Case Brief: *Committee to Elect Dan Forest v. Employees Political Action Committee*[*]

INTRODUCTION

The "thorny thicket" of standing is a "tortuous track"—a track that the Supreme Court of North Carolina has tried to avoid.[1]

At a constitutional minimum, federal standing requires three elements:

> First, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.[2]

State standing, however, can be more permissive than federal standing.[3] While some state courts have explicitly addressed standing under their state constitutions,[4] until 2021, North Carolina had not directly addressed what the North Carolina Constitution requires for a plaintiff to enter the "courthouse doors."[5] In *Committee to Elect Dan Forest v. Employees Political Action Committee*,[6]

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1. Comm. to Elect Dan Forest v. Emps. Pol. Action Comm., 376 N.C. 558, 2021-NCSC-6, ¶ 83.

2. Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992) (internal quotation marks and citations omitted).

3. *See, e.g.*, *Forest*, 2021-NCSC-6, ¶ 10 (citing Comm. to Elect Dan Forest v. Emps. Pol. Action Comm., 260 N.C. App. 1, 2, 817 S.E.2d 738, 739 (2018) (McGee, C.J., dissenting), *aff'd*, 376 N.C. 558, 2021-NCSC-6) ("North Carolina courts are not constitutionally bound by the standing jurisprudence established by the United States Supreme Court.").

4. *See, e.g.*, Lansing Schs. Educ. Ass'n v. Lansing Bd. of Educ., 792 N.W.2d 686, 699, 726 (Mich. 2010) ("[A] litigant has standing whenever there is a legal cause of action."); *see also* Fernandez v. Takata Seat Belts, Inc., 108 P.3d 917, 919 (Ariz. 2005) (recognizing standing absent any alleged distinct and palpable injury in "exceptional circumstances . . . involving issues of great public importance that are likely to recur").

5. *See Forest*, 2021-NCSC-6, ¶ 13. However, before *Forest*, the Supreme Court of North Carolina had observed that North Carolina standing doctrine differs from federal standing. Goldston v. State, 361 N.C. 26, 35, 637 S.E.2d 876, 882 (2006) ("While federal standing doctrine can be instructive as to general principles . . . and for comparative analysis, the nuts and bolts of North Carolina standing doctrine are not coincident with federal standing doctrine.").

6. 376 N.C. 558, 2021-NCSC-6.

the Supreme Court of North Carolina finally confronted this question.[7] In doing so, it held that the North Carolina Constitution does not require injury in fact, and it eliminated proof of injury in fact as a prerequisite for statutory standing.[8] The court held that as long as a plaintiff has a cause of action under a statute,[9] and as long as their interests are injured or they are in the class of persons that the statute aims to protect, "the legal injury itself gives rise to standing."[10]

BACKGROUND

During the 2012 election season, the Employees Political Action Committee ("EMPAC"), a political action committee for the State Employees Association of North Carolina ("SEANC"), ran television ads supporting Linda Coleman, Dan Forest's opponent in the race for North Carolina Lieutenant Governor.[11] When the ads aired, a North Carolina disclosure statute,[12] which has since been repealed, required that all political action committee television ads "include a disclosure statement spoken by the chief executive officer or treasurer of the political action committee."[13] It also required that the ad display a full-screen photo or video of the disclosing individual "throughout the duration of the disclosure statement."[14] Under the statute, opposing candidates who complied with these requirements could seek a monetary remedy against a political action committee whose advertisements violated the statute.[15] Notably, however, the statute did not require that the opposing candidate suffer harm to bring a claim.[16]

According to the Committee to Elect Dan Forest ("Committee"), EMPAC's ad violated the disclosure statute. The Committee observed that the ad did not contain a full-screen picture of EMPAC's chief executive officer or treasurer; instead, it contained a small picture of the CEO of SEANC.[17] The Committee notified EMPAC of its statutory requirement to display a full-size

7. *Id.* ¶ 72.

8. *Id.*

9. "Showing a party falls within the class of persons on whom the statute confers a cause of action may require a showing of some special injury depending on the statutory terms." *Id.* ¶ 82 n.51.

10. *Id.* ¶ 82. The U.S. Supreme Court has explicitly rejected this approach for federal standing. *See* Spokeo, Inc. v. Robins, 578 U.S. 330, 341 (2016) ("Article III standing requires a concrete injury even in the context of a statutory violation.").

11. *Forest*, 2021-NCSC-6, ¶ 2.

12. N.C. GEN. STAT. § 163-278.39A (2011) (repealed 2014).

13. *Forest*, 2021-NCSC-6, ¶ 5 (citing § 163-278.39A(b)(3) (repealed 2014)).

14. *Id.* (citing § 163-278.39A(b)(6) (repealed 2014)).

15. *Id.* ¶ 6 (citing § 163-278.39A(f) (repealed 2014)).

16. *See* § 163-278.39A(f) (repealed 2014).

17. *Forest*, 2021-NCSC-6, ¶ 2; Comm. to Elect Dan Forest v. Emps. Pol. Action Comm., 260 N.C. App. 1, 3, 817 S.E.2d 738, 740 (2018), *aff'd*, 2021-NCSC-6 (2021).

photo.[18] EMPAC responded by displaying a larger version of the same photo.[19] Shortly after the modified ad aired, Forest won the race for lieutenant governor.[20]

Four years after winning the election, the Committee brought a claim under the private right of action in the disclosure statute.[21] EMPAC moved for summary judgment on the grounds that the statute violated the First Amendment as a content-based restriction on speech.[22] The trial court granted EMPAC's motion, although for a different reason than EMPAC had originally provided.[23] It held that, despite the statute's grant of a private enforcement mechanism, standing prevented the Committee from bringing a claim without alleging "any forecast of actual demonstrable damages."[24] Thus, absent these allegations, the statute was unconstitutional as applied.[25]

The Committee appealed, and in a split decision, the North Carolina Court of Appeals reversed the trial court's grant of summary judgment.[26] The court of appeals relied on state supreme court precedent to hold that when a statute creates a private right of action, "the breach of the private right, itself, constitutes an injury which provides standing to seek recourse."[27] Chief Judge McGee dissented from the majority, rejecting the argument that North Carolina's constitution imposed looser restrictions than federal standing requires.[28] Rather, she maintained that "a statutory grant of standing does not necessarily confer standing on a party under the North Carolina Constitution absent a concrete and particularized injury in fact and, because the interests vindicated by the statute were public and not private, the Committee had not suffered adequate harm to satisfy the injury requirements for standing."[29] The

18. *Forest*, 2021-NCSC-6, ¶ 3.

19. *Id.* ¶ 3.

20. *Id.* ¶ 4. North Carolina Court of Appeals Judge Christopher Dillon noted the political irony in Forest, a Republican, bringing a claim "under a law passed by a Democratic-controlled General Assembly and later repealed by a Republican-controlled General Assembly." *Forest*, 260 N.C. App. at 12, 817 S.E.2d at 745, *aff'd*, 2021-NCSC-6.

21. *Forest*, 2021-NCSC-6, ¶ 6.

22. *Id.* ¶ 8.

23. *Id.*

24. *Id.* (quoting Order, Forest v. Emps. Pol. Action Comm., 16-CV-003099, 2017 WL 2655515, at *1 (N.C. Super. Ct. Feb. 15, 2017)).

25. *Id.*

26. *Id.* ¶ 9 (citing *Forest*, 260 N.C. App. at 3, 817 S.E.2d at 740).

27. *Id.* (quoting *Forest*, 260 N.C. App. at 8, 817 S.E.2d at 743). In past cases, the North Carolina Court of Appeals has held that, like Article III standing, North Carolina standing requires injury in fact. *See, e.g.*, Neuse River Found., Inc. v. Smithfield Foods, Inc., 155 N.C. App. 110, 113–14, 574 S.E.2d 48, 51–52 (2002) (applying *Lujan* and noting that Plaintiff must still allege injury in fact even though North Carolina courts are not "constrained by the 'case or controversy' requirement of Article III" standing), *overruled in part by Forest*, 2021-NCSC-6.

28. *See Forest*, 2021-NCSC-6, ¶ 10 (citing *Forest*, 260 N.C. App. at 13–14, 817 S.E.2d at 746 (McGee, C.J., dissenting)).

29. *Id.* (citing *Forest*, 260 N.C. App. at 13–14, 817 S.E.2d at 749 (McGee, C.J., dissenting)).

Supreme Court of North Carolina granted discretionary review to resolve whether standing under the North Carolina Constitution is more permissive than federal standing.[30]

LEGAL ISSUES AND OUTCOMES

Writing for the majority, Justice Hudson acknowledged that it was time for the court to finally clarify the differences between federal standing and standing under North Carolina law.[31] The court began by observing that the word "standing" appears in neither the state constitution nor the federal Constitution but is recognized under federal law as a limit on judicial power that arises from the federal Constitution's Case or Controversy Clause.[32] To determine whether the framers of the North Carolina Constitution intended to limit judicial power this same way, the court began with a textual analysis of the North Carolina Constitution.[33] Finding no clear intent in the text, and noting that the state constitution does not include an express limit on judicial power like the federal Constitution's Case or Controversy Clause,[34] the court next turned to examining the historical context in which the framers adopted the state's constitution.[35]

The historical context in which the framers adopted the state's constitution also does not support limiting judicial power. The court found that, at common law, the concept of standing was essentially nonexistent.[36] Instead, common law allowed for almost "'standingless' public action" and the type of "private attorney[s] general" that federal standing tries to prevent.[37] Against this backdrop, the court was satisfied that the framers of the North Carolina Constitution did not intend for judicial power, as used in the North Carolina Constitution, to require "'actual harm' or 'injury in fact' apart from the existence of a legal right or cause of action to have standing to invoke the power of the courts in this State."[38]

Recognizing that the North Carolina Constitution has been amended since it was ratified in 1776, the court next looked at the evolution of standing to

30. *Id.* ¶ 11.

31. *See id.* ¶ 13. The court emphasized that its "silence on this fundamental matter has engendered substantial confusion and disagreement in the lower courts." *Id.*

32. *Id.* ¶ 16.

33. *See id.* ¶¶ 15–19.

34. *Id.* ¶ 17. Federal standing is grounded in the Case or Controversy Clause. *Id.* ¶ 85; *see* Flast v. Cohen, 392 U.S. 83, 94–99 (1968).

35. *Forest*, 2021-NCSC-6, ¶ 19 (quoting State *ex rel.* McCrory v. Berger, 368 N.C. 633, 639, 781 S.E.2d 248, 252 (2016)).

36. *Id.* ¶ 27.

37. *Id.* (quoting Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1396 (1988)).

38. *Id.*

determine whether it still adhered to common law's conception—or lack of conception—of standing.[39] The court noted that many states, including North Carolina, distinguished between enforcing private rights, which required a showing of legal right or injury, and vindicating public rights, which generally were available to anyone without showing a personal interest.[40] Until the mid-twentieth century, the same was true in federal court.[41] Then, partially in response to "the emergence of the administrative state and constitutional attacks on progressive federal legislative programs,"[42] the idea that a plaintiff must be able to show some particularized injury, rather than a generalized grievance, surfaced in federal court.[43] While this first appeared as a limit only to general grievances in taxpayer and nonstatutory citizen suits,[44] it eventually extended to apply to private rights of action created by statute.[45] This extension was based on the case or controversy requirement,[46] which is noticeably absent from the North Carolina Constitution.[47]

Next, the court emphasized that because the North Carolina Constitution does not include the Case or Controversy Clause as a limit on judicial power, "the framers of the North Carolina Constitution did not, by their plain words, incorporate the same federal standing requirements."[48] Thus, the only way the North Carolina Constitution could impose an injury in fact requirement is if the phrase "judicial power" requires injury in fact or if the North Carolina Constitution's remedy clause requires it.[49] The court held that neither "judicial power" nor the remedy clause requires this.[50]

Looking at why "judicial power" does not require injury in fact, the court emphasized the different motivations behind state and federal standing. It detailed case law showing that unlike federal standing, which is motivated by both separation of powers and federalism concerns, North Carolina standing is concerned with ensuring "concrete adverseness," which is based on "prudential principles of self-restraint in exercise of [the court's] power of judicial review

39. *See id.* ¶ 28.

40. *See id.* ¶¶ 29–34.

41. *Id.* ¶ 38. For most of the twentieth century, a plaintiff had standing if a legal right was invaded under the common law, a statute, or the federal Constitution. *Id.* ¶ 57.

42. *Id.* ¶ 39.

43. *See id.* ¶ 42. The court highlighted that it was unclear whether the prohibition on generalized grievances arose as a prudential concern or, instead, as product of the case or controversy requirement. *Id.*

44. *See id.* ¶ 42.

45. *See id.* ¶ 55.

46. *See id.*

47. *Compare* U.S. CONST. art. III, § 2 ("[J]udicial Power shall extend to all *Cases*, in Law and Equity, arising under this Constitution . . . [and] to *Controversies* between . . . ." (emphasis added)), *with* N.C. CONST. art. IV (containing no analogous provision).

48. *Forest*, 2021-NCSC-6, ¶ 58.

49. *See id.* ¶¶ 63, 76.

50. *Id.* ¶ 65.

for constitutionality."[51] Given that North Carolina standing is directly related to the court's power to resolve actual controversies, the court observed that it "does not necessarily follow that [the] requirement for direct injury applies to suits not arising under the constitution, but instead based on common law or statutory right."[52] In the context of statutory rights specifically, case law shows that the legislature has "broad authority . . . to create causes of action, . . . even where personal, factual injury did not previously exist, in order to vindicate the public interest."[53] The court reasoned that because bringing a claim under a statutory or common law right does not implicate the concerns that motivate the state's standing doctrine,[54] nor is requiring "a showing of direct injury beyond the impairment of the common law or statutory right" consistent with North Carolina case law,[55] the North Carolina Constitution does not require it.[56]

The court also rejected the idea that the remedy clause of the North Carolina Constitution requires injury in fact.[57] It acknowledged that the remedy clause provides that courts are open to "every person for an *injury* done him in his lands, goods, person, or reputation"[58] but reasoned that this language refers to the infringement of a legal right and is not limited to factual injury.[59] In other words, the remedy clause guarantees standing whenever "a legal right at common law, by statute, or arising under the North Carolina Constitution has been infringed."[60]

Applying this reasoning to the Committee, the Committee clearly had standing.[61] The Committee alleged that EMPAC violated the disclosure statute, and the Committee met all statutory requirements to bring a claim.[62] Additionally, the Committee was part of the "class of persons" to whom the statute granted a cause of action.[63] Counter to EMPAC's argument that the Committee's claim failed because it did not allege injury in fact, the court held that the Committee had standing because "the legislature may create causes of

51. *Id.* (citation omitted).

52. *Id.*

53. *Id.* ¶ 71. The court conceded that its decisions "have not always maintained [the distinctions between North Carolina standing and Article III standing] with exactitude." *Id.* ¶¶ 74–75.

54. *Id.* ¶ 73.

55. *Id.* ¶ 74.

56. *Id.* ¶ 73.

57. *Id.* ¶ 81.

58. *Id.* ¶ 77 (emphasis omitted and added) (quoting N.C. CONST. art. I, § 18).

59. *Id.* ¶ 81.

60. *Id.* (citing N.C. CONST. art. I, § 18, cl. 2).

61. *Id.* ¶ 84.

62. *See id.* ¶ 83; *see also* N.C. GEN. STAT. § 163-278.39A(f) (2013) (repealed 2014) (granting candidates who comply with disclosure requirements a monetary remedy against opposing political action committees that violate the disclosure requirements).

63. *Id.* ¶ 84. This was because Forest was Coleman's opposing candidate, Forest complied with the statute's requirements, and Forest assigned his interest to the Committee. *See id.*

action, including 'private attorney general actions' to vindicate even a purely public harm."[64]

Chief Justice Newby concurred in the result, declining to explicitly mention standing but reasoning that the General Assembly is allowed to create "private attorney general actions" and that these statutes "by [their] own accord recognize[] that an injury has occurred and allow[] a specified party to sue for recovery."[65] According to Chief Justice Newby, the General Assembly has this power because some injuries are "difficult to quantify" and therefore require that the General Assembly set the terms of what constitutes an injury.[66] He highlighted North Carolina's Open Meetings Law as an example of an act that provides "private attorney general actions" for plaintiffs absent any individualized injury.[67]

IMPLICATIONS

Forest means that a plaintiff who has not yet been harmed by a defendant—and who may never be harmed—may have standing to bring a claim against the defendant in state court[68] if a North Carolina statute grants the plaintiff that right. The decision thus shifts some control over who can enter the courts from the courts to legislators. In North Carolina, a state where legislators have significant power,[69] this shift is especially significant.

After *Forest*, legislators can more easily grant private citizens the ability to vindicate state constitutional or statutory rights, an authority usually reserved for the executive branch. For example, the North Carolina General Assembly could create a right to a clean environment and pass a law that allows any private citizen to sue an entity or person alleged to have polluted the environment.[70]

64. *Id.*

65. *Id.* ¶ 94 (Newby, C.J., concurring).

66. *Id.*

67. *Id.* ¶ 95 (quoting N.C. GEN. STAT. § 143-318.16A(a) (2019)).

68. Federal standing still bars these claims in federal courts. *See, e.g.*, Spokeo, Inc. v. Robins, 578 U.S. 330, 341 (2016) ("Article III standing requires a concrete injury even in the context of a statutory violation."). Thus, entities, especially those that operate in multiple states, may want to reconsider choice of forum and choice of law clauses in light of *Forest*.

69. "North Carolina has always had a strong legislative branch and a weak governor to protect against executive power." Allison Thoet, *What North Carolina's Power-Stripping Laws Mean for New Gov. Roy Cooper*, PBS NEWS HOUR (Jan. 3, 2017, 3:57 PM), https://www.pbs.org/newshour/politics/north-carolinas-power-stripping-laws-mean-new-gov-roy-cooper [https://perma.cc/4KA5-WP4C] (discussing the North Carolina legislature passing laws that stripped some of the governor's appointment power and subjected the governor's cabinet appointments to senate approval). For example, the North Carolina legislature can override a governor's veto with only a three-fifths vote, N.C. CONST. art. II, § 22, while most states require at least a two-thirds vote, *Veto Overrides in State Legislatures*, BALLOTPEDIA, https://ballotpedia.org/Veto_overrides_in_state_legislatures [https://perma.cc/9C6P-CS7G].

70. For example, the Michigan Environmental Protection Act allows "any person" to bring an action "for declaratory and equitable relief against any person for the protection of the air, water, and

As long as the hypothetical plaintiff falls into the class of persons that the statute was designed to protect—in this case, "any private citizen"—the plaintiff would have standing, even absent a showing that the pollution injured them.

Legislators could also pass laws that allow plaintiffs to bring claims when the plaintiff has suffered no injury and, arguably, when there is no harm to the general public. The Texas Heartbeat Act[71] is an example of this type of law.[72] The Texas Act allows private citizens—who allege no injury to themselves—to sue doctors or others who "knowingly engage[] in conduct that aids or abets the performance or inducement of an abortion."[73] Even absent injury in fact, it grants standing to private citizens, other than governmental officers or employees,[74] by providing them with an explicit statutory cause of action.[75]

other natural resources and the public trust in these resources from pollution, impairment, or destruction." Michigan Environmental Protection Act, ch. 451, 1994 Mich. Pub. Acts 2215, 2227 (codified at MICH. COMP. LAWS § 324.1701 (1995)).

71. Texas Heartbeat Act, ch. 62, 2021 Tex. Gen. Laws 1 (codified in scattered sections of TEX. HEALTH & SAFETY CODE ANN.; TEX. GOV'T; TEX. CIV. PRAC. & REM.).

72. While legislators could try to pass a law like the Texas Heartbeat Act, such laws pose many constitutional issues unrelated to standing. *See generally* Complaint, United States v. Texas, 566 F. Supp. 3d 605 (W.D. Tex. 2021) (No. 1:21-cv-796) (arguing that SB8 is preempted by federal law and violates multiple constitutional provisions as well as the doctrine of intergovernmental immunity).

73. § 171.208(a)(2), 2021 Tex. Gen. Laws at 6. The law applies only to those who "aid[] or abet[] the performance or inducement of an abortion" after a medical professional has detected a fetal heartbeat. *Id.* §§ 171.203, 171.204, 171.208(a)(2), Tex. Gen. Laws at 3–4, 6.

74. The act prohibits governmental enforcement. *See* § 171.208(a)(2), 2021 Tex. Gen. Laws at 5–9. Likely, the act prohibits such enforcement in an effort to avoid federal constitutional review. *See* Complaint at *2, *Texas*, 566 F. Supp. 3d 605 (No. 1:21-cv-796) ("It takes little imagination to discern Texas's goal—to make it too risky for an abortion clinic to operate in the State, thereby preventing women throughout Texas from exercising their constitutional rights, while simultaneously thwarting judicial review."). To bring a preenforcement challenge against the constitutionality of a statute, plaintiffs typically sue the government—the party in charge of enforcing the statute. Diego A. Zambrano, *Maneuvering Around the Court: Stanford's Civil Procedure Expert Diego Zambrano on the Texas Abortion Law*, STAN. L. SCH. BLOGS (Sept. 8, 2021), https://law.stanford.edu/2021/09/08/maneuvering-around-the-court-stanfords-civil-procedure-expert-diego-zambrano-on-the-texas-abortion-law/ [https://perma.cc/XJ5P-8FEA]. But if the government does not enforce a statute, it makes it more difficult for plaintiffs to find an appropriate defendant to bring the challenge against. *See id.*

75. *See* § 171.208(a)(2), 2021 Tex. Gen. Laws at 6. It is unclear whether Texas has adopted federal standing requirements or, if like North Carolina's constitution, Texas's constitution gives a broader class of citizens the right to sue. *See* Zambrano, *supra* note 74; *see also* Order Declaring Certain Civil Procedures Unconstitutional and Issuing Declaratory Judgment at 36, Van Stean v. Tex. Right to Life, No. D-1-GN-21-004179 (Tex. 98th Jud. Dist. Dec. 9, 2021) (declining to explicitly address whether Texas standing requires injury in fact but holding that "SB 8's grant of standing for persons who have not been harmed to sue persons who have not harmed them, mandating a large award without proof of harm, is unconstitutional"). *Compare* Charles W. "Rocky" Rhodes & Howard M. Wasserman, *Solving the Procedural Puzzles of the Texas Heartbeat Act and Its Imitators: The Potential for Defensive Litigation*, 75 SMU L. REV. 187, 229–31 (2022) (observing that Texas standing law is "complicated" and uncertain but noting that Texas Supreme Court dicta implies that statutory standing works as an exception to ordinary standing rules requiring a particularized injury), *with* Wyatt Sassman, *A Survey of Constitutional Standing in State Courts*, 8 KY. J. EQUINE, AGRIC. & NAT. RES. L. 349, 393 (2015) ("Texas courts . . . require the same injury showing as under Article III of the United States Constitution.").

Because standing under the North Carolina Constitution does not require proof of injury in fact when a plaintiff has a statutory cause of action, and because the Texas Heartbeat Act provides private plaintiffs with a statutory cause of action, a statute like the Texas Heartbeat Act may not present standing issues under North Carolina law.[76]

Although the courts still maintain some control over who enters the courthouse doors after *Forest*, they have delegated much of this power to the legislature. Now, legislators can decide what types of harms courts can address. The implications of *Forest* may thus rely more on our elected officials than our courts.

KATE GIDUZ[**]

76. This is concerning because as Justice Newby noted, laws with private enforcement schemes exist for situations where "the harm is to the public generally and is difficult to quantify." Comm. to Elect Dan Forest v. Emps. Pol. Action Comm., 376 N.C. 558, 612, 2021-NCSC-6 ¶ 94 (Newby, C.J., concurring). While an environmental act furthers the purpose of protecting the public from harm, the Texas Heartbeat Act, arguably, neither protects the public from harm nor does it serve to "vindicate the public interest." *See id.* ¶ 71 (majority opinion).

** J.D. Candidate, Class of 2023.