APPENDIX TABLE OF CONTENTS

OPINIONS AND ORDERS

REHEARING ORDER

OTHER DOCUMENTS

OPINION, U.S. COURT OF APPEALS FOR THE FOURTH CIRCUIT (APRIL 4, 2025)

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PATSY TALLEY,

Plaintiff – Appellant,

v.

DALE R. FOLWELL, Individually and in his Official Capacity as Treasurer of the State of North Carolina; LENTZ BREWER; JOHN EBBIGHAUSEN; VERNON GAMMON; DIRK GERMAN; BARBARA GIBSON; LINDA GUNTER; OLIVER HOLLEY; GREG PATTERSON; MARGARET READER; JOSHUA SMITH; CATHERINE TRUITT; JEFFREY WINSTEAD, individually and in their official capacity,

Defendants – Appellees.

No. 24-1215

Appeal from the United States District Court for the Eastern District of North Carolina, at Greenville. Terrence W. Boyle, District Judge. (4:22-cv-00027-BO)

Before: AGEE, QUATTLEBAUM, and RUSHING, Circuit Judges.

QUATTLEBAUM, Circuit Judge:

"There is no such thing as a free lunch."[1] This appeal illustrates this old adage. For over eight years, North Carolina paid Patsy Talley $857 more in monthly retirement benefits than she was supposed to receive. All told, Talley was overpaid to the tune of $86,173.93. When North Carolina finally realized its mistake, it notified Talley that going forward, her monthly benefits would be reduced to recoup the overpayment. Then, it began doing just that. In response, Talley sued, asserting several constitutional theories all premised on North Carolina's failure to provide a hearing before it began reducing her monthly retirement payments. She never denied that she was overpaid or disputed the amount. She instead complained that the way North Carolina went about recouping its overpayment failed to provide her due process rights. The district court dismissed all her claims under Rule 12 of the Federal Rules of Civil

---

[1] This phrase has an interesting history. It seems to have arisen in the late nineteenth century, when bars provided lunch at no cost to lure in customers who would spend more than the bar's costs of providing lunch in alcohol purchases. *See* Rudyard Kipling, RUDYARD KIPLING'S WEST: AMERICAN NOTES BY RUDYARD KIPLING 19 (Arrell Morgan Gibson ed., 1981) (describing how he discovered "the institution of the 'Free Lunch'" while touring the United States in 1889, in which "[y]ou paid for a drink and got as much as you wanted to eat"); *see also Phoenixania*, THE DAILY PHOENIX, Sept. 6, 1873, Vol. IX, No. 144 ("One of the most expensive things in this city—Free lunch."). Milton Friedman later used the phrase as a book title to describe the economic theory of opportunity costs. *See* Milton Friedman, THERE'S NO SUCH THING AS A FREE LUNCH (1975). Colloquially, the point is simple. Rarely, if ever, do you get something for nothing.

Procedure. We agree that Talley failed to plead any plausible claims. So, we affirm.

I.

A.

Talley retired from the Beaufort County School System in 2008, after teaching in the district for over 25 years. The North Carolina Department of State Treasurer has a Retirement System Division ("RSD"), which in turn has a subdivision called the "Teachers' and State Employees' Retirement System" ("TSERS"). J.A. 16. Talley participated in TSERS, accruing vested retirement benefits while she worked as a teacher. TSERS offers various options through which retired teachers can receive their accrued benefits. Talley chose an option that allowed her to receive "a larger monthly payment than the maximum allowable benefits until the month of her sixty-second birthday, after which point [her] payment amount [would be] decreased by an amount equal to an estimate of [her] social security benefits." J.A. 20. Under this method, her overall income would remain constant even after her retirement benefits decreased because her social security benefits would offset that reduction.

At first, things worked as planned. Talley "received $2,703.34 per month . . . until her 62nd birthday." J.A. 20. After her 62nd birthday, in December 2009, she began to receive a reduced monthly benefits payment from TSERS, as expected. Also as planned, Talley's Social Security benefits made up the difference. But in April of 2010, things began to

go awry. At that time, TSERS[2] determined that Talley's monthly payments were $17.90 less than they should have been both before and after she turned 62. To rectify this mistake, TSERS paid Talley for the total amount of the underpayments through April 2010. That corrective action itself was fine. But the next month, TSERS made another mistake. This time, it began paying Talley the recalculated "before age 62" amount when it should have sent the recalculated "after age 62" amount. Since the recalculated "before age 62" payment was more than the recalculated "after age 62" payment, Talley was overpaid each month beginning in April of 2010.

This overpayment continued for over eight years. Finally, in August 2018, TSERS realized its mistake. A few months later, the Executive Director of RSD notified Talley by letter that she "had been overpaid in the amount of $86,173.93. . . . " J.A. 21. And about one month after that, the Deputy Director of Member Services of TSERS notified Talley, again by letter, that her monthly checks would be reduced by $926.35 beginning in April of 2019. In April, Talley was informed by email that she could appeal the reduction.

In response to this email, Talley's lawyer asked that an earlier email from Talley's son to the North Carolina State Treasurer inquiring about the reduction in her pension payments be treated as an appeal. Her lawyer also asked that any reduction in her retirement payments be delayed until the matter

---

[2] Talley refers to both RSD and TSERS throughout her complaint. With the understanding that these entities are not one and the same, we will use the term TSERS in this opinion to refer to both.

was "resolved." J.A. 22. Despite that, in April 2019, Talley began receiving the reduced benefit checks.

On April 24, 2019, Talley was notified that the final agency decision was to reduce her monthly checks by 50%. In June, she filed a petition in the Office of Administrative Hearings to stop the taking of her property "without an opportunity to be heard." J.A. 23. While that administrative proceeding was pending, TSERS agreed to reduce the amount of recoupment each month. Instead of reducing her benefits check by 50% each month, it agreed to reduce it by just 10%. In other words, TSERS did not agree to reduce the total amount it was seeking to recoup, only to recoup at a slower pace.

As part of the administrative proceeding, TSERS and Talley moved for summary judgment. On February 19, 2020, an Administrative Law Judge ("ALJ") granted TSERS' motion for summary judgment and denied Talley's. In its decision, the ALJ found that Talley was overpaid by $86,173.93. It then held that (1) TSERS had a statutory obligation to recoup the overpayment amount under N.C. Gen. Stat. § 143-64.80(b); (2) the overpayment amount could be recouped by offsetting the overpayment against an individual's retirement allowance; (3) "a contested case before the Office of Administrative Hearings in the executive branch is 'not a proper method of challenging the constitutionality of a statute'"; and (4) because there was no dispute of material fact in controversy, Talley's petition should be dismissed. J.A. 65. In this final decision, the ALJ notified Talley that she could appeal the decision to the superior court of the county where she resides. Talley did not exercise this right to appeal.

B.

Talley sued the State of North Carolina, TSERS, RSD, State Treasurer Dale Folwell (individually and in his official capacity) and twelve current or former members of TSERS' board, individually and in their official capacities, in federal court. She asserted claims for (1) deprivation of due process under the U.S. Constitution; (2) deprivation of due process under the North Carolina Constitution; (3) deprivation of equal protection and substantive due process under the U.S. Constitution; and (4) deprivation of equal protection and substantive due process under the North Carolina Constitution. Talley primarily complained that reducing her monthly benefits checks without any sort of pre-deprivation hearing and without any set protocol for how overpayments should be recouped violated her due process and equal protection rights. In her complaint, she purported to bring claims "on behalf of herself and all similarly situated individuals . . . under 42 U.S.C. § 1983 for the deprivation of property and property rights without due process." J.A. 15. But she has yet to file a motion for class certification. Thus, for our purposes, Talley is the only plaintiff in this case.

After defendants moved to dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), Talley voluntarily dismissed her claims against the State of North Carolina, TSERS and RSD and her North Carolina Constitution-based claims. That left the individual TSERS Board of Trustees members as defendants on the federal law-based claims. Then, the district court dismissed Talley's claims against the defendants in their official capacities, explaining that Talley's claims did not allege ongoing violations

of her rights and did not seek prospective relief. As a result, the court held that the Eleventh Amendment immunized the defendants from those claims. It also dismissed Talley's substantive due process claim, explaining that "the availability of internal review" and the "post-deprivation quasi-judicial hearing" meant that she had received fair procedure and thus failed to state a substantive due process claim. J.A. 83. Next, the district court dismissed her equal protection claim, holding that (1) she had "not alleged the presence of any suspect class or the violation of a fundamental right" and (2) that she had not shown that "treating current employees and retirees differently or reducing overpayment recoupment percentages only for people who 'push back' [was] not rationally related to a legitimate state interest, *i.e.*, fully recouping the overpayment of retirement benefits." J.A. 84. Last, as to Talley's procedural due process claim against the defendants in their individual capacities, the district court held that Talley sufficiently alleged a property interest in "the continued receipt of full benefits prior to a reduction based upon the state's recoupment procedures" and that the process provided to her prior to the initiation of recoupment procedures was constitutionally inadequate. J.A. 81. This allowed the individual capacity procedural due process claim to go forward.

The defendants answered, asserting qualified immunity, among other defenses. They also moved for judgment on the pleadings under Rule 12(c). Around the same time, Talley moved to amend her complaint to add additional plaintiffs.

The district court granted the defendants' Rule 12(c) motion, explaining that "plaintiff [] failed to res-

pond substantively to whether defendants [were] . . . entitled to qualified immunity" and thus waived any arguments she could have otherwise made. J.A. 466. It further held that "even assuming, without deciding, that the lack of pre-deprivation process prior to a reduction in plaintiff's retirement benefit amounts to a violation of her procedural due process right, it is not apparent that such a right was clearly established, and thus defendants are entitled to qualified immunity." J.A. 468.

The district court also denied Talley's motion to amend her complaint. It did so because: (1) Talley moved to amend her complaint nearly four months after the "deadline to amend pleadings and join parties" contained in the scheduling order; (2) the motion itself was procedurally deficient because it did not include the required proposed amended pleading and failed to indicate how the amended pleading differed from the original as required by local rule; and (3) Talley had not shown the requisite good cause for modifying the scheduling order under Federal Rule of Civil Procedure 16(b)(4) to add potential plaintiffs, at least some of which she knew of prior to the expiration of the deadline. J.A. 468–71. The district court also noted that, even if good cause to modify the scheduling order existed, "the proposed new plaintiffs do not allege deprivation of the same property interest," and the benefits complained about by the proposed plaintiffs were "not alleged to be managed by the individual defendants who are . . . members of the TSERS Board." J.A. 470–71.

Talley now appeals: (1) the district court's order granting the individual defendants' Rule 12(c) motion for judgment on the pleadings as to her individual

capacity procedural due process claim; (2) the district court's order granting the defendants' Rule 12(b) motion to dismiss as to her official capacity procedural due process claim, her substantive due process claim and her equal protection claim; and (3) the district court's denial of her motion to amend her complaint.[3]

II.

Talley argues that the district court erred in dismissing her claims. We address each claim in turn before reviewing the district court's denial of Talley's motion to amend.

A. Procedural Due Process – Official Capacity

Talley first appeals the district court's dismissal of her official capacity procedural due process claims. She argues that the board members violated her procedural due process rights by recouping the overpaid benefits without providing sufficient process. And she specifically complains that she was not afforded a hearing before the defendants began reducing her benefit checks.

But under the Eleventh Amendment, "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or subjects of any Foreign State." U.S. Const. amend. XI. "This immunity has been judicially interpreted to run as well to

---

[3] We review the district court's grant of both the defendants' motion to dismiss and their motion for judgment on the pleadings de novo. *See Mayfield v. Nat'l Ass'n for Stock Car Auto Racing, Inc.*, 674 F.3d 369, 375 (4th Cir. 2012).

actions by a state's own citizens" including those brought "against state agents or officials that are in fact actions against the state as the real party in interest." *Indust. Servs. Grp., Inc. v. Dobson*, 68 F.4th 155, 163 (4th Cir. 2023) (cleaned up). However, the Supreme Court has crafted an exception to this immunity "for suits brought against state officials . . . acting in violation of the Constitution. . . . " *Id.* (citing *Ex parte Young*, 209 U.S. 123, 160 (1908)). Under the *Ex parte Young* exception, private citizens may "petition a federal court to enjoin State officials in their official capacities from engaging in future conduct that would violate the Constitution or a federal statute." *Id.* (internal quotation mark omitted) (quoting *Antrican v. Odom*, 290 F.3d 178, 184 (4th Cir. 2002)). To successfully bring a claim against a state official in their official capacity for a violation of the Constitution, plaintiffs must "allege an ongoing violation of federal law and seek relief properly characterized as prospective." *Verizon Md., Inc. v. Pub. Serv. Comm'n*, 535 U.S. 635, 645 (2002) (cleaned up). Talley argues her official capacity procedural due process claims fall within this *Ex parte Young* exception to Eleventh Amendment immunity.

Talley's arguments have several problems. For starters, as conceded at oral argument, her primary complaint is TSERS' failure to provide her with sufficient process—mostly a hearing—prior to reducing her benefits checks to recoup the overpayment. That alleged failure occurred before she filed her complaint. Thus, it is not ongoing conduct as required by *Ex parte Young*.

Talley responds that even if the failure to provide sufficient process before the offsets began took

place in the past, the continued recoupment from each of her monthly pension payments is a "consequence" of the earlier failure to provide pre-deprivation process that is itself an ongoing constitutional violation. And to be sure, "presently experienced harmful consequences of past conduct" can be "ongoing violations of federally protected constitutional rights." *Republic of Paraguay v. Allen*, 134 F.3d 622, 628 (4th Cir. 1998) (collecting cases). For example, an injunction can be issued to stop the ongoing, unequal underfunding of a school district even though the initial funding decision was made in the past. *Papasan v. Allain*, 478 U.S. 265, 282 (1986). An injunction mandating a remedial education plan is permissible to address the ongoing effects of a past policy of racial segregation. *Milliken v. Bradley*, 433 U.S. 267, 288–90 (1977). An injunction can require that a state employee terminated without due process be re-hired because, although the termination took place in the past, he experienced a "continuing violation" of his property rights until he was re-hired. *Coakley v. Welch*, 877 F.2d 304, 306–07 (4th Cir. 1989). And an injunction enjoining the collection of taxes is permissible even though the illegal assessment took place in the past because future collection based on the past assessment would violate federal law. *CSX Transp., Inc. v. Bd. of Pub. Works of State of W. Va.*, 138 F.3d 537, 539, 542–43 (4th Cir. 1998).

Talley's claims are not like any of these cases. As explained in *Republic of Paraguay*, for a violation to be ongoing, the officials being sued must be "in violation of federal law at the precise moment when the case was filed." 134 F.3d at 628. Here, the defendants were not in violation of federal law by the

time Talley filed her complaint, if they ever were. That's because by that time, the defendants provided the ALJ hearing at which she was able to oppose the recoupment. *See Tri-Cnty. Paving, Inc., v. Ashe Cnty.*, 281 F.3d 430, 436 (4th Cir. 2002) (quoting *Fields v. Durham*, 909 F.2d 94, 97 (4th Cir. 1990)) (stating that "courts must consult the entire panoply of predeprivation and postdeprivation process provided by the state" to "determine whether a procedural due process violation has occurred"). The ALJ hearing did not end in the result that Talley hoped it would. But her dissatisfaction with the outcome of that hearing does not make the hearing deficient, nor does she really argue that it was.

Talley's only real complaint about the ALJ hearing was her inability to raise constitutional issues at the hearing. True, the ALJ noted that "[a]n Administrative Law Judge follows the constitutional rulings of the Judicial Branch but does not make them" in response to Talley's "constitutional argument that she obtained a vested right to retain the overpaid benefits." J.A. 65. But the ALJ also informed Talley in its final decision that she had a right to appeal that decision to the superior court of the county where she resided. She declined to do so. Her decision not to avail herself of the appeals process—through which she could have made her constitutional arguments in state court—does not render the process she received constitutionally deficient. Thus, any recoupment now being pursued by defendants is not an ongoing consequence of an inadequate process.

For all of these reasons, Talley's official capacity procedural due process claims are barred, and we affirm the district court's dismissal of them.

B. Procedural Due Process – Individual Capacity

Talley also argues that the district court erred in holding that qualified immunity applies to her procedural due process claims against the defendants in their individual capacities. She argues that the "presumptively valid" North Carolina statutes under which the board members acted when recouping the overpayments did not "require[] deprivation of property without constitutionally mandated due process." Op. Br. at 17. And Talley contends that prior caselaw has held that "the taking of property by the government requires pre-deprivation due process." Op. Br. at 20.

To begin, Talley fails to address the district court's statements that she did not make substantive arguments on qualified immunity below. Thus, she likely waived her arguments on this point. *See Volvo Const. Equip. N. Am., Inc. v. CLM Equip. Co.*, 386 F.3d 581, 603 (4th Cir. 2004) (stating that "absent exceptional circumstances, we do not consider issues raised for the first time on appeal").

However, even if Talley did not waive them, her arguments would fail. "Qualified immunity shields government officials from civil damages liability unless the official violated a statutory or constitutional right that was clearly established at the time of the challenged conduct." *Reichle v. Howards*, 566 U.S. 658, 664 (2012). And "[i]n reviewing a district court's denial of qualified immunity, we conduct a two-pronged analysis," asking first "whether the plaintiff has established that a constitutional violation occurred" and second "whether the right at issue was 'clearly established' at the time of the events in question." *Rambert v. City of Greenville*, 107 F.4th 388, 398 (4th

Cir. 2024) (quoting *Stanton v. Elliott*, 25 F.4th 227, 233 (4th Cir. 2022)). Courts have discretion over the order in which to address these two prongs. *See id.*; *see also Pearson v. Callahan*, 555 U.S. 223, 236 (2009) ("The judges of the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand."). And here, like the district court below, we address prong two first.

"A Government official's conduct violates clearly established law when, at the time of the challenged conduct, the contours of a right are sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (cleaned up). Ultimately, qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *White v. Pauly*, 580 U.S. 73, 79 (2017). Thus, "'clearly established law' should not be defined 'at a high level of generality.'" *Id.* (quoting *Ashcroft*, 563 U.S. at 742). Instead, it "must be 'particularized' to the facts of the case." *Id.* (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). "Otherwise, plaintiffs would be able to convert the rule of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights." *Id.* (cleaned up).

Talley's arguments run headlong into two problems. First, as the district court below observed, "[r]arely will a state official who simply enforces a presumptively valid state statute thereby lose her immunity from suit." *Swanson v. Powers*, 937 F.2d

965, 969 (4th Cir. 1991). And North Carolina General Statute § 135-9(b) provides that "any overpayment of benefits or erroneous payments to a member in a State-administered retirement system . . . who is later determined to have been ineligible for those benefits or untitled to those amounts, may be offset against any retirement allowance. . . . " North Carolina law also requires the state to pursue the recoupment of state funds; the state cannot simply forgive the repayment of overpaid funds. *See* N.C. Gen. Stat. § 143-64.80.

Talley claims that these statutes do not immunize the defendants because § 143-64.80(b) says that overpaid benefits may be recouped "by all lawful means available." According to Talley, "by all lawful means available" requires the pre-deprivation hearing she claims she did not receive. She even suggests that § 143-64.80 requires "the filing of a civil action in the General Court of Justice" to recoup overpayments. § 143-64.80(b). She is incorrect on both counts. Section 135-9(b) permits recoupment via an offset against a retirement allowance—making that a "lawful means" available to the defendants. Also, § 143-64.80 says that "all lawful means available" includes, but is not limited to, filing a civil action to recover the money. Thus, filing a civil action is not required. As Talley concedes, these statutes are presumptively valid. They do not on their face mandate that a pre-deprivation hearing be provided, nor do they say that recoupment cannot be sought in the manner that the officials used here. What's more, we are aware of no court that has held North Carolina's recoupment statutes are unlawful or unconstitutional. Accordingly, as in *Swanson*, no "extraordinary circumstances"

exist that should compel us to abandon the ordinary rule that "[u]ntil judges say otherwise, state officers . . . have the power to carry forward the directives of the state legislature." *Swanson*, 937 F.2d at 969 (quoting *Lemon v. Kurtzman*, 411 U.S. 192, 208 (1973)).

Second, existing caselaw does not "place[] the . . . constitutional question [here] beyond debate." *Adams v. Ferguson*, 884 F.3d 219, 226–27 (4th Cir. 2018) (internal quotation mark omitted) (quoting *Reichle*, 566 U.S. at 664). Talley's argument that the law clearly establishes the requirement of pre-deprivation due process before the government can take property is too broad. Precedent from the Supreme Court and our court requires that we look more granularly to see whether the law clearly mandates a hearing before the government recoups overpaid retirement benefits. *See White*, 580 U.S. at 79; *see also Ashcroft*, 563 U.S. at 742; *Anderson*, 483 U.S. at 640; *Adams*, 884 F.3d at 227–28. Here, the law does not. In fact, we have found no court addressing these factual circumstances.

It is true that the Supreme Court has held that a pre-deprivation hearing is owed when the individual being deprived of need-based benefits is "on the very margin of subsistence" and when the risk of error surrounding the deprivation is significant. *Mathews v. Eldridge*, 424 U.S. 319, 340, 344 (1976) (citing *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970)). But the Supreme Court has affirmed repeatedly, in opinions to which Talley herself cites, that "due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Id.* at 334 (quoting *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961)); *see also Parratt v.*

Taylor, 451 U.S. 527, 540–43 (1981) (overruled in part by *Daniels v. Williams*, 474 U.S. 327 (1986)); *Goldberg*, 397 U.S. at 263–64. Rather, it is "flexible and calls for such procedural protections as the particular situation demands." *Mathews*, 424 U.S. at 334 (internal quotation mark omitted) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)). And we know this to be true because *Mathews* and its progeny tell us that even individuals who face total deprivations of non-need-based benefits prior to a hearing may have received constitutionally sufficient process. 424 U.S. at 343 (holding that, in a case involving a recipient of social security, "there is less reason [] than in *Goldberg* to depart from the ordinary principle, established by our decisions, that something less than an evidentiary hearing is sufficient prior to adverse administrative action"). *Mathews* went on to explain that "[t]he judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decisionmaking in all circumstances." *Id.* at 348.

Further, Talley's claims are different from those in *Mathews*. The benefits offset here to recoup overpayments were not need-based. Nor did Talley face a total deprivation of her benefits, as the *Goldberg* and *Mathews* plaintiffs did. Nor is there any evidence of a great risk of error in calculating the amount to be offset. Indeed, Talley does not claim any error in the offset amount; she just says she should have had a hearing before the offsets began. Thus, when we analyze the right in question here at the appropriate level of specificity, it becomes apparent that the "contours of [the] right" Talley asserts are not clearly established. *Ashcroft*, 563 U.S. at 741. Thus, we affirm

the district court's dismissal of Talley's procedural due process claim.[4]

C. Substantive Due Process

As with her other claims, Talley argues that the district court wrongly dismissed her substantive due process claim. She contends that she has sufficiently alleged that the officials' actions were "so arbitrary and capricious as to shock the conscience." Op. Br. at 27. Specifically, she says that the board members "had no written process for recoupment;" "unilaterally and without reference to any written rules or policies" commenced recoupment; and could take as little as 10% or as much as 100% of her pension amount "at their option." Op. Br. at 26–27.

To succeed on a substantive due process claim, a plaintiff must demonstrate "(1) that he had property or a property interest; (2) that the state deprived him of this property or property interest; and (3) that the state's action falls so far beyond the outer limits of legitimate governmental action that *no process* could cure the deficiency." *Quinn v. Bd. of Cnty. Comm'rs for Queen Anne's Cnty., Md.*, 862 F.3d 433, 443 (4th Cir. 2017) (emphasis in original) (cleaned up). Talley does not come close to alleging facts that meet this standard.

The bar to successfully state a substantive due process claim is high. Substantive due process is a "narrow" protection that "covers only state action

---

[4] Since the right Talley asserts to have been violated is not clearly established, we need not address Talley's allegation that the lack of pre-deprivation process violated her procedural due process right.

which is 'so arbitrary and irrational, so unjustified by any circumstance or governmental interest, as to be literally incapable of avoidance by any pre-deprivation procedural protections or of adequate rectification by any post-deprivation state remedies.'" *Sylvia Dev. Corp. v. Calvert Cnty*, *Md.*, 48 F.3d 810, 827 (4th Cir. 1995) (quoting *Rucker v. Hartford Cnty*, 946 F.2d 278, 281 (4th Cir. 1991)). Where, as here, the alleged deprivation "is amenable to 'rectification by . . . post-deprivation state remedies,'" the officials' actions are "hardly arbitrary." *Mora v. City of Gaithersburg*, 519 F.3d 216, 231 (4th Cir. 2008) (quoting *Rucker*, 946 F.2d at 281). Talley does not engage at all with the fact that she received both pre-deprivation internal review and a post-deprivation hearing before an ALJ at which she was able to contest the fact and amount of the recoupment. But it is undisputed that she received both. Further, Talley does not allege or argue that the deprivation she complains about—recoupment of overpaid benefits—could not be rectified via the post-deprivation hearing.

Instead, Talley makes two primary arguments. First, she complains that the officials' decision to withhold only 10% instead of 50% of each monthly benefit check indicates overbroad discretion. But a substantive due process claim requires government action that is so illegitimate that no process could cure it. Talley does not allege facts that show the officials' recoupment efforts—even assuming they were initially as arbitrary as she alleges—could not be, and were not, rectified or cured by the ALJ hearing she received. Besides, any flexibility in the recoupment system inured to Talley's advantage. At

first, her benefit checks were reduced by 50%. Later, they were reduced by only 10%.

Second, Talley contends that "the manner in which the United States and several of the individual States address overpayments" shows that the defendants' actions were arbitrary and violated her substantive due process rights. Op. Br. at 33. But again, what other states do is not the appropriate test. Rather, our inquiry is whether Talley plausibly alleges that the defendants took actions so arbitrary and irrational that even post-deprivation remedies cannot cure them. *See Sylvia Dev. Corp.*, 48 F.3d at 827. As explained above, she has not made that argument.

We see no error in the district court's holding that Talley has failed to state a substantive due process claim.

D. Equal Protection

Finally, Talley argues that the district court erred in dismissing her equal protection claim for two reasons. First, she contends that she "has a fundamental right to the full amount of her pension." Op. Br. at 52. Second, she insists that there was no rational basis for beginning recoupment efforts using arbitrary percentages without set standards or rules governing the process.

Equal protection requires a plaintiff to allege that he or she "has been treated differently from others who are similarly situated" in light of "the appropriate level of constitutional scrutiny." *Doe v. Settle*, 24 F.4th 932, 939 (4th Cir. 2022). And that different treatment must be worse than the similarly situated comparative group. *See Fauconier v. Clarke*,

966 F.3d 265, 277 (4th Cir. 2020) (quoting *Martin v. Duffy*, 858 F.3d 239, 252 (4th Cir. 2017)) (stating that a plaintiff bringing an equal protection claim must allege "that [s]he has been treated differently from others . . . and that the *unequal* treatment was the result of intentional or purposeful discrimination" (emphasis added)). As an initial matter, Talley did not allege facts showing that she was treated worse off than anyone else. In fact, her allegation that the defendants treated those who hired attorneys to challenge recoupment efforts or pushed back on the state's efforts differently from those who did not, even if true, meant she was treated better than others, not worse. Next, the district court correctly held that Talley had not alleged facts that required application of heightened scrutiny. She did not allege that she belongs to a suspect class. Nor has she explained, through argument or cited authority, how the right to one's pension benefits is a fundamental right.[5] In fact, the few cases that have touched on the question of whether individuals have a fundamental right to government benefits—including retirement benefits—suggest that they do not. *See Thompson v.*

---

[5] Fundamental rights include the right to privacy, the right to vote, the right of interstate travel, certain first amendment rights, and the right to procreate. *See Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 312 n.3 (1976). Any such right must be "deeply rooted in this Nation's history and tradition." *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 231 (2022) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)); *see also San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33 (1973) (stating that fundamental rights are those "explicitly or implicitly guaranteed by the Constitution"). And Talley makes no real argument that the right to one's pension benefit is deeply rooted in our Nation's history or tradition.

Walker, 758 F.2d 1004, 1009 (4th Cir. 1985) (holding that a limitation on judges' ability to receive retirement benefits if they practiced law in the Commonwealth of Virginia did not violate equal protection partly because no fundamental right was being interfered with); *see also Dandridge v. Williams*, 397 U.S. 471, 484 (1970) (stating that a challenge to Maryland's welfare system did not "affect[] freedoms guaranteed by the Bill of Rights . . . ").

Thus, to the extent Talley has even alleged different treatment, the district court correctly held that rational basis review applies here. So, we are left to address Talley's argument that defendants "have no rational basis for distinguishing between various overpaid beneficiaries and determining . . . how much, when, and by what method recoupment will occur." Op. Br. at 55.

Rational basis review requires the individual challenging a law to "negate[] every conceivable basis which might support the legislation." *Settle*, 24 F.4th at 944 (quoting *Giarratano v. Johnson*, 521 F.3d 298, 303 (4th Cir. 2008)). In other words, to prevail under rational basis review, Talley must allege facts that show there is no "rational relationship between the disparity of treatment" alleged and "some legitimate governmental purpose." *Id.* at 943 (quoting *Heller v. Doe*, 509 U.S. 312, 320–21 (1993)) (holding that there is no "place in rational-basis review to question the wisdom or logic of a state's legislation" and that "rough line-drawing, even 'illogical' or 'unscientific' line drawing, is often necessary to governing").

Importantly, much of Talley's briefing misapprehends the burden of proof under rational basis review. "Under rational basis review . . . those attacking the

rationality of the rule have the burden to negative every conceivable basis which might support it." *Nat'l Ass'n for the Advancement of Multijurisdiction Prac. v. Lynch*, 826 F.3d 191, 196 (4th Cir. 2016) (cleaned up). Thus, to the extent that Talley suggests the defendants must themselves provide a "plausible reason" for their decision to recoup overpaid benefits in different percentages and using different "means and methods," she is incorrect. Op. Br. at 56.

And Talley otherwise fails to explain why the defendants have no rational basis for distinguishing between overpaid individuals and seeking recoupment in varying amounts. As the district court noted, the defendants had a legitimate interest in recouping overpaid retirement benefits. Thus, the only question is whether the defendants' process for recouping overpayments by reducing benefit checks in varying amounts is rationally related to that interest. The only counterargument Talley makes is that the defendants pursued recoupment in a way that was discretionary and resulted in different treatment for different people. But the defendants argue that responding to different individuals differently depending upon their requests or the requests of their attorneys merely "shows appropriate flexibility and passes rational-basis scrutiny." Resp. Br. at 45. In the absence of any meaningful arguments to the contrary from Talley, and in light of the high bar set by the many opinions applying rational-basis review, we find no error in the district court's holding. The defendants surely have a legitimate governmental purpose here—recouping overpaid pension benefits. And treating Talley "differently" from other individuals by evaluating her particular circumstances and requests and accord-

ingly lowering her recoupment percentage from 50% to 10% bears a rational relationship to that legitimate purpose. The state is ensuring recoupment of those overpaid benefits while being flexible in light of individuals' varying circumstances, which satisfies the rational basis test. As a result, we affirm the district court's conclusion that Talley has not alleged an equal protection violation.

E. Talley's Motion for Leave to Amend

Talley also challenges the district court's denial of her motion for leave to amend her complaint, arguing that she was late in seeking to add the new plaintiffs because of discovery failures on the part of defendants.

In her motion for leave to amend, Talley sought to add four plaintiffs to the lawsuit, each of whom she contends has been denied due process by the state's recoupment procedures. The district court denied Talley's motion because Talley filed it four months after the deadline in the scheduling order for amending pleadings had passed and did not file a motion to amend the scheduling order until after she filed her motion to amend her complaint. The district court also held that Talley did all of this without showing good cause to modify the scheduling order as required by Federal Rule of Civil Procedure 16(b). In reaching this conclusion, it explained that Talley knew "well-before the expiration of the deadline to seek to amend pleadings" of "at least two of the plaintiffs she presumably now seeks to add to her complaint," based on an email sent by plaintiff's counsel. J.A. 470.

We review the court's denial of her motion for leave to amend her complaint for abuse of discretion. *See Drager v. PLIVA USA, Inc.*, 741 F.3d 470, 474 (4th Cir. 2014). On appeal, Talley does not contradict the district court's finding that she knew about at least two of these plaintiffs before the deadline passed—she simply argues that her approach of seeking to add all plaintiffs at once is "more efficient." Op. Br. at 58. But that is not the point. The district court entered a scheduling order, which it is allowed to enforce. Talley has offered no argument that the district court abused its discretion in holding that no good cause existed to warrant modifying the scheduling order, and we find none.[6]

III.

To sum up our ruling, Talley received an unexpected windfall when she began receiving inflated monthly benefit checks. Having enjoyed the $86,173.93 of extra cash she received over eight years, she naturally did not want North Carolina to recoup it. But the state had a statutory obligation to do so. And recouping its overpayment under North Carolina law did not violate Talley's constitutional rights. Talley's procedural due process claim against the defendants in their official capacities is barred by Eleventh

[6] The district court also held that Talley's motion was (1) procedurally deficient due to her failure to attach both a proposed amended pleading and a document showing how the amended pleading differed from the original in accordance with local rules and (2) failed to satisfy Federal Rule of Civil Procedure 20's limitations on joinder of parties. Because we affirm on the basis of the court's Rule 16(b) holding, we do not address whether Talley's pleading was procedurally deficient or whether it runs afoul of Rule 20's joinder requirements.

Amendment immunity; her procedural due process claim against the defendants in their individual capacities is barred by qualified immunity; she has failed to state a substantive due process claim; and she has similarly failed to state an equal protection claim. Lastly, the district court did not abuse its discretion in denying Talley's motion for leave to amend her complaint. Accordingly, the district court's judgment is,

AFFIRMED.

ORDER, U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA EASTERN DIVISION (FEBRUARY 20, 2024)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH
CAROLINA EASTERN DIVISION

PATSY TALLEY,

Plaintiff,

v.

DALE R. FOLWELL, individually and in his official capacity as TREASURER OF THE STATE OF NORTH CAROLINA; TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM (TSERS) OF NORTH CAROLINA; NORTH CAROLINA DEPARTMENT OF STATE TREASURER, RETIREMENT SYSTEMS DIVISION; and the members of the TSERS Board of Trustees both individually and in their official capacity: LENTZ BREWER, JOHN EBBIGHAUSEN, VERNON GAMMON, DIRK GERMAN, BARBARA GIBSON, LINDA GUNTER, OLIVER HOLLEY, GREG PATTERSON, MARGARET READER, JOSHUA SMITH, CATHERINE TRUITT, JEFFREY WINSTEAD, and THE STATE OF NORTH CAROLINA,

Defendants.

No. 4:22-CV-27-BO

Before: Terrence W. BOYLE, U.S. District Judge.

ORDER

This cause comes before the Court on defendants' motion for judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure. Plaintiff has responded, defendants have replied, and in this posture the motion is ripe for ruling. Also pending and ripe for disposition is plaintiff's motion to amend her complaint. For the reasons that follow, defendants' motion is granted and plaintiff's motion is denied.[1]

BACKGROUND

The Court previously granted in part and denied in part defendants' motion to dismiss plaintiff's complaint pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. The Court incorporates the factual background of this action as recited in its prior order as if fully set forth herein. In sum, plaintiff retired as a teacher with the North Carolina public school system and is entitled to vested benefits under the Teachers' and State Employees' Retirement System (TSERS). Through no fault of her own, plaintiff was overpaid benefits for a period of more than ten years. Once that error was discovered, plaintiff received a notice that the overpayment would be recouped pursuant to the procedure pro-

---

[1] In light of the grant of judgment on the pleadings and the denial of the motion to amend the complaint, this order further resolves several other pending motions.

vided in N.C. Gen. Stat. § 135-9(b). Plaintiff was told that her monthly benefit would be reduced by approximately fifty percent until the overpayment was recouped. This Court held that plaintiff had plausibly state a procedural due process claim because she was not afforded a pre-deprivation hearing prior to the reduction in her benefits. The Court dismissed plaintiff's remaining claims. After defendants filed their motion to dismiss, plaintiff voluntarily dismissed all claims against defendants State of North Carolina, TSERS, and the North Carolina Department of State Treasurer, Retirement Systems Division. [DE 18]. Plaintiff further dismissed her supplemental state law claims alleging violation of her rights provided by the North Carolina Constitution. *Id.* Thus, the sole remaining claim is for a procedural due process violation which has been alleged against the individual members of the TSERS Board of Trustees in their individual capacities. Plaintiff's complaint has been filed as a putative class action, but no request for class certification has been filed and a class has not been certified.

Following the Court's order on their motion to dismiss, defendants filed their answer to plaintiff's complaint in which they raise the defense of qualified immunity. Defendants then filed the instant motion pursuant to Rule 12(c), seeking judgment on the pleadings in their favor on the issue of qualified immunity. Plaintiff thereafter moved to amend her complaint, seeking to add several additional named plaintiff's. Defendants oppose plaintiff's motion for leave to amend, arguing, *inter alia,* that plaintiff's proposed amendment would violate Fed. R. Civ. P. 20 and otherwise be futile.

DISCUSSION

I. Motion for judgment on the pleadings

A motion for judgment on the pleadings under Fed. R. Civ. P. 12(c) allows for a party to move for entry of judgment after the close of the pleadings stage, but early enough so as not to delay trial. Fed. R. Civ. P. 12(c). Courts apply the Rule 12(b)(6) standard when reviewing a motion under Rule 12(c). *Mayfield v. Nat'l Ass'n for Stock Car Auto Racing, Inc.,* 674 F.3d 369, 375 (4th Cir. 2012). A Rule 12(b)(6) motion tests the legal sufficiency of the complaint. *Papasan v. Allain,* 478 U.S. 265, 283 (1986). When acting on a motion to dismiss under Rule 12(b)(6), "the court should accept as true all well-pleaded allegations and should view the complaint in a light most favorable to the plaintiff." *Mylan Labs., Inc. v. Matkari,* 7 F.3d 1130, 1134 (4th Cir.1993). A complaint must allege enough facts to state a claim for relief that is facially plausible. *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 570 (2007). Facial plausibility means that the facts pled "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged," and mere recitals of the elements of a cause of action supported by conclusory statements do not suffice. *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009).

Defendants seek judgment on the pleadings in their favor solely on the issue of qualified immunity, which they did not raise in their motion to dismiss the complaint.

> The doctrine of qualified immunity shields government officials from liability for civil damages when their conduct does not violate

> clearly established constitutional or other rights that a reasonable officer would have known. *Pearson v. Callahan, 555* U.S. 223, 231, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009); *Graham v. Gagnon,* 831 F.3d 176, 182 (4th Cir. 2016). Qualified immunity seeks to balance two interests, namely, the "need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Graham,* 831 F.3d at 182 (quoting *Pearson, 555* U.S. at 231, 129 S.Ct. 808). To avoid dismissal of a complaint after a qualified immunity defense is raised, a plaintiff must allege sufficient facts to set forth a violation of a constitutional right, and the court must conclude that this right was clearly established at the time of the alleged violation. *Pearson, 555* U.S. at 232, 129 S.Ct. 808.

Sims v. Labowitz, 885 F.3d 254, 260 (4th Cir. 2018). A court has discretion in deciding which prong of the qualified immunity analysis — whether there was a violation of a constitutional right or whether the right was clearly established — to consider first. *Pearson, 555* U.S. at 236.

In opposition to defendants' motion for judgment on the pleadings, plaintiff raises only procedural objections to the filing of a Rule 12(c) motion raising qualified immunity. Plaintiff contends that defendants have raised qualified immunity via a Rule 12(c) motion to delay the proceedings and take up valuable time in discovery. Plaintiff argues that defendants

have not attached or referred to any documents which were not available to them when they filed their Rule 12(b)(6) motion and that the Court has already decided that plaintiff has stated a plausible procedural due process claim. Finally, plaintiff contends that defendants rely on facts which are not alleged in plaintiff's complaint to support their motion, which is inappropriate at this stage of the litigation.

The Court finds plaintiff's procedural objections to the motion for judgment on the pleadings to be without merit. Defendant's Rule 12(c) motion is procedurally proper. It was filed after the close of pleadings and prior to trial, and Rule 12(g), which prevents successive Rule 12(b) motions, expressly does not apply to Rule 12(c) motions. *See* Fed. R. Civ. P. 12(g)-(h); *Alexander v. City of Greensboro,* 801 F. *Supp.* 2d 429, 434 (M.D.N.C. 2011); *see also Chalk v. Lender Process Servs., Inc.,* No. CIV. CCB-13-1593, 2013 WL 6909425, at *3 (D. Md. Dec. 31, 2013) ("courts have taken a permissive approach to Rule 12(g) and allowed those enumerated defenses to be raised at other times, which comports with the underlying purpose of Rule 12(h)(2)—to preserve defenses."). Accordingly, that the defense was available to defendants at the time of the Rule 12(b)(6) motion is of no moment.

Defendant's Rule 12(c) motion does not ask the Court to reconsider whether plaintiff has plausibly alleged a procedural due process claim, and defendants further do not rely on facts which have not been alleged to argue they are entitled to qualified immunity. Contrary to plaintiff's assertion, whether a defendant is entitled to qualified immunity does not require subjective inquiry into what each defendant knew or

did not know — rather, the qualified immunity "inquiry turns on the 'objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken.'" *Pearson, 555* U.S. at 244. Accordingly, the Court determines that it is procedurally proper to consider defendants' Rule 12(c) motion.

As noted above, plaintiff has failed to respond substantively to whether defendants are at this stage entitled to qualified immunity. The Court may thus consider any substantive arguments plaintiff may have made to have been waived. *See United Supreme Council v. United Supreme Council of Ancient Accepted Scot. Rite for 33 Degree of Freemasonry,* 329 F. Supp. 3d 283, 292 (E.D. Va. 2018) ("Failure to respond to an argument made in a dispositive pleading results in a concession of that claim.").

Defendants rely on *Swanson v. Powers,* 937 F.2d 965 (4th Cir. 1991), to argue that they are entitled to qualified immunity because, taking plaintiff's allegations as true, defendants followed state law in attempting to recoup the overpayment and every reasonable official would not have understood that doing so violated a constitutional right. "A right is clearly established if the contours of the right are sufficiently clear that a reasonable officer would understand that what he is doing violates that right." *E. W. by & through T. W. v. Dolgos,* 884 F.3d 172, 185 (4th Cir. 2018) (cleaned up, citation omitted). In *Swanson,* the court of appeals held that "[r]arely will a state official who simply enforces a presumptively valid state statute thereby lose her immunity from suit." *Id.,* 937 F.2d at 969. *Swanson* thus stands for the proposition that "a state official cannot be responsible for carrying out

the state law as it exists at the time even if the law is later declared unconstitutional." *Mom's Inc. v. Weber,* 951 F. Supp. 92, 94 (E.D. Va. 1996).

The property interest of which plaintiff alleges she was deprived without due process is her continued receipt of full retirement benefits prior to a reduction in those benefits pursuant to the state's recoupment procedures. Although plaintiff received post-deprivation process, the Court determined at the Rule 12(b)(6) stage that plaintiff had plausibly alleged that the lack of *pre*-deprivation process violated plaintiff's procedural due process rights.

The acts allegedly taken by the individual defendants in recouping the benefit overpayment without affording plaintiff a pre-deprivation hearing or other process were taken pursuant to N.C. Gen. Stat. § 135-9(b), which provides that any overpayment or erroneous payment to a member of a retirement system administered by the state "may be offset against any retirement allowance, return of contributions or any other right accruing under this Chapter to the same person, the person's estate, or designated beneficiary." *Id.;* Compl. ¶ 65. North Carolina law further requires state agencies to pursue repayment of state funds that have been overpaid and prohibits them from forgiving any overpayment. N. C. Gen. Stat. § 143-64.80; *Moss v. NC. Dep't of State Treasurer, Ret. Sys. Div.,* 282 N.C. App. 505, 511, (2022).

Accordingly, even assuming, without deciding, that the lack of pre-deprivation process prior to a reduction in plaintiff's retirement benefit amounts to a violation of her procedural due process right, it is not apparent that such a right was clearly established, and thus defendants are entitled to qualified immunity.

Again, for a right to be clearly established, it must be "clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier v. Katz,* 533 U.S. 194, 202 (2001). Following North Carolina law regarding recoupment of overpaid retirement benefits would not cause a reasonable officer to know that his conduct was unlawful. Indeed, "[a]bsent extraordinary circumstances, . . . liability will not attach for executing the statutory duties one was appointed to perform." *Swanson,* 937 F.2d at 969. Plaintiff has not come forward to argue that any extraordinary circumstances exist or that there are any persuasive arguments which would caution against a finding of qualified immunity. Defendants' Rule 12(c) motion is therefore granted.

II. Motion to amend

Plaintiff seeks to amend her complaint to add four additional plaintiff's. Plaintiff contends that these additional plaintiff's have all been similarly deprived of due process through the state's recoupment procedure.

Generally, leave to amend a complaint should be freely given where justice so requires. Fed. R. Civ. P. 15(a). However, leave may be denied where the amendment would be prejudicial to the opposing party, where there has been bad faith on the part of the moving party, or when the amendment would be futile. *Johnson v. Oroweat Food Co.,* 785 F.2d 503, 509 (4th Cir. 1986) (citing *Foman v. Davis,* 371 U.S. 178, 182 (1962)). A proposed amendment is "futile if the claim it presents would not survive a motion to dismiss." *Save Our Sound OBX, Inc. v. N. Carolina*

Dep't of Transp., 914 F.3d 213, 228 (4th Cir. 2019) (citation omitted).

The scheduling order entered in this case provides that the deadline to amend pleadings and join parties was July 31, 2023. [DE 31]. Plaintiff nonetheless filed the instant motion to amend on November 15, 2023. [DE 37]. After she filed her motion to amend her complaint, plaintiff filed a motion to amend the scheduling order, seeking a five-month extension of all deadlines due to defendants' alleged desire to delay discovery; her motion to amend the scheduling order is silent as to why an extension of the deadline to add parties and amend pleadings is necessary. [DE 42]. Plaintiff's motion to amend her complaint is also procedurally deficient, as plaintiff failed to attach to her motion to amend a proposed amended pleading duly signed with all attachments and a form of the amended pleading which indicates how it differs from the original pleading. Local Civil Rule 15.1(a). Though plaintiff has filed a red-lined version of the proposed amended complaint in reply, she has failed to file a complete proposed amended complaint which could be filed.

Moreover, and contrary to plaintiff's argument, because plaintiff filed her motion to amend her complaint after the deadline imposed by the scheduling order expired, she must demonstrate good cause for modifying the scheduling order under Rule 16(b)(4) before the Court considers whether to grant leave to amend her complaint under Rule 15(a). *Nourison Rug Corp. v. Parvizian,* 535 F.3d 295, 298 (4th Cir. 2008) ("after the deadlines provided by a scheduling order have passed, the good cause standard *must* be satisfied to justify leave to amend the pleadings.")

(emphasis added); *see also Johnson v. United Parcel Serv., Inc.,* 839 F. App'x 781, 782 (4th Cir. 2021) (same).

> Rule 16(b)'s "good cause" standard focuses on the timeliness of the amendment and the reasons for its tardy submission. Because a court's scheduling order "'is not a frivolous piece of paper, idly entered, which can be cavalierly disregarded by counsel without peril,'" *Potomac Electric Power Co. v. Electric Motor Supply, Inc.,* 190 F.R.D. 372, 375-376 (D.Md.1999), *quoting Gestetner v. Case Equipment Co., 108* F.R.D. 138, 141 (D.Me. 1985), a movant must demonstrate that the reasons for the tardiness of his motion justify a departure from the rules set by the court in its scheduling order.

Rassoull v. Maximus, Inc., 209 F.R.D. 372, 374 (D. Md. 2002). Plaintiff has failed to demonstrate good cause for extending the deadline to add parties and amend the pleadings. Plaintiff's reply to her motion to amend her complaint states that "there is good cause to amend the scheduling order due to Defendants' refusal to provided [sic] substantive responses to discovery and because Plaintiff Talley was not aware of the existence of the four proposed co-plaintiff's until after her Complaint was filed." [DE 46 p. 4]. However, as is evidenced by an email from plaintiff's counsel in June 2023, well-before the expiration of the deadline to seek to amend pleadings and join parties, plaintiff's counsel indicated that she would be filing a motion to amend to add two party-plaintiff's. [DE 45-1]. Therefore, plaintiff was aware of at least two of the plaintiff's she presumably now seeks to add to her complaint months prior to filing her

motion to amend her complaint. Plaintiff's general arguments regarding discovery responses and lack of knowledge of these additional plaintiff's until after her complaint was filed, which occurred in March 2022, are simply insufficient to demonstrate good cause.

However, even if the Court were to conclude that plaintiff had demonstrated good cause, it would deny plaintiff's motion to amend her complaint. Plaintiff seeks to add four plaintiff's who she contends were also subjected to unconstitutional recoupment procedures by the State of North Carolina. The property interest at issue in plaintiff's remaining procedural due process claim is her interest in the continued receipt of her full monthly TSERS retirement benefit prior to a reduction based on the state's recoupment procedures. The proposed new plaintiff's do not allege deprivation of the same property interest. The proposed new plaintiff's complain regarding a contributory death benefit and disability benefits, which are separate benefits from the retirement benefits complained about by plaintiff and further are not alleged to be managed by the individual defendants who are all members of the TSERS Board. Rule 20 requires that plaintiff's each claim a right to relief "with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences[.]" Plaintiff's proposed amended complaint alleges that each proposed new plaintiff also was denied due process in the recoupment procedure used by the state, but the bare allegations regarding the proposed plaintiff's do not demonstrate that their claims arise from the same transaction or occurrence as plaintiff Talley. Moreover, the bare allegations regarding the proposed plaintiff's in the proposed amended complaint do not

plausibly allege that these defendants would not also be entitled to qualified immunity for those reasons outlined in § I. The Court therefore denies plaintiff's motion to amend her complaint.

III. Motion to seal

Non-party Department of State Treasurer, Retirement Systems Division has moved to seal certain pages of an exhibit attached to plaintiff's motion to compel which contains pages from a letter authored by a compliance officer at the Office of the State Treasurer. The moving party contends that this letter falls squarely within the definition N.C. Gen. Stat. § 135-1(7b) and is therefore shielded from public disclosure by N.C. Gen. Stat. § 135-6(r). Section 135-6(r) requires that any fraud and compliance investigation remain confidential, subject to court order.

"The common law presumes a right to inspect and copy judicial records and documents." *Stone v. Univ. of Maryland Med. Sys. Corp.,* 855 F.2d 178, 180 (4th Cir. 1988) (internal citations omitted). Where a party seeks to seal documents not in connection with diapositive motions, the common law presumption of access applies. *Id.* This right of access may be overcome by countervailing interests which heavily outweigh the public's interest in access. *Virginia Dep't of State Police v. Washington Post,* 386 F.3d 567, 575 (4th Cir. 2004). The motion to seal has been pending on the Court's docket and no opposition has been filed by any non-party or member of the public.

Plaintiff makes no persuasive argument that this document should remain on the public docket. The moving party is *not* a party to this lawsuit as it has been dismissed, and several courts have applied

state confidentiality laws to seal records of non-parties. *See Johnson v. City of Fayetteville,* No. 5:12-CV-456-F, 2014 WL 7151147, at *10 (E.D.N.C. Dec. 11, 2014). The document moving party seeks to seal also does not appear relevant to plaintiff's motion to compel, to which it was attached, as it was not attached to plaintiff's amended version of the same document which is the subject of the motion to compel. *See* [DE 48 p. 6 n.1]. Finally, plaintiff's contention that the motion to seal is designed to delay discovery is plainly without merit; whether a document should be sealed on the public docket does not have any impact on the course and scope of discovery.[2]

In sum, the moving party has demonstrated that the document identified at pages twelve through eighteen of [DE 47-2] should be sealed. The Clerk of Court is unable, however, to seal only selected pages of a filing. Accordingly, the Court directs the Clerk to seal [DE 47-2] and orders plaintiff to file a redacted version without pages twelve through eighteen within five days of the date of entry of this order.

CONCLUSION

Accordingly, for the foregoing reasons, defendants' motion for judgment on the pleadings [DE 34] is GRANTED and plaintiff's motion to amend her complaint [DE 37] is DENIED. In light of the foregoing, the motion to stay discovery pending resolution of the motion for judgment on the pleadings [DE 40], motion to amend the scheduling order [DE 42], motions to

---

[2] Plaintiff has filed a motion for leave to file a surreply to address the moving party's reply. The Court, in the exercise of its discretion, denies the motion.

compel [DE 47 & 49], motion for protective order [DE 53], and the motion to deem response to motion to compel timely filed [DE 60] are DENIED AS MOOT. The motion to seal confidential information filed by plaintiff at [DE 47-2] filed by non-party Department of State Treasurer, Retirement Systems Division [DE 52] is GRANTED. Plaintiff's motion for leave to file a surreply [DE 58] is DENIED. Plaintiff shall file a redacted version of [DE 47-2] in accordance with the foregoing within five (5) days of the date of entry of this order.

The Clerk is DIRECTED to enter judgment in favor of defendants and close this case.

SO ORDERED, this 20th day of February 2024.

/s/ Terrence W. Boyle
U.S. District Judge

ORDER, U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA EASTERN DIVISION (JANUARY 17, 2023)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH
CAROLINA EASTERN DIVISION

PATSY TALLEY,

Plaintiff,

v.

DALE R. FOLWELL, individually and in his official capacity as TREASURER OF THE STATE OF NORTH CAROLINA; TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM (TSERS) OF NORTH CAROLINA; NORTH CAROLINA DEPARTMENT OF STATE TREASURER, RETIREMENT SYSTEMS DIVISION; and the members of the TSERS Board of Trustees both individually and in their official capacity: LENTZ BREWER, JOHN EBBIGHAUSEN, VERNON GAMMON, DIRK GERMAN, BARBARA GIBSON, LINDA GUNTER, OLIVER HOLLEY, GREG PATTERSON, MARGARET READER, JOSHUA SMITH, CATHERINE TRUITT, JEFFREY WINSTEAD, and THE STATE OF NORTH CAROLINA,

Defendants.

No. 4:22-CV-27-BO

Before: Terrence W. BOYLE, U.S. District Judge.

This cause comes before the Court on defendants' motion to dismiss pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. Plaintiff has responded, defendants have replied, and a hearing on the matter was held before the undersigned on October 21, 2022, at Raleigh, North Carolina. In this posture, the motion is ripe for ruling. For the reasons that follow, the motion to dismiss is granted in part and denied in part.

BACKGROUND

Plaintiff worked as a schoolteacher in the Beaufort County, North Carolina school system for more than twenty-five years and retired at age sixty on November 1, 2008. Compl. ¶ 20. Plaintiff participated in the Teachers' and State Employees' Retirement System (TSERS) and had accrued vested retirement benefits prior to her retirement. *Id. §* 21. When she retired, plaintiff elected to receive her monthly TSERS benefit payments under the "Social Security Leveling" method. *Id.* § 23; *see also* N.C. Gen. Stat. § 135-5(g). The Social Security Leveling method allows a retiree to draw more money from her TSERS account before she reaches the age of sixty-two and becomes eligible to draw Social Security; once the retiree begins to draw Social Security, the TSERS amount is reduced, with the goal of providing the retiree approximately the same monthly benefit amount before and after she becomes eligible for Social Security. *Id.* ¶ 24. TSERS is responsible for calculating a retiree's benefits. *Id.* ¶ 22.

In 2008, through no fault of plaintiff, an error was made in the calculation of plaintiffs benefits, resulting in plaintiff being overpaid for a period of years. *Id.* ¶ 27. Plaintiff received a letter on February 22, 2019, informing her that she had been overpaid $86, 173.93 from November 2008 through July 2018. *Id.* ¶ 29. Plaintiff was further informed that the overpayment would be recouped in accordance with the procedure provided in N.C. Gen. Stat. § 135-9(b). *Id.* ¶ 30. Plaintiff was informed in March 2019 that beginning in April 2019 her TSERS benefit checks would be reduced by $926.35. This letter contained no information regarding appeal rights or an opportunity to be heard regarding the reduction. *Id.* ¶¶ 31-32. Plaintiff s son responded on her behalf by email on April 8, 2019, and on April 18, 2019, plaintiff was informed that her retirement check would be reduced by $926.35, approximately half of her monthly benefit, and was informed that she could appeal the reduction. *Id.* ¶ 34. Counsel for plaintiff responded, asking that the email from plaintiff's son be deemed an appeal. Plaintiff's retirement check began to be reduced in April 2019. *Id.* ¶¶ 35-36.

In June 2019, plaintiff filed a petition in the Office of Administrative Hearings in which she sought a post-deprivation hearing regarding the taking of her property and property rights. *Id.* ¶ 39. **On** August 26, 2019, plaintiff was informed that her monthly recoupment of overpayment amount would be reduced to ten percent of plaintiff's TSERS benefit as opposed to fifty percent. Plaintiff alleges that this decision was as arbitrary and capricious as the decision in April 2019 to reduce her monthly benefit by fifty percent. *Id.* ¶ 40. On February 19, 2020, an adminis-

trative law judge dismissed plaintiff's petition in the Office of Administrative Hearings, holding in part that a constitutional challenge to the recoupment statute was not appropriately heard in a contested case before the Office of Administrative Hearing. [DE 4-4]. The administrative law judge further found respondents entitled to summary judgment, denied petitioner's motion for summary judgment, and dismissed the petition. *Id.*

Plaintiff filed this suit on March 31, 2022, on behalf of herself and others similarly situated. Plaintiff alleges claims under 42 U.S.C. § 1983 for deprivation of procedural **due** process, equal protection, and substantive due process rights provided by the Fifth and Fourteenth Amendments. Plaintiff further alleges she was deprived of procedural due process, equal protection, and substantive due process rights as provided by the North Carolina Constitution. After defendants filed their motion to dismiss, plaintiff voluntarily dismissed all claims against defendants State of North Carolina, TSERS, and the North Carolina Department of State Treasurer, Retirement Systems Division. [DE 18]. Plaintiff further dismissed her supplemental state law claims alleging violation of her rights provided by the North Carolina Constitution. Accordingly, remaining for adjudication is whether plaintiff's claims that the individual defendants violated plaintiff's federal constitutional rights survive defendants' motion to dismiss.

DISCUSSION

Federal Rule of Civil Procedure 12(b)(1) authorizes dismissal of a claim for lack of subject matter jurisdiction. "Subject-matter jurisdiction cannot be forfeited

or waived and should be considered when fairly in doubt." *Ashcroft v. Iqbal,* 556 U.S. 662, 671 (2009) (citation omitted). When subject-matter jurisdiction is challenged, the plaintiff has the burden of proving jurisdiction to survive the motion. *Evans v. B.F. Perkins Co.,* 166 F.3d 642, 647-50 (4th Cir. 1999). When a facial challenge to subject-matter jurisdiction is raised, the facts alleged by the plaintiff in the complaint are taken as true, "and the motion must be denied if the complaint alleges sufficient facts to invoke subject-matter jurisdiction." *Kerns v. United States,* 585 F.3d 187, 192 (4th Cir. 2009). The Court can consider evidence outside the pleadings without converting the motion into one for summary judgment. *See, e.g., Evans,* 166 F.3d at 647.

A Rule 12(b)(6) motion tests the legal sufficiency of the complaint. *Papasan v. Allain,* 478 U.S. 265, 283 (1986). When acting on a motion to dismiss under Rule 12(b)(6), "the court should accept as true all well-pleaded allegations and should view the complaint in a light most favorable to the plaintiff." *Mylan Labs., Inc. v. Matkari,* 7 F.3d 1130, 1134 (4th Cir.1993). A complaint must allege enough facts to state a claim for relief that is facially plausible. *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 570 (2007). Facial plausibility means that the facts pled "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged," and mere recitals of the elements of a cause of action supported by conclusory statements do not suffice. *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009). A complaint must be dismissed if the factual allegations do not nudge the plaintiff's claims "across the line from conceivable to plausible." *Twombly,* 550 U.S. at 570. When considering

a Rule 12(b)(6) motion, a court may consider any exhibits attached to the complaint. *Goines v. Valley Cmty. Servs. Bd.,* 822 F.3d 159, 166 (4th Cir. 2016).

A. The Eleventh Amendment bars plaintiff's claims against defendants in their official capacity.

Plaintiff does not appear to dispute that her claims for damages against the individual defendants in their official capacities is barred by the Eleventh Amendment. *See Bd. of Trustees of the Univ. of Ala. v. Garrett,* 531 U.S. 356, 363 (2001); *Huang v. Bd. of Governors of Univ. of N Carolina,* 902 F.2d 1134, 1138 (4th Cir. 1990); *see also Ballenger v. Owens,* 352 F.3d 842, 845 (4th Cir. 2003). In her response to the motion to dismiss, however, plaintiff argues that she may nonetheless obtain prospective relief against these defendants under *Ex Parte Young,* 209 U.S. 123 (1908). Under *Ex Parte Young,* "federal courts may exercise jurisdiction over claims against state officials by persons at risk of or suffering from violations by those officials of federally protected rights, if (1) the violation for which relief is sought is an ongoing one, and (2) the relief sought is only prospective." *Republic of Paraguay v. Allen,* 134 F.3d 622, 627 (4th Cir. 1998).

Plaintiff argues that she seeks prospective injunctive relief to "stop Defendants from continuing to interpret the state recoupment statute as allowing it to engage in the kind of actions it took here against Petitioner" and "to stop all recoupment inconsistent with the law." [DE 17 p. 21]. However, "even [where] the consequences of any past violation may persist, invoking those effects does not transform past state action into an ongoing violation." *Jemsek v. Rhyne,*

662 F. App'x 206, 211 (4th Cir. 2016). And further, the violation for which plaintiff seeks relief plaintiff admits happened *before* she filed the instant complaint, and plaintiff has not alleged that at the time she filed her complaint "responsible state officials were presently violating [her] ongoing rights." *Republic of Paraguay,* 134 F.3d at 628. Accordingly, despite plaintiff's arguments to the contrary, the face of her complaint does not reveal a claim for an ongoing violation for which she seeks only prospective relief. Her official capacity claims are therefore barred by the Eleventh Amendment and appropriately dismissed.

B. Plaintiff has stated a procedural due process claim against the individual defendants in their individual capacities.

To succeed on a procedural due process claim, a plaintiff must show "(1) a cognizable `liberty' or 'property' interest; (2) the deprivation of that interest by 'some form of state action'; and (3) that the procedures employed were constitutionally inadequate." *Iota Xi Chapter Of Sigma Chi Fraternity v. Patterson,* 566 F.3d 138, 145 (4th Cir. 2009) (quoting *Stone v. Univ. of Md. Med. Sys. Corp.,* 855 F.2d 167, 172 (4th Cir.1988)). Property interests, at issue here, "stem from an independent source such as state law[s] . . . that secure certain benefits and that support claims of entitlement to those benefits." *Bd. of Regents of State Colleges v. Roth,* 408 U.S. 564, 577 (1972). In order to determine whether the procedure provided was constitutionally adequate, "courts consider (1) the private interest affected by the official action; (2) the risk of an erroneous deprivation of that interest given the procedures used, as well as the probable value, if any, of additional or substitute procedural safeguards;

and (3) the government's interest." *Accident, Inj. & Rehab., PC v. Azar,* 943 F.3d 195, 203 (4th Cir. 2019).

This case concerns recoupment procedures employed by defendants after it was discovered plaintiff had been overpaid for a period of approximately ten years. It has been determined by the Office of Administrative Hearings that plaintiff, in fact, received an overpayment of benefits. Plaintiff does not dispute this finding in her complaint.

Defendants contend that plaintiff has failed to allege a property interest which has been deprived. Plaintiff relies on the Supreme Court's holding that "the interest of an individual in continued receipt of [Social Security] benefits is a statutorily created 'property' interest" to argue that she has sufficiently alleged a property interest in her full amount of retirement benefits. *Mathews v. Eldridge,* 424 U.S. 319, 332 (1976); *see also Mallette v. Arlington Cnty. Employees' Supplemental Ret. Sys. II,* 91 F.3d 630, 636 (4th Cir. 1996) (due process protections apply to disability retirement benefits); *Pappas v. City of Lebanon,* 331 F. Supp. 2d 311, 317 (M.D. Pa. 2004) ("retiree has a property interest in continued pension payments"). However, [t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Roth,* 408 U.S. at 577. Plaintiff does not allege, nor could she, that she has a property interest in retirement benefits to which she was not entitled. However, the property interest on which plaintiff relies is not an interest in the overpaid benefits, but rather in the continued receipt of full benefits prior to a reduction

based upon the state's recoupment procedures. The Court, at this early stage, determines this is a sufficiently alleged property interest.

Plaintiff must also sufficiently allege that the process she received was constitutionally inadequate. Here, plaintiff's complaint and its attachments reveal that she received adequate post-deprivation process. Plaintiff was notified in April 2019, by way of a letter to her son who had responded to the first notice of overpayment on her behalf, that she could appeal the administrative action of the Retirement Systems Division and seek further review. [DE 4-3 p. 28]. Plaintiff was further informed that the administrative review would result in a final agency decision, which would describe further appeal rights. *Id.* Plaintiff did seek review of the administrative action and received a final agency decision. Plaintiff further received post-deprivation due process in her hearing before the Office of Administrative Hearings. [DE 4-4].

However, "[i]n situations where the State feasibly can provide a predeprivation hearing before taking property, it generally must do so regardless of the adequacy of a postdeprivation tort remedy to compensate for the taking." *Zinermon v. Burch,* 494 U.S. 113, 132 (1990). Where the property interest at issue concerns the means to live, such as welfare benefits, an evidentiary hearing is required prior to the termination of benefits. *Goldberg v. Kelly,* 397 U.S. 254, 264 (1970). But the "procedures required to satisfy due process before a cutoff of benefits other than welfare or other benefits constituting the "very means to live" [can] be less than a full evidentiary hearing[, and] absent exceptional circumstances, a person is entitled to some protective procedures, though

not necessarily a full evidentiary hearing, before being deprived of liberty or property." *Ortiz v. Regan,* 749 F. Supp. 1254, 1259-60 (S.D.N.Y. 1990).

Plaintiff was afforded no hearing or other meaningful process to challenge the reduction in her benefits *prior* to the commencement of recoupment. In light of the nature of a retirement benefit, which as plaintiff alleges constitutes her "very means to live", the Court determines that she has sufficiently alleged that the process provided was constitutionally inadequate. Accordingly, the Court will permit her procedural due process claim to proceed.

The Court further finds that plaintiff has sufficiently alleged that the individual defendants participated in the alleged deprivation of due process. *See Wright v. Collins,* 766 F.2d 841, 850 (4th Cir. 1985). The Court will reserve a more specific holding on this issue for the summary judgment stage on a more developed record.

C. Plaintiff fails to state a claim for violation of substantive due process rights.

"[S]ubstantive due process rights arise solely from the Constitution." *Huang v. Bd of Governors of Univ. of N. Carolina,* 902 F.2d 1134, 1142 n.10 (4th Cir. 1990). To succeed on a substantive due process claim, a plaintiff must demonstrate "(1) that he had property or a property interest; (2) that the state deprived him of this property or property interest; and (3) that the state's action falls so far beyond the outer limits of legitimate governmental action that *no process* could cure the deficiency." *Quinn v. Bd. of Cnty. Commissioners for Queen Anne 's Cnty., Maryland,* 862 F.3d 433, 443 (4th Cir. 2017) (quoting

Sylvia Dev. Corp. v. Calvert Cty., 48 F.3d 810, 827 (4th Cir. 1995)) (alterations omitted).

Because of the availability of internal review as well as a post-deprivation quasi-judicial hearing, plaintiff's substantive due process claim fails, as defendants' "treatment of [plaintiff] is hardly arbitrary when the state has given [plaintiff] the means to correct the errors [s]he alleges." *Mora v. The City Of Gaithersburg, MD,* 519 F.3d 216, 231 (4th Cir. 2008); *see also Richter v. Beatty,* 417 F. App'x 308, 311 (4th Cir. 2011) (finding no substantive due process violation where deprivation "not so unjust that no amount of fair procedure could rectify it."). Accordingly, plaintiff has failed to state a substantive due process claim.

C. Plaintiff has failed to state an equal protection claim.

Plaintiff alleges that the overpayment statutes on which the defendants rely to recoup overpayment of benefits treat individuals differently depending on whether a person is a beneficiary of the retirement system or is a current state employee. The Equal Protection Clause "requires that similarly-situated individuals be treated alike." *Giarratano v. Johnson,* 521 F.3d 298, 302 (4th Cir. 2008). In her response to the motion to dismiss, plaintiff clarifies that she is not raising a facial challenge to the recoupment statute, but rather that she is challenging the manner in which the defendants have chosen to implement the statute in regard to plaintiff and those similarly situated. Plaintiff contends that the "manner in which the Defendants have chosen to implement the statute has violated the equal protection rights of plaintiff and those similarly situated to her by relying

on whether the employee pushes back against recoupment and then how much recoupment the Defendants are willing to accept." [DE 17 p. 18].

> Laws are presumed to be constitutional under the equal protection clause for the simple reason that classification is the very essence of the art of legislation. *Moss v. Clark,* 886 F.2d 686, 689 (4th Cir.1989)(citing *City of Cleburne,* 473 U.S. at 440, 105 S.Ct. 3249). As such, the challenged classification need only be rationally related to a legitimate state interest unless it violates a fundamental right or is drawn upon a suspect classification such as race, religion, or gender. *City of New Orleans v. Dukes,* 427 U.S. 297, 303, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976).

Giarratano, 521 F.3d at 303 (cleaned up).

None of plaintiff's allegations would support application of a heightened level of scrutiny because she has not alleged the presence of any suspect class or the violation of a fundamental right. Thus, she must sufficiently allege that the challenged legislation is not rationally related to a legitimate state interest. Plaintiff has failed to do so, here.

First, she has not by her allegations, as she must do to show that legislation is not rationally related to a legitimate state interest, "negated every conceivable basis which might support the legislation." *Doe v. Settle,* 24 F.4th 932, 944 (4th Cir. 2022) (quoting *Giarratano,* 521 F.3d at 303). Plaintiff has not alleged that treating current employees and retirees differently or reducing overpayment recoupment percentages only for people who "push back" is not rationally related

to a legitimate state interest, *i.e.*, fully recouping the overpayment of retirement benefits. Indeed, there is no place "in rational-basis review to question the wisdom or logic of a state's legislation; rough line-drawing, even 'illogical' or 'unscientific' line drawing, is often necessary to governing." *Settle,* 24 F.4th at 943. Plaintiff has further failed to sufficiently allege that a classification based upon whether a retiree "pushes back" was "intentionally utilized." *Sylvia Dev. Corp.,* 48 F.3d at 819. In sum, plaintiff's burden is high where rational-basis review applies, and she has not sufficiently alleged any violation of the Equal Protection Clause. This claim is therefore properly dismissed.

CONCLUSION

Accordingly, for the foregoing reasons, defendants' motion to dismiss [DE 9] is GRANTED IN PART and DENIED IN PART. Plaintiff's procedural due process claim against the individual defendants in their individual capacities may proceed. Plaintiff's claims against the individual defendants in their official capacities, as well as her substantive due process and equal protection claims are dismissed.

SO ORDERED, this 17 day of January 2023.

/s/ Terrence W. Boyle
U.S. District Judge

ORDER DENYING PETITION FOR REHEARING, U.S. COURT OF APPEALS FOR THE FOURTH CIRCUIT (MAY 20, 2025)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PATSY TALLEY,

Plaintiff – Appellant,

v.

DALE R. FOLWELL, Individually and in his Official Capacity as Treasurer of the State of North Carolina; LENTZ BREWER; JOHN EBBIGHAUSEN; VERNON GAMMON; DIRK GERMAN; BARBARA GIBSON; LINDA GUNTER; OLIVER HOLLEY; GREG PATTERSON; MARGARET READER; JOSHUA SMITH; CATHERINE TRUITT; JEFFREY WINSTEAD, individually and in their official capacity,

Defendants – Appellees.

No. 24-1215
(4:22-cv-00027-BO)

Before: AGEE, QUATTLEBAUM, and RUSHING, Circuit Judges.

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 40 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Agee, Judge Quattlebaum, and Judge Rushing.

For the Court

/s/ Nwamaka Anowi
Clerk

COMPLAINT, U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA EASTERN DIVISION (MARCH 21, 2022)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH
CAROLINA EASTERN DIVISION

PATSY TALLEY,

Plaintiff,

v.

DALE R. FOLWELL, individually and in his official capacity as TREASURER OF THE STATE OF NORTH CAROLINA; TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM (TSERS) OF NORTH CAROLINA; NORTH CAROLINA DEPARTMENT OF STATE TREASURER, RETIREMENT SYSTEMS DIVISION; and the members of the TSERS Board of Trustees both individually and in their official capacity: LENTZ BREWER, JOHN EBBIGHAUSEN, VERNON GAMMON, DIRK GERMAN, BARBARA GIBSON, LINDA GUNTER, OLIVER HOLLEY, GREG PATTERSON, MARGARET READER, JOSHUA SMITH, CATHERINE TRUITT, JEFFREY WINSTEAD, and THE STATE OF NORTH CAROLINA,

Defendants.

Civil Action No.: 4:22-CV-27

(Jury Trial Demanded)
(Class Action)

NATURE OF THE ACTION

1. This action is brought by Plaintiff Pasty Talley ("Plaintiff" or "Talley") on behalf of herself and all similarly situated individuals ("the class members") under 42 U.S.C. § 1983 for the deprivation of property and property rights without due process.

2. This is also an action brought by Plaintiff on behalf of herself and the class under *Corum v. University of North Carolina*, 389 S.E.2d 596, 97 N.C. App. 527 (1992) for violations of Plaintiff's rights under the North Carolina Constitution to the fruits of her labor under Article 1, Section 1, Section 3, and 19, for deprivation of property without substantive and procedural due process, and in violation of Article 1, Section 19 for violations of her rights to equal protection.

3. This action is brought against Defendants Dale Folwell, individually and as the State Treasurer, the Teachers' and State Employees' Retirement System of North Carolina (TSERS) and the above-named members of its Board of Trustees in their individual and official capacity[1], the North Carolina Department of State Treasurer, Retirement Systems Division and the State of North Carolina for actions taken under

---

[1] *See* https://www.myncretirement.com/governance/boards-trustees-and-committees/tsers-lgers-boards-trustees#meet-the-tsers-board-members as of 2022.03.19. (Exhibit 1).

the authority granted in Chapter 135 of the North Carolina General Statutes.

PARTIES, JURISDICTION AND VENUE

1. Plaintiff Patsy Talley is an individual resident of Beaufort County, North Carolina and is a member of TSERS under N.C.G.S. § 135-3(1), and at the times herein complained of was fully vested in TSERS, entitled to receive and was receiving benefits under N.C.G.S. § 135-1, et seq.

2. Pursuant to N.C. Gen. Stat. § 135-6, the Teachers' and State Employee's Retirement System ("TSERS") is responsible for the general determination, control, supervision, management, and governance of all affairs, which calculate and control the approval and distribution of benefits to all retired full-time teachers and State Employees of all public-school systems, universities, departments, institutions, and agencies of the State.

3. Pursuant to N.C. Gen. Stat. § 135-6(a), the Teachers' and State Employee's Retirement System is administered by a Board of Trustees. Membership of the Board consists of thirteen (13) members pursuant to N.C. Gen. Stat. § 135¬6(b)(1), (2), (2a), (3) and (4).

4. The Teachers' State Employee's Retirement System is a department under the North Carolina Retirement System ("RSD").

5. Defendant Dale R. Folwell is a Member of the Board of the Teachers' and State Employee's Retirement System and is the current State Treasurer pursuant to N.C. Gen. Stat. § 135-6(b)(1).

6. Defendant Lentz Brewer is a current Member of the Board of the Teachers' and State Employee's Retirement System pursuant to N.C. Gen. Stat. § 135-6(b)(3).

7. Defendant John Ebbighausen is a current Member of the Board of the Teachers' and State Employee's Retirement System pursuant to N.C. Gen. Stat. § 135-6(b)(3).

8. Defendant Vernon Gammon is a current Member of the Board of the Teachers' and State Employee's Retirement System pursuant to N.C. Gen. Stat. § 135-6(b)(3).

9. Defendant Dirk German is a current Member of the Board of the

Teachers' and State Employee's Retirement System pursuant to N.C. Gen. Stat. § 135-6(b)(3).

10. Defendant Barbara Gibson is a current Member of the Board of the Teachers' and State Employee's Retirement System pursuant to N.C. Gen. Stat. § 135-6(b)(3).

11. Defendant Linda Gunter is a current Member of the Board of the Teachers' and State Employee's Retirement System pursuant to N.C. Gen. Stat. § 135-6(b)(3).

12. Defendant Oliver Holley is a current Member of the Board of the Teachers' and State Employee's Retirement System pursuant to N.C. Gen. Stat. § 135-6(b)(3).

13. Defendant Greg Patterson is a current Member of the Board of the Teachers' and State Employ-

ee's Retirement System pursuant to N.C. Gen. Stat. § 135-6(b)(3).

14. Defendant Margaret Reader is a current Member of the Board of the Teachers' and State Employee's Retirement System pursuant to N.C. Gen. Stat. § 135-6(b)(3).

15. Defendant Joshua Smith is a current Member of the Board of the Teachers' and State Employee's Retirement System pursuant to N.C. Gen. Stat. § 135-6(b)(3).

16. Defendant Catherine Truitt is a current Member of the Board of the Teachers' and State Employee's Retirement System pursuant to N.C. Gen. Stat. § 135-6(b)(3).

17. Defendant Jeffrey Winstead is a current Member of the Board of the Teachers' and State Employee's Retirement System pursuant to N.C. Gen. Stat. § 135-6(b)(3).

18. This Court has subject-matter jurisdiction over this action pursuant to 42 U.S.C. § 1983, as the action arises under deprivation of any rights, privileges, or immunities secured by the Constitutional and Federal Laws.

19. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b)(1), as Plaintiff Talley is a resident of the Eastern District of North Carolina and Defendants perform their statutory duties and have their primary business location in Raleigh, North Carolina which is located in the Eastern District of North Carolina, and under 28 U.S.C. § 1391(b)(2), as a substantial part of the events or omissions giving rise to

this action occurred in the Eastern District of North Carolina.

STATEMENT OF THE FACTS

20. Plaintiff Patsy Talley was employed as a schoolteacher in the Beaufort County School system for over 25 years. She retired from the Beaufort County schools on November 1, 2008, when she was 60 years old.

21. As a full time employee of the North Carolina school system, Plaintiff participated in the TSERS and accrued vested retirement benefits.

22. Upon her retirement, Plaintiff, (as did all participants), had several options from which she could choose to receive her accrued benefits. N.C. Gen. Stat. § 135-5(g). Regardless of the option chosen, the benefits to which a retiree such as Plaintiff was entitled to receive were calculated by TSERS.

23. Plaintiff elected to receive the monthly benefits payments she had accrued with TSERS under "Option 4", the "Social Security Leveling method". N.C. Gen. Stat. § 135-5(g).

24. Under Option Four, the retiring employee receives a larger monthly payment than the maximum allowable benefits until the month of her sixty-second birthday, after which point the payment amount is decreased by an amount equal to an estimate of the employee's social security benefits. This "Leveling Method" is designed so that a retiree draws more money from the TSERS account before the retiree first becomes eligible to draw Social Security at the age of sixty-two (62). The amount drawn from TSERS is reduced once Social Security benefits begin. This

option is designed to provide the retiree, "so far as possible, approximately the same amount per year before and after" Social Security becomes available. A retiring employee choosing Option Four, will apply for social security benefits at age sixty-two, so that the retiree will continue receiving the same income after the reduction in State retirement benefits, due to the augmentation of the retiree's income by social security benefits. N.C. Gen. Stat. Plaintiff did not and had had no reason to question TSER's calculation of the benefits to which she was entitled.

25. Based on calculations by TSERS, taking into consideration Plaintiff's best four consecutive years of State compensation, her estimated Social Security benefit of $857.00 per month, and an "actuarially determined" factor (life expectancy and age), Plaintiff received $2,703.34 per month from TSERS until her 62nd birthday.

26. After Plaintiff's 62nd birthday in December 2009, through March 2019, Plaintiff received a reduced benefit $1,846.34 from TSERS.

27. At some point in 2008, the Defendants, through no fault of Plaintiff's, allegedly made an error in its calculation that resulted in Plaintiff being overpaid over a period of years.

28. When the overpayment was discovered, Defendants contend they were legally obligated to pursue recovery of the overpayment.

29. On or about February 22, 2019, Steven C. Toole, Executive Director of the Retirement Systems Division, sent Plaintiff a letter stating that a final review of TSERS accounts had been completed and that it had determined that Plaintiff had been overpaid

in the amount of $86,173.93 for the period of time from November 2008 through July 2018.

30. The February 22, 2019, letter from Steven C. Toole also indicated that the Retirement Systems Division (RSD) intended to "recoup" the overpayment "in accordance with the RSD's recoupment procedure." N.C. Gen Stat. § 135-9(b).

31. On or about March 19, 2019, Plaintiff received a letter from Vicki Roberts, Deputy Director of Member Services of TSERS, notifying her that beginning April 2019, Talley's checks would be reduced by $926.35. (Exhibit 2.)

32. The March 19, 2019, letter from Vicki Roberts contained no appeal rights or any opportunity to be heard to contest the reduction.

33. On April 8, 2019, Plaintiff's son, Brent Tally, sent an email to the Treasurer of the State of North Carolina, Dale Folwell, inquiring about the fairness of reducing Plaintiff's retirement check by almost half. Brent Talley received an automated response stating that the email volume was heavier than normal and that he would receive a response as soon as possible.

34. On April 18, 2019, Talley was informed that her 2019 April retirement check would be reduced by $926.35 (out of $1,910.73). At this time, Talley was finally informed that she could appeal the reduction in an email from Patrick Kinlaw.

35. Counsel for Plaintiff replied to Patrick Kinlaw's email on behalf of Talley asking him to deem the email sent by Talley's son, Brent Tally, April 8, 2019, to be an appeal, and further asked that

the RSD delay any reductions in Talley's retirement check until the matter could be resolved.

36. Beginning April 2019, Talley's retirement check was unilaterally reduced by RSD despite the fact that Talley had been given no opportunity to be heard before the reduction of her retirement checks.

37.Plaintiff, in her 70s, depends on retirement benefits for living expenses. Allegedly due to Defendant's "administrative error", the reduction in Plaintiff's ongoing benefits caused her to receive less per month than the amount of benefits to which she is entitled, had been promised and for which she worked,

38. On April 24, 2019, Mr. Kinlaw notified Plaintiff that the final agency decision was that the reduction would occur in the amount of 50% of her retirement check $926.35, and that Talley should consider herself fortunate in that regard because the Retirement System Division ("RSD") "could have recouped,[pursuant to N.C. Gen. Stat § 135-9(b)] the full amount of the retirement allowance," (i.e., reduced her on-going benefits to zero) but it had graciously limited itself to only 50% percent." The determination of the amount recouped from on-going benefits was unilateral, arbitrary, and capricious.

39. In June 2019, Plaintiff filed a Petition in the Office of Administrative Hearings, 19DST3536, in an attempt to stop Defendants from taking Plaintiff's property without an opportunity to be heard, seeking a post-deprivation due process hearing on the taking of her property and property rights. Plaintiff also sought her attorney's fees.

40. On August 26, 2019, Theresa Rogers, Chief of Compliance, out of the blue, agreed to reduce

Plaintiff's monthly recoupment to 10% of her TSERS monthly benefit, as authorized with respect to wages by N.C. Gen. Stat. § 135-9(c). Her decision was equally as arbitrary and capricious and the original April 24, 2019, decision of Patrick Kinlaw.

41. On February 19, 2020, the Administrative Law Judge dismissed Plaintiff's Petition on the grounds that "'a contested case before the Office of Administrative Hearings in the executive branch is "not a not a proper method of challenging the constitutionality of a statute." (Exhibit 3.)

42. Defendants' actions in unilaterally miscalculating Plaintiff's benefits over a period in excess of ten years, and then arbitrarily and capriciously seizing a substantial percentage of on-going benefits to which Plaintiff was entitled to remedy their error, deprived Plaintiff of her rights to both pre-termination and post-termination due process to which she was entitled under State and federal law and deprived her of property tights in violation of both the North Carolina and United

STATES CONSTITUTIONS.

43. 42. N.C. G.S. 135-5(n) contains a statute of limitations which provides that: "[n]o action shall be commenced by the State or the Retirement System against any retired member or former member or beneficiary respecting any overpayment of benefits or contributions more than three years after such overpayment was made." Thus, if Defendants brought an action against Plaintiff to recover their overpayment, they would have had to prove the amount overpaid during the preceding three years; and then attempt to collect the same. Here, Defendants, by unilateral

action and without due process, seized sums exceeding three times that amount from Plaintiff's retirement income, depriving Plaintiff of current retirement benefits.

44. RSD's own Final Agency Decision letter reveals that in an egregious lapse of professional standards the professionals of RSD had multiple opportunities to correctly calculate Petitioner's benefits prior to and beginning in 2010 and during the ensuing nine years, but it never did so until it brought its error to the attention of Plaintiff.

45. Plaintiff necessarily relied on RSD's work and expertise and suffered financial distress as a result of RSD's errors as well as a violation of her constitutional rights due to the lack of pre-deprivation and post-deprivation due process.

46. Moreover, under State law, the doctrine of equitable estoppel applies to the facts in this case such that the Defendants should be estopped from recovering the overpayment to Plaintiff because the recovery of the funds from Plaintiff constitutes a loss to Plaintiff and the estoppel will not impair the exercise of the governmental powers of the Defendant.

47. Pursuant to N.C. Gen. Stat. § 135-6, the Teachers' and State Employee's Retirement System ("TSERS"), and its board members, are responsible for the general determination, control, supervision, management, and governance of all affairs, which control the approval and payment of benefits to all full-time teachers and State Employees in all public-school systems, universities, departments, institutions, and agencies of the State.

48. Plaintiff and the class members have no responsibility for or control over the calculation of and subsequent amount of benefits paid each month to them by Defendants.

49. Plaintiff and the class members have clean hands in that they made no representations nor took any actions to cause any of the equities in this case to fall on the side of the Defendants and took no actions upon which Defendants relied to their detriment.

50. Defendants including the TSERS and the State have fully funded and amply and generously funded the TSERS system such that the operation of the TSERS system now or in the future will not be impaired by estopping them from recovering the alleged overpayments to Plaintiff.

51. Defendants are responsible by law for the general determination, control, supervision, management, and governance of the TSERS and they alone control the approval and payment of benefits to all full-time teachers and State Employees in all public-school systems, universities, departments, institutions, and agencies of the State.

52. Defendants' actions to arbitrarily and capriciously confiscate any random amount up to 100% of Plaintiff's monthly on-going retirement benefits to re coup payments calculated and made negligently by Defendants and the employees assigned to performed the statutory duties assigned by the legislature falls so far outside of the outer limits of legitimate government that in fact no process could cure the deficiency which is a violation of Plaintiff's rights to be free from arbitrary and capricious action by the government.

53. If Plaintiff or the class members were receiving wages, under the statutes upon which Defendants rely, Defendants take the position that they are permitted to recover from between 10% up to 100% of such wages under N.C. G.S. § 135-9(c).

54. However, if Defendants filed an action against Plaintiff or the class members to recover any alleged overpayment, under N.C. G.S. § 135-5(n), Defendants would be prohibited from commencing any action against "any retired member or former member or beneficiary respecting any overpayment of benefits or contributions more than three years after such overpayment was made."

55. Defendants did not file an action for recovery because they seized Plaintiff's benefits without filing such an action, which seizure was in violation of the US and NC Constitutions.

56. Even though not a current employee receiving wages, Plaintiff sought Defendants' agreement to garnish only 10% of her monthly retirement pension in this case, but Defendants refused such agreement prior to her filing a contested case hearing. Only after Plaintiff commenced litigation did Defendants unilaterally stop its garnishments in excess of 10%.

57. Defendants routinely garnish arbitrary and capricious amounts from the amounts of money paid to individuals like Plaintiff and have no system for notifying individuals of their right to appeal such garnishments or their rights to negotiate the terms of repayment, or even whether repayment is required under the circumstances. (Exhibit 4.)

58. Because Plaintiff was a retiree receiving a pension, instead of wages, Defendants treated her

differently by telling her that they were entitled to take 100% of her pension, and then eventually initially settling on 50% of her pension.

59. Again, after Plaintiff commenced litigation, Defendants unilaterally reduced their garnishment to 10% of Plaintiff's retirement pension.

60. In fact, with regard to any entity other than the State, Defendants and any court-ordered equitable distribution and child support payments, under N.C. G.S. § 135-9(a), "the pension, or annuity, or a retirement allowance . . . or any optional benefit or any other right accrued or accruing to any person under the provisions of this Chapter, and the moneys in the various funds created by this Chapter, are exempt from levy and sale, garnishment, attachment, or any other process whatsoever, and shall be unassignable except as in this Chapter specifically otherwise provided."

61. All allegations of each paragraph of this Complaint are incorporated into each Count thereof, as though fully set out therein.

COUNT ONE
DEPRIVATION OF DUE PROCESS GUARANTEED BY THE U.S. CONSTITUTION (42 U.S.C. § 1983)

62. Plaintiff, as a former employee of the State of North Carolina and therefore a member of the Retirement System for Teachers and State Employees, had a vested property interest in her accrued retirement benefits; such benefits were calculated and paid by Defendants.

63. For years, Plaintiff and the class members have been and are being deprived of property by the state without any pre-deprivation or post-deprivation

due process or notification of their rights to contest such garnishments by the State.

64. Pension benefits are so sacrosanct they are only subject to garnishment or attachment to pay equitable distribution or child support to support other individuals, except that Defendants routinely garnish and attach pension benefits when they allege such benefits have been negligently calculated by them and mistakenly overpaid through no fault of the garnishee.

65. To the extent, Defendants rely on certain statutory provisions including but not limited to N.C. G.S. § 135-9 and § 135-5(n) to justify their actions in failing to provide Plaintiff and the class members with any pre-deprivation due process and post-deprivation due process only when represented by counsel, such statutes as applied by Defendants deny Plaintiff's and the class members' due process.

66. The constitutional due process rights of Plaintiff and the class members have been violated as a result of Defendants' actions.

67. Plaintiff and the class members have suffered damages as a result of the Defendants' unconstitutional deprivation of their property without due process.

COUNT TWO
DEPRIVATION OF DUE PROCESS GUARANTEED BY THE N.C. CONSTITUTION (CORUM CLAIM)

68. Defendants have routinely seized property belonging to Plaintiff and the class members in the form of portions of benefits paid under Chapter 135 of the N.C. General Statutes, without due process.

69. The N.C Supreme Court has interpreted several provisions of the North Carolina Constitution as guarantees of due process, including Article I, Sections 1, 3 and 19.

70. Defendants provided Plaintiff and the class members no pre-deprivation due process and Defendants only provided Plaintiff with a final agency decision which provided notice that she was entitled to a contested case hearing at the N.C. Office of Administrative Hearings because she was represented by counsel who asserted her rights to due process.

71. To the extent, Defendants rely on certain statutory provisions including but not limited to N.C. G.S. § 135-9 and § 135-5(n) to justify their actions in failing to provide Plaintiff and the class members with any pre-deprivation due process and post-deprivation due process only when represented by counsel, such statutes as applied by Defendants deny Plaintiff and the class members' due process.

72. The constitutional due process rights of Plaintiff and the class members have been violated as a result of Defendants' actions.

73. Plaintiff and the class members have suffered damages as a result of the Defendants' unconstitutional deprivation of their property without due process.

COUNT THREE
DEPRIVATION OF EQUAL PROTECTION AND SUBSTANTIVE DUE PROCESS GUARANTEED BY U.S. CONSTITUTION (42 U.S.C. § 1983)

74. Under the U.S. Constitution, Plaintiff and the class members are guaranteed equal protection

under the law under the Fifth and Fourteenth Amendments of the U.S. Constitution.

75. The statutes upon which Defendants rely to garnish and attach the retirement pension of Plaintiff and the class members treat individuals differently depending on whether the individual is a member or beneficiary of the retirement system or alternatively, is a current employee of the State or political subdivision thereof.

76. The statutes upon which Defendants rely to garnish and attach the benefits paid to Plaintiff and the class members and treat them differently are arbitrary and capricious and lacking in any rational basis as they depend on whether the State is the Plaintiff or Defendant with regard to the overpayment.

77. The statutes upon which Defendants rely to garnish and attach the benefits paid under Chapter 125 to Plaintiff and the class members and treat individuals differently are arbitrary and capricious and lacking in any rational basis as they depend on whether the Plaintiff and the class members obtain legal representation and attempt to negotiate a payment amount different from the 100%, 50%, or any other percentage that Defendants claim they are entitled to garnish.

78. To the extent, Defendants rely on certain statutory provisions including but not limited to N.C. G.S. § 135-9 and § 135-5(n) to justify their actions, such statutes as applied, deny Plaintiff and the class members the equal protection of the law and are arbitrary and capricious in violation of the rights of Plaintiff and the class members to substantive due process.

79. The constitutional rights of Plaintiff and the class members to equal protection and substantive due process have been violated as a result of Defendants' actions.

80. Plaintiff and the class members have suffered damages as a result of the Defendants' denial of their rights to equal protection and to be free from arbitrary and capricious government action which violates their substantive due process rights.

COUNT FOUR
DEPRIVATION OF EQUAL PROTECTION AND SUBSTANTIVE DUE PROCESS GUARANTEED BY N.C. CONSTITUTION (CORUM CLAIM)

81. Under the N.C. Constitution, Plaintiff and the class members are guaranteed equal protection under the law under section 19 of Article 1.

82. The statutes upon which Defendants rely to garnish and attach the benefits paid under Chapter 135 to Plaintiff and the class members treat individuals differently depending on whether the individual is a member or beneficiary of the retirement system or alternatively, depending on whether the individual is a current employee of the State or political subdivision thereof.

83. The statutes upon which Defendants rely to garnish and attach the benefits paid to Plaintiff and the class members treat individuals differently depending on whether the State or Defendant is the plaintiff with regard to the overpayment and when the overpayment was made.

84. The statutes upon which Defendants rely to garnish and attach the retirement pension of Plaintiff

and the class members treat individuals differently depending on whether the Plaintiff and the class members obtain counsel and attempt to negotiate a payment amount different from the 100%, 50%, or any other percentage that Defendants arbitrarily decide to garnish and attach.

85. To the extent, Defendants rely on certain statutory provisions including but not limited to N.C. G.S. § 135-9 and § 135-5(n) to justify their actions, such statutes as applied, deny Plaintiff and the class members the equal protection of the law and are arbitrary and capricious in violation of their rights to substantive due process.

86. There is no rational basis for treating former or current employees/beneficiaries differently with regard to the collection of alleged overpayments in amount or kind and the failure to treat individuals differently based on whether they protest the garnishing/attaching of their retirement pension or wages is likewise irrational.

87. The constitutional rights of Plaintiff and the class members to equal protection and substantive due process have been violated as a result of Defendants' actions.

88. Plaintiff and the class members have suffered damages as a result of the Defendants' denial of their rights to equal protection and to be free from arbitrary and capricious government action which violates their substantive due process rights.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiff respectfully prays that this Court:

1. That this Court issue an injunction prohibiting Defendants from continuing to seize benefits paid under Chapter 135 of the N.C. General Statutes to Plaintiff and the class members;

2. That the Court enter an injunction prohibiting Defendants from garnishments of alleged overpayments of benefits to Plaintiff and the class members under Chapter 135 of the N.C. General Statutes beyond the three years preceding the notice of overpayment provided in G.S. § 135-5(n);

3. That the Court enter an injunction prohibiting Defendants from garnishments of any benefits paid to Plaintiff and the class members under Chapter 135 of the N.C. General Statutes without pre-deprivation and post-deprivation due process;

4. That this Court provide Plaintiff and the class members damages for the deprivation of their constitutional rights to substantive due process and equal protection in the terms of the garnishments for alleged overpayments for benefits paid under Chapter 135 of the N.C. General Statutes;

5. That this Court award the Plaintiff and the class members reasonable attorney's fees and any other costs related to this action; and

6. That this Court award Plaintiff and the class members such other and further relief as may be deemed just and proper.

DEMAND FOR JURY TRIAL

Plaintiff requests a jury trial on all questions of fact raised by the Complaint.

Respectfully submitted, this the 21st day of March 2022.

/s/ Valerie L. Bateman
Valerie L. Bateman
NEW SOUTH LAW FIRM
N.C. Bar 13417
209 Lloyd St., Ste 350
Carrboro, NC 27510
Telephone: (919) 810-3139
valerie@newsouthlawfirm.com

/s/ June K. Allison
June K. Allison
NEW SOUTH LAW FIRM
N.C. Bar 9673
233 S. Laurel Ave.
Charlotte, NC 28207
Telephone: (704) 277-0113
june@newsouthlawfirm.com

**EXHIBIT 2 TO COMPLAINT,
LETTER FROM VICKI ROBERTS
(MARCH 19, 2019)**

NORTH CAROLINA TOTAL RETIREMENT PLANS

**NORTH CAROLINA
DEPARTMENT OF STATE TREASURER
RETIREMENT SYSTEMS DIVISION**

3/19/2019

Patsy W Talley
6459 Broad Creek RD
Washington NC 27889-9735

Re: PATSY W TALLEY Member ID 974693

Dear Ms. TALLEY:

Your overpayment balance as of 3/19/2019 is $86,173.93. Effective with your April, 2019 benefit payment, our office will begin monthly deductions of $926.35 to be applied to the overpayment balance.

If we may be of further assistance, please contact us at the address or telephone number listed below.

Sincerely,

/s/ Vicki Roberts
Deputy Director of Member Services
Retirement Systems Division

EXHIBIT 3 TO COMPLAINT,
SUMMARY SHEET OF OVERPAYMENT
OPTION 4 AMOUNTS

{ Note: Only Relevant Columns of Data included. The Data for Patsy W. Talley was moved to the top of the table }

OP Time Period	# of Month	OP Total	TERMS of Rep.
Data for Patsy W. Talley			
11/08 - 7/18	99	$86,173.93	10%
Data for Other Employees			
4/08 - 7/18	124	$120,290.68	20%
7/08 - 7/18	121	$135,108.45	25%
12/09 - 7/18	104	$64,493.02	20%
12/07 - 7/18	128	$135,462.18	25%
3/07 - 7/18	137	$94,206.93	10%
7/91 - 7/18	325	$295,289.33	20%
8/10 - 7/18	96	$71,534.89	40%
11/04 - 7/18	165	$232,577.60	30%
1/10 - 7/18	103	$66,126.91	10%
9/05 - 7/18	155	$107,943.72	N/A
1/02 - 7/18	199	$175,003.90	50%

OP Time Period	# of Month	OP Total	TERMS of Rep.
3/01 - 8/18	210	$147,152.85	30%
8/95 - 7/18	276	$329,192.70	N/A
6/97 - 7/18	254	$145,110.64	50%
7/96 - 7/18	265	$216,790.82	25%
6/06 - 7/18	146	$127,061.40	40%
7/05 - 7/18	157	$201,611.84	40%
4/08 - 7/18	124	$73,877.49	50%
3/88 - 12/18	370	$163,374.42	30%
7/09 - 7/18	109	$68,291.09	50%
7/04 - 7/18	169	$217,796.02	N/A
4/00 - 7/18	220	$141,533.92	10%
9/07 - 7/18	131	$99,508.76	10%
1/10 - 7/18	103	$80,840.71	N/A
1/05 - 7/18	163	$172,841.05	N/A
10/89 - 7/18	346	$282,062.13	50%
1/95 - 7/18	283	$185,069.93	20%
7/05 - 7/18	157	$108,787.74	110%
6/10 - 7/18	98	$54,156.83	20%
1/91 - 7/18	331	$13,130.10	$550/mo
1/99 - 7/18	231	$236,350.44	20%
7/09 - 7/18	109	$116,443.37	N/A
TOTAL		**$4,765,195.82**	

AFFIRMATION

I, Theresa R. Rogers, being first duly sworn, do depose and say that I am the Chief Compliance Officer for the Retirement Systems Division in the Office of State Treasurer; that I am acquainted with the facts of this case; that I have reviewed Respondent's Responses to Petitioner's First Set of Interrogatories; and that to the best of my knowledge, information, and belief, the factual statements in the responses to Interrogatory No. 2, 3, and 4 are true and accurate.

/s/ Theresa R. Rogers

WAKE COUNTY, NORTH CAROLINA

Signed and sworn to before me this day by Theresa R. Rogers.

Date: 12/13/2019

/s/ Annie B. Morgan
Notary Public
Wake County, N.C.

My Commission expires: 8/10/2022

**EXHIBIT 4 TO COMPLAINT,
FINAL DECISION SUMMARY JUDGMENT,
BEAUFORT COUNTY OFFICE OF
ADMINISTRATIVE HEARINGS
(FEBRUARY 19, 2020)**

STATE OF NORTH CAROLINA
COUNTY OF BEAUFORT

IN THE OFFICE OF ADMINISTRATIVE
HEARINGS

PATSY TALLEY,

Petitioner,

v.

DALE R FOLWELL IN HIS CAPACITY AS
TREASURER OF THE STATE OF NC
NC OFFICE OF STATE TREASURER
RETIREMENT SYSTEMS DIVISION TEACHERS
AND STATE EMPLOYEES RETIREMENT
SYSTEM OF NC AND THE STATE OF NC,

Respondent.

No. 19 DST 03536

Before: J RANDOLPH WARD,
Administrative Law Judge.

THIS MATTER is before the undersigned on the *Respondent's Motion for Summary Judgment and Memorandum in Support of Respondent's Motion for Summary Judgment*, filed November 25, 2019; the *Petitioner's Response to Respondent's Motion for Summary Judgment, and Petitioner's Motion For Summary Judgment and Motion for Attorney's Fees*, filed December 5, 2019; *Respondent's Reply to Petitioner's Response to Respondent's Motion for Summary Judgment and Response to Petitioner's Motion for Summary Judgment and Motion for Attorney's Fees*, filed December 16, 2019; *Petitioner's Reply to Respondent's Response to Petitioner's Motion for Summary Judgment*, filed February 10, 2020; and, *Addendum to Petitioner's Reply to Respondent's Response to Petitioner's Motion for Summary Judgment*, filed February 13, 2020.

RECITATION OF UNDISPUTED FACTS

The following account of the events giving rise to this dispute is drawn from the Affidavit of Teresa R. Rogers, the Chief of Compliance in the Retirement Systems Division, and a custodian of its records, filed on Nov. 25, 2019.

1. The Petitioner Patsy W. Talley retired from the Beaufort County schools effective November 1, 2008, when she was 60 years old. She elected to accept the monthly benefit payments she had accrued with the Teachers' and State Employees' Retirement System ("TSERS") under "Option 4," the "Social Security Leveling method." N.C. Gen. Stat. § 135-5(g), Option 4. The "leveling" effect is achieved by drawing more money from the TSERS account before the retiree first becomes eligible to draw Social Security

at age 62, and a lesser amount after her Social Security benefit begins, with these amounts calculated to provide the retiree, "so far as possible, approximately the same amount per year before and after" Social Security benefits become available.

2. Based on Respondent's calculation of Petitioner's best four consecutive years of State compensation, her estimated Social Security benefit of $ 857.00 per month, and an "actuarially determined" factor (presumably, her life expectancy based on her attained age), Ms. Talley received $ 2,703.34 per month from TSERS until her 62nd birthday. That birthday came in December 2009, and from January through April of 2010, she received $ 1,846.34 from TSERS ($ 2,703.34-$ 857.00 = $ 1,846.34).

3. In April 2010, Respondent determined that Ms. Talley's average final compensation was $ 470.08 greater than the figure used in initially calculating her benefits. The agency recalculated the benefits that should have been paid, before and after her sixty-second birthday. The "before-age-sixty-two" amount, $ 2,721.24, and the "after-age-sixty-two" amount, $ 1,864.24, were both $ 17.90 higher. Respondent sent Petitioner check for $322.20 to compensate for the monthly underpayments that had accumulated from November 2008 through April 2010. Respondent contends, without contradiction, that with this titration, Petitioner was properly paid her benefits through April 2010.

4. Beginning in May 2010, TSERS began erroneously paying Petitioner the recalculated "*before*-age-sixty-two amount of $ 2,721.24" monthly, while she was also drawing Social Security retirement benefits. Consequently, she was receiving a total of $3,578.24,

rather than the "level" amount of $ 2,721.24 roughly comparable to her *before*-age-sixty-two benefits. The General Assembly subsequently granted retirees cost-of-living adjustments ("COLAs") or one-time cost-of-living supplements in 2012, 2014, 2016 and 2017, which cumulatively increased the miscalculated monthly benefits Ms. Talley was receiving from TSERS to $ 2,803.69.

5. Ms. Rogers avers that in August 2018, the agency "realized the error and corrected the benefit payment," adjusted for the COLAs, to $ 1,920.73 per month. Respondent calculates that it overpaid Ms. Talley by $ 86,173.93 between May 2010 through July 2018. See a summary of the overpayments at page 3 of the document constituting agency action, dated April 24, 2019, appended to Respondent's Pre-hearing Statement, filed July 24, 2019.

6. Initially, Respondent withheld one half of the monthly TSERS benefit. On August 26, 2019, Ms. Rogers spoke to Petitioner and agreed to reduce the repayment amount to 10% of the TSERS benefit, as authorized by N.C. Gen. Stat. § 135-9(c).

ISSUES AND ARGUMENTS

7. In support of its summary judgment motion, the Respondent cites its "statutory obligation to recoup . . . the overpayment amount" imposed by N.C. Gen. Stat. § 143-64.80(b):

> No State department, agency, or institution, or other State-funded entity may forgive repayment of an overpayment of State funds, but shall have a duty to pursue the repayment of State funds by all lawful means

> available, including the filing of a civil action in the General Court of Justice.

N.C. Gen. Stat. § 135-9 specifies that this affirmative duty may be met by offsetting and overpayment "against any retirement allowance, return of contributions or any other right accruing under this Chapter [135]." This section effectively conditions the right to receive the TSERS retirement benefits on the State's prerogative to recover overpayments.

8. In her Response to Respondent's Motion, Petitioner first argues that the statute of limitations for the State to file suits to recover such overpayments significantly limits TSERS' right to recover benefits from Petitioner. The statute provides:

> No action shall be commenced against the State or the Retirement System by any retired member or beneficiary respecting any deficiency in the payment of benefits more than three years after such deficient payment was made, and no action shall be commenced by the State or the Retirement System against any retired member or former member or beneficiary respecting any overpayment of benefits or contributions more than three years after such overpayment was made. This subsection does not affect the right of the Retirement System to recoup overpaid benefits as provided in G.S. 135-9.

N.C. Gen. Stat. § 135-5(n) (2019). Petitioner argues that Respondent cannot recoup overpayments made more than three year before it files an action for recovery.

9. Our Court of Appeals has considered Petitioner's argument under factually similar circumstances and came down firmly on the side of the Respondent.

> We agree with the State that the term "action" in N.C. Gen. Stat. § 135-5(n) is inapplicable to the State's reduction of future state benefits. When used in this context, the phrase "no action shall be commenced" has a special meaning, drawn from N.C. Gen. Stat. § 1-2, which describes an action as "an ordinary proceeding in a court of justice, by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment or prevention of a public offense." The State's reduction of [retiree] Trejo's benefits to recoup the overpayment and apply the offset going forward is not a proceeding in a court of justice and thus is not the commencement of an action for purposes of the statute of limitations.
>
> Moreover, N.C. Gen. Stat. § 135-9 permits the State to recoup any overpayment through the reduction of other state benefits owed to the recipient "[n]otwithstanding any provisions to the contrary" and N.C. Gen. Stat. § 135-5(n) provides that its three-year limitation "does not affect the right of the Retirement System to recoup overpaid benefits as provided in G.S. 135-9." Thus, the State is permitted to use recoupment to recover an overpayment regardless of whether N.C. Gen. Stat. § 135-5(n) might limit the State's ability to recover that same overpay-

> ment through other legal means in a court proceeding. Accordingly, we reject Trejo's argument that the State's reduction in her benefits is time barred.

Trejo v. NC Dep't of State Treasurer Ret. Sys. Div., 808 S.E.2d 163, 168 (N.C. Ct. App. 2017), review denied, 813 S.E.2d 243 (N.C. 2018).

10. Petitioner offers a constitutional argument that she obtained a vested right to retain the overpaid benefits, citing *Bailey v. State*, 348 N.C. 130, 141, 500 S.E.2d 54, 60 (1998), *Faulkenbury v. Teachers' & State Emples. Ret. Sys.*, 345 N.C. 683, 483 S.E.2d 422 (1997), and their progeny. She also argues that the statutes allowing Respondent to stop the overpayments before affording petitioner a due process hearing are constitutionally defective. This may preserve these arguments for judicial review, but a contested case before the Office of Administrative Hearings in the executive branch is "not a not a proper method of challenging the constitutionality" of a statute. *Beard v. North Carolina State Bar*, 320 N.C. 126, 357 S.E.2d 694 (N.C., 1987) "[I]t is the province of the judiciary to make constitutional determinations." *Meads v. North Carolina Dep't of Agric.*, 349 N.C. 656, 670, 509 S.E.2d 165, 174 (1998); *Bailey v. State of North Carolina*, 330 N.C. 227, 246, 412 S.E.2d 295, 306 (1991), *cert. denied*, 504 U.S. 911, 112 S.Ct. 1942, 118 L.Ed.2d 547 (1992). An Administrative Law Judge follows the constitutional rulings of the Judicial Branch but does not make them.

11. Petitioner seeks "an award of attorney's fees under N.C. Gen. Stat. § 6-19.1," which authorizes such relief under certain circumstances for "a party who is contesting state action" in a "civil action" or

"pursuant to G.S. § 150B-43," which authorizes the review in Superior Court of a contested case decision by an Administrative Law Judge. That Court is authorized include in an award "attorney fees applicable to the administrative review portion of the case, in contested cases arising under Article 3 of Chapter 150B." Assuming that an Administrative Law Judge can make an attorney's fee award pursuant to this statute, it requires that the movant be the "prevailing party" in the "action."[1]

12. Under the Administrative Procedure Act, an Administrative Law Judge can award reasonable attorney's fees in cases of this kind when it is found that a State agency has "substantially prejudiced the petitioner's rights and has acted arbitrarily or capriciously[.]" N.C. Gen. Stat. § 150B-33(b)(11) (emphasis added). "The 'arbitrary or capricious' standard is a difficult one to meet. Administrative agency decisions may be reversed as arbitrary or capricious if they are patently in bad faith, or whimsical in the sense that they indicate a lack of fair and careful consideration or fail to indicate any course of reasoning and the exercise of judgment. . . . " Act-Up *Triangle v. Comm'n for Health Services for the State of N.C.*, 354 N.C. 699, 707, 483 S.E.2d 388, 393 (1997). In this instance, Respondent clearly sought to follow its interpretation of the applicable statutes.

---

[1] As Petitioner's citation suggests, the standard for determining whether agency's action was "substantially justified" is not "outcome determinative.". *Crowell Constructors, Inc. v. State ex rel. Cobey*, 342 N.C. 838, 845, 467 S.E.2d 675, 679 (1996). However, the statute itself requires a successful movant.

13. Summary judgment is appropriate when the movant shows "that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c). All evidence must be viewed in the light most favorable to the non-moving party, taking its asserted facts as true, and drawing all reasonable inferences in its favor. *Kennedy v. Guilford Tech. Community College*, 115 N.C. App. 581, 583, 448 S.E.2d 280, 281 (1994). The party seeking summary judgment bears the initial burden of demonstrating the absence of any genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). "According to well-established North Carolina law, when a moving party has met his burden of showing that he is entitled to an award of summary judgment in his favor, the non-moving party cannot rely on the allegations or denials set forth in her pleading, *Ind–Com Elec. Co. v. First Union Nat. Bank*, 58 N.C. App. 215, 217, 293 S.E.2d 215, 216–17 (1982), and must, instead, forecast sufficient evidence to show the existence of a genuine issue of material fact in order to preclude an award of summary judgment." *Steele v. Bowden*, 238 N.C. App. 566, 768 S.E.2d 47, 57 (2014). "An Administrative Law Judge may grant . . . summary judgment, pursuant to a motion made in accordance with G.S. 1A-1, Rule 56, that disposes of all issues in the contested case." N.C. Gen. Stat. § 150B-34(e).

FINAL DECISION

It appearing that there is no genuine issue of material fact in controversy, and that the Respondent is entitled to summary judgment as a matter of law,

the Petitioner's motions for summary judgment and attorney's fees are denied, and the Petition must be, and hereby is, DISMISSED. N.C. Gen. Stat. §§ 1A-1, Rule 56; 150B-34(e); 26 NCAC 03 .0101(a).

NOTICE OF APPEAL

This is a Final Decision issued under the authority of N.C. Gen. Stat. § 150B-34.

Under the provisions of North Carolina General Statute § 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of the county where the person aggrieved by the administrative decision resides, or in the case of a person residing outside the State, the county where the contested case which resulted in the final decision was filed. The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision. In conformity with the Office of Administrative Hearings' rule, 26 N.C. Admin. Code 03.0102, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, this Final Decision was served on the parties as indicated by the Certificate of Service attached to this Final Decision. N.C. Gen. Stat. § 150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Under N.C. Gen. Stat. § 150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings

at the time the appeal is initiated in order to ensure the timely filing of the record.

IT IS SO ORDERED.

This the 19th day of February, 2020.

/s/ J Randolph Ward
Administrative Law Judge