NO. 403PA21 EIGHTEENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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LOUIS M. BOUVIER, JR., KAREN ANDREA NIEHANS, SAMUEL R. NIEHANS, and JOSEPH D. GOLDEN,	)	
Plaintiffs-Appellees	)	
v.	)	
	)	From Guilford County
WILLIAM CLARK PORTER, IV, HOLTZMAN VOGEL JOSEFIAK TORCHINSKY PLLC, STEVE ROBERTS, ERIN CLARK, GABRIELA FALLON, STEVEN SAXE, and the PAT MCCRORY COMMITTEE LEGAL DEFENSE FUND,	)	No. COA20-441
Defendants-Appellants.	)	

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REPLY BRIEF OF DEFENDANTS-APPELLANTS HOLTZMAN VOGEL JOSEFIAK TORCHINSKY PLLC, STEVE ROBERTS, ERIN CLARK, GABRIELA FALLON, STEVEN SAXE, and the PAT MCCRORY COMMITTEE LEGAL DEFENSE FUND

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NO. 403PA21 EIGHTEENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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LOUIS M. BOUVIER, JR., KAREN ANDREA NIEHANS, SAMUEL R. NIEHANS, and JOSEPH D. GOLDEN, Plaintiffs-Appellees v. WILLIAM CLARK PORTER, IV, HOLTZMAN VOGEL JOSEFIAK TORCHINSKY PLLC, STEVE ROBERTS, ERIN CLARK, GABRIELA FALLON, STEVEN SAXE, and the PAT MCCRORY COMMITTEE LEGAL DEFENSE FUND, Defendants-Appellants.	)	From Guilford County No. COA20-441

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REPLY BRIEF OF DEFENDANTS-APPELLANTS HOLTZMAN VOGEL JOSEFIAK TORCHINSKY PLLC, STEVE ROBERTS, ERIN CLARK, GABRIELA FALLON, STEVEN SAXE, and the PAT MCCRORY COMMITTEE LEGAL DEFENSE FUND

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INTRODUCTION

The Court of Appeals declared that "on the Record and facts before us, absolute privilege applies to the election protests containing the allegedly defamatory statements in this case." *Bouvier v. Porter*, 279 N.C. App. 528, 544, 865 S.E.2d 732, 742 (2021). That declaration should have been the end of this case. Instead, the Court of Appeals held that, although the statements at issue were absolutely privileged and Porter was immune, Defendants were not immune for the same statements because they were not "participants." *Id.* at 545–48, 865 S.E.2d at 743–45. The lower court's holding was a clear departure from this Court's absolute-privilege jurisprudence.

Plaintiffs' brief is a committed effort to preserve a favorable holding from below. Plaintiffs slant the facts to try to discredit Defendants, claim to have found supporting cases, rewrite their claim to introduce new legal theories, and offer policy justifications for their desired outcome. As explained below, Plaintiffs' efforts are unavailing. Therefore, the Court should remain faithful to its past precedents and reverse the Court of Appeals' ruling.

ARGUMENT

I. PLAINTIFFS' FACTUAL NARRATIVE IS INACCURATE AND IRRELEVANT.

Plaintiffs' eighteen-page narrative of their "most salient" facts, Pls.' Br. at 2, is not targeted at the absolute-privilege doctrine—it is targeted at

Defendants. Plaintiffs seek to vilify Defendants. Defendants will therefore set the record straight.

To start, Defendants never accused Plaintiffs of "felony double voting" or "voter fraud." *See, e.g.*, Pls.' Br. at 1, 3, 37 n.14. The election protests said:

> Upon review of early voting files from other states, it appears that [a number of] individual[s] cast ballots in both North Carolina and another state. Casting a ballot in more than one state is a clear violation of North Carolina and federal election laws. Therefore, these ballots were erroneously counted and tabulated by the [identify county] County Board of Elections.

(R. 9 p. 493–95, 506–07). The words "voter fraud," "fraud," "felony," and "crime" never appear in the election protests. (*See id.*). Instead, the election protests cite an administrative voting statute. (*See id.* (citing N.C. Gen. Stat. § 163-82.1)).[1]

Second, Plaintiffs mischaracterize Defendants as reckless for using data provided by RNC data professionals. *See* Pls.' Br. at 11–13. Plaintiffs conceal that the two RNC data professionals had, collectively, 12 years of experience

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[1] Moreover, the criminal voting laws to which Plaintiffs cite, *see* Pls.' Br. at 9 n.4, require either fraudulent intent, *see* N.C. Gen. Stat. § 163-275(7) ("with intent to commit a fraud . . ."), or another form of *mens rea*, *see* 52 U.S.C. § 10307(e)(1) ("Whoever votes more than once in an election . . . shall be . . . imprisoned not more than five years[.]"); *see also Liparota v. United States*, 471 U.S. 419, 425–26 (1985) (explaining that Congress's omission of a *mens rea* element from a criminal statute "does not signal a departure from this background assumption of our criminal law"). The election protests did not allege fraudulent intent or any other type of *mens rea*, which are necessary elements of such criminal charges.

analyzing voting data, (R 9 p. 270, 886–89, 893–94, 930–32), and that they identified potential matches using a database that was described as "the gold standard" and a "more conservative" protocol, (R 9 p. 678–84, 907). And, although the RNC data professionals have no recollection of suggesting the data needed further review, (R 9 p. 923–24, 933), Torchinsky nonetheless asked another data professional to double check the data, (R 9 p. 688).

Third, Plaintiffs claim, without a citation to any evidence, that "[n]one of Defendants' other protests" "were found to have any merit." Pls.' Br. at 18 n.5. To the contrary, the Record shows that a second protest filed by Porter was upheld for having identified a ballot cast in the name of a deceased voter. (R 9 p. 842).[2] Plaintiffs make a similarly inaccurate claim that the State Board of Elections dismissed all of the protests. Pls.' Br. at 18–19. But the 28 November 2016 order issued by the State Board merely distinguished the standard for adjudicating an election protest from the standard for adjudicating a voter challenge. (R 9 p. 1007–08). The order did not address the merits of a single protest; it remanded the protests back to the county elections boards for adjudication. (*Id.* (¶ 10)).

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[2] Defendants did not appear at the board hearings to defend the merits of the election protests because the North Carolina Republican Party was responsible for providing local attorneys to do so. (R. 9 p. 697–98, 744–46). Defendants were disappointed to learn, after the fact, that local attorneys were never dispatched to the hearings to defend the protests. (R. 9 p. 744–46).

Finally, Plaintiffs' brief exaggerates their victimhood. Not only did Plaintiffs admit they suffered no real harm[3]; they invited much of the "negative attention," Pls.' Br. at 3, about which they now complain. Bouvier and the Niehans voluntarily made statements to TV reporters about the election protest. (R 9 p. 993, 969). At a Christmas dinner, Mr. Niehans confronted a guest—who knew nothing about Mr. Niehans—and instigated an argument about the election protest. (R 9 p. 970, 978–80). Golden conceded that his wife "may have drawn attention to the election protest" by posting about it twice on Facebook. (R 9 p. 984). These Facebooks posts were in addition to Golden himself publishing his story: Golden volunteered to sit for video interviews with Bob Hall of Democracy North Carolina because the organization was "advancing a cause." (R 9 p. 985–87). Mr. Niehans characterized this lawsuit *not* as an effort to secure a monetary remedy, (R 9 p. 113), but instead as an opportunity to make a "personal political statement," (R 9 p. 971).

If Plaintiffs' objective is to make a "political statement" by maligning Defendants, then their factual narrative may serve a purpose. But for purposes

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[3] Bouvier testified that he could not give a concrete example of how the election protest harmed his reputation. (R 9 p. 996). The most harm to which Golden could point were "general feeling[s]" that his "name was out there[.]" (R 9 p. 990). The Niehans were unable to point to any harm the election protests caused beyond feeling "a little bit stressed" about attending an election board hearing. (R 9 p. 977). This stress, however, was quickly relieved after the hearing, when "quite a few" people in the audience voiced support for the Niehans and some even gave the couple high-fives. (R 9 p. 976).

of determining whether the statements in the election protests are absolutely privileged, Plaintiffs' "salient facts" are irrelevant. The relevant facts are the facts that the Court of Appeals found (and Plaintiffs do not dispute): the allegedly defamatory statements were made in and relevant to the election protest proceedings. *See Bouvier*, 279 N.C. App. at 542–44, 865 S.E.2d at 741–42. The statements are privileged. *See id.* According to this Court's precedents, the facts here dictate that Defendants cannot be liable for defamation.

II. THE DECISION BELOW IS THE LONE IDENTIFIED INSTANCE OF A NORTH CAROLINA COURT WITHHOLDING ABSOLUTE PRIVILEGE WHEN A STATEMENT WAS MADE IN DUE COURSE OF A JUDICIAL PROCEEDING.

Contrary to Plaintiffs' assertions, no court in North Carolina has ever before applied a "participants" standard to the absolute privilege. This is because the "participants" standard proposed by Plaintiffs is unsuitable for absolute privilege.

A. Plaintiffs cannot identify a single North Carolina case in which a court withheld absolute privileged from a defendant who did not sufficiently "participate."

For almost 170 years, this Court has articulated a simple standard for whether a statement is shielded by absolute privilege. "[A] defamatory statement *made in the due course of a judicial proceeding* is absolutely privileged and will not support a civil action for defamation[.]"*Jarman v. Offutt*, 239 N.C. 468, 472, 80 S.E.2d 248, 251 (1954) (emphasis added); *Shelfer*

v. Gooding, 47 N.C. 175, 178 (1855) (finding statement was made in court and was "relevant and pertinent to the cause") (per curiam). The Court has never deviated from this standard.

The Court's singular focus on whether a statement was "made in the due course" is because absolute privilege "belongs to *the occasion*." *R. H. Bouligny, Inc. v. United Steelworkers of Am., AFL-CIO*, 270 N.C. 160, 171, 154 S.E.2d 344, 354 (1967) (emphasis added). Plaintiffs try to dismiss the importance of the occasion by characterizing *Bouligny* as an isolated decision dealing with qualified privilege. Pls.' Br. at 28. They are mistaken. First, although *Bouligny* dealt with qualified privilege, the Court's opinion established the primacy of the occasion "[b]oth as to absolute privilege and as to qualified privilege[.]" 270 N.C. at 171, 154 S.E.2d at 354. Second, *Bouligny* is but one of many decisions by this Court that have expressly pinned absolute privilege to the occasion. *See, e.g.*, *Ponder v. Cobb*, 257 N.C. 281, 295, 126 S.E.2d 67, 78 (1962) ("[I]t is not the publication itself, but the occasion of its publication, that is privileged." (citation cleaned up)); *Perry v. Perry*, 153 N.C. 266, 69 S.E. 130, 131 (1910) (describing the statement as having "warm language, but the occasion was privileged"); *Shelfer*, 47 N.C. at 176–77 ("[N]o action can be sustained for words spoken upon such an occasion[.]"). None of these opinions spoke to whether the statement was made by a "participant."

The Court of Appeals' most recent absolute-privilege decision, *Topping v. Meyers*, 270 N.C. App. 613, 842 S.E.2d 95 (2020), remained faithful to this Court's precedents. Plaintiffs repeatedly point to *Topping* as affirming a "participant" requirement by focusing on the status of the defendant. Pls.' Br. at 21, 23, 25, 28–29. To the contrary, *Topping* rejected the lower court's reliance on the status of counsel as being determinative of whether the privilege attaches. The court instead looked at the "'occasion' where and when the statements were made." 270 N.C. App. at 622, 842 S.E.2d at 102 (citing *Bouligny*, 270 N.C. at 171, 154 S.E.2d at 354). In other words, the *Topping* court did not look at *who* made the statement; rather, it held the privilege applied based on "*where* and *when* the statements were made." *Id.* (emphasis added). Because the statements were made outside of a proceeding (i.e., at a press conference) they were not privileged, even though made by counsel. *See id.* at 622–25, 842 S.E.2d at 102–04.[4]

[4] Plaintiffs cite two other Court of Appeals decisions in support of their participants requirement. *See* Pls.' Br. at 23–24. Both of these decisions merely observe that "[p]articipants in the judicial process must be able to testify or otherwise take part without being hampered by fear of defamation suits." *Houpe v. City of Statesville*, 128 N.C. App. 334, 346, 497 S.E.2d 82, 90 (1998) (internal citation omitted); *see Harman v. Belk*, 165 N.C. App. 819, 824, 600 S.E.2d 43, 47 (2004). Plaintiffs overlook that, after making these policy observations, the Court of Appeals faithfully applied the long-standing test of whether the statement was made in and relevant to a judicial proceeding—i.e., whether the occasion was privileged. *See Houpe*, 128 N.C. App. at 346, 497 S.E.2d at 90; *Harman*, 165 N.C. App. at 824, 600 S.E.2d at 47.

Plaintiffs offer a table of cases as proof that absolute privilege belongs to the "Status of the Speaker," Pls.' Br. at 24–25—as opposed to "belong[ing] to the occasion," *Bouligny*, 270 N.C. at 171, 154 S.E.2d at 354. The table, though, only shows that speakers in privileged occasions are often witnesses, parties, or counsel of record; this is simply because witnesses, parties, and counsel are the most common roles in judicial proceedings. The table does not show a single case in which a North Carolina court has demanded that a defendant fall within Plaintiffs' list of statuses to be entitled to the privilege.

Indeed, Plaintiffs' table is a carefully curated presentation of North Carolina cases. For example, Plaintiffs classify the speaker in *Jarman* as a participating "witness," Pls.' Br. at 25, but the speaker's statements appeared in an unfiled affidavit found behind a cabinet in a barber shop. 239 N.C. at 473–74, 80 S.E.2d at 251, 252–53. Thus, the speaker never testified as a witness in a proceeding. Similarly, Plaintiffs classify the speaker in *Nissen v. Cramer*, 104 N.C. 574, 10 S.E. 676 (1890), as a participating "party," Pls.' Br. at 24, but the Court held the speaker should have been censured for speaking while represented by counsel, *Nissen*, 104 N.C. at 579–80, 10 S.E. at 678–79. Thus, the speaker's statement was an unsanctioned outburst. Thus, two of Plaintiffs exemplars of "participants" are speakers who either did not participate or inappropriately participated in a proceeding—but the privilege nonetheless applied because of the occasion in which the statements appeared.

The table also omits the Court of Appeals' decision in *Harris v. NCNB Nat. Bank of N. Carolina*, 85 N.C. App. 669, 675, 355 S.E.2d 838, 843 (1987), which applied absolute privilege to a draft complaint sent by a defendant to opposing counsel. In *Harris*, there was no proceeding in which the defendant could qualify as a "participant"—yet the statement was privileged.

Thus, as Plaintiffs' table and brief reveals, the decision below is the only instance in over 170 years of jurisprudence in which a North Carolina court has withheld absolute privilege from a defendant despite the allegedly defamatory statement having been made in due course of a judicial proceeding. Notably, the holding is not just an anomaly within North Carolina. Plaintiffs could not find a case anywhere in the United States in which a court denied a defendant absolute privilege when a statement was made in due course of a judicial proceeding.

Plaintiffs direct the Court to a pair of cases from the District of Colombia as support for their position. Pls.' Br. at 22. Both cases held that attorneys were not entitled to absolute privilege solely because of their status as attorneys. *See Cloonan v. Holder*, 602 F. Supp. 2d 25, 30–32 (D.D.C. 2009) (holding that an attorney's defamatory letter to various individuals did not relate to any proceedings); *Oparaugo v. Watts*, 884 A.2d 63, 81 & n.12 (D.C. 2005) (holding that defendant's status as an attorney did not entitle her to inject defamatory statements into a proceeding in which she had no role, yet preserving

defendant's ability to "show entitlement to the privilege after the record is further developed"). In other words, the District of Columbia courts refused to award the privileged based on the speaker's status—*who* made the statement—and instead looked at the occasion—*when* and *where* the statement was made.

Other jurisdictions have recognized that absolute privilege attaches to the occasion—not the status of a particular speaker—and, therefore, extends to defendants who might not constitute "participants" in the judicial proceeding. *See, e.g.*, *Petty v. Gen. Acc. Fire & Life Assur. Corp.*, 365 F.2d 419, 421 (3d Cir. 1966) ("New Jersey law recognizes that the immunity which attends judicial proceedings protects both counsel *and other representatives to assist a party in the course of litigation*." (emphasis added)); *Hoover v. Van Stone*, 540 F. Supp. 1118, 1122 (D. Del. 1982) ("[T]he privilege protects judges, parties, attorneys, witnesses *and other persons connected with litigation* from the apprehension of defamation suits, thus permitting them to speak and write freely, without undue restraint." (emphasis added)); *Hawkins v. Harris*, 141 N.J. 207, 211, 661 A.2d 284, 286 (1995) (absolute privilege extends to private investigators hired by an insured's insurance company to conduct pretrial discovery); *cf. Watt v. McKelvie*, 219 Va. 645, 651, 248 S.E.2d 826, 829 (1978) ("We hold that third-party statements made during the course of a judicial proceeding, which are relevant to the subject matter of the litigation, are

absolutely privileged and may not be used to impose civil liability upon the originator of the statements." (citation omitted)).

In sum, North Carolina and other jurisdictions have consistently applied absolute privileged based on the occasion, not based on a defendant's level of "participation." Plaintiffs have not shown otherwise.

B. A "participant" requirement is unsuitable for absolute privilege.

Neither Plaintiffs nor the Court of Appeals offer, much less cite to, a definition of the term "participant." This is because the concept is novel in absolute-privilege jurisprudence. Nevertheless, by parsing Plaintiffs' brief and the opinion below, the Court can attempt to discern what might constitute "participation." In doing so, it becomes obvious that the definition applied by Plaintiffs and the Court of Appeals is an unsound legal standard.

Plaintiffs and the Court of Appeals appear to define "participant" based on the status of a speaker. For Plaintiffs, "counsel, parties, and witnesses" are all "participants." Pls.' Br. at 22. This status-based standard awards privilege to these roles regardless of the individual's involvement with a statement. The Court of Appeals, though focusing solely on attorneys, used a similar definition: the court reasoned that Law Firm Defendants were not "participating" in the protest proceedings because they were not "acting as attorney for the protestors" and "did not appear at the hearings." *Bouvier*, 279 N.C. App. at 545,

865 S.E.2d at 744.[5] According to these definitions, status affords one the protection of absolute privilege. A status-based standard for absolute privilege is problematic for two reasons.

First, the standard would exclude beneficial services that are commonly undertaken by attorneys. The North Carolina State Bar has issued a formal ethics opinion that explicitly condoned attorneys at Carolina Legal Services helping ghostwrite pleadings for parties without appearing for the parties.

> [A]n attorney may counsel nonlawyers who wish to proceed pro se. In so doing an attorney may provide assistance in the drafting of legal documents, including pleadings. When an attorney provides such drafting assistance, the Rules of Professional Conduct do not require the attorney to make an appearance as counsel of record.

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[5] Plaintiffs also cite a couple of cases for the proposition that Defendants were not "participating" because they were not granted formal *pro hac vice* admission before the elections boards. Pls.' Br. at 33. Even assuming Defendants needed to be admitted *pro hac vice*, *but see infra* n.8, the cases that Plaintiffs quote regarding "participating attorneys" are uninstructive as to what constitutes "participation" for purposes of absolute privilege. In *Selph v. Post*, 144 N.C. App. 606, 607, 552 S.E.2d 171, 172 (2001), the Court of Appeals determined an out-of-state attorney's failure to comply with Section 84-4.1 was "not prejudicial." Notably, the non-"participating" attorney in *Selph* filed a complaint and argued at a motions hearing, *id.* at 607, 552 S.E.2d at 172—thus, the attorney unquestionably took part (i.e., participated) in the proceeding. In *State v. Daughtry*, 8 N.C. App. 318, 319, 174 S.E.2d 76, 77 (1970), the Court of Appeals dismissed an appeal for failure to timely docket the record, and the court's passing remark about Alabama attorneys who were not "considered as participating attorneys" has no apparent relevance to the decision.

N.C. State Bar, Ethics Op. 114 (1991) (also known as RCP 114). Notably, this is exactly the conduct that Plaintiffs chastise Defendants for undertaking with the election protests. *See* Pls.' Br. at 33 n.10. According to Plaintiffs, an attorney for Carolina Legal Services (currently known as Legal Aid of North Carolina) would be denied absolute privilege for a defamatory statement that appeared in a pleading they helped draft because the attorney did not also appear as counsel of record in the proceeding.[6] In contrast, the long-standing test applied by this court—which looks only to the statement's occasion, and not a particular defendant's conduct, *see Bouligny*, 270 N.C. at 171, 154 S.E.2d at 354—would automatically shield such attorneys, such as those at Legal Aid, with absolute privilege.

Second, these status-based definitions of participation are too narrowly defined. The roles of counsel, party, and witness are not the exclusive means of participating in a proceeding. Participation is "[t]he act of taking part in something[.]" Black's Law Dictionary (7th ed. 1999) (defining "participation"). Here, the Guilford County Board of Elections sent Roberts notice that it had

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[6] This is a reason why Plaintiffs' reliance on the Restatement of Torts is misplaced. Plaintiffs argue that the Restatement requires that, for an attorney to be shielded by absolute privilege, the attorney must "participate[] as counsel" in the proceeding. Pls.' Br. at 21 (quoting Restatement (Second) of Torts § 586) (emphasis omitted). Adopting such a cramped application of absolute privilege would expose Legal Aid attorneys to defamation liability whenever they assist a pro se party with a filing.

found probable cause and scheduled a hearing, (R 9 p. 841), and that the board had ultimately dismissed the protest, (R 9 p. 842). Clark submitted additional materials to the Brunswick County Board of Elections at the board's request. (R 9 p. 855, 864). These actions were subsequent to Roberts and Clark submitting the protests in the first place. (R 9 p. 722, 742–43, 497–99, 855, 860). Thus, Roberts and Clark actually took part in the proceedings—yet they are excluded from the status-based definitions used by Plaintiffs and the Court of Appeals.

In defending the Court of Appeals' use of a "participants" standard for absolute privilege, Plaintiffs ask the Court to look at *who* made the statement—not *when* and *where* the statement was made. Such a standard, though, is the very standard that the Court of Appeals previously rejected in *Topping*. *See* 270 N.C. App. at 622–25, 842 S.E.2d at 102–04. Defendants ask the Court to reject Plaintiffs' participants requirement and, instead, adhere to its past precedents that look to the occasion of the statement. *See, e.g.*, *Bouligny*, 270 N.C. at 171, 154 S.E.2d at 354.

III. A PARTY CANNOT REWRITE ITS CLAIMS ON APPEAL.

Plaintiffs' brief introduces two new legal claims that have not appeared before in this case. First, Plaintiffs argue that Defendants can be held liable for statements made "outside of the proceedings," Pls. Br. at 27, despite their Amended Complaint making clear that the only statements at issue were those

that appeared in the election protests. Second, Plaintiffs argue that Defendants are liable for violating the *pro have vice* requirements of N.C. Gen. Stat. § 84-1.4, Pls.' Br. at 31–33, despite their Amended Complaint not bringing a claim under Chapter 84. The Court should not countenance Plaintiffs' attempt to amend their complaint while on appeal.

Plaintiffs' Amended Complaint makes very clear that the sole cause of action is libel based on the statements in the election protests filed with the county boards of elections. The Amended Complaint expressly identifies the "documents [filed] with the Guilford County Board of Elections *which are at issue here*" and "another document [filed] with the Brunswick County Board of Elections *which is also at issue here*." (R p. 60–62 (¶¶ 22, 27) (emphasis added)). The Amended Complaint labels these documents as "Election Protests," (*id.*), and alleges that, contrary to the allegations *made in these Election Protests*, Plaintiffs voted only in North Carolina, (*id.* (¶¶ 26, 31)). Plaintiffs go on to allege that each of the attorney Defendants (Roberts, Clark, Fallon, and Saxe) "submitted election protests." (R p. 62 (¶¶ 33—36)). Finally, Plaintiffs' first cause of action asserts that "[t]he statements made by Defendants concerning plaintiffs *in 'Election Protests'* filed across the state were false publications

wrongly accusing Plaintiffs of a crime, namely illegal voting." (R p. 64 (¶ 47) (emphasis added)).[7]

Despite the Amended Complaint only alleging libelous statements in the election protests, Plaintiffs now claim that Defendants should be held liable for statements other than those in the election protest filings. Specifically, Plaintiffs claim that Defendants should be liable for statements made to the protestors themselves:

> Those [libelous] publications included not only the statements to the county election boards [as alleged in the Amended Complaint], but also *Defendants' statements to the protestors themselves*. Those individuals, Mr. Porter and Mr. Agovino, knew nothing of the claims of voter fraud or the individuals accused when first approached to serve as signatories to the protests. Because those statements were not disseminated by Defendants in the course of their participation in the election protest proceeding, they are actionable.

Pls.' Br. at 37 n.14 (emphasis added). Plaintiffs assert this new claim—based on statements outside of the election protests—elsewhere in their brief. *See id.*

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[7] To further erase any doubt that Plaintiffs' libel claim is based solely on the statements in the election protests, the Amended Complaint also includes class-action allegations that define the proposed class as "[a]ll registered North Carolina voters who were wrongly identified as having engaged in voting irregularities in connection with the 2016 Geneal Election *in putative Election Protests filed by Defendants*." (R p. 63 (¶ 38) (emphasis added)). Plaintiffs' class-action claim identifies one of the common questions of law and fact as "whether accusations made by Defendants *in the context of one or more improperly filed Election Protests*" were defamatory. (*Id.* (¶ 40(a) (emphasis added)).

at 27 ("[S]trangers to a legal proceeding, like the Defendants here, are [not] free to make defamatory statements *outside of the proceeding* simply by virtue of the 'occasion' of the proceeding." (emphasis added)), 30 ("[T]here is no authority anywhere establishing the availability of absolute privilege to non-participants *outside a proceeding*[.]" (emphasis added)), 45 ("[A] a non-privileged defamatory statement published to a third-party who is privileged to publish it again (such as Mr. Porter) does not magically extend the third-party's privilege backwards to the original publisher[.]").

Likewise, despite the Amended Complaint only alleging libelous statements in the election protests, Plaintiffs now claim that Law Firm Defendants should be held liable for violating Section 84-4.1's *pro hac vice* requirements. *See* Pls.' Br. at 30–33. Make no mistake, Plaintiffs want the Court to punish Defendants for the unauthorized practice of law. They make their case for how Law Firm Defendants purportedly violated Section 84-4.1, Pls.' Br. at 32,[8] and ask the Court "to discipline [Defendants'] conduct" by

[8] Although it is not relevant to absolute privilege—which is the lone issue on appeal—Defendants wish to point out that they did not engage in the unauthorized practice of law. First, Defendants did not practice law when working with the protestors; a GOP staffer could have assisted the protestors in completing and submitting the protests. *See Matter of Appeal of Harris Teeter, LLC*, 271 N.C. App. 589, 599, 845 S.E.2d 131, 139 (2020) (recognizing a "scrivener's exception to the practice of law"), *aff'd sub nom. Matter of Harris Teeter, LLC*, 378 N.C. 108, 861 S.E.2d 720 (2021). Second, even if their conduct did rise to the level of practicing law, an attorney can assist a pro se party in preparing a pleading without having to appear as counsel for the party. *See*

holding them liable for defamation, *see id.* at 36–37; *see also id.* at 36 (explaining that, in this case, defamation liability is the only "'punishment'" available for the unauthorized practice of law (citation omitted)). This is a new legal claim clothed as a policy argument.

Plaintiffs cannot bring new claims against Defendants while on appeal. Plaintiffs are bound to their lone claim in their Amended Complaint: "The statements made by Defendants concerning plaintiffs in 'Election Protests' filed across the state were false publications wrongly accusing Plaintiffs of a crime, namely illegal voting." (R p. 64 (¶ 47)). Plaintiffs "cannot assert an additional theory of recovery for the first time on appeal[.]" *Parkersmith Properties v. Johnson*, 136 N.C. App. 626, 631, 525 S.E.2d 491, 494 (2000); *cf. Bryan Builders Supply v. Midyette*, 274 N.C. 264, 272, 162 S.E.2d 507, 512 (1968) ("A litigant 'may not acquiesce in the trial of his case in the Superior Court upon one theory and here complain that it should have been tried upon

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N.C. State Bar, Ethics Op. 114 (1991). Therefore, Defendants' conduct did not necessitate the filing of *pro hac vice* motions. (Moreover, it is not clear that formal *pro hac vice* admission would have been required to appear before county boards of elections. *See* N.C. Rev. R. Prof. Cond. 5.5, cmt. 5 ("Such [*pro hac vice*] authority may be granted . . . pursuant to informal practice of the tribunal or agency.").) In addition, Rule 5.5(c)(4) of North Carolina's Revised Rules of Professional Conduct permits out-of-state attorneys to be supervised by local counsel, N.C. Rev. R. Prof. Cond. 5.5(c)(4), and Defendants associated with multiple North Carolina attorneys who counseled them on the election protests. (R 9 p. 666–67, 669–70, 680, 689, 693–96).

another.'" (quoting *Mills v. Dunk*, 263 N.C. 742, 746, 140 S.E.2d 358, 362 (1965)).

In addition, to the extent Plaintiffs wished to raise these two arguments on appeal, they should have first appeared in Plaintiffs' brief before the Court of Appeals. They did not. Accordingly, these two arguments are abandoned before this Court. *See* N.C.R. App. P. 28(a) ("Issues not presented and discussed in a party's brief are deemed abandoned."); *see State v. Cradle*, 281 N.C. 198, 209, 188 S.E.2d 296, 304 (1972) (Arguments not "contained in defendant's brief filed in the Court of Appeals . . . may be deemed abandoned under Rule 28[.]").

Plaintiffs did not identify these two claims in the Amended Complaint nor articulate these arguments before the Court of Appeals. Plaintiffs, therefore, cannot introduce these new theories for the first time before the Supreme Court. "[A] party cannot 'swap horses between courts in order to get a better mount in the Supreme Court.'" *New Hanover Cnty. Bd. of Educ. v. Stein*, 380 N.C. 94, 114, 868 S.E.2d 5, 19 (2022) (quoting *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836 (1934)).

IV. ROBERTS AND CLARK ACTED AS AUTHORIZED AGENTS WHEN SUBMITTING THE STATEMENTS.

An agency relationship "arises when parties manifest consent that one shall act on behalf of the other and subject to his control." *Miller v. Piedmont Steam Co.*, 137 N.C. App. 520, 524, 528 S.E.2d 923, 926 (2000); *see also* Pls.'

Br. at 43 ("Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act." (quoting Restatement (Third) of the Law Agency § 1.01)). There is no dispute that Porter and Agovino authorized Roberts and Clark, respectively, to draft and transmit the protests on their behalf. (R 9 p. 105–06, 806–07, 844, 855). Roberts and Clark, therefore, are entitled to absolute privilege as agents of Porter and Agovino.

The Court of Appeals never referenced the definition of agency nor acknowledged the authorization received by Roberts and Clark. *See Bouvier*, 279 N.C. App. at 546–47, 865 S.E.2d at 744. Instead, the Court of Appeals offered three justifications for its conclusion that Roberts and Clark were not the agents of Porter and Agovino. *See id.* Contrary to Plaintiffs' arguments, *see* Pls.' Br. at 40–41, none of these justifications support the Court of Appeals' conclusion.

First, even though Law Firm Defendants "disclaimed acting as attorneys for the protestors," *Bouvier*, 279 N.C. App. at 546, 865 S.E.2d at 744, agent-principal relationships occur outside the context of attorney-client relationships. *See*, *e.g.*, *Branch Banking & Trust Co. v. Creasy*, 301 N.C. 44, 56, 269 S.E.2d 117, 124 (1980) ("An agent is one who acts for or in the place of another by authority from him."). It is erroneous to conclude that, because they

were not counsel for the protestors, Law Firm Defendants were not otherwise agents of the protestors. The Court of Appeals ignored, for instance, that Porter gave Roberts written express authorization to file the protest for him. (R 9 p. 844).[9] Although Roberts was not Porter's lawyer, he was nevertheless Porter's agent in fact and in law.

Second, the Court of Appeals offered a list of common agency roles and concluded that, because Law Firm Defendants never claimed they served in one of these particular roles, Law Firm Defendants could not have served as agents. *Bouvier*, 279 N.C. App. at 547, 865 S.E.2d at 744. An individual's conduct, however, need not fall within a predefined role in order to be recognized as an agent. All that is required is that the principal manifest consent that his agent act on his behalf. *See Miller*, 137 N.C. App. at 524, 528 S.E.2d at 926. The record is clear that Porter and Agovino consented to Roberts and Clark submitting the protests on their behalf.

Third, the Court of Appeals determined that Law Firm Defendants' employment as counsel for the Defense Fund precluded them from also serving

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[9] Plaintiffs defend the Court of Appeals' misinterpretation of Roberts' testimony that he was "not acting as Porter's 'attorney in fact,'" *Bouvier*, 279 N.C. App. at 547, 865 S.E.2d at 744, by citing the definition of "attorney in fact" from Black's Law Dictionary, *see* Pls.' Br. at 42 n.16. This ignores Roberts' definition of "attorney in fact" as being limited to "when you enter an appearance for an individual for a limited purpose." (R 9 p. 405). Roberts testified that he considered himself "to be acting as an agent of William Porter[.]" (*Id.*).

as agents for protestors. *Bouvier*, 279 N.C. App. at 547, 865 S.E.2d at 744. Dual agency, though, is a common occurrence. "It appears here, as not infrequently happens, that the same persons were agents of . . . two different principals." *McCartha v. Colonial Ice Co.*, 220 N.C. 367, 17 S.E.2d 479, 482 (1941); *see*, *e.g.*, *Greene v. Rogers Realty & Auction Co.*, 159 N.C. App. 466, 669, 586 S.E.2d 278, 280 (2003) (recognizing a real estate agent "can represent both the seller and buyer"). Being counsel for the Defense Fund did not foreclose Law Firm Defendants from being agents of the protestors for purposes of completing and submitting the protests.[10]

Because the record is clear that Roberts and Clark submitted the protests as agents of Porter and Agovino, Law Firm Defendants are entitled to

[10] Plaintiffs argue that, because Law Firm Defendants' actions on behalf of the protesters were part of the Defense Fund's broader post-election strategy, Law Firm Defendants cannot "shoehorn" their submissions of the election protests into the definition of agency. Pls.' Br. at 42–44. But Law Firm Defendants' conduct fits squarely within the definition of agency, *see Miller*, 137 N.C. App. at 524, 528 S.E.2d at 926, and the fact that the conduct was in furtherance of a broader plan does not diminish Defendants' role as agents for the protestors. For example, legal organizations regularly solicit plaintiffs to file civil rights lawsuits designed to achieve the legal organization's broader objectives, *see, e.g.*, *NAACP v. Button*, 371 U.S. 415, 429 (1963) (recognizing solicitation of plaintiffs was "not a technique of resolving private differences; it is a means of achieving the lawful objectives of equality of treatment"), and the Supreme Court of the United States has held that this conduct does not warrant "an inference of any injurious intervention in or control of litigation," *id.* at 444. Likewise, Plaintiffs cannot inject an inference of undue control here, especially when the record is clear that Porter and Agovino gave authorization to Roberts and Clark, respectively, to submit the protests on their behalf.

the same protection of absolute privilege that the Court of Appeals afforded Porter. *See Bouvier*, 279 N.C. App. at 545, 865 S.E.2d at 743.

V. THIS COURT'S PRECEDENTS FURTHER THE PUBLIC POLICY UNDERLYING ABSOLUTE PRIVILEGE.

As this Court has repeatedly held, absolute privilege "belongs to the occasion," *Bouligny*, 270 N.C. at 171, 154 S.E.2d at 354—not to a particular status of speaker. As explained in Defendants' opening brief, attaching the privilege to the occasion comports with the public policy behind absolute privilege: Society wants to protect the flow of relevant information to government tribunals, which is especially important in the context of disputes over election results. *See* Defs.' Br. at 27–33. In contrast to this well-established public policy, Plaintiffs offer unpersuasive policy justifications for their "participants" requirement.

Plaintiffs oppose the Court affording absolute privilege to Defendants because it will create a "special class of persons with automatic and impenetrable immunity—out-of-state attorneys[.]" *Id.* at 36. But it is Plaintiffs who are seeking to create a special class. Absolute privilege provides "automatic and impenetrable immunity" *to anybody* who makes a statement in due course of a judicial proceeding, and Defendants ask only to be treated—as Porter was—like anybody else. Plaintiffs, though, label Defendants as "unlicensed," "out-of-state," and "non-nonparticipants," *id.* at 36, to carve out

Defendants as a special class who should be excluded from absolute privilege. Absolute privilege does not recognize such labels—it is *absolute*.

Plaintiffs also insist that absolute privilege should not apply here because there are no disciplinary "'safeguards built into'" election protest proceedings. *Id.* at 35 (quoting *Butz v. Economou*, 438 U.S. 478, 512 (1978)). But the "safeguards" identified in *Butz* were not the enforcement of "professional obligations" (as suggested by Plaintiffs) but the adversarial process, cross examination of witnesses, unbiased triers of fact, and appellate review. *See* 438 U.S. at 512. "Because these features of the judicial process tend to enhance the reliability of information and the impartiality of the decisionmaking process, there is a less pressing need for individual suits[.]" *Id.* In other words, the standard features of a judicial proceeding mitigate the need for collateral defamation lawsuits. All of these features exist in election protest proceedings. *See* N.C. Gen. Stat. §§ 163-182.10(a)—(c) (requiring protest to be heard by elections board and setting forth conduct of hearing), 163-182.11 (right of appeal).

Finally, Plaintiffs argue that, because election-protest proceedings lack disciplinary safeguards, "out-of-state Law Firm Defendants" should be ineligible for absolute privilege. Pls.' Br. at 35. This is another attempt to carve out a "special class of persons" so as to exclude Defendants from absolute privilege. Notably, such disciplinary safeguards—imposed by "the Bar, law

enforcement, or the courts," *id.* at 36—do not exist for non-attorneys filing election protests, but Plaintiffs do not insist that non-attorneys (such a Porter) be excluded from absolute privilege. Plaintiffs reserve their exclusion from absolute privilege for Defendants only.

To protect the unfettered flow of information to judicial tribunals, absolute privilege must attach to statements made in due course of judicial proceedings, regardless of the status or characteristics of the speaker. Introducing qualifications to absolute privilege—in an attempt to exclude certain speakers while still protecting others—undermines the doctrine's effectiveness. Placing qualifications on privilege will sow doubt about whether a speaker will be immune, which will yield a harvest of self-censorship that will impinge the flow of relevant information to tribunals. The Court should keep the absolute privilege absolute.

CONCLUSION

For the reasons stated above and in its New Brief, Defendants respectfully ask the Court to reverse the Court of Appeals' holding regarding the applicability of absolute privilege to Defendants and to remand the case with instructions to enter judgment dismissing all claims with prejudice.

Respectfully submitted this the 18th day of August, 2023.

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CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that on this day a copy of the foregoing document was served upon the parties by email, with a courtesy copy sent via mail if requested, to:

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