

NORTH CAROLINA)
WAKE COUNTY)

IN THE GENERAL COURT OF)
JUSTICE)
SUPERIOR COURT DIVISION)
WAKE CTY: 24 CV 013410-910)
RANDOLPH CTY: 23 CVS 1479)

RANDOLPH COUNTY BOARD OF)
EDUCATION, ex rel JONATHAN)
BURRIS,)

Plaintiff)

vs.)

**PLAINTIFF'S MOTION FOR)
SUMMARY JUDGMENT)**

JOSH STEIN, in his official capacity)
as North Carolina Attorney General,)
NELS ROSELAND, in his official)
capacity as North Carolina)
Controller, ROY COOPER in his)
official capacity as North Carolina)
Governor.)

Defendants.)

Plaintiff, Randolph County Board of Education, ex rel Jonathan Burris, moves for Summary Judgment pursuant to Rule 56 of the Rules of Civil Procedure on the grounds that the materials listed below (and any others submitted by Defendants) demonstrate that there is no genuine issue of material fact and that Plaintiff is entitled to judgment as a matter of law. Materials submitted include:

1. The Complaint, as amended and as verified.
2. The Defendants' Memorandum in Support of its Amended Motion to Dismiss served April 3, 2024 attached as Exhibit A to this Motion.

3. Plaintiff's demand on the Randolph County School Board dated April 17, 2023 verified by affidavit of Jonathan Burris, attached as Exhibit B to this Motion.
4. Certified copy by the Clerk of the Randolph County Board of Education's resolution denying the Demand of Relator, Jonathan Burris, attached as Exhibit C to this Motion.

The following responses of the Defendant's to Plaintiff's interrogatories:

5. Plaintiff's 1st Set of Interrogatories #5, Plaintiff asked, "What is the total Agreement funds deposited by the Attorney General into the State Treasury from 1 July, 2019 through 30 November, 2023. See Complaint paragraph 15."

Defendants answered "[T]he Attorney General has deposited a total of \$10,224,567.98 into Fund 2204 Smithfield EEG of the State Treasury for fiscal years 2019-20, 2020-21, 2021-22, 2022-23, and 2023-24 up to and including November 30, 2023."

6. Plaintiff's 1st Set of Interrogatories #6, asked, "What is the total amount the Attorney General or the Department of Justice 'requisitioned' or otherwise received from the State Treasury from 1 July, 2019 to 30 November, 2023. See Complaint paragraph 1."

Defendants answered, ". . . \$5,162,604.75 has been disbursed from Fund 2204 Smithfield EEG for fiscal years 2019-20, 2020-21, 2021-22, 2022-23, and 2023-24 up to and including November 30, 2023."

and Defendants' responses:

7. Plaintiff requested Admission of Exhibit C, 32 sheets of paper certified by the Secretary of State on November 2, 2023, Defendants responded:

“Defendants admit that Exhibit C to Plaintiffs' First Set of Requests for Admission includes a certification, signed by the North Carolina Secretary of State, identifying the following 32 pages as 'a true copy of Session Law 2023-134, House Bill 259, Title Page, Section 4.1, Section 43.2, signature page, and Section A of the North Carolina General Assembly Joint Conference Committee Report on the Current Operations Appropriations Act of 2023 of the 2023 Legislative Session, entitled An Act to Make Base Budget Appropriations for Current Operations of State Agencies, Departments, and Institutions.’”

8. Plaintiff requested admission of Exhibit D, July 30, 2021 NC IBIS Fund Code – Smithfield EEG July 21, 2020, modified July 22, 2020 and effective July 1, 2020.

Defendants responded, “. . . Defendants admit that Exhibit D to Plaintiff's First Set-of Requests for Admission purports to be a Fund Code Request for the Smithfield Environmental Enhancement Grants, created on July 21, 2020, modified on July 27, 2020, with an effective date of July 1, 2020.”

9. Plaintiff requested admission of Exhibit E, The Governors Certified Budget for fiscal year 22-23 dated 10/4/22 p. 47 and 49 of 54. Defendants responded:

“. . . Defendants admit that Exhibit E to Plaintiffs' First Set of Requests for Admission consists of two pages. Defendants admit that the first page contains a header reading 'Office of State Budget And Management, Certified Budget - Revised (BD307), Summary by

Purpose, Biennium 2021-23.' Defendants further admit that the second page's header reads 'Office of State Budget And Management, Certified Budget- Revised (BD307), Detail by Fund, Biennium 2021-23.' Defendants further admit that the time stamp on the bottom right corner of each page reads '10/04/2022 10:34:32AM.' The first page also reads, 'Page 47 of 54,' and the second page reads 'Page 49 of 54.'"

10. Plaintiffs requested admission of Exhibit F, Portions of the Governors Recommended Base Budget Line Item Detail and Fund Purpose Statements 2023-25 for Justice and Public Safety dated 3/13/2023 – title page and pages 296,297,298 of 1,281.

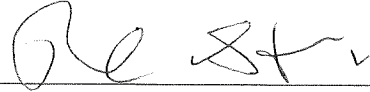
Defendants replied:

“ . . . Defendants admit that Exhibit F to Plaintiffs' First Set of Requests for Admission contains four pages, including a title page identifying it as the 'Recommended Base Budget, Line Item Detail & Fund Purpose Statement 2023-25, JUSTICE ~ AND PUBLIC SAFETY' from the Office of State Budget & Management within the Office of the Governor. Defendants further admit that the remaining three pages are identified as pages 296-298 of 1,281, respectively.”

There is no genuine issue as to the material facts and Plaintiff is entitled to judgment as a matter of law. The Court should grant Summary Judgment in its favor.

This the 8 of May, 2024.

STAM LAW FIRM, PLLC

A handwritten signature in black ink, appearing to read "Paul Stam", is written above a horizontal line.

Paul Stam
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CERTIFICATE OF SERVICE

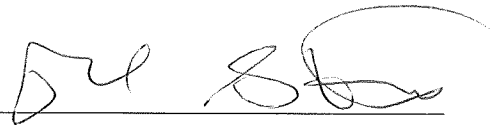
This is to certify that the undersigned has this date served this Plaintiff's Motion for Summary Judgment in the above action, by email and by Odyssey addressed to the following:

Laura H. McHenry
Special Deputy Attorney General
NC State Bar No. 45005
lmchenry@ncdoj.gov

Matthew Tulchin
Special Deputy Attorney General
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This the 8 of May, 2024.

By: _____



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STATE OF NORTH CAROLINA
RANDOLPH COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
23 CVS 1479

RANDOLPH COUNTY BOARD OF
EDUCATION, ex rel. JONATHAN
BURRIS,

Plaintiff,

v.

JOSH STEIN, in his official capacity as
NORTH CAROLINA ATTORNEY
GENERAL, MATTHEW
LONGOBARDI, NELS ROSELAND, in
his official capacity as NORTH
CAROLINA CONTROLLER, ROY
COOPER, in his official capacity as
NORTH CAROLINA GOVERNOR, and
THOMAS W. CHEEK,

Defendants.

**MEMORANDUM OF LAW
IN SUPPORT OF DEFENDANTS'
AMENDED MOTION TO DISMISS
PLAINTIFF'S COMPLAINT**

NOW COME Defendants Joshua H. Stein, in his official capacity as North Carolina Attorney General; Matthew Longobardi; Nels Roseland, in his official capacity as North Carolina Controller; Roy Cooper, in his official capacity as North Carolina Governor; and Thomas W. Cheek, by and through undersigned counsel and submits this memorandum in support of their Amended Motion to Dismiss Plaintiff's Complaint pursuant to Rules 12(b)(1), 12(b)(2), 12(b)(3), and 12(b)(6) of the North Carolina Rules of Civil Procedure.

INTRODUCTION

Jonathan Burris brings this suit on behalf of the Randolph County Board of Education seeking declaratory and other equitable relief for alleged violations of N.C.G.S. § 147-76.1, N.C.G.S. § 143C, and the North Carolina Constitution. Plaintiff's Complaint is subject to dismissal on several grounds.



First, Plaintiff's claims are asserted against the Governor, the Attorney General, the State Controller, and two state employees who, by virtue of their employment, perform administrative tasks on behalf of the North Carolina Department of Justice and the North Carolina Office of State Budget and Management. Under North Carolina law, claims brought against "a public officer or person especially appointed to execute his duties, for an act done by him by virtue of his office" must be tried in the county where the cause arose. N.C.G.S. § 1-77. Each named Defendant executes his official duties in Wake County. Therefore, venue is improper in Randolph County and the case must be either dismissed or transferred to the proper venue.

Second, even in the proper venue, Plaintiff's claims are barred for lack of standing, failure to state a claim for relief, mootness, and sovereign immunity.

This is the third attempt to claim funds earmarked for the Environmental Enhancement Grants, administered by the North Carolina Attorney General. The first was in *DeLuca v. Stein*, 372 N.C. 59, 822 S.E.2d 622 (2019), and the second was in *New Hanover County Board of Education v. Stein*, 374 N.C. 102, 840 S.E.2d 194 (2020) (*New Hanover I*), and 380 N.C. 94, 868 S.E.2d 5 (2022) (*New Hanover II*). Both times, the North Carolina Supreme Court held that the trial court properly entered summary judgment in favor of the Attorney General and dismissed Plaintiff's claims as a matter of law.

This third attempt essentially repackages the same arguments that have already been rejected twice, hoping for a different outcome. But the legal standards remain unchanged. Plaintiff's complaint, on its face, reveals that he does not have standing to bring his claims, discloses that no case or controversy exists between the parties that is ripe for adjudication, fails to state a claim upon which relief can be granted, and does not demonstrate the prerequisites have been met to bring an action against the State. Plaintiff's Complaint should be dismissed.

STATEMENT OF FACTS

In July 2000, then-Attorney General Michael Easley entered into an agreement with Smithfield Foods, Inc. and its subsidiaries, to promote environmental enhancement. *See Ex. A.* The Agreement included, among other things, a commitment by Smithfield Foods of \$50 million over the course of 25 years. *Ex. A*, p 14. Pursuant to the Agreement, Smithfield has provided \$2 million each year to be distributed through the Environmental Enhancement Grant (EEG) Program, which is administered by the Attorney General's Office. The EEG Program solicits grant applications each year and, after review by committee, the Attorney General selects grant recipients and disburses the funds in the form of reimbursements for costs incurred by EEG grant recipients for their environmental enhancement activities. (Compl. ¶¶ 12-14). *See also New Hanover I*, 380 N.C. at 96-97, 868 S.E.2d at 7-8.

From 2000 to 2019, Smithfield Foods deposited those funds directly into a bank account to be held for disbursement to grant recipients by the Attorney General. (Compl. ¶ 14) *Id.* In 2019, the General Assembly passed and implemented N.C.G.S. § 147-76.1, which provides that "all funds received by the State, including cash gifts and donations, shall be deposited into the State treasury." N.C.G.S. § 147-76.1(b). (Compl. ¶ 15) As of the statute's effective date, the Attorney General ensured that all Agreement funds provided by Smithfield Foods were deposited directly into the State treasury in accordance with statute. (Compl. ¶ 15)

Since the statute's enactment, the General Assembly has appropriated the funds to the Department of Justice to continue its administration of the EEG Program. As demonstrated by the applicable Appropriations Acts and Certified Budgets enacted by the General Assembly, the Agreement funds are appropriated to the Department of Justice for the EEG Program through the 2024-2025 fiscal year.

LEGAL STANDARD

When a defendant moves for dismissal under Rules 12(b)(1) and 12(b)(2), the plaintiff bears the burden of establishing both subject matter jurisdiction and personal jurisdiction. *Blinson v. State*, 186 N.C. App. 328, 333, 651 S.E.2d 268, 273 (2007); *Harper v. City of Asheville*, 160 N.C. App. 209, 217, 585 S.E.2d 240, 245 (2003); *Wyatt v. Walt Disney World Co.*, 151 N.C. App. 158, 162-63, 565 S.E.2d 705, 708 (2002). Obtaining jurisdiction over the parties and the claims is necessary and essential before the exercise of any authority by the Courts over the State. *Bunch v. Britton*, 253 N.C. App. 659, 665, 802 S.E.2d 462, 468 (2017); *see also* N.C. R. Civ. P. 12(h)(3). A court may consider any evidence in its evaluation of a motion to dismiss based on Rules 12(b)(1) or 12(b)(2). *Smith v. Privette*, 128 N.C. App. 490, 493, 495 S.E.2d 395, 397 (1998).

When a defendant moves for dismissal under Rule 12(b)(3), “it is well established that ‘the trial court has no discretion in ordering a change of venue if demand is properly made and it appears that the action has been brought in the wrong county.’” *Semelka v. Univ. of N.C.*, 275 N.C. App. 683, 687, 854 S.E.2d 47, 50 (2020) (quoting *Stern v. Cinoman*, 221 N.C. App. 231, 232, 728 S.E.2d 373, 374 (2012)). “Defendants have a statutory right to a legally proper venue,” so an order denying a motion to dismiss under Rule 12(b)(3) is immediately appealable. *Id.* at 685-86, 854 S.E.2d at 49. *See also* N.C.G.S. § 1-77(2).

On a motion to dismiss pursuant to Rule 12(b)(6), “the standard of 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.” *Stunzi v. Medlin Motors, Inc.*, 214 N.C. App. 332, 335, 714 S.E.2d 770, 773 (2011) (quoting *Nucor Corp. v. Prudential Equity Group, LLC*, 189 N.C. App. 731, 735, 659 S.E.2d 483, 486 (2008)). The complaint’s material factual

allegations are treated as true, but legal conclusions are not entitled to a presumption of validity. *Izydore v. Alade*, 242 N.C. App. 434, 438, 775 S.E.2d 341, 345 (2015).

Dismissal is proper under Rule 12(b)(6) when: “(1) the complaint on its face reveals that no law supports the plaintiff’s claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff’s claim.” *Id.* (citations omitted). Although a court may not look to matters outside the pleadings when considering a 12(b)(6) motion, “a court may properly consider documents which are the subject of the plaintiff’s complaint and to which the complaint specifically refers even though they are presented by the defendant.” *Weaver v. St. Joseph of the Pines, Inc.*, 187 N.C. App. 198, 204, 652 S.E.2d 701, 707 (2007) (citing *Oberlin Capital, L.P. v. Slavin*, 147 N.C. App. 52, 60, 554 S.E.2d 840, 847 (2001)).

ARGUMENT

I. Plaintiff’s Claims Are Subject to Dismissal Under Rule 12(b)(3).

Wake County Superior Court is the only appropriate venue in which Plaintiff’s claims may be heard. N.C.G.S. § 1-77(2). Section 1-77 of the North Carolina General Statutes provides that actions brought against a public officer or person appointed to execute the duties of a public officer, for an act done by him by virtue of his office, “must be tried in the county where the cause, or some part thereof, arose.” *Id.* Here, Plaintiff’s claims are asserted against Josh Stein in his official capacity as North Carolina Attorney General for acts done by him by virtue of his office; Matthew Longobardi, for acts performed by him which he was appointed to execute on behalf of the North Carolina Department of Justice; Nels Roseland in his official capacity as the North Carolina State Controller for acts done by him by virtue of his office; Roy Cooper in his official capacity as Governor of North Carolina and Director of the Budget; and Thomas Cheek, for acts performed

by him which he was appointed to execute on behalf of the North Carolina Office of State Budget and Management. (Compl. ¶¶ 2-6) There is no dispute that any act performed by these Defendants, as alleged in the Complaint, was done so by virtue of the Defendant's public office or appointment to execute certain duties on behalf of a public officer. Similarly, there is no dispute that these Defendants execute their official duties in Raleigh, North Carolina, which is located in Wake County. Accordingly, venue in Randolph County Superior Court is improper.

To the extent Plaintiff argues venue is proper in Randolph County because that is where his injury occurred, "[o]ur courts have [] long recognized, in applying § 1-77, a general rule that 'the cause of action arises in the county where the *acts or omissions* constituting the basis of the action occurred.'" *Frink v. Batten*, 184 N.C. App. 725, 728-29, 646 S.E.2d 809, 811 (2007) (quoting *Wells v. Cumberland County Hosp. Sys., Inc.*, 150 N.C. App. 584, 589, 564 S.E.2d 74, 77 (2002) (rejecting plaintiff's argument that original venue was proper because it was where the injury occurred).

"Once a defendant has made a timely motion requesting a change of venue, upon making the proper findings, the trial court lacks discretion to resolve the issue and must transfer the case to the place of proper venue." *Hyde v. Anderson*, 158 N.C. App. 307, 309, 580 S.E.2d 424, 425 (2003) (quoting *Thompson v. Norfolk S. Ry. Co.*, 140 N.C. App. 115, 122, 535 S.E.2d 397, 401-02 (2000)). Under the plain language of N.C.G.S. § 1-77(2), venue can only be proper in Wake County. *See Hyde*, 158 N.C. App. At 310, 580 S.E.2d at 426 (reversing trial court's denial of motion to transfer venue under N.C.G.S. § 1-77(2)); *Semelka*, 275 N.C. App. at 688-89, 854 S.E.2d at 51 (vacating trial court's order denying motion to transfer pursuant to § 1-77(2)).

Therefore, this Court must dismiss this action for improper venue pursuant to Rule 12(b)(3) or transfer the matter to the proper venue: Wake County Superior Court.

II. Even in the Proper Venue, Plaintiff's Claims Are Still Subject to Dismissal Under Rules 12(b)(1), 12(b)(2), and 12(b)(6).

Plaintiff's complaint contains numerous deficiencies that are fatal to this action. First, Plaintiff's first cause of action is moot on its face, depriving the Court of jurisdiction to consider it. Second, Plaintiff lacks standing to bring his claims, as demonstrated by *inter alia* the Supreme Court's decisions in *DeLuca v. Stein*, 372 N.C. 59, 822 S.E.2d 622 (2019), *New Hanover Cnty. Bd. of Educ.*, 374 N.C. 102, 840 S.E.2d 194 (2020) (*New Hanover I*), and *New Hanover County Board of Education v. Stein*, 380 N.C. 94, 868 S.E.2d 5 (2022) (*New Hanover II*). Plaintiff's allegations fail to state a claim for relief under North Carolina law, and his statutory claims are barred by sovereign immunity. For these reasons, this action should be dismissed under Rules 12(b)(1), 12(b)(2) and 12(b)(6).

A. Contrary to his assertion, Plaintiff Does Not Have Standing to Bring his Claims.

Plaintiff asserts that he has standing to bring his claims under N.C.G.S. § 143C-10-1, *Fuller v. Easley*, 145 N.C. App. 391, 553 S.E.2d 43 (2001), and/or *Goldston v. State*, 361 N.C. 26, 637 S.E.2d 876 (2006). (Compl. ¶ 10) This assertion is incorrect, and his claims are subject to dismissal under Rule 12(b)(1).

1. Plaintiff does not have standing under N.C.G.S. § 143C-10-1.

A party may bring a claim "in the public interest" under a statute if the statute itself creates a cause of action. *Forest*, 376 N.C. at 608, 853 S.E.2d at 733. But N.C.G.S. § 143C-10-1 does not create a civil cause of action. Instead, it provides that certain violations of Chapter 143C are punishable as Class 1 misdemeanors. N.C.G.S. § 143C-10-1(a). Section 143C-10-2 provides that "[a] person convicted of an offense under G.S. 143C-10-1 is liable in a civil action for any damages suffered by the State in consequence of the offense. N.C.G.S. § 143C-10-2. Plaintiff

does not, and cannot, allege that any of the Defendants have been convicted of an offense under N.C.G.S. § 143C-10-1. Therefore, he lacks standing to bring a claim under this Chapter.

2. Plaintiff does not have standing under *Fuller v. Easley*.

In *Fuller v. Easley*, the Court of Appeals reaffirmed the principle that a plaintiff may have standing to bring a taxpayer action, not as an individual taxpayer, but on behalf of a public agency or political subdivision that has “neglected or refused to act.” *Fuller*, 145 N.C. App. at 395, 553 S.E.2d at 46. *Fuller* quotes this rule from *Guilford County Board of Comm’rs v. Trogden*, 124 N.C. App. 741, 747, 478 S.E.2d 643, 647 (1996), which quotes *Branch v. Bd. of Educ.*, 233 N.C. 623, 625, 65 S.E.2d 124, 126 (1951). In *Branch*, the Court noted that “public officers are sometimes derelict in the performance of official duties . . . [which] permits a taxpayer’s action on behalf of a public agency or political subdivision.” *Branch*, 233 N.C. at 625, 65 S.E.2d at 126. “The law takes cognizance, however, of the disruptive tendency of officious intermeddling by taxpayers in matters committed to the decision of public officers.” *Id.* Therefore, the Court held that a taxpayer cannot bring an action on behalf of a public agency or political subdivision where the “proper authorities have not wrongfully neglected or refused to act.” *Id.*

In applying *Fuller*, the Court of Appeals has insisted that plaintiffs seeking to bring these claims allege in their complaint that the public authority’s refusal to act was wrongful. *See Whitmire v. Cooper*, 153 N.C. App. 730, 570 S.E.2d 908 (2002) (affirming dismissal under Rule 12(b)(1) for lack of standing). In *Whitmire*, plaintiffs alleged that they were taxpayers and had made a demand upon the proper authority to act but their demand was refused. *Id.* at 736, 570 S.E.2d at 912. The appellate court held that the plaintiffs nevertheless lacked standing because they had not alleged facts showing that the refusal was wrongful. *Id.*

Such is the case here. Plaintiff alleges that he made a demand on the Randolph County Board of Education to file this action and that the Board refused. (Compl. ¶ 11) Plaintiff's Complaint contains no additional factual allegations showing that the Board's refusal was wrongful. Therefore, under *Fuller* and its progeny, Plaintiff lacks standing to bring his claims on behalf of the Randolph County Board of Education and his Complaint should be dismissed.

3. Plaintiff does not have standing under *Goldston v. State*.

Under the North Carolina Supreme Court's decision in *Goldston v. State*, a taxpayer has standing to bring an action against appropriate government officials for the alleged misuse or misappropriation of public funds, and may seek "equitable relief and a declaratory judgment when alleging government officials violated statutory or constitutional provisions by diverting tax levies appropriated for one purpose but disbursed for another." *Goldston*, 361 N.C. at 33-34, 637 S.E.2d at 881. However, the taxpayer must show injury to his interests as a taxpayer and must allege an "actual controversy between the parties." *Id.* at 32-33, 637 S.E.2d at 881.

Here, Plaintiff does not have standing under *Goldston* because (1) he does not bring this action as a taxpayer but rather on behalf of the Randolph County Board of Education; (2) even if the Court treats Plaintiff as a taxpayer, Plaintiff has not alleged any injury to his interest; (3) there is no controversy between the parties; (4) the Agreement funds have not been "appropriated for one purpose but disbursed for another." *Id.* at 32-34, 637 S.E.2d at 881.

B. Plaintiff's First Cause of Action Should be Dismissed Pursuant to Rules 12(b)(1), 12(b)(2), and 12(b)(6).

i. On its face, Plaintiff's first claim is moot.

Plaintiff's own allegations reveal there is no controversy between the parties with respect to his first cause of action, rendering it moot. Our Supreme Court has repeatedly held that judicial restraint is proper when a claim is moot. *E.g., In re Peoples*, 296 N.C. 109, 147, 250

S.E.2d 890, 912 (1978) (“That a court will not decide a ‘moot’ case is recognized in virtually every American jurisdiction.”). Whenever it appears that a plaintiff has obtained the relief sought or the controversy identified in the pleadings no longer exists, “the case should be dismissed, for courts will not entertain or proceed with a cause merely to determine abstract propositions of law.” *Id.* See also *McAdoo v. Univ. of N.C. at Chapel Hill.*, 225 N.C. App. 50, 68, 736 S.E.2d 811, 823 (2013) (holding that plaintiff’s claims were hypothetical, speculative and moot, and thus not justiciable).

The mootness doctrine applies with equal force under the Declaratory Judgment Act. *Emerson v. Cape Fear Country Club*, 259 N.C. App. 755, 764, 817 S.E.2d 402, 409 (2018). A moot question under the Declaratory Judgment Act presents only an abstract or hypothetical proposition of law, the resolution of which would have no practical effect. *Id.* “[T]he courts of this state do not issue anticipatory judgments resolving controversies that have not arisen.” *State ex rel. Utils. Comm’n v. Carolina Water Serv.*, 149 N.C. App. 656, 658, 562 S.E.2d 60, 63 (2002). To satisfy the jurisdictional requirement of an actual controversy, a complaint must demonstrate “that litigation appears unavoidable.” *Id.* at 658, 562 S.E.2d at 62. The actual controversy requirement functions to ensure that courts considering claims for declaratory relief do not render decisions upon “remote, contingent, and uncertain events that may never happen,” but rather upon events of “imminence and practical certainty.” *Sharpe v. Park Newspapers of Lumberton, Inc.*, 317 N.C. 579, 590, 347 S.E.2d 25, 32 (1986).

Here, Plaintiff’s Complaint reveals that there has never been a controversy between the parties relating to the deposit of Agreement funds into the State treasury. Section 147-76.1 of the General Statutes, which was passed and became effective in 2019, provides that “all funds received by the State . . . shall be deposited into the State treasury.” N.C.G.S. § 147-76.1(b)

(2019). (Compl. ¶ 17) Plaintiff’s Complaint alleges that, “[a]fter N.C.G.S. § 147-76.1 became effective on 1 July 2019, the Attorney General began depositing the Agreement funds into the State treasury—a total of more than \$8,150,000.00 through June of 2023.” (Compl. ¶ 15)

Plaintiff’s first claim for relief seeks a declaratory judgment from this Court ordering “that the Attorney General must deposit all Agreement funds received on or after N.C.G.S. § 147-76.1’s effective date into the State treasury.” Plaintiff does not allege that the Attorney General has failed to comply with the statute or indicated any future intent not to comply with the statute.¹ Indeed, Plaintiff’s own allegations demonstrate that the Attorney General has consistently complied with the statute by depositing the Smithfield funds into the State treasury every year since the statute’s enactment. (Compl. ¶ 15)

The relief Plaintiff seeks has always been ensured by the Attorney General through his compliance with the statute since its inception. There is no controversy between the parties and Plaintiff cannot show that litigation is unavoidable. *See Carolina Water Serv.*, 149 N.C. App. at 658, 562 S.E.2d at 63. This Court should dismiss Plaintiff’s claim for declaratory judgment as moot. *See Gaston Bd. of Realtors, Inc. v. Harrison*, 311 N.C. 230, 234-35, 316 S.E.2d 59, 62 (1984) (“When the record shows that there is no basis for declaratory relief, or the complaint does not allege an actual, genuine existing controversy, a motion for dismissal under . . . Rule 12(b)(6) will be granted.”).

¹ Notably, our Supreme Court has already explained that “the Board of Education would have been required to allege that the Attorney General had failed to deposit the funds that the Smithfield companies have paid in accordance with the agreement into the State treasury” for this claim to be viable. *New Hanover II*, 380 N.C. at 111-12, 868 S.E.2d at 17. Observing that the complaint was devoid of such an allegation, the Court affirmed judgment as a matter of law for defendants and dismissed this claim. *Id.*

This Court should exercise the judicial restraint urged by our appellate courts in *Emerson*, *McAdoo*, *Carolina Water Cons.*, *Gaston Bd of Realtors*, and other cases, and dismiss this claim as moot pursuant to Rules 12(b)(1) and 12(b)(6).

- ii. **N.C.G.S. § 147-76.1 does not create a private cause of action and thus this claim must be dismissed for lack of standing and failure to state a claim for relief.**

Plaintiff's first claim for relief alleges a violation of N.C.G.S. § 147-76.1. But there is no private cause of action for a violation of this statute and thus, in addition to the mootness and failure to meet the jurisdictional threshold explained above, Plaintiff's first cause of action is subject to dismissal under Rule 12(b)(1) for lack of standing to bring this claim and Rule 12(b)(6) for failure to state a claim for relief.

North Carolina law generally holds that "a statute allows for a private cause of action only where the legislature has expressly provided a private cause of action within the statute." *See Lea v. Grier*, 156 N.C. App. 503, 508, 577 S.E.2d 411, 415 (2003). *Cf. Comm. To Elect Forest v. Employees PAC.*, 260 N.C. App. 1, 7-8, 817 S.E.2d 738, 743 (2018) (reiterating previous holdings that a plaintiff has standing to sue for statutory violations without having to prove actual damages "where the statute at issue creates a private cause of action as a mechanism to enforce the provisions of the statute at issue.") (citations omitted), *aff'd*, 376 N.C. 558, 599, 853 S.E.2d 698, 727-28 (2021). The statute under which Plaintiff's first claim is brought does not provide for a private cause of action. *See* N.C.G.S. § 147-76.1. Therefore, Plaintiff lacks standing and this claim must be dismissed.

Additionally, while the Supreme Court did not reach this question in *New Hanover II*, it did note with skepticism the absence of any authority tending to suggest that the Board of Education had "any substantive rights under or the ability to assert a claim pursuant to § 147-

76.1.” 380 N.C. at 113, 868 S.E.2d at 18, n6. It went on to acknowledge that “the absence of statutory language authorizing the Board of Education to assert such a claim casts further doubt upon the validity of plaintiff’s argument” *Id.* Here, Plaintiff Jonathan Burris brings this claim in the shoes of the Randolph County Board of Education. (Compl. ¶ 11) It follows that Burris, like the Randolph County Board of Education and the New Hanover Board of Education, will be unable to demonstrate that he has standing to bring a claim under N.C.G.S. § 147-76.1. *See id.*

Standing is a necessary prerequisite to a court’s proper exercise of subject matter jurisdiction in a declaratory judgment action. *E.g., United Daughters of the Confederacy v. City of Winston-Salem*, 383 N.C. 612, 652, 881 S.E.2d 32, 61 (2022) (affirming dismissal for lack of standing to bring declaratory judgment action). Where the statute invoked does not authorize the assertion of a private cause of action for the purpose of enforcing that statutory provision, dismissal is proper. *Id.* at 638, 881 S.E.2d at 52 (contrasting the absence of any statutory authorization to assert a private cause of action under N.C.G.S. § 100-2.1 with the explicit provisions authorizing a private cause of action in N.C.G.S. § 163-278.39A(f)). Here, N.C.G.S. § 147-76.1 does not contain any provision allowing for a private cause of action. Accordingly, Plaintiff’s first claim for relief must be dismissed.

iii. Sovereign Immunity bars Plaintiff’s statutory claim for relief.

Finally, it is an established principle of jurisprudence that a state may not be sued unless it has consented or otherwise waived its immunity from suit. *See, e.g., Wynn v. Frederick*, 385 N.C. 576, 580, 895 S.E.2d 371, 376 (2023) (reversing decision of the Court of Appeals and holding that sovereign immunity barred plaintiff’s claim arising out of an alleged statutory violation). This protection extends to public officials sued in their official capacities. *Id.* “Waiver

of sovereign immunity may not be lightly inferred, and state statutes waiving this immunity, being in derogation of the sovereign right to immunity, must be strictly construed.” *Id.* (quoting *Guthrie v. N.C. State Ports Auth.*, 307 N.C. 522, 538-39, 299 S.E.2d 618, 627 (1983)).

The statute serving as the basis for Plaintiff’s first claim for relief, N.C.G.S. § 147-76.1 does not contain a waiver of the state’s immunity from suit. *Compare* N.C.G.S. § 147-76.1 *and* N.C.G.S. § 143-291 (providing limited waiver of sovereign immunity for tort claims filed in the Industrial Commission) *and* N.C.G.S. § 126, Art. 8 (providing limited waiver of sovereign immunity for state employees asserting specific claims related to adverse employment action).

Even where a limited waiver of immunity is provided by statute, that waiver is narrowly construed to ensure the legislative intent is achieved. *Wynn*, 385 N.C. at 581, 895 S.E.2d at 377.

For example, in a case decided by the North Carolina Supreme Court a few months ago, the Court determined that the text of N.C.G.S. § 58-76-5, which provides a cause of action against “any register, surveyor, sheriff, coroner, county treasurer, or other officer,” did not waive immunity for claims brought against magistrates. *Id.* at 582, 895 S.E.2d at 377. Because the text of the statute and the legislative intent did not indicate that magistrates fell within the statute’s scope of “other officers,” the Court held that the claim brought against a magistrate was barred by sovereign immunity. *Id.* at 582-86, 895 S.E.2d at 377-80.

The Court’s holding in *Wynn* serves as guidance to this court that, without an explicit waiver of sovereign immunity allowing for a private cause of action in N.C.G.S. § 147-76.1, this claim is barred by Rules 12(b)(1), 12(b)(2), and 12(b)(6). *See Can Am South, LLC v. State*, 234 N.C. App. 199, 122-24, 759 S.E.2d 304, 307-09 (2014) (observing that the defense of sovereign immunity implicates subject matter jurisdiction, personal jurisdiction, and failure to adequately plead a claim for relief).

C. Plaintiff's Second and Third Claims Must Also Be Dismissed Pursuant to Rule 12(b)(6).

Plaintiff's second and third claims seek a declaratory judgment under Articles V and IX of the North Carolina Constitution and the State Budget Act. (Compl. ¶¶ 20-30) But these claims have effectively been considered and rejected by this State's highest court. These claims are subject to dismissal for lack of standing, failure to state a claim for relief, collateral estoppel, and the doctrine of separation of powers.

i. Constitutional claims against state employees in their individual capacities fail as a matter of law.

Plaintiff's second and third theories of recovery invoke the North Carolina Constitution. It is well-established that a constitutional claim will not lie against an individual. *See, e.g., Corum v. Univ. of N.C.*, 330 N.C. 761, 789, 413 S.E.2d 276, 293 (1992) (holding that plaintiff had no direct cause of action against defendants sued in their individual capacities for alleged constitutional violations). The Constitution secures an individual's rights vis-à-vis the State, not individuals. *Id.* at 788, 413 S.E.2d at 293. Therefore, only claims brought against the State or state officials acting in their official capacity that allege a violation of constitutional rights can survive a Rule 12(b)(6) motion to dismiss. Accordingly, before embarking on an analysis of the merits of Plaintiff's constitutional claims, this Court should dismiss Plaintiff's claims against Matthew Longobardi and Thomas Cheek. *Id.*

ii. Plaintiff fails to state a claim for relief under Article V of the North Carolina Constitution or the State Budget Act.

At bottom, Plaintiff's second cause of action alleges that the Attorney General's disbursement of Smithfield funds to EEG recipients violates the State Budget Act and the North Carolina Constitution because, Plaintiff asserts, these funds have not been appropriated. But that assertion is patently false. Article V prohibits withdrawals from the State treasury without

“appropriations made by law.” N.C. Const. Art V, sec. 7. But the legislature has appropriated the Smithfield Funds to the EEG program through the passage of N.C.G.S. § 147-76.1 and the 2021-22 and 2023-24 Appropriations Acts.

a. In enacting N.C.G.S. § 147-76.1, the legislature appropriated the Smithfield funds to the EEG Program.

First, the text of N.C.G.S. § 147-76.1 itself constitutes an appropriation. The statute contains three subsections. The first defines “cash gift or donation” as “any funds provided, without valuable consideration, to the State, for use by the State, or for the benefit of the State.” N.C.G.S. § 147-76.1(a). The second requires that all funds received by the State, including cash gifts and donations, be deposited into the State treasury. N.C.G.S. § 147-76.1(b). The third provides that “the terms of an instrument evidencing a cash gift or donation are a binding obligation of the State.” N.C.G.S. § 147-76.1(c).² It continues, “[n]othing in this section shall be construed to supersede, or authorize a deviation from the terms of an instrument evidencing a gift or donation setting forth the purpose for which the funds may be used.” *Id.*

Assuming the Smithfield Funds meet the definition of a “cash gift or donation” under the Statute, the language of the statute requires that the Smithfield Funds be first deposited into the State treasury, and then disbursed to grant recipients of the EEG, consistent with the terms of the Agreement between Smithfield and the Attorney General. *Id.*; *Ex. A*. Disbursement or allocation of those funds to the civil penalty forfeiture fund, as Plaintiff requests, would clearly violate the terms of N.C.G.S. § 147-76.1(c). Moreover, our Supreme Court has already ruled that the Smithfield Funds do not constitute civil penalties for the purposes of Article IX of the North Carolina Constitution. *New Hanover I*, 374 N.C. at 123, 840 S.E.2d at 209.

² Even without this provision, the Contracts Clause of the United States Constitution prohibits a state from passing a law that impairs a contract. U.S. Const. Art. I, § 10.

b. Through the state budget process, the General Assembly has appropriated the Smithfield funds to the EEG Program.

Second, the General Assembly adopted the base budget in passing the 2021-22 and 2023-24 budgets, which included appropriation for the Smithfield Funds to be used for the EEG program. Moreover, in 2021, the General Assembly considered a modification that would have diverted Smithfield funds to the public schools, as Plaintiff requests, but ultimately rejected that modification in its final version, which was sent to the Governor and signed into law. *See* SL 2021-180 (including a revision that would have redirected Smithfield Funds to the Department of Public Instruction in § 7.74 of versions 5 and 6 of the bill, but omitting that section in version 7 and the ratified bill sent to the Governor and signed into law as the 2021 Appropriations Act³). To the extent this Court has any doubt that N.C.G.S. § 147-76.1(c) serves as an appropriation of the funds itself, the legislature's actions in passing a budget without making any modifications to the base budget with respect to the Smithfield Funds removes any debate.

The North Carolina Constitution empowers the Governor “to prepare and recommend to the General Assembly a comprehensive budget of the anticipated revenue and proposed expenditures of the State for the ensuing fiscal period.” N.C. Const. Art III, § 5(3). The State Budget Act outlines how the Governor is to prepare the Recommended Budget. *See* N.C.G.S. § 143C, Art. 3. The legislature, judiciary, and each state agency submit their financial needs to the Governor, who in turn presents his budget recommendations⁴ to the General Assembly. N.C.G.S.

³ The relevant pages of these versions of Session Law 180 are provided in an addendum for ease of reference for the Court's consideration. They are discussed in more detail on pages 18-19 below.

⁴ North Carolina uses a biennial budget, so the Recommended Budget covers a two-year period beginning on July 1 of each odd-numbered year and ending on June 30 of the next odd-numbered year. N.C.G.S. § 143C-1-1.

§ 143C-3-1, § 143C-3-2, § 143C-3-3, § 143C-3-5. “The Governor’s Recommended State Budget shall include a base budget,” which must employ the North Carolina Accounting System Uniform Chart of Accounts to show “both uses and sources of funds,” and a recommended Current Operations Appropriations Act, that makes appropriations for each fiscal year of the biennium. N.C.G.S. § 143C-3-5(b)(2)–(3).

Once the Governor presents the Recommended Budget, the General Assembly begins its legislative review in each house. N.C.G.S. § 143C-5-1. The General Assembly makes adjustments to the Governor’s Recommended Budget and ratifies a Current Operations Appropriations Act for the Governor’s signature (or veto, which the General Assembly may override by approval of three-fifths of each house). N.C.G.S. § 143C-5; N.C. Const. Art. II, § 22(1). “[T]he Governor shall administer the budget as enacted by the General Assembly,” and is required to “ensure that appropriations are expended in strict accordance with the budget enacted by the General Assembly.” N.C.G.S. § 143C-6-1(a). As Director of the Budget, the Governor “shall certify to each State agency the amount appropriated to it for each program and each object from all funds included in the budget as defined in G.S. 143C-3-5(d).” N.C.G.S. § 143C-6-1(c).

The Governor’s Recommended Budget is available to the public on the Office of State Budget Management website: <https://www.osbm.nc.gov/budget/governors-budget-recommendations>. Past recommended budgets are also available to the public on this website. See <https://www.osbm.nc.gov/budget/governors-budget-recommendations/past-recommended-budgets>.

The current base budget reflects receipt of \$2,000,000 in grant funds from Smithfield Foods to the Department of Justice:



**Recommended Base Budget (Worksheet I)
Summary By Purpose
Biennium : 2023-25
Status : Approved**

090-Department of Justice
23606-Justice - Seized and Forfeited Assets

Requirements

Fund Code	Fund Title	Actual 2021-22	Certified 2022-23	Authorized 2022-23	Incr/Decr 2023-24	Total 2023-24	Incr/Decr 2024-25	Total 2024-25
2204	Smithfield Environment Enhancement Grants	\$1,040,767	\$2,000,000	\$2,000,000	\$0	\$2,000,000	\$0	\$2,000,000
Total Requirements		\$1,040,767	\$2,000,000	\$2,000,000	\$0	\$2,000,000	\$0	\$2,000,000

Receipts

Fund Code	Fund Title	Actual 2021-22	Certified 2022-23	Authorized 2022-23	Incr/Decr 2023-24	Total 2023-24	Incr/Decr 2024-25	Total 2024-25
2204	Smithfield Environment Enhancement Grants	\$2,007,153	\$2,000,000	\$2,000,000	\$0	\$2,000,000	\$0	\$2,000,000
2231	Seizure and Forfeited Assets - Medicaid USDOJ	\$57	\$0	\$0	\$0	\$0	\$0	\$0
Total Receipts		\$2,007,210	\$2,000,000	\$2,000,000	\$0	\$2,000,000	\$0	\$2,000,000
Change in Fund Balance		\$966,443	\$0	\$0	\$0	\$0	\$0	\$0

No FTE Available

See Recommended Base Budget Item Detail & Fund Purpose Statements, 2023-25, Justice and Public Safety, p 300, available at <https://www.osbm.nc.gov/base-budget-fy-2023-25-jps/download?attachment>.

The base budget also reflects disbursement of \$2,000,000 from the Department of Justice to the “Smithfield Environmental Enhancement Grants”:



**Recommended Base Budget (Worksheet I)
Fund Detail by Account
Biennium : 2023-25
Status : Approved**

090-Department of Justice
23606-Justice - Seized and Forfeited Assets
2204-Smithfield Environment Enhancement Grants

Requirements

OTHER EXPENSES & ADJUSTMENTS

Account Code	Account Title	Actual 2021-22	Certified 2022-23	Authorized 2022-23	Incr/Decr 2023-24	Total 2023-24	Incr/Decr 2024-25	Total 2024-25
535900	OTHER EXPENSES	\$1,040,767	\$2,000,000	\$2,000,000	\$0	\$2,000,000	\$0	\$2,000,000
Total OTHER EXPENSES & ADJUSTMENTS		\$1,040,767	\$2,000,000	\$2,000,000	\$0	\$2,000,000	\$0	\$2,000,000
Total Requirements		\$1,040,767	\$2,000,000	\$2,000,000	\$0	\$2,000,000	\$0	\$2,000,000

Receipts

GRANTS

Account Code	Account Title	Actual 2021-22	Certified 2022-23	Authorized 2022-23	Incr/Decr 2023-24	Total 2023-24	Incr/Decr 2024-25	Total 2024-25
432411	GRANT SMITHFIELD FOODS	\$2,000,000	\$2,000,000	\$2,000,000	\$0	\$2,000,000	\$0	\$2,000,000
Total GRANTS		\$2,000,000	\$2,000,000	\$2,000,000	\$0	\$2,000,000	\$0	\$2,000,000

INVESTMENT INCOME

Account Code	Account Title	Actual 2021-22	Certified 2022-23	Authorized 2022-23	Incr/Decr 2023-24	Total 2023-24	Incr/Decr 2024-25	Total 2024-25
433120	STIF INT INC-PROGRAM REV	\$7,153	\$0	\$0	\$0	\$0	\$0	\$0
Total INVESTMENT INCOME		\$7,153	\$0	\$0	\$0	\$0	\$0	\$0
Total Receipts		\$2,007,153	\$2,000,000	\$2,000,000	\$0	\$2,000,000	\$0	\$2,000,000
Change in Fund Balance		\$966,387	\$0	\$0	\$0	\$0	\$0	\$0

No FTE Available

See *id.* at p 302.

The Certified Budget for each State agency is also available on the OSBM website at: <https://www.osbm.nc.gov/budget/certified-budget>. The Certified Budget for the Department of Justice, which the Attorney General oversees and directs pursuant to N.C.G.S. § 114-1, reflects receipt and disbursement of \$2,000,000 for the Smithfield Environmental Enhancement Grants:

**Office of State Budget And Management
Certified Budget
Detail by Fund
Biennium 2023-25**

23606-Justice - Seized and Forfeited Assets
202806-DOJ 2204 SMITHFIELD ENVIRON ENHANCEMENT GRANTS BC 23606

Account Code	Account Title	2023-2024	2024-2025
REQUIREMENTS			
55909999	OTHER EXPENSES	\$2,000,000	\$2,000,000
TOTAL OTHER EXPENSES AND ADJUSTMENTS		\$2,000,000	\$2,000,000
TOTAL REQUIREMENTS		\$2,000,000	\$2,000,000
RECEIPTS			
42499999	PRIVATE GRANTS	\$2,000,000	\$2,000,000
TOTAL GRANTS		\$2,000,000	\$2,000,000
TOTAL RECEIPTS		\$2,000,000	\$2,000,000
CHANGE IN FUND BALANCE		\$0	\$0

See Current Operations Appropriation Act, Certified Budget for the Department of Justice, p 39, available at <https://www.osbm.nc.gov/media/3704/download?attachment>.

These materials demonstrate that the General Assembly’s adoption of the base budget without modification to the Smithfield funds allocation for the EEG Program serves as an appropriation made by law, which necessarily defeats Plaintiff’s second cause of action.

The General Assembly’s failure to modify the Smithfield funds allocation was not an oversight. As noted above, the legislature considered and **ultimately rejected** an appropriation that would have likely provided the relief Plaintiff seeks here.

The legislative history shows that, in June 2021, all three versions of Senate Bill 105 did not include any revisions or modifications to the base budget with respect to the Smithfield funds. See SL 2021-180, Editions 1-3, ADD 10-63. During the House chamber’s review in

August 2021, however, a new provision, § 7.74, titled Environmental Enhancements of Public Schools/Smithfield Foods Agreement, was proposed. *See* SL 2021-180, Edition 5, ADD 8, 78-80. This section specifically allocates the “funds received by the State resulting from the environmental enhancement provision of the agreement entered into between the Attorney General of North Carolina and Smithfield Foods, Inc., and its subsidiaries, dated July 25, 2000” to the Department of Public Instruction. ADD 79. This proposed provision would have required the State Controller to “transfer any available funds received by the State under the Agreement on or after July 1, 2019,” into a fund that is appropriated for “the Department of Public Instruction for the 2022-23 fiscal year, and for subsequent fiscal years, under a plan that provides for the allocation of funds to local school administrative units for environmental enhancements.”

ADD 79-80. It further instructs that the Controller shall reserve all funds received from Smithfield into this new fund, that all previous funds held in reserve have not been appropriated by law “as that phrase is used in Section 7(1) of Article V of the North Carolina Constitution,” and that the Governor and Attorney General are specifically “prohibited from directing the use of the funds” ADD 80.

The next version of the House’s budget also included the proposed § 7.74, with identical language and requirements of Defendants. *See* SL 2021-180, Edition 6, ADD 81-83.

However, the proposed § 7.74 is absent from the Ratified Bill finalized in November 2021. ADD 4, 84, 86. Naturally, it also does not appear in the final version signed into law on November 18, 2021. ADD 87-89.

It is evident that the proposed diversion of the Smithfield funds from the EEG Program to the public school systems was considered but ultimately failed as a result of the compromises required in a democratic legislative process. ADD 1-11, 82-89. The absence of the proposed

section in the 2021 Appropriations Act is compelling evidence of the legislature's intent not to modify the existing appropriation of the Smithfield funds to the EEG Program. These funds have been appropriated, and Plaintiff's second cause of action fails as a matter of law.

c. There is no support for Plaintiff's alternative assertion that the Smithfield funds were appropriated to the civil penalty forfeiture fund.

Plaintiff's alternative theory that, if this Court determines that there is an appropriation, "that appropriation must have been to the civil penalty forfeiture fund under N.C. Const. Art. IX and N.C.G.S. § 115C-437" fails on its face. As noted above, in *New Hanover I*, the North Carolina Supreme Court ruled that the Smithfield Funds do not constitute civil penalties. *New Hanover I*, 374 N.C. 102, 123, 840 S.E.2d 194, 209 (2020). Indeed, in *New Hanover II*, a unanimous Supreme Court reaffirmed that its decision in *New Hanover I* is binding precedent: "whether payments made by the Smithfield companies in accordance with the agreement constituted civil penalties for the purpose of Article IX, section 7, of the North Carolina Constitution [] is an issue that this Court **definitively resolved** in its earlier decision in this case." *New Hanover II*, 380 N.C. at 113, 868 S.E.2d at 18 (emphasis added). The doctrines of res judicata and collateral estoppel preclude Plaintiff, who stands in privity with the New Hanover County Board of Education, from relitigating this issue. *See, e.g., Urquhart v. E. Carolina Sch. Of Med.*, 211 N.C. App. 124, 127-30, 712 S.E.2d 200, 203-05. (2011).

The Attorney General has authority from the legislative to disburse the Smithfield Funds to EEG recipients, and doing so does not violate Article V's prohibition of withdrawals from the State treasury without appropriation made by law. Similarly, Plaintiffs' allegations fail to state a claim against the Governor, the State Controller, or any employee of the Department of Justice or the OSBM, under either the North Carolina Constitution or the State Budget Act. Plaintiff's

second cause of action plainly fails to state a claim for relief and dismissal is appropriate under Rule 12(b)(6).

iii. Plaintiff's Complaint fails to state a claim for relief under Article IX of the North Carolina Constitution.

Plaintiff's third claim for relief ostensibly argues in the alternative that the Smithfield Funds are not a civil penalty but instead an unappropriated gift, which must be allocated for the public school system under Article IX, sec. 6, of the North Carolina Constitution. However, the text of the Constitution, along with guidance from the North Carolina Supreme Court, reveals that this claim obviously fails.

Article IX does require that all grants, gifts, and devises made to the State that are not otherwise appropriated—either by the State or by the terms of the grant, gift, or devise—shall be paid into the State Treasury and “used exclusively for establishing and maintaining a uniform system of free public schools.” N.C. Const. Art. IX, § 6. This gift clause is “intended to ensure that any general grants, gifts, and devises that are received by the State and are not intended for any other purpose shall be spent for educational purposes.” *Cooper*, 376 N.C. at 39, 852 S.E.2d at 60.

But the Smithfield funds clearly do not fit within this category. While they are a gift, they are by no means a “general gift” providing funds to the State with no designated purpose. *See id.* The Agreement expressly provides that Smithfield funds “will be used to enhance the environment of the State, including eastern North Carolina, to obtain environmental easements, construct or maintain wetlands and such other environmental purposes, as the Attorney General deems appropriate.” *Ex. A*, p 14. It further reiterates that the funds “will be paid to such organizations or trusts as the Attorney General will designate.” *Id.* Given this clear direction about how the Smithfield funds will be used, this gift need not go to the schools under the gift

clause, because it is “otherwise appropriated . . . by the terms of the grant, gift, or devise”. N.C. Const., Art. IX, § 6. Similarly, N.C.G.S. § 147-76.1(c) recognizes that the terms of the Agreement are “binding,” and those terms permit the Attorney General to disburse the Smithfield Funds, even after they are deposited into the State treasury, to “such organizations or trusts as the Attorney General will designate.” *Ex. A*, p 14. And finally, as explained above, the Smithfield funds were appropriated to the EEG program, as administered by the Attorney General, during the legislative review process under the State Budget Act.

The Smithfield funds are appropriated—by the General Assembly in the budget and in N.C.G.S. § 147-76.1, and by the terms of the Agreement—to the EEG program. Therefore, they are not unappropriated funds that must be allocated to the public school system. Instead, they must be utilized for the purpose for which they were designated. *Id.*


Plaintiff’s third claim for relief based on Article IX of the North Carolina Constitution fails on its face and should be dismissed pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure.

CONCLUSION

Based on the foregoing reasons and authorities, Defendants respectfully move the Court to dismiss all of Plaintiff’s claims and grant Defendants’ motion to dismiss Plaintiff’s complaint in its entirety with prejudice.

Respectfully submitted this the 5th day of April, 2024.

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Counsel for Defendants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing **MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S COMPLAINT** was served by email and US mail, and addressed to the following:

Paul Stam
STAM LAW FIRM, PLLC
P.O. Box 1600
Apex, NC 27502
Paulstam@stamlawfirm.com

This the 5th day of April, 2024.



Laura H. McHenry
Special Deputy Attorney General

NORTH CAROLINA)
WAKE COUNTY)

IN THE GENERAL COURT OF)
JUSTICE)
SUPERIOR COURT DIVISION)
WAKE CTY: 24 CV 013410-910)
RANDOLPH CTY: 23 CVS 1479)

RANDOLPH COUNTY BOARD OF)
EDUCATION, ex rel JONATHAN)
BURRIS,)

Plaintiff)

vs.)

JOSH STEIN, in his official capacity)
as North Carolina Attorney General,)
NELS ROSELAND, in his official)
capacity as North Carolina)
Controller, ROY COOPER in his)
official capacity as North Carolina)
Governor.)

Defendants.)

**AFFIDAVIT OF
JONATHAN BURRIS**

Jonathan Burris, being first duly sworn, deposes and says:

1. My name is Jonathan Burris. I am an adult and under no disability, and I have personal knowledge of the facts stated herein.
2. I am the Plaintiff, as relator, in the above action pending before this court.
3. On April 17, 2023, I authorized a letter written on my behalf to the Randolph County Board of Education, requesting that the Board initiate litigation against Josh Stein, Nels Roseland, and Roy Cooper for claims under N.C.G.S. §§ 143C-1-1, 147-76.1, and N.C. Const. Art. V and IX. A true copy is attached as Exhibit A.
4. I have attached hereto a true and accurate copy of the letter sent on my behalf to the Randolph County Board of Education.



5. Furthermore, I also affirm that the amendment to my complaint filed on April 5, 2024, specifically the revision of page two's last sentence to read "The Randolph County Board of Education wrongfully refused to file this action," accurately reflects my directives and beliefs.

6. I make this affidavit to authenticate the attached letter and amendment for its introduction as evidence in the pending litigation and to verify the addition of the word "wrongfully".

This is the ^{May} 7th day of April, 2024.

Jonathan Burris
Jonathan Burris

Sworn to and subscribed before me this ^{May} 8th day of April, 2024.

Beverly F. Scott
Notary Signature

Notary's Printed Name: Beverly F. Scott, Notary Public

My commission expires: 4/4/2025



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April 3¹², 2023

By U.S. Mail and Electronic Mail

Gary Cook
Chairman, Randolph County Board of Education
garycook@randolph.k12.nc.us
Randolph County Board of Education
Randolph County School System Administrative Offices
2222-C South Fayetteville Street
Asheboro, N.C. 27205

Re: Diversion of Funds by Attorney General Josh Stein



Ms. Smith,

This letter is a demand for litigation under *Branch v. Bd. of Educ.*, 233 N.C. 623, 626, 65 S.E.2d 124, 126 (1951). The Attorney General and Governor are diverting taxpayer funds that rightly belong to public schools, including the Randolph County Board of Education. Filing suit to stop that diversion would protect the interests of the Randolph County Board of Education. We have enclosed a draft complaint.

The North Carolina Supreme Court decided *New Hanover County Board of Education v. Stein* in February of 2022. New Hanover challenged an agreement between the Attorney General and Smithfield Foods. Smithfield agreed to pay the Attorney General \$2 million

dollars a year for 25 years. The Attorney General distributes that money to environmental enhancement grants.

Under a law that took effect on 1 July 2019, that money must go to the State Treasury. The Attorney General argues, contra Article V of the North Carolina Constitution, that he can still control the distribution of the money even after it is in the State Treasury. In fact, the Attorney General has continued "requisitioning" and distributing the money. The Attorney General also argues, contra Article IX, the money doesn't have to go to public schools.

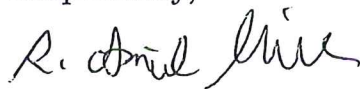
The Supreme Court's decision in *New Hanover v. Stein* was a procedural decision that New Hanover could not tack on a 2019 law to a lawsuit it filed in 2016. Because of its narrow nature, the Supreme Court essentially invited new litigation:

the Board of Education remains free under our decision in this case to file a new complaint in the Trial Division of the General Court of Justice asserting any claims that might otherwise be available to it pursuant to § 147-76.1 or any other statutory provision.

New Hanover Cty. Bd. of Ed. v. Stein, 2022-NCSC-9, ¶ 37. The New Hanover County Board of Education, because of fatigue from the case and other controversies it is involved in, declined to take up the Court's invitation.

Absent a lawful appropriation, these taxpayer funds belong to North Carolina's public schools. Our client, Jonathan Burris, is a taxpayer and resident of Randolph County. He requests that you bring suit on these claims. If you do not bring suit, he will sue in the name of the Board. Thank you for your attention to this matter.

Respectfully,


R. Daniel Gibson


Paul "Skip" Stam

STATE OF NORTH CAROLINA

RANDOLPH COUNTY

AFFIDAVIT OF RECORDS CUSTODIAN

Beverly Fowler, first duly sworn, deposes and says:

1. My name is Beverly Fowler. I am an adult and under no disability.
2. I am the clerk to the Randolph County Board of Education and have the general duty of overseeing the maintenance of records of the Board of Education.
3. Attached hereto is a true and accurate copy of the resolution adopted by the Randolph County Board of Education at its meeting on June 29, 2023.

This the 16th day of April, 2024.



Beverly Fowler
Clerk, Randolph County Board of Education

Signed and sworn to (or affirmed) before me by Beverly Fowler.

Date: 4-16-2024


[Official Signature of Notary]

Barbara L. Moody, Notary Public
[Notary's printed or typed name]

My commission expires: 10-11-2026



WHEREAS, on April 17, 2023, Jonathan Burris requested that the Randolph County Board of Education (the "Board") file suit against Josh Stein, Nels Roseland, and Roy Cooper alleging claims under N.C.G.S. §§ 143C-1-1, 147-76.1 and N.C. Const. Art. V and IX;

WHEREAS, the Board has reviewed a proposed complaint and fee agreement drafted by Jonathan Burris' counsel;

WHEREAS, the Board has many important priorities related directly to the education of children and lacks the resources of time, effort, and funds necessary to pursue a lawsuit on this subject;

WHEREAS, the Board acknowledges that it is entitled to receive, for its exclusive use, the clear proceeds of all penalties and forfeitures and of all fines collected in the several counties for any breach of the penal laws of the State, and that failure by any government to remit said clear proceeds to which the Board is entitled is unconstitutional; and

WHEREAS, though the Board lacks the resources to recover a sum which, divided amongst all 100 counties, does not justify the time and effort necessary to secure such clear proceeds in the particular case presented by Mr. Burris given the many priorities of the Board and the strains on resources already present, the Board nonetheless supports the efforts of any taxpayer to recover the clear proceeds to which the Board is constitutionally entitled.

NOW, THEREFORE, BE IT RESOLVED that the Randolph County Board of Education denies Mr. Burris' request to engage in litigation due to the limitations on its resources.

FURTHER be it RESOLVED that the Board commends Mr. Burris for extraordinary performance of his civic duty and advocacy of the interests of Randolph County taxpayers, and encourages Mr. Burris to pursue litigation to secure funds to which the Board is constitutionally entitled.