Plaintiffs have properly alleged that Defendants caused them harm as a matter of law. Plaintiffs' Complaint satisfies this lenient standard.

1. *Defendants are in a position of practical and actual authority over magistrates.*

The trial court held that Plaintiffs lacked standing to sue Defendants because "[Defendants] have no power to nominate, appoint, remove, or otherwise control magistrates, nor do [Defendants] have the power to institute criminal prosecutions against magistrates for failure to perform their duties." (R pp 87-88). This Court should reverse that ruling because it leaves no room for the reality that administrative agencies often wield real, tangible power over government employees that they do not hire, fire, or supervise. At the core of Plaintiffs' case is the allegation that Defendants overstepped their bounds and thereby caused harm to Plaintiffs. Should Defendants seek to argue that they in fact did *not* overstep their bounds, that argument is properly made on the merits, not on a motion to dismiss. For the purposes of a 12(b)(1) motion to dismiss, Plaintiffs merely need to demonstrate that they have a personal stake in the alleged controversy with Defendants. Blinson v. State, 186 N.C. App. 328, 334 (2007). Plaintiffs have such a personal stake, and such a controversy exists, because of Defendants' position of influence over judicial staff.

In addition to the practical authority discussed below that the AOC has over magistrates, it also has actual authority and influence as a general proposition. Not only is the AOC responsible for paying magistrates, but it also exerts administrative and substantive control including, for example:

- Determining whether a magistrate has the sufficient work experience to be nominated for the position. N.C.G.S. § 7A-171.2(b);
- Setting the annual salary for each magistrate in consultation with a chief district judge. N.C.G.S. § 7A-171.1;
- Ensuring "overall compliance with federal and State laws, internal and external regulations, rules and procedures, and other applicable requirements." N.C.G.S. § 7A-343(3a)(c);
- Examining and analyzing the effectiveness of administrative and procedural operations. N.C.G.S. § 7A-343(3a)(b);
- Reviewing the effectiveness of proceedings conducted by judicial officers. N.C.G.S. § 7A-343(3a)(d);
- Collaborating to guide and direct court officials in following recommended and required compliance standards. N.C.G.S. § 7A-343(3a)(e);
- Setting an amount of the bond for a magistrate, and procuring that bond. N.C.G.S. § 7A-174; and
- Providing for the training of magistrates. N.C.G.S. § 7A-177.

Cumulatively, the AOC has actual authority and exerts influence over many aspects of a magistrate's job, including whether an applicant even has sufficient experience to apply to the position. N.C.G.S. § 7A-171.2(b). Further, the AOC's powers to determine whether a magistrate has sufficient work experience to be

hired and to set a magistrate's annual salary give it substantial influence in the hiring, firing, and supervision of magistrates. *See* N.C.G.S. § 7A-171.2(b); N.C.G.S. § 7A-171.1.

Further, one cannot but wonder, if Defendants have no authority over magistrates, then why did they send out two separate directives in October 2014 dictating what they thought a magistrate's duty was? And why did the Director reiterate his particular interpretation of the law when pushed by Senator Berger? Defendants did not equivocate or quibble. They stated plainly that "Magistrates should begin immediately conducting marriages of all couples … No further authorization or instructions are necessary." (R p 30). That is not a polite suggestion to the magistrates' nominating or appointing authority. That is not advice for how a supervisor should respond to a magistrate who does not agree with Defendants' suggestion. The cumulative effect of both memos and the letter to Senator Berger is clear – they constitute an unambiguous directive from an authoritative source, dictating that a supervisor must tell a magistrate how to perform his or her job, and that unambiguous directive contained thinly veiled threats of criminal prosecution, civil penalties, and employment discipline. (R pp 32-34).

It is also unclear why the Director would say that the AOC would not accommodate the religious beliefs of a magistrate if it has no authority over

magistrates. By their own actions, Defendants demonstrated that the Director has control over magistrates in the North Carolina court system. Defendants intended for their actions to have precisely the impact that they did. They intended to force a magistrate to either participate in a same-sex marriage ceremony or no longer remain a magistrate. In pursuit of this goal, Defendants issued directives not just to Plaintiffs, but to all members of the North Carolina court system.

Plaintiffs' supervisor, Chief District Judge Walker, acknowledged that he thought that a magistrate must participate in a same-sex marriage ceremony without regard to any potential religious objection based on his understanding of the directives issued by the AOC in October 2014. (R pp 83-85). He further acknowledged that he came to this understanding based on Defendants' directives. Id. Defendants are therefore in a position of authority and control over magistrates, even if they do not directly hire, fire, or supervise such magistrates, just as a puppeteer controls a marionette by pulling strings rather than tugging directly on the puppet. A person in such a position of authority and control is *ipso facto* in a position where he or she can cause harm.

2. *Defendants exerted authority over North Carolina magistrates, including Plaintiffs.*

Defendants instructed all of the employees and officials in the North Carolina court system unequivocally that every magistrate must participate in same-sex marriage ceremonies. (R pp 32-34). Defendants said that any magistrate

who refused to participate in a same-sex marriage ceremony could face discipline, termination, and even criminal prosecution. Id. The Director even wrote a letter reiterating his position and stating that the AOC would not accommodate any magistrate who felt compelled to refuse to participate in a same-sex marriage ceremony for religious reasons. (R pp 36-38). In that letter, the Director steadfastly maintained that any magistrate who so refused could face personal civil liability. Id. When pressed on this issue by President Pro Tempore of the Senate Phil Berger, the Director conceded that "a magistrate may not be *required* by statute to officiate over marriages since the statute...speaks in terms of '*additional powers*.'" (R p 37). Despite this concession, the Director did not recant his position that "if a magistrate refuses to [perform a same-sex marriage]...that refusal is grounds for suspension or removal from office, as well as, potential criminal charges." (R p 33). Thus, after admitting the arguable nature of the law, the Director maintained his position on the impact of the federal rulings, as well as his insistence that the AOC's interpretation of these rulings be treated as the proper understanding of the law. When pushed, he refused to relent. This is a clear exertion of authority by a public official in a position of influence, and it had the intended effect.

By exerting influence over those officials who directly supervise and appoint magistrates, as well as the magistrates themselves, Defendants achieved their goal of requiring magistrates to perform same-sex marriages. Chief District Judge

Richard Walker of the 30th Judicial District, who oversees all magistrates in both Swain and Graham Counties, averred that Defendants' directives led him to inform Plaintiff Breedlove that he had to choose between his religious beliefs and his job. (R p 84). Specifically, Judge Walker has provided an affidavit stating:

> "I informed Magistrate Breedlove that the memoranda [from Defendants] made it clear that the duties of North Carolina magistrates included performing marriage ceremonies regardless of the gender of the participants, and that this was a requirement if one were to continue to hold the position of magistrate...**My instructions to Magistrate Breedlove [were] the result of the information contained in these memoranda from AOC and the statements therein** citing the statutory duties of magistrates and the possible results of refusing to perform those statutory duties." (Emphasis added) (R p 84).

Thus, the District Judge responsible for overseeing both Plaintiffs understood that the AOC was exerting control over magistrates. Moreover, that judge, *based on the actions of Defendants and their threats to Plaintiffs*, understood that Plaintiffs had to perform same-sex marriages or would otherwise be subject to termination, as well as civil and criminal penalties. Judge Walker's affidavit is evidence of the harm caused to Plaintiffs by the actions of Defendants, as he would not have come to this understanding but for Defendants' actions.

3. *Plaintiffs reasonably resigned under duress due to Defendants' exertions of authority, thus forfeiting their religious freedoms under force or threat of force.*

a. As alleged, Plaintiffs reasonably resigned under duress.

As alleged, Plaintiffs were injured by being forced to resign rather than forfeit their constitutional rights. (R pp 22, 25, 27-28). Such allegations are sufficient to survive a motion to dismiss pursuant to Rule 12(b)(1) of the North Carolina Rules of Civil Procedure. Whether or not Defendants' actions *actually* constituted duress, and whether or not Plaintiffs' perception that they were being forced to resign were reasonable, are issues of fact that are not properly determined on a motion to dismiss. Motions to dismiss pursuant to Rule 12(b) of the North Carolina Rules of Civil Procedure test the legal sufficiency of the pleadings, not the merits of the case. Block v. County of Person, 141 N.C. App. 273, 277 (2000).

In examining whether a resignation is made "under duress," federal courts "[look] to the circumstances of the resignation to determine whether the employee was denied the opportunity to make a free choice." Scharf v. Dep't. of the Air Force, 710 F.2d 1572, 1574 (Fed. Cir. 1983), *citing* Perlman v. U.S., 490 F.2d 928, 933 (1974). Such cases include those where an employee is deprived of a protected interest. Id. In the realm of contracts, "duress" exists when a person "is induced to...perform or forego some act under circumstances which deprive him of the exercise of free will." Reynolds v. Reynolds, 114 N.C. App. 393, 398 (1994), *citing* Link v. Link, 278 N.C. 181 (1971).

Defendants forced Plaintiffs to resign under duress rather than face potential discipline, termination, or criminal prosecution for exercising their religious beliefs. At the very least, when the AOC sent out a memo dictating that a magistrate must participate in a same-sex marriage ceremony without delay or accommodation, it established a mandate that magistrates must perform such ceremonies. Whether or not explicit in the law, the AOC has the real authority to take such action and set policy for magistrates and the officials who directly supervise and appoint magistrates in the North Carolina court system, not to mention the practical authority that the AOC wields over judicial staff that is evidenced by Judge Walker's affidavit.

This Court should hold that Plaintiffs have been injured and may seek redress where Defendants take such action to control Plaintiffs, especially when, in doing so, they misinterpret the law and compel Plaintiffs to forfeit their constitutional right to free exercise of religion. This is especially the case given that the Director admitted to Senator Berger that the question is "arguable that a magistrate may not be *required* by statute to officiate over marriages," but still took a stand on the proper application of the federal rulings to North Carolina magistrates. (R pp 32, 36-38).

b. Plaintiffs' resignations constitute compelled forfeiture of their religious freedoms.

The free exercise of religion is impaired not only by governmental prohibition of religion, but also by "governmental compulsion of that which one's religious belief forbids." In re Williams, 269 N.C. 68, 79 (1967). The North Carolina Supreme Court has made clear that "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." Harris v. Matthews, 361 N.C. 265, 270 (2007). While the Plaintiffs bring their case under Article I Sections 13 and 19 of the North Carolina Constitution rather than the First Amendment of the U.S. Constitution, the rights secured by these provisions are similar. *See* In re Williams at 79 (discussing the similarity between state and federal constitutional protections for religious liberty).

Plaintiffs allege that they have suffered harm due to Defendants' actions. The actions of Defendants constituted a directive or mandate tantamount to enforcement. Similar to how litigants have standing to challenge the "enforcement" of a "legislative enactment" where they allege a constitutional violation, Plaintiffs have standing to challenge Defendants' actions where those actions have allegedly infringed upon Plaintiffs' constitutionally protected religious liberties. Stephenson v. Bartlett, 358 N.C. at 226. Defendants contend that could not have committed any sort of constitutional violation since they are not directly charged with the statutory duty to supervise magistrates. In addition to ignoring the practical influence that Defendants have over magistrates and their supervisors, this

contention would require the Plaintiffs, District Judge Walker, and Senate President Pro Tempore Phil Berger to all be incorrect in their understanding that Defendants' memoranda constituted directives that must be obeyed. These are all men who understand the law better than the average person. Two magistrates, a district judge, and a senator who has practiced law for decades all understood that magistrates and their supervisors had to comply with Defendants' directives.

Judge Walker understood that Defendants, in their memoranda, put forth performing same-sex marriages as "a requirement if one were to continue to hold the position of magistrate," and that he came to this understanding as a "result of the information contained in these memoranda from AOC and the statements therein citing the statutory duties of magistrates and the possible results of refusing to perform those statutory duties." (R p 84). Plaintiff Breedlove stated that "based on the response [he] got from Chief District Judge Walker who relied on the AOC memos, [he] felt compelled to resign from [his] position as a magistrate instead of facing criminal prosecution for acting in accordance with [his] religion." (R p 81). Senator Phil Berger believed that by issuing the two memoranda, Defendants overstepped their bounds and incorrectly stated the law on religious freedom and same-sex marriage. All four men understood, based on the actions of Defendants, that Plaintiffs had to choose between violating their religious beliefs and losing their jobs.

Defendants forced this choice upon Plaintiffs, and in doing so violated Plaintiffs' religious liberties secured by the North Carolina Constitution. Such a violation constitutes sufficient harm to confer standing upon Plaintiffs. The trial court therefore erred in dismissing the action for lack of subject matter jurisdiction.

B. Failure to hold Defendants accountable for their exertions of authority would create unpredictability in the legal system.

Should this Court fail to permit Plaintiffs to challenge the misconduct of Defendants, it would leave administrative agencies unchecked in their authority and influence over state employees that those agencies do not directly supervise. This unpredictability would extend beyond the AOC, touching other state agencies and employees.

Consider for a moment, the Department of Public Instruction ("DPI"), a state agency created by statute. N.C.G.S. § 143A-44.1. DPI is headed by a Superintendent of Public Instruction, whose office is created by the North Carolina Constitution. N.C. Const. Art. III § 7. The law does not grant the Superintendent the authority to directly hire, fire, or supervise teachers in the several school districts around the State. But what if the Superintendent distributed a directive to all of the school boards, principals, teachers, and other public school system employees in the State instructing them that all teachers must participate in a particular ceremony or otherwise face discipline, termination, or criminal prosecution? That could impact some or all of those teachers' ability to freely

exercise their religion. If the Superintendent ordered all teachers to participate in leading the Pledge of Allegiance, it would be entirely reasonable for a teacher to think that his or her job was at risk if he or she did not comply with the Superintendent's directive. Nevertheless, some teachers may feel that their religious views preclude them from participating in the recitation of the Pledge of Allegiance. Based on the trial court's ruling, such teachers would lack standing to challenge such an exertion of authority by the Superintendent.

Further, even if the Superintendent could not fire or discipline a teacher who failed to comply with this directive, he or she could and does influence the teacher's direct supervisors. This includes principals, local school system superintendents, and local school board members who do have that authority. Thus, the Superintendent's directive could have an indirect impact on the teacher by influencing the teacher's direct supervisors. If the trial court's statement of the law regarding standing is correct, then the Superintendent could trample on teachers' religious freedom with no fear of recourse. The trial court's ruling on standing and this Court's decision will have far broader impact than this case alone.

If the trial court's decision is affirmed, then Plaintiffs and similarly situated parties in future disputes will have no recourse against an administrative agency that exerts real power over them, either directly or indirectly. This Court should allow Plaintiffs to hold Defendants accountable for their exertions of authority in

order to avoid unfettered exertions of control by government agencies, and the unpredictability and fear which would ensue.

II. THE TRIAL COURT ERRED IN DISMISSING PLAINTIFFS' COMPLAINT FOR FAILURE TO STATE A CLAIM AS A MATTER OF LAW

A. Plaintiffs properly stated a claim under the North Carolina Constitution.

In Corum, the North Carolina Supreme Court addressed the issue of "whether a plaintiff has a direct cause of action under the State Constitution against governmental defendants for alleged violations of the plaintiff's free speech rights." Corum v. Univ. of N. Carolina Through Bd. of Governors, 330 N.C. 761, 781 (1992). The Court held that because "the provision of our Constitution which protects the right of freedom of speech is self-executing...the common law...will furnish the appropriate action for the adequate redress of a violation of that right." Corum at 782. When the provision of the North Carolina Constitution "forbids damage to a right but points out no remedy, and no statute affords one...the provision is self-executing." Sale v. State Highway & Pub. Works Comm'n, 242 N.C. 612, 618 (1955).

Plaintiffs allege claims pursuant to Article I Sections 13 and 19 of the North Carolina Constitution. Article I Section 13 provides that "no human authority shall, in any case whatever, control or interfere with the rights of consciences." N.C. Const. Art. I § 13. Article I Section 19 provides that "No person shall

be...subjected to discrimination by the State because of...religion." N.C. Const. Art. I § 19. Neither provision points to a specific constitutional or statutory remedy. They are therefore both "self-executing." Sale at 618. Further, Plaintiffs have no other statutory state remedy to redress the harm that Defendants did to them by violating their constitutional right to religious liberty.

Because Plaintiffs bring claims under self-executing provisions of the North Carolina Constitution and have no other state remedies, they have properly stated claims against Defendants under the North Carolina Constitution. Whether Defendants *actually* violated Plaintiffs' rights secured by these provisions is a different question not properly determined on a motion to dismiss. Plaintiffs must be afforded the opportunity to argue that point during later proceedings, such as summary judgment or trial. All Plaintiffs ask for now is a chance to make their case. They simply want their day in court, and respectfully ask that this Court not nail shut the courthouse door based on hyper-technical understanding of the relationship between administrative agencies and the state employees they influence. If Defendants take issue with the reasonableness of Plaintiffs' resignation, and whether their situation constitutes "duress," such questions of fact are not properly disposed of on a motion to dismiss. For now, the sole question is whether Plaintiffs may advance to an argument on the merits. The trial court therefore erred in dismissing the complaint for failure to state a claim.

B. North Carolina's heightened protections for religious liberty provide Plaintiffs with a remedy against Defendants.

The Court below concluded that Plaintiffs failed to state a claim upon which relief could be granted. However, that conclusion was based on an apparent misapprehension of the correct legal test for reviewing religious liberty claims. The North Carolina Constitution provides that "All persons have a natural and inalienable right to worship Almighty God according to the dictates of their own consciences, and no human authority shall, in any case whatever, control or interfere with the rights of conscience." N.C. Const. Art. I § 13. It also provides that no person shall be "subjected to discrimination by the State because of … religion." N.C. Const. Art. I § 19. Plaintiffs alleged in their Complaint that Defendants violated Plaintiffs' rights as guaranteed by both of these provisions.

The North Carolina Constitution protects these religious liberties, and the courts guard that liberty with a "compelling governmental interest" test that is considerably more robust than its federal counterpart. Matter of Browning, 124 N.C. App. 190, 193-194 (1996). Historically, federal courts used to use an identical "compelling governmental interest" test formulated in Sherbert v. Verner, 374 U.S. 398 (1963), in cases raising religious freedom principles under the United States Constitution. However, in 1990 the United States Supreme Court rejected that test and adopted a new rule. This new rule allowed a governmental actor to enforce a neutral law of general applicability without violating the United States Constitution.

Empl't Div. v. Smith, 494 U.S. 872, 878-79 (1990). This made it more difficult for an individual to pursue a claim against a state actor for violating his or her freedom to exercise his or her religion under federal law. But North Carolina is not bound by the shifting federal standard and has not forsaken the compelling governmental interest test.

Developments in federal law notwithstanding, North Carolina maintained its heightened protections for religious liberties. Prior to the federal decision in Smith, North Carolina used a "compelling governmental interest" standard. In re Williams, 269 N.C. 68, 80 (1967). In 1996, six years after the Smith decision, the North Carolina Court of Appeals ignored the development in federal law by stating that "one may not be compelled by a governmental action to do that which is contrary to his religious beliefs in the absence of a 'compelling state interest in the regulation of a subject within the State's Constitutional power to regulate.'" Matter of Browning, 124 N.C. App. 190, 193-194 (1996), *quoting* In re Williams, 269 N.C. 68, 80 (1967). North Carolina courts therefore maintained and renewed the State's adherence to the "compelling state interest" test set forth in Williams even after the federal courts watered down the federal standard in Smith.

Defendants relied upon In re Williams to claim that the North Carolina Constitution allows an individual to exercise his or her religious freedoms in the same manner as allowed by the United States Constitution. (R p 60-62).

Defendants claim that, under the North Carolina Constitution, the protections of an individual's religious freedoms are now similar to the new rule from Smith. Id. Based on this in part, Defendants claimed that Plaintiffs' Complaint failed to state a claim upon which relief can be granted. (R p 59). The trial court granted Defendants' motion, in part, holding that Plaintiffs' Complaint failed to state a claim upon which relief can be granted. (R p 86-87).

Defendants' understanding of North Carolina's protections for religious liberty is flawed. North Carolina courts continue to adhere to the "compelling governmental interest" test. Against the backdrop of that stringent standard and, where construed liberally, Plaintiffs' Complaint properly stated a claim against Defendants for alleged violations of their religious freedoms under the North Carolina Constitution.

CONCLUSION

For the foregoing reasons, Plaintiffs-Appellants respectfully request that the decision of the Trial Court be reversed and that the matter be remanded for further proceedings.

Respectfully submitted, this the 27th day of January, 2016.

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*N.C. R. App. P. 33(b) Certification:
I certify that the attorney listed below has authorized me to list his name on this document as if he had personally signed.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the Rules of Appellate Procedure, counsel for the Appellant certifies that the foregoing brief, which is prepared using a proportional font, is less than 8,750 words (excluding cover, indexes, tables of authorities, certificates of service, this certificate of compliance and appendixes) as reported by the word-processing software.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a copy of the foregoing brief on counsel for the Appellee by depositing a copy, contained in a first-class postage-paid wrapper, into a depository under the exclusive care and custody of the United States Postal Service, addressed as follows:

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