No. 89PA22 DISTRICT THREE-A

NORTH CAROLINA SUPREME COURT

****

ERIC STEVEN FEARRINGTON,
CRAIG D. MALMROSE,

Plaintiffs-Respondents,

v.

CITY OF GREENVILLE, PITT COUNTY BOARD OF EDUCATION,

Defendants-Petitioners.

From the Court of Appeals
No. COA20-877

From Pitt County
No. 19 CVS 1217

****

PLAINTIFF-RESPONDENT'S NEW BRIEF

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INTRODUCTION

The North Carolina Constitution protects schools and citizens by requiring that revenue from penalties, including civil penalties, goes to public schools instead of those enforcing the law. Article IX, § 7(a) protects the public by: (1) ensuring funding for schools, (2) preventing the diversion of funds, and (3) shielding citizens from arbitrary government by ensuring those enforcing the law have no financial stake in how the law is enforced.

Greenville and the Pitt County Board of Education devised a scheme to defeat these purposes. Greenville contracted with a private, for-profit Arizona corporation to install and monitor red light cameras in Greenville. But Greenville did not pay that private corporation directly. Instead, it sent the revenue the corporation collected to the Board—along with a bill for enforcement costs. After the Board pays Greenville and Greenville pays the Arizona corporation, the Board keeps only 71.66% of the revenue. The rest pays a Greenville police officer's salary and a corporation in Arizona.

To justify their scheme, Defendants diminish the purposes of Article IX, § 7(a) and carve novel exceptions into this Court's holdings on standing. Defendants argue Article IX is satisfied as long as the Board gets more money—no matter how that money is collected or spent. Article IX does not only fund public schools, it also requires that the funds be used to "maintain a free system of public schools." Paying an Arizona corporation to install and operate a red-light cameras and prepare citations is not public schooling.

Defendants' scheme diverts funds from public schools. Rather than funding education, those funds go to a private, for-profit corporation. That corporation, chose where to place the cameras, drew engineering plans for cameras at those intersections, monitors the intersections, prepares the citations, and reaps the profit. It has a financial incentive to maximize its profits by maximizing citations. Fearrington and Malmrose each paid citations, giving them standing to challenge the unconstitutional misappropriation of those funds.

Article IX protects schools and citizens by ensuring those funds go to education and not to policing for profit. This Court should affirm the Court of Appeals and hold Defendants' scheme is unlawful.

STATEMENT OF THE CASE AND OF THE FACTS

Fearrington and Malmrose each received citations prepared by American Traffic Solutions, the company operating Defendants' Red Light Camera Program. (R pp 46-47, 52). Nearly one-third of the $100 penalty Fearrington and Malmrose paid ultimately went to American Traffic Solutions. (R p 143).

Fearrington and Malmrose each appealed their citations, arguing that the cameras were improperly designed so they did not have the time or distance to safely stop. (R p 50). They later learned that American Traffic Solutions was not licensed to practice engineering in North Carolina and a North Carolina engineer had been sanctioned for rubber-stamping American Traffic Solutions plans without independently reviewing them. (R pp 125-132). Although they presented affidavits from an engineer saying they were innocent, Greenville still found Fearrington and

Malmrose liable. (R pp 49, 53). Fearrington and Malmrose ultimately presented an uncontradicted affidavit from that engineer saying 80-90% of penalized drivers were innocent. (R p 261). After their separate hearings, Greenville sent Fearrington and Malmrose notices of determination saying they had "fully exhausted their administrative remedies." (R p 51).

Fearrington appealed his citation to the Pitt County Superior Court for certiorari review, realleging his constitutional challenges. (Doc. Ex. p 1). Defendants represented that, the "proper mechanism through which to present your two constitutional challenges to the Program is through a declaratory judgment action." (R p 215). Fearrington, Greenville, and the Board of Education entered a consent judgment dismissing Fearrington's certiorari petition. (R p 216). In that judgment, the Pitt County Superior Court concluded that Fearrington "exhausted his administrative remedies" and should bring a declaratory judgment action to "present his as-applied challenged to the Red Light Camera Safety Program." (Doc Ex. p 2).

This case is that as-applied challenge to the Program. (R pp 2-69). Malmrose joined the action because he took Greenville at its word when it said he had exhausted his administrative remedies. (R p 49). Malmrose and Fearrington raised five challenges to the Red Light Camera Program that fit under three broad headings: (1) improper, unlicensed engineering subjecting drivers to arbitrary citations by ignoring the immutable laws of physics, (2) defects in Defendants' administrative process, including forcibly preventing Malmrose from recording his hearing, and (3) diversion of funds from public schools and public education. (R pp 2-13).

The Superior Court held two hearings on motions. (R pp 259-260, pp 326-329). In October 2019, the Superior Court heard Greenville and Pitt County's motions to dismiss and Plaintiff's motion for summary judgment. (R p 259). It granted Defendants' motions to dismiss and denied Plaintiffs' motion for summary judgment on all claims except Plaintiffs' substantive and procedural due process claims. (R pp 259-260). In July 2020, the Superior Court heard Greenville's motion to dismiss, Pitt County's motion to dismiss, and Plaintiffs' motion for summary judgment on the substantive and procedural due process claims. (R pp 326-328). It granted Pitt County's motion to dismiss. (R p 326). It then "converted Greenville's motion to dismiss into a motion for summary judgment" and granted Greenville summary judgment. (R p 328). Fearrington and Malmrose appealed both orders. (R p 329).

The Court of Appeals held the Red Light Camera Program violated Article IX, § 7. *Fearrington v. Greenville*, 2022-NCCOA-158, ¶ 1. Plaintiffs appealed both the granting of Defendants' motions to dismiss and the denial of their motion for summary judgment, so the Court of Appeals reversed the dismissal and "remanded for entry of summary judgment in Plaintiffs' favor" on that issue. *Id. at* ¶ 1.[1]

Writing for the Court of Appeals, Judge Griffin concluded that Defendants' "funding scheme" violated Article IX, § 7 for three reasons. *Fearrington v. Greenville*, 2022-NCCOA-158, ¶ 56. First, N.C.G.S. § 115C-437 requires that the School Board

[1] The School Board argues this disposition prejudiced it because the "trial court did not consider any evidence on" the Article IX claim. School Board Br. p. 9. But Plaintiffs' properly noticed their summary judgment motion, submitted hundreds of pages of materials to the trial court, obtained an order on that motion, and filed a timely notice of appeal of the denial of their motion for summary judgment. (R pp 98-220, p 261-291, pp 326-328, and p 329). Defendants also submitted sixty-four pages of materials on the summary judgment motion. (R pp 225-258, pp 296-325).

receive at least 90% of the penalties, but the School Board received just 71.66% of the penalties. *Id. at* ¶ 58. Second, Greenville unconstitutionally charged the School Board for enforcement costs, including an officer's salary and American Traffic Solutions' fees. *Id.* at ¶ 59. Third, the funds were used for the red light camera program and not "exclusively for maintaining free and public schools." *Id.* at ¶ 63. The Court of Appeals unanimously concluded that "the clear purpose of the people in mandating that the clear proceeds of such fines be '*faithfully appropriated*' to the public schools cannot be circumvented by the elaborate diversion of funds or cleverly drafted contracts." *Id.* at ¶ 62 (emphasis original).

Defendants petitioned this court for discretionary review, and this Court allowed the petition.

ARGUMENT

Because of Defendants' scheme Fearrington and Malmrose each paid $100 they otherwise would not have paid. They have standing to challenge the misappropriation of penalties they paid. Defendants elaborate arguments and diversion scheme cannot change the fact that the red light camera program has no educational purpose and obligating the School Board to pay an Arizona corporation to operate them violates Article IX, § 7(a).

I. Diverting Funds from Public Schools to Private Corporations Violates Our Constitution, Our General Statutes, and Our Precedent and Harms Citizens by Undermining Good Government.

Article IX, § 7 appropriates the penalties Fearrington and Malmrose paid to education only:

> (a) Except as provided in subsection (b) of this section, all moneys, stocks, bonds, and other property belonging to a county school fund, and *the clear proceeds of all penalties* and forfeitures and of all fines collected in the several counties for any breach of the penal laws of the State, shall belong to and remain in the several counties, and *shall be faithfully appropriated and used exclusively for maintaining free public schools*.
> (b) The General Assembly may place in a State fund the clear proceeds of all civil penalties, forfeitures, and fines which are collected by State agencies and which belong to the public schools pursuant to subsection (a) of this section. Moneys in such State fund shall be faithfully appropriated by the General Assembly, on a per pupil basis, to the counties, to be used exclusively for maintaining free public schools.

(emphasis added). Defendants cannot pay enforcement costs out of the clear proceeds without violating Article IX, § 7(a). If the rule were anything else, there Could be no clear proceeds. Those enforcing the law would stand to profit from how they enforce the law. Defendants' elaborate diversion of funds is only the latest effort to circumvent Article IX, § 7(a). This Court should affirm the Court of Appeals and hold that scheme unlawful.

A. Article IX, § 7(a) Requires that Red Light Camera Citation Revenues be "Used Exclusively for Maintaining Free Public Schools." Paying an Arizona Corporation to Operate Red Light Cameras is Not Public Education.

The plain meaning of Article IX, § 7(a) is dispositive. That section requires that the "clear proceeds of all penalties and forfeitures" and "fines collected . . . for any breach of the penal laws of the state" shall "be faithfully appropriated and used exclusively for maintaining free public schools."

Article IX, § 7(a) imposes four requirements. First, Greenville must disburse the "clear proceeds." Second, the funds must come from "penalties" "forfeitures" or "fines collected . . . for any breach of the penal laws of the state." Third, the funds

must be "faithfully appropriated" to the public schools. Fourth, the funds must be "used exclusively to maintain free public schools." By deducting enforcement costs from clear proceeds and spending funds on non-educational purposes, Defendants' scheme violates these requirements.

Defendants concede that the civil penalties at issue here are "penalties," "forfeitures," or "fines" under Article IX, § 7(a).

Defendants' do not disburse the clear proceeds because their scheme defies this Court's interpretation of "clear proceeds." Before the General Assembly defined clear proceeds, this Court defined clear proceeds to mean "the total sum *less only the sheriff's fees for collection, when the fine and cost are collected in full*." *Cauble v. Asheville*, 314 N.C. 598, 606, 336 S.E.2d 59, 64 (1985). The "costs of collection" "are limited to the administrative costs of collecting the funds." To hold otherwise would mean that "there could never be any clear proceeds of such fines." Given the financial incentive, municipalities could increase their accounting for the costs of enforcement so much that there could be no clear proceeds for public schools. To prevent that result and protect schools and citizens, this court held that costs of enforcement cannot be deducted from revenue to determine clear proceeds. *Id*.

From 2017 to 2019, the Board of Education effectively paid American Traffic Solutions $581,986.65 to operate the red light camera program and paid Greenville Police Officer O'Callaghan a $75,000 salary. (R pp 149-150). Greenville invoiced the Board a total of $706,986.65 for collection and enforcement costs. (R p 150). *Cauble*

held that our Constitution prevents Greenville from deducting those enforcement costs from the clear proceeds.

To avoid that conclusion Defendants argue Greenville has deducted nothing. Defendants' scheme is that the Board gets all the proceeds—along with a bill it is legally obligated to pay. (R p 26). This violates Article IX, § 7(a)

Article IX, § 7(a) limits both the General Assembly and school boards' discretion to spend penalties. Its requirement that funds be "faithfully appropriated" to public schools limits the General Assembly's appropriation authority. As the Board of Education has previously argued, those funds are "constitutionally appropriated." *Sch. Boards Ass'n v. Moore*, COA 09-741, Plaintiffs-Appellants' Brief, p 8; Appendix A p 3. In *Moore*, Pitt County said that "the legislative power of the purse does not extend to include the power to appropriate or direct the use of the fines, penalties[,] or forfeitures reserved by the Constitution for public schools." *Id*, pp 14-15. Even if the General Assembly's state budget said, "American Traffic Solutions shall receive $466,458.10 from the proceeds of Greenville's red light camera program," that legislation would fail because it violates the Constitution's text.

Despite constitutional language to the contrary, defendants argue the General Assembly may allow cities to deduct enforcement costs from clear proceeds. The Court of Appeals has noted that the General Assembly's enactments, "make[] it clear that the Legislature *feels* it has the authority to clarify the meaning of clear proceeds in the context of red light camera programs." *Shavitz v. City of High Point,* 177 N.C. App. 465, 482, 630 S.E.2d 4, 12 (2006) (emphasis added). Our Constitution is not

built on the shifting sand of the General Assembly's feelings. The General Assembly may feel that it can grant a monopoly or feel that it can pass a local act regulating trade—but the General Assembly's feeling is not law. The Constitution, as expounded by this Court, is law. The Court of Appeals' recognition in *Shavitz* that the General Assembly believes it can define clear proceeds did not overturn this Court's holding in *Cauble*'s that the Constitution itself prevents deducting the costs of enforcement from the clear proceeds. The Constitution appropriates civil penalties to only one use: maintaining a free system of public schools.

The Board is also powerless to spend penalty funds on non-educational purposes. Article IX, § 7(a) does not just speak of appropriation. When it says that civil penalty funds shall "be used exclusively for maintaining free public schools," it limits the Board of Education's authority. The Board of Education can only use these funds for educational purposes. As long as the purpose is educational,[2] the Board can contract with a city or third party to use funds, including civil penalty funds. *E.g., Boney v. Bd. of Trs.*, 229 N.C. 136, 140, 48 S.E.2d 56, 59 (1948).[3] No matter how noble the other purpose, The Board cannot divert civil penalty funds from education because the Constitution itself appropriates them.

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[2] Article IX, § 7 limits the purpose to K-12 education.

[3] The Board of Education argues *Boney* authorizes the interlocal agreement because it provides more resources to public education. School Board Br. pp 20-21. The use in *Boney* was an athletic field and playground for the public *and* the schools. *Boney*, 229 N.C. at 140, 48 S.E.2d. at 59. This Court held that "physical training is a legitimate function of education." Because the use was educational and the field was "set apart . . . for the use of the children attending Kinston Graded Schools," *Boney*'s interlocal agreement did not violate Article IX. Unlike physical education, operating red light cameras is not an educational purpose.

Preventing the Board of Education from spending funds on noneducational purposes follows Article IX, § 7's history and intent. In 1825, North Carolina created a fund for public education, the Literary Fund. D. Lawrence, *Fines, Penalties, and Forfeitures: An Historical and Comparative Analysis*, 65 N.C.L. Rev. 49, 52 (1986). The Fund failed because its "trustees and the general assembly believed it was appropriate to use Fund principal and income to support internal improvements and even to lend money to the State treasury." *Id*. at 53. During the Civil War, many counties diverted funds from education to war-related expenditures—leaving it with just $766 of income in 1866. *Id*. at 54. Against this background, North Carolina amended its Constitution in 1868 and 1875. The "intentions of the 1868 and 1875 drafters of section 7 are very relevant to a determination of the current meaning of the section." *Id*. at 52. Their intention was "to insulate funds principal and income from diversion to noneducational purposes." *Id*. at 55. Neither the General Assembly nor the Board of Education can use Article IX, § 7 funds for non-educational purposes.

This Court should affirm the Court of Appeals and hold Defendants' scheme violates Article IX, § 7(a)'s plain meaning, history, and intent.

B. The Board Receives Less than 90% of the Proceeds from Red Light Camera Citations and Pays Enforcement Costs. This Violates N.C.G.S. § 115C-437.

Defendants elaborate diversion of funds does not just violate Article IX, § 7(a) it also violates N.C.G.S. § 115C-437 by (1) deducting costs of enforcement and (2) deducting more than 10% of the amount collected.

N.C.G.S. § 115C-437 defines clear proceeds as "the full amount of all penalties, forfeitures or fines collected under authority conferred by the State, diminished only

by the actual costs of collection, not to exceed ten percent (10%) of the amount collected." This law imposes two limits: (1) a municipality may only deduct "the actual costs of collection" and (2) those costs cannot exceed 10% of the total amount collected. Defendants' scheme violates each limit.

Although N.C.G.S. § 115C-437 says the Board must receive at least 90% of the proceeds, the Board is left with 71.66% of the proceeds after paying its bills. Defendants do not dispute that, if deductions after the Board receives funds are accounted for, the Board receives less than 90% of the clear proceeds. Defendants instead argue the 90% requirement only applies to deductions *before* the Board receives funds. This narrows "clear proceeds" to the point of irrelevance. Every municipality that wants more money from its civil penalties would simply say to its Board of Education "you are only receiving the money from this program if you pay our costs, no matter how creatively we account for them, after we give you all of the money." Approving such a scheme would make N.C.G.S. § 115C-437 and Article IX, § 7(a) of no effect.[4]

Even if the Board retained 90% or more of the proceeds, N.C.G.S. § 115C-437 and Article IX, § 7(a) prevent the Board from paying a penny of Greenville's enforcement costs. N.C.G.S. § 115C-437 says Greenville can only deduct "the actual costs of collection." Because the General Assembly enacted this law after *Cauble*, the legislature is presumed to know that case's holding. *Cauble* distinguished collection

[4] The Pharisees impoverished the elderly by teaching that children could avoid their obligation to support their parents by giving funds to the temple instead. Diverting funds from parents to the temple made the command to honour your father and mother "of no effect." (Mark 7:9-13).

costs and enforcement costs. Collection costs are "limited to the administrative costs of collecting the funds" and "do not include the costs associated with enforcing the ordinance." *Cauble*, 314 N.C. at 606, 336 S.E.2d at 64. This means a municipality cannot deduct its law enforcement officers' salaries or the expenses of a private corporation enforcing the ordinance. *Shavitz,* 177 N.C. App. at 482, 630 S.E.2d at 12. Yet Defendants do both. The Board is paying Officer O'Callaghan's salary and paying American Traffic Solutions to operate red light cameras and prepare citations. These are enforcement costs and the Board cannot pay any of them no matter what percentage of revenue it receives. N.C.G.S. § 115C-437.

The Interlocal Agreement cannot circumvent the General Statutes or the Constitution. The General Assembly gave Defendants authority to "enter into an interlocal agreement" that "may include provisions on cost-sharing and reimbursement" for "the purpose of effectuating the provisions of [N.C.]G.S. 160A-300.1 and [S.L. 2016-64.]" N.C. Sess. Laws 2016-64. That enactment does not give either defendant authority to abrogate N.C.G.S. § 115C-437 or the Constitution. Defendants are creations of the legislature and have only those powers the General Assembly has delegated to them. An express delegation of power includes implied powers essential to exercising expressly delegated powers. The General Assembly did not expressly give Defendants the authority to give the Board less than 90% of the clear proceeds or to charge the Board enforcement costs, nor are these powers essential to entering into an interlocal agreement on red light cameras. The Board and Greenville could make an interlocal agreement where the Board and Greenville

agree to deduct up to 10% of the proceeds as collection costs without violating either Session Law 2016-64 or N.C.G.S. § 115C-437.

This Court should harmonize N.C.G.S. § 115C-437 and Session Law 2016-64. When this Court examines legislative intent, it construes statutes on the same subject together and harmonizes them "whenever possible." More specific statutes control only when multiple statutes cannot be reconciled. *E.g.*, *Nat'l Food Stores v. N.C. Bd. of Alcoholic Control*, 268 N.C. 624, 629, 151 S.E.2d 582, 586 (1966). If the Court can reconcile the statutes, it must. Defendants' argument that Session Law 2016-64 allows them to deduct enforcement costs and exceed the 10% cap on deductions brings Session Law 2016-64 and N.C.G.S. § 115C-437 into unnecessary conflict. A plain reading of the express words of those statutes does not suggest any conflict. This Court should enforce the plain meaning of Session Law 2016-64 and N.C.G.S. 115C-437.

Even if Defendants' overstatement of the presumption of constitutionality were correct, the presumption of constitutionality would harm Defendants, not help them. Fearrington and Malmrose seek to enforce N.C.G.S. § 115C-437 against Defendants. Defendants want to make the General Statutes of no effect. The problem is not what N.C.G.S. § 115C-437 or Session Law 2016-64 say; it is Defendants' scheme to evade them. N.C.G.S. § 115C-437 says the Board must retain at least 90% of civil penalty revenue and that the Board cannot pay enforcement costs. Defendants say otherwise. This Court should enforce the General Assembly's enactments and affirm the Court of Appeals' holding that Defendants' elaborate diversion of funds is unlawful.

C. Defendants' Deduction of Enforcement Costs from Clear Proceeds Violates *Shavitz* and *Cauble*.

Shavitz v. High Point directly addressed the issues here. The difference between that case and this—when the Board pays enforcement costs—is incidental.

High Point installed a red light camera system in 1999. *Shavitz,* 177 N.C. App. at 469, 630 S.E.2d at 8. High Point deducted the costs of its hearing officers' salaries and the private company preparing red light camera citations from the clear proceeds. *Id*. at 482, 630 S.E.2d. at 16. *Shavitz* said the argument that these costs could be deducted from the clear proceeds was "nonsensical as these costs clearly constitute enforcement costs rather than collection costs." *Id*. Because its local law was silent on clear proceeds, High Point argued that "the General Assembly did not intend for the ten percent formula of section 115C-437 to apply in determining the clear proceeds of red light camera penalties." *Id*. at 483, 630 S.E.2d at 16. *Shavitz* rejected this argument. High Point's local law did not create a new definition of clear proceeds, so High Point was bound by N.C.G.S. § 115C-437's definition.

Like High Point, Defendants argue they have an exception. Like High Point, Session Law 2016-64 does not redefine clear proceeds. Defendants are bound by N.C.G.S. § 115C-437's definition of clear proceeds. The only difference between this case and *Shavitz* is *when* the Board pays enforcement costs. High Point deducted the enforcement costs *before* it gave its board of education the proceeds. Greenville invoices the Board for its enforcement costs *after* giving the Board the proceeds. The effect is the same: a board of education paying a city's enforcement costs for a red

light camera program. This Court should affirm *Shavitz*, rely on *Cauble*, and hold that Defendants' scheme violates Article IX, § 7(a) and N.C.G.S. § 115C-437.

D. Policing for Profit Harms the Public.

Enforcing penal laws should protect and serve the public. Those tasked with enforcing the law should have no financial stake in how the law is enforced. Article IX, § 7(a) does not just protect public education funding. It also protects citizens from policing for profit.

This Court's "case law applying Article IX, Section 7 has developed over time in response to attempts by state and local governmental entities to circumvent the State constitutional requirement that proceeds from fines or penalties inure to the benefit of public schools." *New Hanover Cty. Bd. of Educ. v. Stein*, 374 N.C. 102, 126, 840 S.E.2d 194, 211 (2020) (Newby, J, dissenting). This case is just the latest scheme to circumvent Article IX. Past schemes have tried to redefine clear proceeds, to make agreements saying the fines or penalties are not actually being paid for violating the law, or to add deductions. Today's variation is getting the School Board to agree to pay enforcement costs. Calling the School Board's decision voluntary is euphemistic at best. Its choices were (1) pay American Traffic Solutions and Greenville and get some money or (2) not pay them and get nothing. Unsurprisingly, it chose to get some money rather than nothing.

Since this nation's founding, we have recognized that "[w]hen the same man, or set of men, holds both the sword and the purse, there is an end of liberty." George Mason, *Fairfax County Freeholders' Address and Instructions to Their General Assembly Delegates* (May 30, 1783), *in* Jeff Broadwater, George Mason: Forgotten

Founder 153 (2006). Allowing private corporations to enforce the law and keep part of the proceeds creates a "direct funding mechanism that is totally outside the legislative appropriations and oversight process" and incentivizes them to focus "more on getting money" than catching criminals." *Civil Asset Forfeiture: When Good Intentions Go Awry*: Hearing before the Mississippi Asset Forfeiture Transparency Task Force, Jul. 20 2016 (Statement of John Malcolm).

Defendants admit their financial motivation: "Without reimbursement from the School Board, the City has no incentive to spend the money to operate the red light camera program." Board of Education Br. p. 21. Unless someone else pays for it Greenville has *no incentive* to operate the red light camera program. Not public safety. Not stopping car accidents. Not preventing injuries. Not saving lives. No, Defendants say none of those reasons would motivate Greenville to pay for the red light camera program. Defendants say their only incentive is financial.

If, instead of giving American Traffic Solutions a part of the revenue it raises, Greenville had to pay for the red light camera program, then its only motivation for that program would be public safety. American Traffic Solutions' revenue depends on citations. (R p 36). It gets "$31.85 per paid violation," which amounts to nearly one-third of the cost of each $100 citation. (R p 36). That financial incentive violates our Constitution and harms the public by creating an incentive for corruption. Diverting revenue from public schools to a private corporation corrupts the entire process from the engineering of the red light camera program to the issuing of

citations to the administrative hearings issuing penalties for "fast yellow[s]." (R p 59).

Our Constitution protects citizens from precisely this sort of corruption by preventing the diversion of civil penalties from public education. Using those funds to financially benefit the corporation deciding whether to put the cameras, operating the cameras, and preparing the citations is an unlawful recipe for corruption that removes one of our Constitution's most significant public protections. This Court should reject that scheme and reaffirm that law enforcement is about public safety, not raising revenue.

II. Fearrington and Malmrose Received Citations for Alleged Red Light Camera Violations and Paid these Citations. They have Standing to Challenge Defendants' Red Light Camera Program.

As a last means of defending their unlawful diversion scheme, Defendants argue that Fearrington and Malmrose lack standing to challenge the red light camera program.

The standing analysis here is simple: Fearrington and Malmrose paid Greenville penalties and Defendants unlawfully misappropriated those funds. Without Defendants' scheme, Fearrington and Malmrose would not have been penalized. That scheme is a but-for cause of Fearrington and Malmrose each paying Defendants $100. Defendants took Fearrington and Malmrose's money and used it unlawfully. Fearrington and Malmrose have standing to challenge the unlawful use of money Defendants obtained from them.

Defendants employ a complicated standing analysis to avoid this simple reality. Their complicated argument contradicts precedent, the Rules of Civil Procedure, and their own earlier statements.

Our Constitution "guarantee[s] standing to sue" where a right "arising under the North Carolina Constitution has been infringed." *Comm. to Elect Forest v. Emps. PAC*, 2021 NCSC 6 ¶ 76. "Those who suffer harm" have standing. Harm may be purely legal; in those cases the legal injury itself gives rise to standing. Thus, the federal "injury-in-fact standard is inconsistent with the caselaw of this Court." *Id.* at ¶ 74.

Because of our Constitution's guarantee, taxpayers have broader standing in North Carolina than in federal courts. An "actual right of action" is "not necessary" for a taxpayer to seek declaratory relief. *N.C. Consumers Power, Inc. v. Duke Power Co.*, 285 N.C. 434, 450, 206 S.E.2d 178, 188 (1974). A taxpayer who alleges a municipality has exceeded its powers can sue to enjoin it "from transcending its lawful powers or violating any legal duty which will injuriously affect the taxpayer." *Id.*

Taxpayer standing includes the right to sue over "the alleged misuse or misappropriation of public funds." *Goldston v. State,* 361 N.C. 26, 33, 637 S.E.2d 876, 881 (2006). The *Goldston* Plaintiffs sued to enjoin transfers of public money from the North Carolina Highway Trust Fund to the general fund. *Id.* at 27. By the time the case reached this Court, the Plaintiffs had "abandoned" the portion of their claim seeking "to compel the return of the challenged assets to the Trust Fund." *Id.* at 34.

They only sought a "declaration by a court the defendants acted unlawfully without also seeking additional redress." Although the *Goldston* Plaintiffs were not seeking any affirmative relief, this Court still held they had standing. They paid the taxes that defendants were diverting. Fearrington and Malmrose suffered even more harm than the *Goldston* plaintiffs. They did not just pay taxes Defendants diverted,[5] they paid the penalties Defendants are unlawfully diverting.

Defendants misread *Goldston* in the same way the Court of Appeals misread *Mangum* in *Dan Forest*. The Court of Appeals in *Dan Forest* read *Mangum*'s statement that "one must have suffered some 'injury in fact' to have standing to sue" as imposing a constitutional injury in fact requirement in North Carolina. *Dan Forest*, ¶ 76. This Court rejected that reading, holding " 'harm' is a sufficient but not a necessary condition for 'standing.' " *Id*. Defendants read *Goldston*'s statement that a taxpayer can "restrain the unlawful use of public funds *to his injury*" to require injury in fact in taxpayer suits. (Greenville Br. p. 22). But Defendants do not explain why taxpayer suits should be treated any differently from other suits or how the taxpayers in *Goldston* suffered a different harm than Fearrington and Malmrose. And this Court has already held that the injury in fact "requirement has *no place* in the text or history of our state Constitution." *Dan Forest*, ¶ 73 (emphasis added).

Even before *Goldston* and *Dan Forest*, this Court recognized standing to challenge the misappropriation of civil penalties. In 1980, this court addressed a taxpayer's challenge to Asheville's diversion of funds it collected from parking

[5] Indeed, Malmrose was party to a pre-enforcement challenge to the red light camera program based on his standing as a taxpayer. (Pitt County 17 CVS 2411).

ordinances. *Cauble*, 301 N.C. at 342, 271 S.E.2d at 259. This Court addressed the merits of Cauble's claim without directly addressing standing. Greenville argues this Court cannot imply anything from this silence. But standing is a prerequisite to the Court's subject matter jurisdiction, so a court has a "duty" to take notice of a defect in standing and "dismiss the suit" at "any stage of the proceedings." *Burgess v. Gibbs*, 262 N.C. 462, 465, 137 S.E. 2d 806, 808 (1964). Indeed, the Court can take notice of a defect in standing even when the parties do not raise it. *See Union Grove Milling & Mfg. Co. v. Faw*, 109 N.C. App. 248, 251, 426 S.E.2d 476, 478, *aff'd per curiam*, 335 N.C. 165, 436 S.E.2d 131 (1993) (quoting *Reliance Ins. Co. v. Walker*, 33 N.C. App. 15, 234 S.E.2d 206, *disc. review denied*, 293 N.C. 159, 236 S.E.2d 704 (1977)); *see also Hedgepeth v. N.C. Div. of Servs. for the Blind*, 142 N.C. App. 338, 341, 543 S.E.2d 169, 171 (2001) ("[I]ssues pertaining to standing may be raised for the first time on appeal, including *sua sponte* by the Court."). In more than five years of litigation, neither the Superior Court nor the Court of Appeals nor this Court ever doubted that Cauble had standing.

Dan Forest, Goldston, and *Cauble* are clear: Fearrington and Malmrose have standing to sue over the misappropriation of penalties they paid. Defendants' only escape from these holdings is inserting a novel exhaustion of administrative remedies requirement. That requirement contradicts Greenville's own earlier statements to plaintiffs and the Superior Court, this Court's precedent, and the Rules of Civil Procedure. Agreeing with Defendants would require this Court to set aside an order

that is not part of this case and no party appealed. This Court should reject Defendants' novel arguments and novel remedies.

Exhaustion of administrative remedies is irrelevant when a plaintiff seeks a declaration that a law is unconstitutional. Administrative remedies presuppose the constitutionality of the law and the administrative process. That is why Defendants told Fearrington that a superior court hearing his case in certiorari "may not have jurisdiction over claims challenging the constitutionality of the entire program" so the "proper mechanism through which to present your two constitutional challenges to the Program is through a declaratory judgment action." (R pp 214-215). The administrative hearing derives its authority from the ordinance Fearrington and Malmrose challenge. If that ordinance is unlawful and thus void, then so is the administrative hearing. If Fearrington and Malmrose had miraculously convinced their hearing officers that the red light camera program was unconstitutional, Defendants would argue the hearing officers had no jurisdiction to declare their own proceedings unlawful. [6] Requiring plaintiffs challenging the legality of an administrative process to exhaust their administrative remedies is not just bad policy, it is illogical.

Not requiring exhaustion of administrative remedies follows this Court's holdings and the Court of Appeals holdings. This Court has held there is no

[6] This is a variation on Epimenides' paradox or the liar paradox. If a Cretan says, "all Cretans are liars," then he must be lying because he is a Cretan. If it is true that all Cretans are liars, and then the statement, "all Cretans are liars" is true then this Cretan is lying too. But if he is lying, his statement that "all Cretans are liars," is not true. Whatever way you turn the proposition, the conclusion is a contradiction.

requirement to exhaust administrative remedies when a plaintiff argues an agency adopted a rule exceeding its authority or a plaintiff raises a challenge under the United States Constitution. *Charlotte-Mecklenburg Hosp. Auth. v. N.C. Indus. Comm'n*, 336 N.C. 200, 211, 443 S.E.2d 716, 723 (1994); *Edward Valves, Inc. v. Wake Cty.*, 343 N.C. 426, 434-35, 471 S.E.2d 342, 347 (1996). The Court of Appeals has been more direct: "exhaustion of administrative remedies "is not required" when a plaintiff "challenges the constitutionality of a regulation or statute." *Shell Island Homeowners Ass'n v. Tomlinson*, 134 N.C. App. 217, 224, 517 S.E.2d 406, 412 (1999).

The Rules of Civil Procedure also expressly exempt declaratory judgment actions from the exhaustion requirement. Rule 57 says that "an adequate state remedy does not preclude a judgment for declaratory relief." That is why the Court of Appeals has held that direct constitutional claims are barred by the existence of administrative remedies. *E.g.*, *Structural Components Int. v. City of Charlotte*, 154 N.C. App. 119, 127, 573 S.E.2d 166, 172 (2002). *Structural Components* did not address a declaratory judgment action. Nor did the plaintiff in *Structural Components* petition for certiorari. Fearrington did petition for certiorari and brought a declaratory judgment action. Fearrington did not have to exhaust his administrative remedies before bringing a declaratory judgment action.

Defendants' arguments that Fearrington did not exhaust his administrative remedies are improper collateral attack on a final order they did not appeal. In Fearrington's certiorari appeal, the Superior Court entered a consent order

dismissing Fearrington's appeal. (Doc. Ex. p 1).[7] That order concluded that "Petitioner has fully exhausted his administrative remedies with the City of Greenville concerning his citation." (Doc. Ex. p 2). Defendants consented to that order. That order is not on appeal here, so the Court lacks jurisdiction to set it aside. *E.g.*, *Starnes v. Thompson,* 173 N.C. 466, 469, 92 S.E. 259, 260 (1917) ("If the court had jurisdiction of the subject-matter and the parties, it is altogether immaterial how grossly irregular or manifestly erroneous its proceedings may have been; its final order cannot be regarded as a nullity, and cannot, therefore, be collaterally impeached."); *In re McGee*, 217 N.C. App. 325, 328, 719 S.E.2d 222, 225 (2011). Indeed, no party appealed that order. Nor has any party asserted that the Superior Court lacked subject matter jurisdiction over Fearrington's administrative appeal. The order's unappealed conclusions are binding. *E.g.*, *In re J.M.W*, 179 N.C. App. 788, 795, 635 S.E.2d 916, 921 (2006) ("Because the order was not appealed, it is valid and binding in every respect."); *Daniels v. Montgomery Mut. Ins.,* 320 N.C. 669, 676, 360 S.E.2d 772, 777 (1987) ("an erroneous order may be remedied by appeal; it may not be attacked collaterally"). This Court should not take the extraordinary step of voiding an order no party appealed.

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[7] In a yet more novel argument, Greenville argues the order dismissing Fearrington's claim was not actually a final order. N.C.G.S. § 160D-1402(k) says a Superior Court reviewing an administrative decision on certiorari may affirm, reverse and remand with instructions, or remand the case for further proceedings. Greenville reasons that because the consent order "did none of these three things," it "could not constitute a final order[.]" But N.C.G.S. § 160D-1402(k) does not say those are a Superior Court's only options. The Rules of Civil Procedure still apply and give the Superior Court authority to dismiss, effectively affirming the administrative proceeding. An order dismissing a case is a final order.

This Court should reject Defendants' unnecessarily complex standing arguments, expressly reject Defendants' novel exhaustion of administrative remedies argument, and rely on *Dan Forest, Cauble, Goldston*, and the unappealed order dismissing Fearrington's certiorari appeal to hold that Fearrington and Malmrose have standing.

CONCLUSION

Diverting funds from public schools violates our Constitution, General Statutes, and this Court's precedents. When that diversion gives a private, for-profit corporation a financial stake in maximizing citations, it creates an incentive for corruption that harms the public. Fearrington and Malmrose each paid penalties they would have never paid but for Defendants' scheme to divert funds from public education. They have standing to challenge that scheme and this Court should affirm the Court of Appeals' holding that Defendants' scheme is unconstitutional.

Respectfully submitted,

7 August 2023

STAM LAW FIRM, PLLC

/s/ R. Daniel Gibson
R. Daniel Gibson
N.C. State Bar No. 49222

I certify that the lawyers below have authorized me to list their names on this document as if they had personally signed it.

/s/ Paul Stam
Paul Stam
N.C. State Bar No. 6865

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CERTIFICATE OF SERVICE

I certify that I served the attached **New Brief** on all parties by electronic mail addressed as follows:

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7 August 2023

/s/ R. Daniel Gibson
R. Daniel Gibson

APPENDICES

APPENDICES

NO. COA09-741 TENTH JUDICIAL DISTRICT

NORTH CAROLINA COURT OF APPEALS

* *

NORTH CAROLINA SCHOOL BOARDS ASSOCIATION; BUNCOMBE COUNTY BOARD OF EDUCATION; CHAPEL HILL-CARRBORO CITY BOARD OF EDUCATION; CHARLOTTE-MECKLENBURG SCHOOLS BOARD OF EDUCATION; CUMBERLAND COUNTY BOARD OF EDUCATION; DURHAM PUBLIC SCHOOLS BOARD OF EDUCATION; EDGECOMBE COUNTY BOARD OF EDUCATION; ELIZABETH CITY-PASQUOTANK BOARD OF EDUCATION; GUILFORD COUNTY BOARD OF EDUCATION; HALIFAX COUNTY BOARD OF EDUCATION; HENDERSON COUNTY BOARD OF EDUCATION; IREDELL-STATESVILLE SCHOOLS BOARD OF EDUCATION; JOHNSTON COUNTY BOARD OF EDUCATION; LENOIR COUNTY BOARD OF EDUCATION; NEW HANOVER COUNTY BOARD OF EDUCATION; ORANGE COUNTY BOARD OF EDUCATION; PITT COUNTY BOARD OF EDUCATION; ROBESON COUNTY BOARD OF EDUCATION; WAKE COUNTY BOARD OF EDUCATION; and WATAUGA COUNTY BOARD OF EDUCATION,

Plaintiffs,

v.

RICHARD H. MOORE, State Treasurer; ROBERT POWELL, State Controller; DAVID MCCOY, State Budget Officer; PHILLIP J. KIRK, JR., Chairman of the State Board of Education; MICHAEL E. WARD, State Superintendent of Public Instruction; ROY COOPER, Attorney General of North Carolina; E. NORRIS TOLSON, Secretary of the North Carolina Department of Revenue; LYNDO TIPPETT, Secretary of the North Carolina Department of Transportation; CAROL HOWARD, North Carolina Commissioner of Motor Vehicles; MOLLY CORBETT BROAD, President

FROM WAKE COUNTY
FILE NO. 98 CVS 14158

of the University of North Carolina; JAMES MOESER, Chancellor of the University of North Carolina at Chapel Hill; MARYE ANN FOX, Chancellor of North Carolina State University at Raleigh; WILLIAM G. ROSS, Jr., Secretary of the North Carolina Department of Environment and Natural Resources; JIM FAIN, Secretary of the North Carolina Department of Commerce; CARMEN HOOKER BUELL, Secretary of the North Carolina Department of Health and Human Services; L. THOMAS LUNSFORD, II, Executive Director of the North Carolina State Bar; RAYMOND W. GOODMAN, JR. Chairman of the North Carolina Employment Security Commission; SANDRA O'BRIEN, Executive Secretary of the North Carolina Board of Examiners of Plumbing, Heating, and Fire Sprinkler Contractors; ROBERT L. BROOKS, JR., Director of the North Carolina Board of Examiners of Electrical Contractors; DOUGLAS H. VAN ESSEN, Executive Director of the North Carolina Board of Cosmetic Art Examiners; each of whom is sued in his or her official capacity only,

Defendants.

* *

PLAINTIFFS-APPELLANTS' BRIEF

* *

INDEX

Lulla v. Effective Minds, LLC, 184 N.C. App. 274, 646 S.E.2d 129, 133 (2007); *Davis v. Dept. of Crime Control & Public Safety*, 151 N.C. App. 513, 516, 565 S.E.2d 716, 719 (N.C. App. 2002). *De novo* review is appropriate for questions of constitutional interpretation. *State v. Maynard*, __ N.C. App. __, 673 S.E.2d 877, 878 (2009).

The $18 million in parking and traffic fines collected and set aside by the defendant universities during this litigation are constitutionally appropriated to the county school districts, and Defendants cannot constitutionally expend them for any other purpose. Because these funds are reserved by the North Carolina Constitution for the public schools, a court order returning the funds to their rightful owners is within the constitutional authority of the judicial branch. Furthermore, even if the funds were subject to the legislature's spending authority, by statute they are already appropriated. Therefore, the legislature's constitutional authority over appropriations should not be implicated by a court order directing Defendants to transfer the money to the Civil Fines and Forfeitures Fund.

A. The Funds are Constitutionally Appropriated to the County School Districts and Cannot Be Diverted for Any Other Purpose

Article IX, Section 7 of the North Carolina Constitution

requires that "the clear proceeds of all penalties and forfeitures and of all fines collected in the several counties for any breach of the penal laws of the State" belong to the several counties to be used "exclusively for maintaining free public schools."[1] From time to time the judicial branch has been called upon to enforce this constitutional mandate against encroachment by the legislature, executive agencies, counties and municipalities. *See Bd. of Educ. of Vance Co. v. Town of Henderson*, 126 N.C. 689, 36 S.E. 158 (1900) (invalidating legislation directing fines for violation of municipal ordinances to municipal treasuries); *Bd. of School Directors for Buncombe Co. v. City of Asheville*, 128 N.C. 249, 38 S.E. 874 (1901) (criminal fines collected by city belong to the county school board); *Bd. of School Directors for Buncombe Co. v. City of Asheville*, 137 N.C. 503, 50 S.E. 279 (1905) (legislature may not appropriate criminal fines to purpose other than school board); *Cauble v. City of Asheville*, 301 N.C. 340, 271 S.E.2d 258 (1980) (city ordered to remit collected parking fines to board of education); *Craven Co. Bd. of Educ. v. Boyles*, 343 N.C. 87, 468 S.E.2d 50 (1996) (civil penalty paid by accused polluter to Department of Environment, Health, and Natural Resources and by DEHNR to the State General Fund belonged to the board of

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1 A similar provision was found in the Constitution of 1868 at Article 9, Sec. 5. See, e.g., *Bd. of Educ. of Vance County v. Town of Henderson*, 126 N.C. 689, 36 S.E. 158 (1900).

education); *Donoho v. City of Asheville*, 153 N.C.App. 110, 569 S.E.2d 19 (2002), *disc. rev. denied* 576 S.E.2d 107, 356 N.C. 669, 576 S.E.2d 110 (citizen successfully sought to enjoin consortium of counties from depositing fines collected for violations of clean air ordinances in clean air fund rather than remitting to schools); *Shavitz v. City of High Point*, 177 N.C.App. 465, 630 S.E.2d 4 (2006), *disc. rev. denied* 361 N.C. 430, 648 S.E.2d 845 (city ordered to pay proceeds of red light camera fines to board of education).

In filing the current action in 1998, the plaintiff school boards sought judicial intervention to enforce Art. IX, Sec. 7 with respect to numerous civil fines and penalties collected by a variety of state agencies. In response, the North Carolina Supreme Court declared that almost every category of penalties or fines challenged were reserved for the public schools by the North Carolina Constitution. *See N.C. School Boards Ass'n v. Moore*, 359 N.C. 474, 614 S.E.2d 504 (2005). With regard to the defendant universities, the Court held that fines collected for violations of campus traffic and parking ordinances are civil penalties "and they belong to the public schools under Article IX, Section 7." *Id.* at 497, 614 S.E.2d at 518.

Thus it is clearly established that any fines, penalties or forfeitures subject to Art. IX, Sec. 7 are appropriated by the North Carolina Constitution exclusively for the public schools. The

Constitution prevents Defendants from diverting the funds to any purpose other than the State's public schools. *See, e.g., Bd. of Educ. of Vance Co. v. Town of Henderson*, 126 N.C. 689, 692, 36 S.E.2d 158, 159 (1900) ("It must therefore follow that all the fines the defendant has collected . . . belong to the common-school fund of the county. It is thus appropriated by the constitution, and it cannot be diverted or withheld from this fund without violating the constitution."). There is also no question that the traffic, parking, and registration fines collected by the various campuses of the University of North Carolina and set aside during the pendency of this litigation are subject to Art. IX, Sec. 7. By refusing to pay these funds to the Civil Fines & Forfeitures Fund, the defendant universities are in continuing violation of the Trial Court's order, the North Carolina Supreme Court's decision in this case, and the North Carolina Constitution. R. pp. 135-147.

B. The Separation of Powers Doctrine is Not Implicated Where the Funds Sought by Plaintiffs are Appropriated by the Constitution and Therefore Not Subject to the Legislature's Authority over Appropriations

Defendants-Appellees have argued that once these penalties were collected by the universities, they "became state funds subject to the control of the legislature as well as the accounting and disbursement policies of the State Treasurer and the Office of State Budget and Management." R. p. 176. Therefore, the argument went, these funds are beyond the reach of the judiciary, because

state funds cannot be disbursed from the treasury except by appropriation. R. p. 174. Plaintiffs-Appellants submit that this characterization is simply incorrect. The case law is clear: civil penalties subject to Art. IX, Sec. 7 are not "state funds." They are reserved for the public schools of the several counties by the state constitution, and neither the legislature nor the university system may constitutionally appropriate or expend them for any other purpose. *See, e.g., Bd. of Educ. of Vance Co. v. Town of Henderson*, 126 N.C. 689, 692-94, 36 S.E.2d 158, 159 (1900); *see also Craven Co. Bd. of Educ. v. Boyles*, 343 N.C. 87, 91, 468 S.E.2d 50, 53 (1996) (affirming order that fine be paid over to county school board notwithstanding that the funds had been paid into the state treasury by the defendant agency upon receipt). Where the funds are appropriated by the Constitution, the Separation of Powers doctrine does not prevent the judiciary from recovering them for their rightful recipient; in doing so, the courts do not reach into the legislature's sphere of authority.

The North Carolina Constitution sets forth a clear separation between the three branches of government in Article I, Sec. 6: "The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." With regard to the separation between the judicial and legislative branches, the North Carolina Supreme Court has stated:

> The courts have absolutely no authority to control or supervise the power vested by the Constitution in the General Assembly as a co-ordinate branch of the government. They do not assume to direct the course of legislation or to share in the making of the laws or to exercise any power to repeal a statute. . . . it is only when the Legislature transcends the bounds prescribed by the Constitution . . . that the courts may say, "Hitherto thou shalt come, but no further."

Person v. Board of State Tax Com'rs et al., 184 N.C. 499, 503, 115 S.E.2d 336, 340 (1922).

The Legislature's constitutional sphere of authority includes the exclusive power to appropriate funds from the State treasury. N.C. CONST. Art. V, Sec. 7 ("No money shall be drawn from the State treasury but in consequence of appropriations made by law . . . "). North Carolina's courts have long held that the courts have the power to declare a plaintiff's rights as against the State, but may not by exercise of judicial authority compel the legislature to appropriate funds from the state treasury to pay a particular judgment or debt. *See, e.g., State v. Davis*, 270 N.C. 1, 13, 153 S.E.2d 749, 757-58, *cert. denied,* 389 U.S. 828, 19 L. Ed. 2d 84 (1967) (Separation of Powers Clause prohibited judge from ordering the State to pay Plaintiffs' fees from a specific state fund, where the enabling legislation for the fund did not contemplate such payment).

In this case, the defendant agencies represented to the Trial Court that the civil penalties at issue had long since been spent on various agency activities. R. pp. 10-23. The Trial Court

reasoned that any recovery for the plaintiffs would necessarily come from the State's General Fund. Because the state constitution reserves for the legislature the exclusive power to appropriate funds from the General Fund, the Trial Court concluded that it had no authority to compel such appropriation. R. pp. 144; *see also Smith v. State,* 289 N.C. 303, 320, 222 S.E.2d 412, 424 (1976) (while plaintiff could bring breach of contract claim against the State, he could not "obtain execution to enforce the judgment" because "[s]atisfaction will depend upon the manner in which the General Assembly discharges its constitutional duties").

Plaintiffs did not challenge the Trial Court's conclusion on this point, nor do they now challenge the General Assembly's exclusive authority to appropriate funds from the General Fund. Plaintiffs are not seeking a general judgment against the State, to be enforced through attachment or liens on state property, nor are Plaintiffs seeking the courts' help in compelling the disbursement of funds from the State Treasury. Rather, Plaintiffs are seeking to compel the return of funds which are already appropriated by the Constitution for benefit of Plaintiffs, and therefore are outside the legislature's constitutional sphere of authority.

The case law interpreting Article IX, Sec. 7, and its predecessor clearly demonstrates that the legislative power of the purse does not extend to include the power to appropriate or direct the use of the fines, penalties or forfeitures reserved by the

Constitution for the public schools. Since the adoption of the 1868 Constitution, containing the predecessor to today's Art. IX, Sec. 7, the state's appellate courts consistently have invalidated legislative attempts to appropriate these funds for any other purpose. *See Bd. of Educ. of Vance Co. v. Town of Henderson*, 126 N.C. 689, 693-94, 36 S.E. 158, 159 (1900) (1899 statute appropriating fines for violation of municipal ordinances to the municipal treasuries exceeded the legislature's constitutional authority); *see also Bd. of School Directors for Buncombe Co. v. City of Asheville*, 128 N.C. 249, 38 S.E. 874 (1901) (criminal fines collected by city belong to the county school board, notwithstanding attempt to appropriate them to the municipality); *State v. Maultsby*, 139 N.C. 583, 51 S.E. 956 (1905) (invalidating statute remitting portion of criminal fines to citizen informants because "the General Assembly cannot appropriate the clear proceeds of fines to any other purpose than the school fund"); *Bd. of School Directors for Buncombe Co. v. City of Asheville*, 137 N.C. 503, 50 S.E. 279 (1905) (legislature may not appropriate criminal fines to private citizens or municipalities). In the same fashion, the North Carolina Supreme Court in the instant case invalidated the portion of N.C.G.S. § 116-44.4(m) directing the universities to place the penalties collected for traffic and parking violations into institutional trust funds. *N.C. School Boards Ass'n v. Moore*,

359 N.C. 474, 496, 614 S.E.2d 504, 518 (2005). In all of these cases, the courts declared that the legislative power of the purse does not extend to the power to appropriate or direct the use of the fines, penalties or forfeitures reserved by the Constitution for the public schools.

More recently, the Craven County Board of Education successfully recovered a civil penalty under Art. IX, Sec. 7, even though the funds had been deposited in the state's General Fund. In *Craven County Bd. of Educ. v. Boyles,* 343 N.C. 87, 468 S.E.2d 50 (1996), the Board of Education brought a declaratory action seeking the clear proceeds of $926,000 paid by the Weyerhauser Corporation to the N.C. Department of Environment, Health and Natural Resources (DEHNR) in settlement of a fine assessed by DEHNR for environmental violations. *Id.* at 88, 468 S.E.2d at 51. Upon receipt of the settlement funds, DEHNR subtracted its costs of investigating the violations and paid the remainder into the State General Fund. The Board of Education made a demand on the State Treasurer, and eventually instituted a declaratory action under Art. IX, Sect. 7 of the North Carolina Constitution. *Id.* at 89, 468 S.E.2d 51. The Trial Court granted summary judgment to the plaintiff school board and held that "the defendant State Treasurer or any other officer having custody of the clear proceeds . . . is required to remit such funds to the finance officer of the Craven County Schools, and that defendant State Treasurer or any other defendant having

custody or control of such funds is ORDERED to pay those monies to the finance officer of the Craven County Schools." Order Allowing Summary Judgment for Plaintiff, *Craven Co. Bd. of Educ. v. Boyles et al.*, 93 CV 07810 (Wake County Superior Court, March 6, 1995) (attached as Exhibit A). The North Carolina Supreme Court affirmed the Trial Court's order in its entirety. *Boyles* at 92, 468 S.E.2d at 53.

By the time the North Carolina Supreme Court issued its opinion in *Craven County*, five years had passed since the settlement funds had been deposited in the General Fund. However, the separation of powers limitation raised in prior cases involving judgements against the State was not at issue, because no action by the General Assembly was necessary to satisfy the judgment for the Board. Like Plaintiffs-Appellants in this case, the Craven County Board sought return of specific property, not a general judgment against the State.

C. Even If these Civil Penalties are Considered State Funds, No Legislative Appropriation is Necessary to Remit Them to the Public Schools

As outlined above, Plaintiffs believe that these funds are not State funds at all and therefore the details of where and how they are being held are irrelevant to whether the Court can order the relief sought. Nevertheless, Plaintiffs note that even if these funds are somehow subject to legislative or agency authority, by the Defendant Universities' own admission they are already

appropriated and can be disbursed by the institutions without further legislative action. The Universities have represented that these funds are being held as "agency funds" under N.C.G.S. § 116-36.2, a statutory provision that describes "special funds" of UNC institutions. R. p. 175, T. pp. 5-6, 8. It is not clear to Plaintiffs how these civil penalties can be designated special funds, since the statute defines "special funds" as "(1) Moneys received from or for the operation by an institution of its program of intercollegiate athletics; [or] (2) Moneys held by an institution as fiscal agent for individual students, faculty, staff members, and organizations." N.C.G.S. § 116-36.2 (2008). Nevertheless, if Defendants deem these funds to be "special funds," then by statute they "are appropriated" and can be used by the institutions. N.C.G.S. § 116-36.2(a) ("The special funds of individual institutions regulated by this section are appropriated and may be used only as authorized by this section.") Since the funds are already appropriated, the legislature's constitutional authority over the State Treasury should not be implicated. *See White v. Worth*, 126 N.C. 570, , 36 S.E. 132, (1900) (in suit by state officer for unpaid salary, court granted writ of mandamus ordering state treasurer to pay out his salary, where the funds for that office had been legislatively appropriated and were in the hands of the treasurer).

Tharrington Smith, LLP, is "highly qualified for this matter" and its hourly rates "reasonable in comparison with the rates charged by other lawyers in the community with the same level of experience and expertise." R. pp. 83-84. Plaintiff's counsel is not seeking a windfall, but simply to spread the considerable cost of this litigation across the numerous beneficiaries who were not parties to the original suit.

CONCLUSION

For the reasons stated above, Plaintiffs-Appellants respectfully request that this Court reverse the Trial Court's order denying their Motion for Appropriate Relief and Motion for Attorneys' Fees and direct that court to enter an appropriate order requiring the defendant universities to remit the funds in question to the Civil Penalties and Forfeitures Fund and award Plaintiffs-Appellants' reasonable attorneys' fees out of the funds recovered.

RESPECTFULLY SUBMITTED, this 28th day of August, 2009.

THARRINGTON SMITH, L.L.P.

Eva B. DuBuisson
N.C. State Bar No. 36729

Eric Fearrington
Administrative Hearing
Sheppard Memorial Library
530 Evans Street
Greenville, NC 27858

RE: Citation # 4871800078560; PIN - 8306

Issue #1

The Red Light Safety Camera Program, in its operational effects, violates Article I, Sections 1, 19, 35 and 36 of the North Carolina Constitution by creating an offense for which a penalty may be assessed based upon a flawed application of the ITE Yellow Change Interval Formula.

The NCDOT engineers' misapplication of the ITE Yellow Change Interval formal contravenes the immutable laws of physics and results in a shortened yellow light. The shortened yellow light creates "dilemma zone," in which all drivers are subjected to innocently and inevitably running a red light. Exhibit A provides a fuller explanation of this problem.

[ADD 2-3 SENTENCES ABOUT THE FACTS OF YOUR CITATION]

Issue #2 yellow light seemed to be very quick in left turn lane Tried to avoid pothole in intersection

The implementation of Greenville's Red Light Camera Safety Program through Session Law 2016-64, Greenville City Code § 10-2-281 *et seq.*, the resolutions, the Interlocal Agreement, and the Agreement for Management violates Article IX, Section 7 of the North Carolina and its enacting statute, N.C. Gen. Stat. § 155C-147. The Constitution and Enacting Statute require that ninety percent of the clear proceeds of fines, forfeitures, and penalties go to the free public schools. *See Shavitz v. City of High Point*, 177 N.C. App. 465, 630 S.E.2d 4 (2006); N.C Gen. Stat. § 115C-147.

Under the current implementation of the Program, the Pitt County Board of Education receives approximately sixty-four percent (64%) of the civil penalty assessments.

I, Eric Fearrington, request that this document be placed in the Record of the Proceedings of this Administrative Hearing.

Eric Fearrington

Respect The Red

City of Greenville, NC

Greenville NORTH CAROLINA POLICE DEPARTMENT

To Whom It May Concern,

Please be advised that following this hearing, you have fully exhausted your administrative remedies with the City of Greenville concerning your citation. Should you desire to appeal this matter further, you will be required to file a Petition for Writ of Certiorari before the Pitt County Superior Court located at 100W. 3rd St. Greenville NC 27834. .

I have been given or signed the following paper work.

1. Instructions on filing an appeal of the administrative decision to Pitt County Superior court in accordance with North Carolina General Statute § 160A-393(e)
2. The Court Cost and Fees Chart for the filing of civil actions. This is from the NC Administrative Office of the Courts web-site.
3. Was offered the option of signing the Hearing Disposition form. By signing this form, I acknowledge that I understand the findings of the Administrative hearing.
4. I completed an Affidavit of Non-Responsibility form. No Notary was present.
   a. Yes _____
   b. No ✓

If you require additional assistance with the filing/petition processes please seek legal counsel.

By signing this document you acknowledge that you have been provided the statutes and filing instructions for Pitt County Superior Court.

Acknowledged: _____ Date: 10-16-18

THE TRADE UNION PRESS POST OFFICE BOX 663, AYDEN, NORTH CAROLINA 28513 TELEPHONE: 252 746 2900

TRADE UNION PRESS

City of Greenville, NC
c/o Red Light Camera Safety Program
500 S. Greene St.
Greenville, NC 27834

December 4, 2018

To whom it may concern:

By way of this letter, I'm writing under protest to request an administrative hearing in regard to the traffic citation I received on November 28. This document bears the title: "FAILURE TO COMPLY — SECOND NOTICE OF VIOLATION". The reasons for my request are listed below:

1) I *never received* the first citation that was claimed to have been sent. As an ordinary citizen, I'm not responsible for the delivery of U.S. Mail, and have no control over its transit, destination or receipt. (Please note that a copy of the second, and only citation is attached.)

2) The late fee that was added is a violation of state law. GS 160A-300.1 (3) only allows a maximum penalty of $100.00. That includes the late penalty. Session Law 2016-64 does not change this fact.

3) The duration of the yellow lights at the named intersection have been tested and timed by a qualified engineer. Based upon his findings, the yellow left turn arrow is 2.4 seconds too short. NCDOT standards require that when parallel phases come to an end, they must end at the same time. At this intersection, the left turn phase does not end at the same time as the straight, yellow ball phase.

4) GS 160A-300.1 (3) states the following: *The owner of the vehicle shall be issued a citation which shall clearly state the manner in which the violation may be challenged, and the owner shall comply with the directions on the citation.* The citation (attached) contains no language indicating the manner in which the violation may be challenged. This omission both limits and hinders my right to due process.

5) Please see the attached supporting documents from NC Board of Examiners for Engineers and Surveyors and Talus Software.

Based upon the items cited above, I'm requesting an administrative hearing to contest the city's claim that I've committed a violation.

Sincerely yours,

Craig D. Malmrose, Owner
Trade Union Press
Professor, East Carolina University

PLAINTIFF'S EXHIBIT
Page 1 of 7
PENGAD 800-631-6989

NORTH CAROLINA

WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
18-CVS-9970

MARY SUE VAITOVAS,

Plaintiff,

v.

CITY OF GREENVILLE; PITT COUNTY BOARD OF EDUCATION; JOSH STEIN, in his capacity as Attorney General of the State of North Carolina; PHIL BERGER, in his capacity as President Pro Tempore of the Senate; and TIM MOORE, in his capacity as Speaker of the House of Representatives,

Defendants.

AFFIDAVIT OF ANN E. WALL IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

ANN E. WALL, being duly sworn, deposes and says:

1. I am over eighteen years of age and suffer from no known disability. I am competent to testify to the facts sworn to in this Affidavit.

2. The statements in this Affidavit are made based upon my personal knowledge, voluntarily and of my own free will.

3. I am a resident of Pitt County, North Carolina.

4. I am employed by the City of Greenville (the "City") as the City Manager.

5. My responsibilities include overseeing all business of the City, allocating resources, developing a budget, managing agreements entered into by the City, and implementing the policies of the City Council.

6. The City Council decided that it wished to implement a Red Light Camera Enforcement Program at certain intersections.

16. As provided in Sections 2.1 and 2.2 of the ATS Contract, all costs associated with procuring, installing, and maintaining the Red Light Camera Enforcement Program camera facilities are borne completely by ATS.

17. In accordance with Section 2.4 of the ATS Contract, civil penalties from the Red Light Camera Enforcement Program are collected by ATS and deposited weekly into a City bank account setup by the City for collecting such revenues. ATS does not deduct or reduce any amounts from the civil penalties received from violators of the Red Light Camera Enforcement Program prior to depositing such amounts. Instead, 100% of every $100.00 fine collected by ATS is deposited into the City's bank account on a weekly basis.

18. Once the funds from the civil penalties are received by the City, the full amount of the civil penalties received is then deposited by the City into the Board's account in accordance with Section 3 of the Interlocal Agreement. Although the City is authorized under the Interlocal Agreement to deduct up to 10% of each $100.00 fine collected for the costs associated with the production and mailing of notices to the vehicle owners responsible for the violations, the City does not currently deduct such amounts and has not previously deducted such amounts. As a result, 100% of every $100.00 civil penalty deposited into the City's bank account by ATS is deposited into the Board's bank account by the City.

19. Civil penalties are also occasionally paid directly to the City by violators who make the payments in person. The City communicates to ATS when civil penalties are paid this way and transmits such payments to the Board free of deductions.

20. After the funds received from ATS are deposited by the City into the Board's bank account, ATS sends the City an invoice for services rendered for the previous month in accordance with Article 12 of the ATS Contract. An example of an ATS invoice to the City is attached hereto as Exhibit E.

21. In accordance with Article 12 of the ATS Contract, ATS invoices the City in the amount of $31.85 for every $100.00 civil penalty collected. Although Article 12 of the ATS Contract authorizes ATS to invoice the City for other items (e.g., recovered revenue for late payments or additional notices), ATS does not currently invoice the City for such items and has not previously invoiced the City for such items.

22. After receiving the ATS invoices, the City then prepares and sends invoices to the Board for the actual amount shown on the ATS invoices received by the City each month ($31.85 for every $100.00 civil penalty collected) in accordance with Section 4(a) of the Interlocal Agreement. An example of a City invoice to the Board for the actual amount shown on the ATS invoices received by the City each month is attached hereto as Exhibit F.

23. The City also invoices the Board $6,250.00 every month for the salary and benefits of the City police officer serving as the manager of the Red Light Camera Enforcement Program in accordance with Section 4(b) of the Interlocal Agreement. An example of a City invoice to the Board for the salary and benefits of the City police officer serving as the manager of the Red Light Camera Enforcement Program is attached hereto as Exhibit G.

24. Finally, the City processes and pays all invoices received from ATS in accordance with the ATS Contract.

NORTH CAROLINA

PITT COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
19 CVS 1217

ERIC STEVEN FEARRINGTON,
CRAIG D. MALMROSE,

Plaintiffs

v.

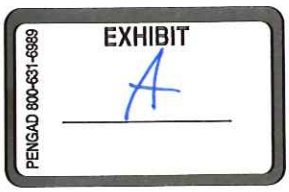
CITY OF GREENVILLE; PITT COUNTY BOARD OF EDUCATION;

Defendants

AFFIDAVIT OF CRAIG MALMROSE

I, Craig Malmrose, first being duly sworn, depose and say,

1. I am a plaintiff in this action. I am over 18 and of sound mind. This affidavit is made on my personal knowledge.
2. I am a citizen, resident, and taxpayer of Pitt County, North Carolina. I pay property tax, state and local sales tax, and state income tax.
3. I own a vehicle that I regularly drive in Pitt County and Greenville. My vehicle is registered in Pitt County. While driving that vehicle, I received a citation from Defendants.
4. I have read the Complaint and know its contents. The allegations of the Complaint are true of my own knowledge, except the allegations stated upon information and belief (which I believe to be true) and the allegations in paragraphs 19 to 21 of the Complaint (which relate solely to Eric Steven Fearrington).



5. On Tuesday 19 February 2019, I appeared before the City of Greenville's Red-Light Camera Hearings Panel.
6. Before the Hearing, I submitted the documents attached as **Exhibit A** to this complaint to Officer O'Callaghan with the Greenville Police Department as a defense to my alleged red light violation.
7. Upon entering the hearing room, I was met by Officer O'Callaghan and Dallas Clark. When I sat down, I turned my iPhone to the "record" setting and placed it on the table. My partial recording of the hearing is as follows:

> Dallas Clark: What is your position on whether the light was red when you entered the intersection since you've looked at it? Was it red or not when you entered?
>
> Craig Malmrose: It's so hard to tell because of the grainy black-and-white video.
>
> Dallas Clark: Okay.
>
> Craig Malmrose: (unintelligible)
>
> Officer O'Callaghan: Is your phone recording?
>
> Craig Malmrose: Yes it is.
>
> Officer O'Callaghan: Turn it off. Turn it off.
>
> Craig Malmrose: There's a General Statute…
>
> Officer O'Callaghan: No m'am, no sir, in these (sic) recordings. I don't record them. We don't record them. Turn your phone off or you will (unintelligible)."

The final words of the recording are unintelligible because, as Officer O'Callaghan spoke them, he grabbed my phone and took it away from me so he could stop the recording himself.

8. Despite feeling illegally threatened, I complied with Officer O'Callaghan's orders. Officer O'Callaghan went on to say that these were the instructions he was given by Greenville's city attorney.
9. At the Hearing, I presented the same evidence I had submitted to officer O'Callaghan on December 7, 2018. That included documents from licensed engineer, Brian Ceccarelli. O'Callaghan strongly disagreed with what I had presented and said the traffic lights in Greenville had been timed correctly by a city engineer.
10. I also presented a letter from the NC Board of Examiners for Engineers and Surveyors which indicates ATS is practicing engineering in North Carolina without a license. Mr. Clark indicated the letter is dubious and has no legal bearing until the claims are heard and ruled upon by a judge in a court of law.
11. The hearing officers decided that I was liable. Greenville's Notice of Determination stated "reason: fast yellow." Greenville's Notice of Determination imposed a $200 fine upon me.

This is the ____ day of September 2019.

NORTH CAROLINA

PITT COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
19 CVS 1217

ERIC STEVEN FEARRINGTON,
CRAIG D. MALMROSE,

Plaintiffs

v.

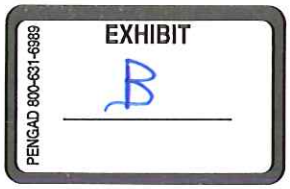
CITY OF GREENVILLE; PITT COUNTY BOARD OF EDUCATION;

Defendants

AFFIDAVIT OF ERIC FEARRINGTON

I, Eric Fearrington, first being duly sworn, depose and say,

1. I am a plaintiff in this action. I am over 18 and of sound mind. This affidavit is made on my personal knowledge.
2. I am a citizen, resident, and taxpayer of Pitt County, North Carolina. I pay property tax and state and local sales tax.
3. I own a vehicle that I regularly drive in Pitt County and Greenville. My vehicle is registered in Pitt County. While driving that vehicle, I received a citation from Defendant City of Greenville.
4. I have read the Complaint and know its contents. The allegations of the Complaint are true of my own knowledge, except the allegations stated upon information and belief (which I believe to be true) and the allegations in paragraphs 23 to 27 of the Complaint (which relate solely to Craig Malmrose). Exhibits G, H, and I of the Complaint are true and accurate copies of my citation,



the documents I submitted at my hearing, and my hearing notice of determination.

5. On Tuesday 16 October 2019, I appeared before the City of Greenville's Red-Light Camera Hearing Panel.

6. At the Hearing, I presented the documents attached as Exhibit H to the Complaint. I argued that I was not liable because of the timing of the traffic light, the yellow light was too fast, and I was trying to avoid a large pothole in the intersection.

7. Despite the documentation and arguments I presented at the hearing, Defendant Greenville found me liable. Greenville's Notice of Determination (complaint Exhibit I) stated "reason: no defense."

8. I filed a petition for writ of certiorari in 18 CVS 3149. As part of a consent order dismissing that case, the Court concluded and the parties stipulated that "a declaratory judgment action" is "the most efficient means for Petitioner to present his as-applied challenged to the Red Light Camera Safety Program."

This the 18th day of September 2019.

Eric Steven Fearrington

Pitt County, North Carolina

Sworn to and subscribed before me this day by Eric Steven Fearrington

Date: September 18, 2019

(Seal)

SUSAN L ELLSWORTH NOTARY PUBLIC PITT COUNTY, NC

Notary Public

Susan L Ellsworth
Notary Public Printed Name

My Commission Expires: May 20, 2023

I, Andrew L. Ritter, Executive Director of the North Carolina Board of Examiners for Engineers and Surveyors, certify as custodian of the records of the Board that this document is a true and correct copy of the official record kept in the regular course of business, this the 20th day of August, 2019.

Andrew L. Ritter

NORTH CAROLINA

WAKE COUNTY

NORTH CAROLINA BOARD OF EXAMINERS
FOR ENGINEERS AND SURVEYORS

IN THE MATTER OF:

Robert F. Rennebaum, PE
License No. 034779

DECISION AND ORDER
Case No. V2018-092

Pursuant to the provisions of G. S. 150B and Chapter 89C-21 of the North Carolina General Statutes, and sections .1402 and .1403, Title 21, Chapter 56 of the North Carolina Administrative Code by NOTICE OF CONTEMPLATED BOARD ACTION dated April 17, 2019, you were notified that the Board had sufficient evidence which supports a charge of gross negligence, incompetence, or misconduct. You were further advised that unless a request for hearing or settlement conference to rebut the charges was made by Certified Mail within twenty (20) days of receipt of notice, the Board would be justified in taking disciplinary action.

The general nature of the evidence on which the Board based its action was as follows:

> That on Novemer 28, 2018, the Board authorized an investigative case and the resulting investigation determined that Robert F. Rennebaum, PE:
>
> > affixed seal to work not done under direct supervisory control (responsible charge) [.0701(c)(3)]; aided or abetted another to evade or attempt to evade the provisions of G. S. 89C [G. S. 89C-16]; and failed to comply with the Standard Certification Requirements [.1103] by not including date of signing [.1103(a)(4)], failing to include address on documents [.1103(a)(6)], and failing to include firm license number on documents [.1103(a)(6)].

Since twenty (20) days have elapsed since receipt of the Board Notice by you on April 22, 2019 the Board by its Decision and Order, hereby issues Robert F.Rennebaum, PE, a Reprimand, Levy a Civil Penalty of five thousand dollars ($5,000.00) to be paid

within thirty (30) days of this Decision and Order, and Require Proof, *within six months of date of Decision and Order*, of passing the Engineering Ethics Intermediate Course offered by the Murdough Center of Texas Tech University.

Failure to comply with the Decision and Order will result in suspension of the Certificate of Licensure, immediately as of the date of the failure to comply and violation of the Decision and Order, and continuing until compliance is shown. Course hours do not count toward annual mandatory CPC requirements.

The Board's decision is now final and not subject to appeal.

This 28th day of May, 2019.

NORTH CAROLINA BOARD OF EXAMINERS
FOR ENGINEERS AND SURVEYORS

By: _____
Andrew L. Ritter
Executive Director

NORTH CAROLINA

PITT COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
19 CVS 1217

ERIC STEVEN FEARRINGTON,
CRAIG D. MALMROSE,

Plaintiffs

v.

CITY OF GREENVILLE; PITT COUNTY BOARD OF EDUCATION;

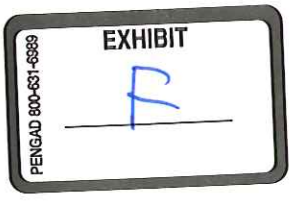
Defendants

DEFENDANT CITY OF GREENVILLE'S RESPONSES TO PLAINTIFFS' FIRST DISCOVERY REQUESTS

TO: Paul Stam, Esq.
R. Daniel Gibson, Esq.
Stam Law Firm, PLLC
510 W. Williams Street
Post Office Box 1600
Apex, North Carolina 27502-1600
Attorneys for Plaintiffs

As used in these discovery requests, unless context otherwise requires, the term, "Defendant" or "Defendants" includes either and both Defendants and, in addition to the named party(s), includes information or documents in the possession of the attorneys, agents, servants, employees, representatives, or others who are in the possession of information for or on behalf of either Defendant.

Unless context otherwise requires American Traffic Solutions means American Traffic Solutions, Inc., its successors in interest, and any other corporate entity with which American Traffic Solutions may have merged with from 2016 to the present.



RESPONSE: Objection. The City objects to this Interrogatory in that it is irrelevant and overly broad. The City further objects to this Interrogatory as vague and ambiguous, especially as to the term "money collected." However, notwithstanding and without waiving said objections, and in the spirit of discovery and cooperation, the City answers as follows:

For purposes of responding to this Interrogatory, the City defines "money collected" to mean all revenue collected by ATS and/or the City for RLCEP citations issued during the relevant calendar year. The total amount of revenue collected by ATS on behalf of the City is as follows:

2017:

Revenue Type	Amount
Red Light Violation Fine:	$60,300.00

2018:

Revenue Type	Amount
Red Light Violation Fine	$1,475,665.00
Returned Payment Fee	$125.00
Second Notice Fee	$170,400.46
Total:	$1,646,190.46

2019:

Revenue Type	Amount
Red Light Violation Fine	$686,725.00
Returned Payment Fee	$150.00
Second Notice Fee	$102,015.00
Total:	$788,890.00

For the total amount ATS ultimately invoiced the City, please see response to Interrogatory # 10.

3. For each year, state the number of red-light citations appealed and the number of hearings held upon appeals.

RESPONSE: Objection. The City objects to this Interrogatory because it is irrelevant, overly broad, unduly burdensome, and not reasonably calculated to lead to discovery of admissible evidence. However, notwithstanding and without waiving said objections, and in the spirit of discovery and cooperation, the City answers as follows: In responding to

b. **Richard DiCesare**
(N.C. P.E License: 030362), (PTOE Certification: 1420)

Stacey Pigford
(N.C. P.E. License: 035651)

c. **Both Mr. DiCesare and Ms. Pigford are employed by the City and can be contacted through counsel.**

9. Describe what legal basis, if any, Officer O'Callaghan, had to prevent Craig Malmrose or any other member of the public from recording, by audio, any red-light citation appeal hearing.

RESPONSE: Objection. The City objects to this Interrogatory because it is irrelevant, overly broad, unduly burdensome, vague, ambiguous, and not reasonably calculated to lead to discovery of admissible evidence. The City further objects on the grounds that this Interrogatory calls for legal conclusions that are beyond the scope of discovery under the North Carolina Rules of Civil Procedure.

10. State each amount ATS invoiced (1) the City of Greenville and (2) the Pitt County Board of Education for any purpose relating to the Red Light Safety Camera Program in 2017, 2018, and 2019.

RESPONSE: Objection. The City objects to this Interrogatory because it is irrelevant, overly broad, unduly burdensome, and not reasonably calculated to lead to discovery of admissible evidence. However, notwithstanding and without waiving said objections, and in the spirit of discovery and cooperation, the City answers as follows:

1)

Year	Amount ATS Invoiced the City
2017	$15,479.10
2018	$391,458.10
2019	$175,049.45*
TOTAL	$581,986.65

*** = Current through 6/30/2019.**

2) ATS does not invoice the Pitt County Board of Education.

11. State each amount the City invoiced Pitt for any purpose relating to the Red Light Safety Camera Program in 2017, 2018, and 2019.

RESPONSE: Objection. The City objects to this Interrogatory because it is irrelevant, overly broad, unduly burdensome, and not reasonably calculated to lead to discovery of admissible evidence. The City also objects to this Interrogatory in that it is vague and ambiguous, especially as to the statement "any purpose." However, notwithstanding and without waiving said objections, and in the spirit of discovery and cooperation, the City answers as follows:

Year	Amount the City invoiced Pitt
2017	$27,979.10 ($15,479.10 ATS Fees + $12,500.00 Officer P.D. O'Callaghan's Salary and Benefits = $27,979.10).
2018	$466,458.10 ($391,458.10 ATS Fees + $75,000.00 Officer P.D. O'Callaghan's Salary and Benefits = $466,458.10).
2019	$212,549.45 ($175,049.45 ATS Fees + $37,500.00 Officer P.D. O'Callaghan's Salary and Benefits = $212,549.45). *
TOTAL	$706,986.65 ($27,979.10 + $466,458.10 + $212,549.45 = $706,986.65

*** = Current through 6/30/2019.**

12. Identify all petitions for judicial review filed because of a red-light citation issued by Defendants.

RESPONSE: Objection. The City objects to this Interrogatory because it is irrelevant, overly broad, and not reasonably calculated to lead to discovery of admissible evidence. However, notwithstanding and without waiving said objections, and in the spirit of discovery and cooperation, based upon information and belief, the City answers as follows:

December 11, 2018

VIA EMAIL AND FIRST CLASS MAIL

Paul Stam, Esq.
Stam Law Firm, PLLC
510 West Williams Street
Apex, NC 27502
paulstam@stamlawfirm.com

Re: *Eric Steven Fearrington v. City of Greenville; Pitt County Board of Education;* Case No. 18 CVS 3149 (Pitt County, NC)

Dear Paul:

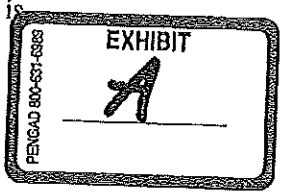
We write concerning the above-captioned Petition for Certiorari which you have filed in the Superior Court of Pitt County against the City of Greenville ("City") and the Pitt County Board of Education ("School Board"). This firm represents both the City and the School Board. While filing the Petition is not the appropriate procedural mechanism by which to have all of your client's claims heard in full, we would like to avoid further procedural disputes and have the substantive claims presented to the courts in an efficient manner. This letter outlines the problems with proceeding exclusively under your Petition and the steps we suggest the parties take in order for the merits of the dispute to be heard quickly.

You have filed a Petition for Writ of Certiorari in the form of an appeal from a quasi-judicial decision of a decision-making board as authorized by N.C. Gen. Stat. § 160A-393. This procedure is not an effective way to present your class action challenge to the constitutionality of the red light enforcement program (the "program") for three reasons.

First, the School Board is not a proper party to this action because it does not meet the definition of a "respondent" under N.C. Gen. Stat. § 160A-393(e). If you are unwilling to take the steps outlined in this letter, then the School Board will move to dismiss on these grounds.

Second, the Court will be limited in its review to the record from the hearing process conducted by the City, and may not have jurisdiction over claims challenging the constitutionality of the entire Program. C. Gen. Stat. § 160A-393(k) (limiting the Court's scope of review to "the decision-making body's findings, inferences, conclusions, or decision," not the City's ordinances, agreements, or programs on the whole).

Third, for the same reasons as above, the court could not consider the claims of members of the class who did not undertake the administrative process, because the scope of review is



limited to the record of the individual named plaintiff. Thus, class certification is not an option under the procedure you have used.

The proper mechanism through which to present your two constitutional challenges to the Program is through a declaratory judgment action pursuant to N.C. Gen. Stat. § 1-253, *et seq.* While we recognize, as we have said before, that your client needs to exhaust his administrative remedies, we would like to find a way to streamline the process and reach the merits of this dispute. Therefore, we propose that you file a new declaratory judgment action asserting your constitutional challenges and enter into a Consent Judgment in 18 CVS 3149 with the parties affirming exclusively the decision of the City's hearing officer with respect to Mr. Fearrington's citation (not the constitutional challenges). Doing so would address any standing concerns by ensuring that your client will have fully exhausted his administrative remedies and allow your client's constitutional challenges to be properly presented to, and expeditiously heard by, the courts.

We hope that you can agree to this course of action, as we know that having the substantive issues heard by courts with the appropriate subject matter jurisdiction is in the interest of all parties.

Very truly yours,

Elizabeth L. Troutman

Robert J. King III
Elizabeth L. Troutman
BROOKS, PIERCE, MCLENDON,
HUMPHREY & LEONARD, LLP
Post Office Box 26000
Greensboro, NC 27420-6000
Attorneys for Defendants City of Greenville and Pitt County Board of Education

TALUS SOFTWARE
where science, engineering and software meet . . .

AFFIDAVIT SUPPLEMENTAL of BRIAN N. CECCARELLI

Brian N. Ceccarelli, first being duly sworn, depose and say:

I signed under oath an affidavit in this case. All of the statements in that affidavit remain true.

1. On March 2, 2020, the Institute of Transportation Engineers (ITE) acknowledged that its 55-year-old practice for timing yellow lights conflicts with the laws of physics, and that the practice made drivers who obey the law and intend to obey the law run red lights inadvertently. ITE adopted a new practice:

   "We adopted the extended kinematic equation as the most appropriate representation of the physics involved . . . ."

   Jeff Panati, Executive Director & CEO; *ITE Journal*, March 2020, p 6.

2. ITE published its new practice:
   - *Guidelines for Determining Traffic Signal Change and Clearance Intervals—a Recommended Practice*, https://www.ite.org/technical-resources/topics/traffic-engineering/traffic-signal-change-and-clearance-intervals/.
   - The article "An Explanation of Mats Järlström's Extended Kinematic Equation" in the *ITE Journal* March 2020 issue, attached as Exhibit A.
   - The webinars "ITE Recommended Practice: Guidelines for Determining Traffic Signal Change and Clearance Intervals", PowerPoint slides attached as Exhibit B.
3. I have read the publications and attended the webinars.
4. When ITE's new practice is implemented to its full extent, my opinion is that 80% - 90% fewer red light running violations will be recorded by the camera system used in Greenville. In particular, neither Eric Fearrington nor Craig Malmrose would have been cited for a red-light violation.
5. Most of the remaining violations are not the fault of drivers. These remaining violations are caused by situations which even the new practice does not handle. For example, the new practice still does not calculate long enough yellow times for impeded traffic (shared right-

TALUS SOFTWARE PLLC, 4605 WOODMILL RUN, APEX NC 27539
T: (919) 815-0126 U: TALUSSOFTWARE.COM FIRM LICENSE P-1693

No. COA20-877

No. 20-877 DISTRICT THREE-A

NORTH CAROLINA COURT OF APPEALS

****

ERIC STEVEN FEARRINGTON,
CRAIG D. MALMROSE,

Plaintiffs-Appellants,

v.

CITY OF GREENVILLE, PITT COUNTY BOARD OF EDUCATION,

Defendants-Appellees.

From Pitt County
No. 19 CVS 1217

****

Rule 9(d) Documentary Exhibits

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INDEX

NORTH CAROLINA PITT COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 18 CVS 3149
ERIC STEVEN FEARRINGTON, Petitioner, v. CITY OF GREENVILLE; PITT COUNTY BOARD OF EDUCATION; Respondents.	CONSENT ORDER

This cause came on to be heard before the undersigned Superior Court Judge at the January ___, 2019 session of Pitt County Superior Court. It appearing to the Court that counsel for all parties have reached certain agreements regarding Petitioner's Petition for Review in the Nature of Certiorari in this matter without the necessity of a hearing and have asked the Court to enter this Consent Order for the purpose of effectuating their agreements. The Court makes the following:

FINDINGS OF FACT

1. On 15 May 2018, Petitioner received a citation for violating the Red Light Safety Camera Program.

2. Petitioner appealed his citation as provided in the Greenville Code of Ordinances.

3. On 16 October 2018, Petitioner had a hearing before a hearing officer, who found that Petitioner was liable for the $100.00 civil penalty assessment.

4. The City of Greenville has prepared and certified to this Court the

record of the proceedings below as required by the Writ of Certiorari.

5. In his Petition for Review in the Nature of Certiorari, Petitioner raised as applied challenges to the constitutionality of the Red Light Camera Safety Program and sought a declaratory judgment and other relief.

Based on the foregoing Findings of Fact, the Court makes the following:

CONCLUSIONS OF LAW

1. Petitioner has fully exhausted his administrative remedies with the City of Greenville concerning his citation.

2. A declaratory judgment action, rather than a Petition for Review under N.C. Gen. Stat. § 160A-393, is the most efficient means for Petitioner to present his as-applied challenges to the Red Light Camera Safety Program.

Now, therefore, it is hereby ORDERED, ADJUDGED AND DECREED:

1. The Petition for Review in the Nature of Certiorari is dismissed.

2. The Court declares that Petitioner has fully exhausted his administrative remedies with the City of Greenville.

3. The Petition is dismissed with prejudice as to the appeal of the hearing officers' decision that Petitioner was liable for the $100.00 civil penalty assessment.

4. This Order dismissing the Petition for Review in the Nature of Certiorari is without prejudice to any claims Eric Steven Fearrington may have to a civil action seeking declaratory and/or other relief.

18CVS3149 Consent Order

This the 15th day of January, 2019.

~~Judge~~ Presiding

CONSENTED TO BY:

Date: Jan 4, 2019

Paul Stam and R. Daniel Gibson
STAM LAW FIRM, PLLC
510 W. Williams Street
Apex, NC 27502
Attorneys for Petitioner

Date: Jan. 14, 2019

Robert J. King, III
Elizabeth Troutman
Jill Wilson
BROOKS, PIERCE, McLENDON,
HUMPHREY & LEONARD, LLP
2000 Renaissance Plaza
230 North Elm Street
Greensboro, N.C. 27401
Attorneys for Defendants