NORTH CAROLINA

WAKE COUNTY

GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
14-CVS-14791

NORTH CAROLINA STATE BOARD OF EDUCATION,

Plaintiff,

v.

THE STATE OF NORTH CAROLINA and THE NORTH CAROLINA RULES REVIEW COMMISSION,

Defendants.

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

INTRODUCTION

This action is a state constitutional challenge to the North Carolina Rules Review Commission's ("RRC's") exercise of authority over the North Carolina State Board of Education ("the Board"). It presents a matter of first-impression in North Carolina, yet it requires no more than a review of the plain language of the North Carolina Constitution and the expressly-stated intent of the framers to resolve the issues.

For nearly 150 years, the people of North Carolina in their Constitution have conferred broad, sweeping, "legislative" rulemaking power on the Board to manage North Carolina's free public schools. Article IX, Section 5 of the North Carolina Constitution provides:

> The State Board of Education shall supervise and administer the free public school system and the educational funds provided for its support, except the funds mentioned in Section 7 of this Article, and shall make all needed rules and regulations in relation thereto, subject to laws enacted by the General Assembly.

N.C. Const. art. IX, § 5.

As discussed more fully below, this provision only allows two instances in which the Board's rules can be nullified. First, if the Board enacts a rule, the General Assembly may veto that rule by revising or repealing it. Second, if the General Assembly preemptively enacts

specific legislation on a particular substantive topic, the Board is precluded from enacting a rule to the contrary. Outside of these two instances, the Board has plenary rulemaking authority on matters concerning North Carolina's free public schools.

Neither of these two instances are present here. This action concerns the authority of the RRC, a statutorily-created administrative agency mentioned nowhere in the North Carolina Constitution. For reasons it has never articulated, the RRC believes it has the constitutional authority to strike down the Board's rules. The RRC's exercise of veto authority fits nowhere within the two carefully circumscribed instances in which the General Assembly can veto the Board's rules under Article IX, Section 5 of the North Carolina Constitution. Instead, the RRC's position is contrary to the plain language of Article IX, Section 5 and the intent of the framers. Furthermore, when the RRC strikes down the Board's rules, its exercise of unchecked authority violates the North Carolina Constitution's non-delegation doctrine.

Accordingly, the Board is duty-bound under the North Carolina Constitution to exercise the full extent of the powers delegated to it by the people of North Carolina without unconstitutional interference by the RRC. For the reasons that follow, the Board is entitled to summary judgment on its Article IX, Section 5 claim (Count 2) and, should the Court reach it, the Board's non-delegation doctrine claim (Count 3).

STATEMENT OF FACTS

Overview of the Board's Constitutional Powers and Duties

Article I, Section 15 of the North Carolina Constitution provides that "[t]he people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right." N.C. Const. art. I, § 15. To ensure that the State fulfills its duty of "guarding and maintaining" this right, the people of North Carolina in their 1868 Constitution created the Board to manage the day-to-day issues facing North Carolina's free public schools. *See infra* at 10-11.

Commensurate with this great responsibility, the 1868 Constitution conferred broad, sweeping, "legislative" rulemaking power on the Board. *See* 1868 N.C. Const. art. IX, § 9. Specifically, the 1868 Constitution provided that "[t]he Board of Education shall . . . have full power to legislate and make all needful rules and regulations in relation to Free Public Schools." *Id.* Under the 1868 Constitution, this plenary power could only be limited by an act of the General Assembly "altering, amending, or repealing" a particular rule adopted by the Board. *See id.* ("[A]ll acts, rules and regulations of said Board may be altered, amended or repealed by the General Assembly, and when so altered, amended or repealed, they shall not be re-enacted by the Board.").

As discussed more fully below, that same power exists today. Since the creation of the Board in 1868, no state constitutional amendment or judicial decision has reduced the broad, sweeping, "legislative" rulemaking power conferred upon the Board by the 1868 Constitution.

In its current form, Article IX, Section 5 of the North Carolina Constitution provides:

> The State Board of Education shall supervise and administer the free public school system and the educational funds provided for its support, except the funds mentioned in Section 7 of this Article, and shall make all needed rules and regulations in relation thereto, subject to laws enacted by the General Assembly.

N.C. Const. art. IX, § 5.

History and Overview of the RRC Rules Review Process

In the late 1970s, the General Assembly considered the establishment of an advisory committee to review rules adopted by executive branch agencies. Charlotte A. Mitchell, *The North Carolina Rules Review Commission: A Constitutional Quandary*, 2 N.C.L. Rev. 2092, 2099 (2004) (citing M. Jackson Nichols, *Rules Review in North Carolina: History and Constitutional Issues*, Admin. Law (N.C. Bar Ass'n Nov. 1997). To perform this advisory function, the General Assembly in 1977 created the Administrative Rules Review Committee

("the Committee"). The Committee was comprised of nine legislators. *Id.* The Committee functioned in an oversight capacity, identifying potential problems with agency regulations and recommending to the General Assembly as a whole that it take corrective legislation in order to address those problems. *Id.* The Committee was purely advisory, however, and lacked any authority to veto administrative rules. *Id.*

In 1983, the General Assembly replaced the Committee with the Administrative Rules Review Commission, the predecessor to the current RRC. *Id.* This new agency had the authority to "object on the record" to administrative rules. *Id.* However, it lacked the authority to veto administrative rules. *Id.*

In 1985, the General Assembly established the current RRC. *Id.* However, the General Assembly made the creation of the RRC contingent upon an advisory opinion from the Supreme Court of North Carolina. *Id.* When the Court ultimately did not issue any such opinion, the General Assembly the following year removed the contingency provision and established the current RRC. *Id.*

The typical executive branch agency subject to the RRC is created by statute. Because these agencies are statutorily created, they can be reorganized, limited, or even abolished by the General Assembly as it sees fit. By contrast, the Board was created by the North Carolina Constitution as a constitutional body in its own right. Nevertheless, because the Board was not expressly named as an exempt entity under the RRC's enabling statute, the RRC takes the position that the Board is subject to its authority. (Verified Complaint at ¶ 24).

The RRC's Encroachment on the Board's Constitutional Authority

Under the RRC's enabling statutes, an agency that adopts a rule must file that rule with the RRC within 30 days. N.C. Gen. Stat. § 150B-21.2(g) (2013). The RRC in its sole discretion then decides whether the rule is enacted. N.C. Gen. Stat. § 150B-21.10 (2013). Unless and until

the RRC approves the rule, the agency's adopted rule is of no force and effect – it is void *ab initio*. N.C. Gen. Stat. § 150B-21.3(b)(2) (2013). If the RRC objects to the agency's adopted rule, then the rule cannot be implemented unless and until the agency revises the rule to address the RRC's objections. N.C. Gen. Stat. § 150B-21.19(4) (2013).

Since the RRC's inception, the RRC or its staff has objected to or modified every rule adopted by the Board. (Verified Complaint at ¶ 25). Most recently, the RRC in February 2014 struck down the Board's Model Teacher Contract Rule, which would have established uniform requirements for contracts between teachers and local boards of education. Exhibit A, RRC Objection Letter for Model Teacher Contract Rule (stating that "the Commission disapproved the [Model Teacher Contract] rule"), and March 17, 2014 Response Letter from the Board ("The [Board] has received the [RRC's] objection of the . . . rule. We disagree with the objection and are considering our next course of action.").[1] In addition, the Board has declined to adopt a number of rules that it otherwise would have adopted but for the fact that the RRC would have objected to these rules or struck them down. (Verified Complaint at ¶ 25).

The RRC review process typically takes a minimum of six months and often longer. *Id.* at ¶ 26. Thus, because the Board's rules are void *ab initio* unless the RRC approves them, in the intervening months or years, statewide education policy is effectively enjoined. *Id.* As a result, the RRC's exercise of authority over the Board's rulemaking impedes the Board's ability to timely address critical issues facing our State in the area of education. *Id.*

The Board's Decision to Exercise the Full Extent of its Constitutional Authority

Although historically the Board has stopped short of bringing a legal challenge, the Board has repeatedly questioned the constitutionality of the RRC's purported exercise of authority. *Id.*

[1] The Court may take judicial notice of these public records. *See, e.g., West v. Slick*, 313 N.C. 33, 45, 326 S.E.2d 601, 608-09 (1985); *State ex rel. Utilities Com. v. Southern Bell Tel. & Tel. Co.*, 289 N.C. 286, 288, 221 S.E.2d 322, 323 (1976).

at ¶ 24. As currently constituted, the Board has now made the decision to exercise the full extent of its powers and duties under the North Carolina Constitution without unconstitutional interference by the RRC. *Id.* at ¶ 27.

The Board has resolved that it will no longer voluntarily submit its rules for RRC approval. *Id.* at ¶ 28. The Board will nevertheless deem its rules to have the immediate full force and effect of law. *Id.* The Board recognizes that this decision is in direct conflict with the RRC's views about whether it can exercise authority over the Board. *Id.* at ¶ 29. It is for that reason that the Board filed this declaratory judgment action seeking a determination of the proper interpretation and application of the North Carolina Constitution. *Id.*

The Complaint does not seek damages, nor does it seek retroactive relief to address past violations of the North Carolina Constitution. *Id.* at ¶¶ 14-15. Rather, the Complaint merely seeks prospective declaratory and injunctive relief to prevent the RRC from continuing to exercise authority over the Board in violation of the North Carolina Constitution. *Id.*

The only two claims currently before the Court are the Board's Article IX, Section 5 claim (Count 2) and the Board's non-delegation doctrine claim (Count 3). The remainder of the Board's claims are not before the Court on any pending motion.[2] Counts 2 and 3 challenge the RRC's exercise of authority over the Board alone, such that entry of summary judgment in the Board's favor would only affect the RRC's exercise of authority over the Board. Entry of summary judgment in the Board's favor on these claims would not affect the RRC's exercise of authority over any other state government entity.

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[2] The Board voluntarily dismissed its facial challenges on separation of powers grounds (Counts 4-7) without prejudice as part of an unsuccessful effort to resolve this dispute. The Board also voluntarily dismissed its statutory construction claim (Count 1) without prejudice in light of legislation introduced in the 2015 Legislative Session that, if enacted, could ultimately moot that claim. The Board intends to pursue those claims should the Court not resolve this action on the basis of Count 2 or 3.

Counts 2 and 3 are now ripe for decision on the Board's motion for summary judgment.

STANDARD OF REVIEW

Counts 2 and 3 of the Complaint involve pure issues of law. "In cases 'where there is no genuine issue as to the facts, the presence of important or difficult questions of law is no barrier to the granting of summary judgment.'" *Knight Publ'g Co. v. Charlotte-Mecklenburg Hosp. Auth.*, 172 N.C. App. 486, 488, 616 S.E.2d 602, 604 (2005) (quoting *Kessing v. Nat'l Mortg. Corp.*, 278 N.C. 523, 534, 180 S.E.2d 823, 830 (1971)). "The purpose of a summary judgment motion is to eliminate a trial when, based on the pleadings and supporting materials, the trial court determines that only questions of law, not fact, are at issue." *Loy v. Lorm Corp.*, 52 N.C. App. 428, 437, 278 S.E.2d 897, 903 (1981); *Kessing*, 278 N.C. at 534, 180 S.E.2d at 830.

ARGUMENT

I. THE BOARD IS ENTITLED TO SUMMARY JUDGMENT ON COUNT 2 OF THE COMPLAINT BECAUSE THE RRC'S EXERCISE OF AUTHORITY OVER THE BOARD VIOLATES ARTICLE IX, SECTION 5 OF THE NORTH CAROLINA CONSTITUTION.

A. The RRC's decisions to strike down the Board's rules violate the plain language of Article IX, Section 5.

The first and most basic rule for construing the North Carolina Constitution is that the Court must apply the plain language as it appears in the text. *Coley v. State*, 360 N.C. 493, 498, 631 S.E.2d 121, 125 (2006). If the plain language is clear, that is where the analysis begins and ends. *See id.* ("If the meaning of the language of [a state constitutional provision] is plain, we must follow it."); *Martin v. North Carolina*, 330 N.C. 412, 416, 410 S.E.2d 474, 476 (1991) (quoting *State ex rel. Martin v. Preston*, 325 N.C. 438, 449, 385 S.E.2d 473, 478 (1989)) ("In interpreting our Constitution – as in interpreting a statute – where the meaning is clear from the words used we will not search for a meaning elsewhere."); *see also, e.g., In re Appeal of University of North Carolina*, 300 N.C. 563, 573, 268 S.E.2d 472, 478 (1980) (holding

legislation unconstitutional because it was in direct conflict with the plain language of the Constitution).

The plain language of Article IX, Section 5 of the North Carolina Constitution provides:

> The State Board of Education shall supervise and administer the free public school system and the educational funds provided for its support, except the funds mentioned in Section 7 of this Article, and shall make all needed rules and regulations in relation thereto, subject to laws enacted by the General Assembly.

N.C. Const. art. IX, § 5. As the Supreme Court of North Carolina explained in *Guthrie v. Taylor*, 279 N.C. 703, 185 S.E.2d 193 (1971), this plain language "conferred upon the State Board of Education the powers so enumerated, including the powers to . . . make needful rules and regulations in relation to . . . the administration of the public school system." *Id.* at 710, 185 S.E.2d at 198-99. These powers are only "subject to limitation and revision by acts of the General Assembly." *Id.*

Accordingly, the plain language of Article IX, Section 5 means what it says: only "laws enacted by the General Assembly" can nullify the Board's rules governing public education. N.C. Const. art. IX, § 5; *Guthrie* at 710, 185 S.E.2d at 199. Here, the RRC's exercise of authority over the Board violates this plain language because the RRC's decisions to strike down the Board's rules are not "laws enacted by the General Assembly" within the meaning of Article IX, Section 5.

First, the RRC's decisions to strike down the Board's rules are not "laws enacted." Under the North Carolina Constitution, any "laws enacted" in North Carolina require bicameral passage and presentment of a bill. N.C. Const. art. II, § 22. The RRC's decisions to strike down the Board's rules are not passed by the North Carolina House and Senate or presented to the Governor. They are mere administrative decisions by an administrative agency. For this reason alone, the RRC's decisions to strike down the Board's rules violate Article IX, Section 5.

Second, the RRC is not "the General Assembly." The RRC is not a subdivision of the General Assembly. *See* N.C. Const. art. II, § 1 (providing that "the General Assembly . . . shall consist of a Senate and a House of Representatives"). The RRC is a separate administrative agency that is neither representative of the people of North Carolina nor accountable to them. It is comprised entirely of unelected, appointed individuals who are not members of the General Assembly. *See* N.C. Gen. Stat. § 143B-30.1(a) (2013) ("The Commission shall consist of 10 members to be appointed by the General Assembly, five upon the recommendation of the President Pro Tempore of the Senate, and five upon the recommendation of the Speaker of the House of Representatives."). These unelected individuals act on their own accord when the RRC strikes down the Board's rules. They formulate their own reasons for striking down the Board's rules. Thus, the RRC's decisions to strike down the Board's rules are the actions of the RRC, not the actions of "the General Assembly."

For these reasons, the RRC's exercise of authority over the Board violates the plain language of Article IX, Section 5. The Board's rules are not "subject to decisions of the Rules Review Commission." Rather, the Board's rules are only "subject to laws enacted by the General Assembly." N.C. Const. art. IX, § 5. The plain language of Article IX, Section 5 is clear, and the Court must apply it.

On these grounds alone, the Board is entitled to summary judgment on Count 2 of the Verified Complaint. The Court need not go any further in resolving this dispute.

B. The RRC's exercise of authority over the Board is directly contrary to the framers' expressly-stated intent.

"In interpreting our Constitution, [courts] are bound to 'give effect to the intent of the framers of the organic law and of the people adopting it.'" *Beaufort County Bd. of Educ. v. Beaufort County Bd. of Comm'rs*, 363 N.C. 500, 505, 681 S.E.2d 278, 282 (2009) (quoting *Perry*

v. Stancil, 237 N.C. 442, 444, 75 S.E.2d 512, 514 (1953)). "Therefore, courts should keep in mind the object sought to be accomplished by its adoption . . . ." *N.C. State Bar v. DuMont*, 304 N.C. 627, 633-34, 286 S.E.2d 89, 93 (1982).

Article I, Section 15 of the North Carolina Constitution establishes the great principle that "[t]he people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right." N.C. Const. art. I, § 15. These strong words were first included in the 1868 Constitution and have remained part of the Constitution since then without change. They are unique to the North Carolina Constitution. No other state constitution includes these words. No other state constitution includes any right to education in its bill of citizens' rights.

The people of North Carolina in their 1868 Constitution created the Board as a means of ensuring that the State lived up to its promise to "guard and maintain" the right to public education. *See Hoke County Bd. of Educ. v. State*, 358 N.C. 605, 614-15, 621-22 n.8, 599 S.E.2d 365, 376, 381 n.8 (2004) ("In *Leandro*, this Court, in sum, decreed that the State and State Board of Education had constitutional obligations to provide the state's school children with an opportunity for a sound basic education . . . ."). As the Supreme Court of North Carolina succinctly explained shortly after the 1868 Constitution was approved by the voters, the 1868 Constitution "establishes the public school system[,] the General Assembly provides for it, and the State Board of Education . . . manage[s] it." *Lane v. Stanly*, 65 N.C. 153, 157 (1871).

When they created the Board, the people of North Carolina made an important decision. Rather than simply stating in the Constitution that the legislature would prescribe what the Board's powers and duties would be, the people of North Carolina conferred specific powers on the Board directly in the Constitution itself. *Id.* Specifically, Article IX, Section 9 of the 1868

Constitution conferred on the Board the "full power to *legislate* and make all needful rules and regulations in relation to Free Public Schools." 1868 N.C. Const. art. IX, § 9 (emphasis added).

By setting forth this broad, sweeping power in the Constitution itself, the people elevated the Board to a unique status. The Board and the Office of Governor are the only two entities in North Carolina whose powers and duties are set forth in the North Carolina Constitution itself. N.C. Const. art. IX, § 5; N.C. Const. art. III, § 5. Although the North Carolina Constitution establishes other constitutional entities and offices, the Constitution merely provides that their powers and duties will be prescribed by the legislature. *See, e.g.*, N.C. Const. art. III, § 7 (establishing the office of the Secretary of State and Attorney General, among others, but stating that "their respective duties shall be prescribed by law"). Thus, like the Office of Governor, the constitutional status of the Board is unique.

Since the creation of the Board in 1868, no state constitutional amendment or judicial decision has reduced the Board's broad constitutional powers and duties. In fact, the Board's powers were further increased when the people ratified an amendment in 1942 to strengthen the Board's powers by further centralizing public education governance with the Board.

In the 75 years that had passed since the Board's creation in the 1868 Constitution, various administrative agencies had begun to insert themselves into matters that had traditionally been within the broad authority of the Board. *Report and Recommendations of the Governor's Commission on Education*, at 30 (1938) ("There seems to be much duplication and some dual control in the workings of these various boards and unnecessary duplication in the work of school administrators. It is the opinion of the Commission that all these boards should be consolidated under one State Board of Education in Raleigh and that the direction of all activities of the teaching profession should come from this central board."). In an effort to return authority

in these areas to the Board and further centralize power in the Board, the people in 1942 amended the North Carolina Constitution to list additional areas in which the Board – as opposed to other various, "scattered" administrative agencies – would have exclusive authority. *Id.* at 31 (explaining that further centralizing power in the Board would be in the "best interest of the public school system to have immediate relief from scattered administration"); 1942 N.C. Const. art. IX, § 8. These areas of authority included the "power to divide the State into a convenient number of school districts; to regulate the grade, salary and qualifications of teachers; to provide for the selection and adoption of the text books to be used in the public schools; [and] to apportion and equalize the public school funds over the State." 1942 N.C. Const. art. IX, § 8.

Thus, as amended in 1942, Article IX, Section 8 of the North Carolina Constitution provided:

> The State Board of Education shall succeed to all the powers and trusts of the President and Directors of the Literary Fund of North Carolina and the State Board of Education as heretofore constituted. The State Board of Education shall have power to divide the State into a convenient number of school districts; to regulate the grade, salary and qualifications of teachers; to provide for the selection and adoption of the text books to be used in the public schools; to apportion and equalize the public school funds over the State; and generally to supervise and administer the free public school system of the State and make all needful rules and regulations in relation thereto. All the powers enumerated in this section shall be exercised in conformity with this Constitution and subject to such laws as may be enacted from time to time by the General Assembly.

Id. By expressly stating that the Board "shall succeed to all the powers . . . of the State Board of Education as heretofore constituted," the people further clarified that the Board retained all the powers it held under the 1868 Constitution, including the broad power to "legislate" on matters regarding North Carolina's free public schools. *Id.*

Notably, in 1959, the North Carolina Constitutional Commission recommended that "the provisions giving broad, general administrative powers to the State Board of Education" in Article IX, Section 5 should be deleted and "replaced by a provision to the effect that that powers

of the Board, other than as specifically enumerated by the Constitution, shall be as prescribed by the General Assembly." *Report of the North Carolina Constitutional Commission* (1959). This recommendation was never adopted by the General Assembly or presented to the voters for their approval.

Instead, the broad powers of the Board continue to remain as extensive as they had been since the 1868 Constitution. When the North Carolina Constitution was editorially revised in 1971, only non-substantive revisions were made to Article IX, Section 5. *DuMont*, 304 N.C. at 640, 286 S.E.2d at 97 (explaining that the 1971 Constitution "was meant to be an editorial revision of the 1868 Constitution and that fundamental changes in the constitution were made only by separate amendment"). In fact, as the people expressly stated in the 1942 amendment regarding the Board, the framers of the 1971 North Carolina Constitution likewise clarified their intent that the "legislative" rulemaking powers of the Board would remain as extensive as they had been since the 1868 Constitution. *See Report of the State Constitutional Study Commission* (1968) ("[Article IX, Section 5] restates in much abbreviated form the duties of the State Board of Education, but *without any intention that its authority be reduced.*") (emphasis added). Accordingly, the Board's broad, sweeping, "legislative" power to make whatever rules it deems necessary for North Carolina's public schools was carried forward to North Carolina's current Constitution in 1971.

That same year, the Supreme Court of North Carolina issued its seminal decision in *Guthrie*. The Court in *Guthrie* applied the plain language of Article IX, Section 5 to hold that the Board had "legislative power" under the North Carolina Constitution, and that the Board's rules were "subject to limitation and revision" only "by acts of the General Assembly." 279 N.C. at 710, 185 S.E.2d at 198. Thus, "[i]n the silence of the General Assembly, the authority of

the State Board . . . [is] limited only by other provisions in the Constitution itself." *Id.* at 710, 185 S.E.2d at 198-99.

The Court in *Guthrie* recognized that both the plain language and intent of Article IX, Section 5 establish a constitutional framework under which there are only two instances in which the Board's rules can be nullified. First, if the Board enacts a rule, the General Assembly may veto that rule by revising or repealing it. *Guthrie* at 710, 185 S.E.2d at 199 (recognizing that the Board's rules are "subject to limitation and revision by acts of the General Assembly"). Second, if the General Assembly preemptively enacts specific legislation on a particular substantive topic, the Board is precluded from enacting a rule to the contrary. *See id.* at 711, 185 S.E.2d at 199 (implying that if the General Assembly had "specifically" enacted legislation, the Board would have been preempted from enacting a rule to the contrary). Absent either of those two instances, the Board has broad, sweeping, "legislative" power to make whatever rules it deems necessary for North Carolina's public schools. *See, e.g., id.* at 710, 185 S.E.2d at 198-99 (holding that because the General Assembly had not enacted specific legislation to the contrary, "the authority of the State Board to promulgate and administer regulations concerning the certification of teachers in the public schools was limited only by other provisions in the Constitution, itself").

Here, the RRC's rules review process denies the Board its constitutional powers by turning this constitutional framework on its head. Instead of the Board or the General Assembly, the RRC has final veto authority over whether rules concerning North Carolina's free public schools are ultimately made. The framers did not envision – and even sought to eliminate in 1942 – the potential for such an administrative agency to interfere with the Board's broad, sweeping powers to govern North Carolina's free public schools. *See supra* at 12-13; *see also*

1995 Op. N.C. Att'y Gen. 32 at 5 (May 1, 1995) ("By giving the State Board the power to 'supervise and administer the free public school system . . . subject to laws enacted by the General Assembly we think the people intended that the policies and standards for the public school system would be set by the State Board in conjunction with the General Assembly *and not by the General Assembly in conjunction with some other body*.") (emphasis added).

In addition, the RRC is composed entirely of non-experts. Its members are not required to have any background or experience in public education. This only worsens the constitutional problem because the framers intended that the Board – a constitutional body with experience in matters of public education – "legislate" on matters of education policy. *See Guthrie* at 709-10, 185 S.E.2d at 198 (quoting 1868 N.C. Const. art. IX, § 9); *see also, e.g., West Virginia Bd. of Educ. v. Hechler*, 376 S.E.2d 839, 842-43 (W. Va. 1988) ("'General supervision' is not an axiomatic blend of words designed to fill the pages of our State *Constitution*, but it is a meaningful concept to the governance of schools and education in this state. Decisions that pertain to education must be faced by those who possess expertise in the educational area. These issues are critical to the progress of schools in this state, and, ultimately, the welfare of its citizens.").

Finally, the RRC's rules review process frustrates the framers' intent by impeding the Board of Education's ability to "manage" the day-to-day issues facing public education and react quickly to the challenges facing North Carolina's free public schools. *Lane*, 65 N.C. at 157; *Guthrie* at 710, 185 S.E.2d at 199 (observing that the Board's "rules and regulations" are "needed for the effective supervision and administration of the public school system"); *see also, e.g., Hechler*, 376 S.E.2d at 842 ("Rules proposed by the Board, like the rule in this case, are integral to the day-to-day operation of schools."). The magnitude of this problem is significant.

Since the RRC's inception in 1986, the RRC or its staff has objected to or modified *every* rule adopted by the Board and submitted to the RRC for approval. (Verified Complaint at ¶ 25). These include rules addressing a wide variety of important issues facing public education. Most recently, for example, the RRC in February 2014 struck down the Board's Model Teacher Contract Rule, which would have established uniform requirements for contracts between teachers and local boards of education. *See* Exhibit A. In addition to the countless rules struck down by the RRC, the Board has declined to adopt a number of rules that it otherwise would have adopted but for the fact that the RRC would have objected to these rules. (Verified Complaint at ¶ 25).

Worse, under the RRC's rules review process, the "default" is that the Board's rules are dead on arrival. *See* N.C. Gen. Stat. § 150B-21.3(b)(1) (2013) (providing that a "rule that is not approved by the Commission . . . does not become effective"). Thus, unless and until the RRC gives its approval, the Board's rules are void *ab initio*. N.C. Gen. Stat. § 150B-21.3(b)(1) (2013). However, this process of seeking RRC approval typically takes a minimum of six months and often longer. (Verified Complaint at ¶ 26). As a result, North Carolina's constitutional process for making statewide education policy is effectively enjoined for months or years at a time. *Id.* Not only is this not good constitutional law, it is not good government. It is precisely the opposite of what the framers and the people of North Carolina intended.

For these reasons, the RRC's exercise of authority over the Board is both contrary to the plain language of Article IX, Section 5 and contrary to the expressly-stated intent of the framers.

C. The RRC's rules review process in its entirety violates Article IX, Section 5 because it takes away the Board's constitutional rulemaking power and gives it to a separate entity.

The RRC may attempt an end-run around the plain language and intent of Article IX, Section 5 by arguing that all the various laws that make up the RRC rules review process as a

whole could somehow be deemed "laws enacted by the General Assembly" under Article IX, Section 5. That argument only creates more constitutional problems for the RRC.

In contrast to statutorily-created state boards of education, constitutionally-created state boards of education constitute "the highest form of juristic person known to the law, a constitutional corporation of independent authority, which, within the scope of its functions, is co-ordinate with and equal to that of the legislature." *State v. State Bd. of Educ.*, 196 P. 201, 204-05 (Idaho 1921) (holding further that the Idaho State Board of Education "is a constitutional corporation with granted powers, and while functioning within the scope of its authority, is not subject to the control or supervision of any other branch, board or department of the state government, but is a separate entity, and may sue and be sued, with power to contract and discharge indebtedness, with the right to exercise its discretion within the powers granted"); *Hechler*, 376 S.E.2d at 843 ("Unlike most other administrative agencies which are constituents of the executive branch, the Board [of Education] enjoys a special standing because such a constitutional provision exists."); *Mont. Bd. of Public Ed. v. Mont. Adm. Code Comm.*, 1992 Mont. Dist. LEXIS 204, at *10 (Mont. Dist. Ct. 1992) ("The [Montana Board of Education] is a constitutionally recognized and created agency" and "[a]s such, it is not subject to the usual administrative and legislative constraints to which the State refers").

Article IX, Section 5 of the North Carolina Constitution provides that "the State Board of Education shall supervise and administer the free public school system . . . and shall make all needed rules and regulations in relation thereto, subject to laws enacted by the General Assembly." N.C. Const. art. IX, § 5. In *Guthrie*, the Court explained that the first part of this constitutional provision is a "direct delegation by the people" of North Carolina, who gave the Board the "power to make rules and regulations" concerning the "free public school system."

279 N.C. at 710, 712, 185 S.E.2d at 198-99. The second part of Article IX, Section 5 "was designed to make, and did make, the powers so conferred upon the State Board of Education subject to *limitation and revision* by acts of the General Assembly." *Id.* (emphasis added).

The Opinions of the North Carolina Attorney General and the decisions of other states uniformly recognize that when the legislature or an administrative agency interferes with a constitutionally-created state board of education's rulemaking function, this goes well beyond a "limitation" and amounts to an unconstitutional denial of the board's authority. 1994 Op. N.C. Att'y Gen. 41 (June 23, 1994) and 1995 Op. N.C. Att'y Gen. 32 (May 1, 1995), discussed *infra* at 20-22; *see, e.g.*, *Hechler*, 376 S.E.2d at 840-41 (construing virtually identical state constitutional provision providing that the State Board of Education would "perform such duties as may be prescribed by law" and concluding it was unconstitutional for the legislature to require the Board to "submit its . . . rules to an oversight commission for review" because this interfered with the Board's constitutional rulemaking authority); *Mont. Bd. of Public Ed.*, 1992 Mont. Dist. LEXIS 204, at *8 ("As in *Hechler*, we here have a situation where the Montana legislature is interfering with the rule-making authority of a constitutionally created Board of Education. This being the case, that statutory interference is unconstitutional."); *see also State Bd. of Educ.*, 196 P. at 204 (construing virtually identical state constitutional provision making the State Board of Education's constitutional rulemaking powers subject to "such regulations as may be prescribed by law" and holding that such regulations "must not be of character to interfere essentially with the constitutional discretion of the board"). Just as the General Assembly cannot enact legislation providing that the Board "shall not make all needed rules and regulations," the General Assembly cannot accomplish the same objective by taking away the Board's rulemaking authority and giving it to another entity.

This axiomatic principle applies with even more force in North Carolina because the Board's constitutional status is unique. As described above, the Board and the Office of Governor are the only two entities in North Carolina whose powers and duties are set forth in the North Carolina Constitution itself. N.C. Const. art. IX, § 5; N.C. Const. art. III, § 5. This has great legal significance. As the North Carolina's Attorney General has explained, it is a "basic principl[e] of constitutional construction" that "[i]f powers are specifically conferred by the constitution upon the governor, or upon any other specified officer [or authority], the legislature cannot require or authorize [those powers] to be performed by any other officer or authority." 1995 Op. N.C. Att'y Gen. 32 at 5 (quoting *Cooley's Constitutional Limitations*, vol. 1, at 215) (1927)); *see also Cooley* at 225 ("Those matters which the constitution specifically confides to [a specified body or agency] the legislature cannot directly or indirectly take from [its] control.").

Yet the RRC's rules review process does just that by taking away the Board's rulemaking power and giving the RRC veto authority over the Board. When the RRC disagrees with the Board about whether a rule should be enacted, it stops the Board's rulemaking process dead in its tracks. This is because if the Commission does not approve the Board's rule, the Board is prohibited from exercising its constitutional rulemaking function. Consequently, under the RRC's rules review process, the RRC – not the Board – gets to decide whether a particular rule governing North Carolina's free public schools is enacted. In addition, because the "default" under the RRC's rules review process is that the Board's rules are dead on arrival, *see* N.C. Gen. Stat. § 150B-21.3(b)(1) (2013), the Board's rules adopted pursuant to its constitutional authority are void *ab initio* and have no force or effect on their own. This operates as an outright denial of the Board's constitutional power and duty to "make all needed rules and regulations" for North Carolina's free public schools.

Indeed, the North Carolina Attorney General recognized not long ago in two separate Opinions that giving an administrative agency the authority to veto the Board's rules would violate Article IX, Section 5. The first of these Attorney General Opinions addressed the constitutionality of a bill to create a Professional Teaching Standards Board, which was charged with setting standards for licensing teachers and issuing, renewing, and revoking licenses "independently of the State Board of Education." 1994 Op. N.C. Att'y Gen. 41. The Attorney General stated that this legislation was "likely" unconstitutional, because, even though the General Assembly had the power to specifically "limit" or "revise" the Board's decisions, the General Assembly could not transfer the Board's final rulemaking authority to a separate entity:

> We think that a legislative act transferring the State Board's constitutional power regarding teacher licensing to another agency to be exercised by that agency independently of the State Board would amount to more than a limitation or revision of the constitutional powers of the State Board. It would amount to the denial to the State Board of a power conferred on the State Board by the people. While the General Assembly has the power to limit and revise the manner in which the State Board exercises its constitutional powers, the General Assembly in our opinion likely does not have the power to take away completely a constitutionally specified power of the State Board and give it to another agency.

Id. at 3-4.

The Opinion went on to explain that the key to whether the legislation was constitutional is whether "some form of final approval" or final "authority remains with the State Board." *Id.* at 4-5. In sum, the Attorney General recognized that Article IX, Section 5 prohibited the General Assembly from giving an administrative agency veto authority over the Board's rules.

A second Attorney General's Opinion addressed this issue again a year later, this time in response to an inquiry from the Board regarding "the power of the General Assembly to assign [the] State Board of Education's constitutional powers to an independent body." 1995 Op. N.C. Att'y Gen. 32. The General Assembly had created the Professional Teaching Standards Commission, which was charged with the duty to "prepare a plan for how it [the Commission]

could establish high standards for teachers and the teaching profession." *Id.* at 1. The Attorney General explained that Article IX, Section 5 prohibited the General Assembly from taking away the Board's authority to make the final decision about whether a rule is enacted and giving this authority to the Commission. *Id.* at 4.

In his Opinion, the Attorney General correctly contrasted the difference between a law requiring the Board to consider non-binding recommendations of an independent body versus a law giving an independent body the final decision of whether to adopt a rule. *See id.* (contrasting a constitutional law "requiring [the Board] to consider recommendations of study commissions" with an unconstitutional law that gave the power of determining whether to ultimately "adopt policies . . . to an independent body other than the State Board of Education"). The latter, it explained, would be unconstitutional under the plain language of Article IX, Section 5:

> [T]he legislation proposed by the Commission, if enacted, likely would be in excess of the powers of the General Assembly, and therefore could be held by the courts to be unconstitutional. By giving the State Board the power to 'supervise and administer the free public school system . . . subject to laws enacted by the General Assembly' we think the people intended that the policies and standards for the public school system would be set by the State Board in conjunction with the General Assembly ***and not by the General Assembly in conjunction with some other body.***

Id. at 5 (emphasis added).

The Attorney General further noted that its "reading of the Constitution is consistent with basic principles of constitutional construction," including the principle that "[i]f powers are 'specifically conferred by the constitution upon the governor, or upon any other specified officer, the legislature cannot require or authorize [those powers] to be performed by any other officer or authority." 1995 Op. N.C. Att'y Gen. 32 at 5 (quoting *Cooley* at 215). The Attorney General further explained that his decision was "also consistent with the decisions of the courts of other

states." *Id.* Notably, the Opinion cited the West Virginia Supreme Court's decision in *Hechler*, 376 S.E.2d 839, discussed above. 1995 Op. N.C. Att'y Gen. 32 at 5.

In sum, as North Carolina's Attorney General has twice recognized, the General Assembly cannot give an administrative agency veto authority over the Board's rules because it would deny the Board its constitutional rulemaking power. For this reason, even if the RRC's rules review process as a whole could constitute "laws enacted by the General Assembly," the RRC's exercise of authority over the Board violates Article IX, Section 5.

II. THE BOARD IS ENTITLED TO SUMMARY JUDGMENT ON COUNT 3 OF THE COMPLAINT BECAUSE THE RRC'S EXERCISE OF AUTHORITY OVER THE BOARD CONSTITUTES AN EXERCISE OF UNLAWFULLY DELEGATED AUTHORITY.

As described above, Article IX, Section 5 is crystal clear about which entity has the power to nullify the Board's rules: the General Assembly. Here, however, it is not the General Assembly that is striking down the Board's rules. It is the RRC.

Under the separation of powers set forth in Article I, Section 6 and Article II, Section 1 of the North Carolina Constitution, the legislature can delegate only a "'limited portion of its legislative powers,'" and it can do so only if the delegation is "accompanied by adequate guiding standards." *Adams v. N.C. Dep't of Natural & Econ. Res.*, 295 N.C. 683, 697, 249 S.E.2d 402, 410 (1978) (quoting *N.C. Turnpike Auth. v. Pine Island, Inc.*, 265 N.C. 109, 114, 143 S.E.2d 319, 323 (1965)); *see also Conner v. N.C. Council of State*, 365 N.C. 242, 251, 716 S.E.2d 836, 842 (2011). The Supreme Court of North Carolina has articulated several tests to determine whether this standard has been met. The RRC's exercise of authority over the Board fails each one.

First, the General Assembly may only delegate its power to agencies that are "equipped to adapt legislation 'to complex conditions involving numerous details with which the Legislature cannot deal directly.'" *Adams* at 697, 249 S.E.2d at 410 (quoting *Turnpike*

Authority, 265 N.C. at 114, 143 S.E.2d at 323). Surely the RRC would not contend that the General Assembly "cannot deal directly" with matters concerning North Carolina's free public schools. It can and it must. *See generally Hoke*, 358 N.C. at 609, 599 S.E.2d at 373 ("[T]he North Carolina Constitution . . . recognize[s] that the legislative and executive branches have the *duty* to provide all the children of North Carolina the opportunity for a sound basic education.") (emphasis added). In addition, any constitutionally-imposed burden on the General Assembly is ameliorated by the fact that under Article IX, Section 5, the General Assembly relies on the Board for the day-to-day "management" of North Carolina's free public schools. *Lane*, 65 N.C. at 155-56.

Furthermore, the RRC is by no means well-equipped to "adapt [the Board's rules] to complex conditions" in the field of public education. The members of the RRC are not required to have any particular expertise, knowledge, or background in public education. Other than being endorsed by the Speaker of the House or the President of the Senate, they are not required to have any particular qualifications at all. N.C. Gen. Stat. § 143B-30.1(a) (2013). As a result, the RRC's rules review process takes away final decision-making authority from the Board and gives it to non-experts. This is especially dangerous given the importance of the duty to "supervise and administer the free public school system" under Article IX, Section 5. *See Hechler* at 842 ("'General supervision' is not an axiomatic blend of words designed to fill the pages of our State Constitution, but it is a meaningful concept to the governance of schools and education in this state. Decisions that pertain to education must be faced by those who possess expertise in the educational area. These issues are critical to the progress of schools in this state, and, ultimately, the welfare of its citizens.").

Thus, in the context of its exercise of authority over the Board, the RRC cannot demonstrate that it is an agency "equipped to adapt legislation 'to complex conditions involving numerous details with which the Legislature cannot deal directly." On these grounds alone, the RRC's exercise of authority over the Board violates the non-delegation doctrine.

Second, the General Assembly has not provided the RRC with appropriate or sufficient standards to apply when deciding whether to strike down the Board's rules. The only guidance the General Assembly has provided the RRC is that it must determine whether a rule is: (1) "within the authority delegated to the agency by the General Assembly"; (2) "clear and unambiguous"; (3) "reasonably necessary to implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency"; and (4) "adopted in accordance with [the APA]." N.C. Gen. Stat. § 150B-21.9(a) (2013). Other than assisting the Board with the scrivener's task of drafting "clear and unambiguous" rules – a task that the Board is capable of accomplishing without the RRC's assistance – this "guidance" is useless when applied to the Board.

This is because the Board's rulemaking authority is not delegated to it by the General Assembly like a typical administrative agency. Rather, as discussed above, the Board's plenary rulemaking authority derives from Article IX, Section 5 of the North Carolina Constitution. For that reason, determining whether the Board's rules are within the authority delegated to it by the General Assembly, adopted in accordance with the APA, or necessary to implement legislation is nonsensical when applied to the Board. When the Board makes rules, it does not need to search for a source of its rulemaking power, nor does it need the RRC's assistance to locate the source of that power. The source is the North Carolina Constitution itself. Accordingly, the General Assembly has failed to provide the RRC with appropriate standards here.

Furthermore, as the Court explained in *Adams*, the General Assembly's attempt to delegate power "should be closely monitored to ensure that . . . the agency is not asked to make important policy choices which might just as easily be made by the elected representatives in the legislature." *Id.*, 295 N.C. at 697, 249 S.E.2d at 411. Here, the General Assembly gives the RRC no meaningful guidance on how to evaluate the Board's rules on a substantive level. As a result, the RRC's rules review process often devolves into a "forum to re-argue policy issues with which agencies have already wrestled." John Wagner, Ten Citizens With Clout Irk Rule Makers, News & Observer (Raleigh, N.C.), Feb. 20, 2000, at A1. History shows that this results in the RRC nullifying rules "based on ideology and political pressure." Jim Rossi, *Overcoming Parochialism: State Administrative Procedure and Institutional Design*, 53 Admin. L. Rev. 551, 563 (2001) (suggesting that the RRC has used its authority to veto several controversial rules in response to political pressure). Thus, when applied to the Board's constitutionally-enacted rules, not only is the General Assembly's "guidance" to the RRC inapplicable, it is also devoid of any substance.

Finally, there are no "adequate procedural safeguards in the [RRC] statute[s] to assure adherence to the legislative standards." *Bring v. N.C. State Bar*, 348 N.C. 655, 659, 501 S.E.2d 907, 910 (1998); *Adams*, 295 N.C. at 701, 249 S.E.2d at 412-13. When the RRC strikes down the Board's rules, the only available "procedural safeguard" is to file a lawsuit. Aside from the fact that years of protracted litigation is hardly an "adequate safeguard," this option is never "adequate" for the Board. As described more fully above, the "default" provisions of the RRC rules review process render the Board's rules void *ab initio* for at least six months or more every time the Board attempts to enact a rule. (Verified Complaint at ¶ 26). In the interim, the Board is unable to fulfill its constitutional rulemaking duties. This results in *per se* irreparable harm.

See Elrod v. Burns, 427 U.S. 347, 373 (1976) (holding that constitutional violations "for even minimal periods of time, unquestionably constitutes irreparable injury"); *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 511 (4th Cir. 2002) (same). Thus, when applied to the Board, the procedural safeguard of a lawsuit is meaningless.

For all these reasons, the legislature's open-ended delegation to the RRC to strike down the Board's rules violates the non-delegation doctrine. N.C. Const. art. I, § 6; *id.* at art. II, §1; *id.* at art. IX, § 5. Accordingly, should the Court reach this issue, the Board is entitled to summary judgment on Count 3 of the Complaint.

III. DEFENDANTS' MOTION TO DISMISS THE COMPLAINT IS MERITLESS AND SHOULD BE SUMMARILY DENIED.

In deciding a Rule 12(b)(6) motion, the Court treats the well-pled allegations of the complaint as true and admitted. *Sutton v. Duke*, 277 N.C. 94, 98, 176 S.E.2d 161, 163 (1970). The facts and permissible inferences set forth in the complaint are to be treated in a light most favorable to the nonmoving party. *Ford v. Peaches Entm't Corp.*, 83 N.C. App. 155, 156, 349 S.E.2d 82, 83 (1986). The "essential question" raised by a Rule 12(b)(6) motion is "whether the complaint, when liberally construed, states a claim upon which relief can be granted on any theory." *Barnaby v. Boardman*, 70 N.C. App. 299, 302, 318 S.E.2d 907, 909 (1984).

A motion to dismiss should be granted only if "it appears certain that [the plaintiff] can prove no set of facts which would entitle [it] to relief under some legal theory." *Fussell v. N.C. Farm Bureau Mut. Ins. Co.*, 364 N.C. 222, 225, 695 S.E.2d 437, 440 (2010). Therefore, "Rule 12(b)(6) 'generally precludes dismissal except in those instances where the face of the complaint discloses some insurmountable bar to recovery.'" *Energy Investors Fund, L.P. v. Metric Constructors, Inc.*, 351 N.C. 331, 337, 525 S.E.2d 441, 445 (2000) (quoting *Sutton*, 277 N.C. at 102, 176 S.E.2d at 166).

The RRC and the State contend that the Board's Complaint should be dismissed for "failure to abide by the applicable statute of limitations, failure to present a justiciable claim or controversy under the Declaratory Judgment Act, and failure to abide by the principles of estoppel." (Def. Mot. at 2). For the reasons that follow, each of these defenses is meritless.

A. Defendants' statute of limitations defense is both legally and factually without merit.

A cause of action based on the North Carolina Constitution accrues when the right to institute and maintain a suit arises. N.C. Gen. Stat. § 1-15(a) (2013). However, the North Carolina Supreme Court has "recognized the 'continuing wrong' or 'continuing violation' doctrine." *Williams v. Blue Cross Blue Shield*, 357 N.C. 170, 178-79, 581 S.E.2d 415, 423 (2003) (quoting *Faulkenbury v. Teachers' & State Employees' Ret. Sys. of N.C.*, 345 N.C. 683, 694-95, 483 S.E.2d 422, 429-30 (1997)). The doctrine is simple: "continual unlawful acts . . . restart the running of the statute of limitations." *Id.* Thus, "if the same alleged violation was committed at the time of each act, then the limitations period begins anew with each violation." *Id.* at 179-80, 581 S.E.2d at 423 (explaining that "a statute of limitations does not begin to run until the violative act ceases").

Our appellate courts have repeatedly applied the continuing violation doctrine to reject statute of limitations defenses to constitutional challenges. *See, e.g., id.*; *see also Amward Homes, Inc. v. Town of Cary*, 206 N.C. App. 38, 56-57, 698 S.E.2d 404, 418 (2010) (holding that the statute of limitations did not bar the plaintiffs' constitutional challenge to an unconstitutional building permit requirement because under the continuing violation doctrine, the statute of limitations restarted "[e]ach time a builder-plaintiff applied for a permit and paid the fee to the Town"); *Faulkenbury*, 345 N.C. at 695, 483 S.E.2d at 429-30 (applying continuing violation

doctrine because "reductions in [plaintiffs' retirement] payments under the [violative law] were deficiencies which have continued to the present time").

This case presents a textbook example of the continuing wrong doctrine. The Verified Complaint states that "[n]otwithstanding the Board's constitutional authority, the RRC since its creation in 1986 has purported to exercise authority over the Board" up to the present day. (Verified Complaint at ¶ 4). The Verified Complaint alleges that "[s]ince [the RRC's] inception in 1986," the RRC "has objected to or modified every rule adopted by the Board and submitted to the RRC for approval." (*Id.* at ¶ 25). On the face of the Verified Complaint, Defendants' statute of limitations defense fails, because the dispute continues right up to the present day.

Furthermore, even if the Court found it necessary to go beyond the Complaint, which by itself would be grounds for denying Defendants' Rule 12(b)(6) motion, public records confirm that the RRC struck down one of the Board's rules as recently as February 21, 2014. *See supra* at 5. In light of these publicly-available facts of which the RRC is well-aware, it is puzzling why Defendants would make a statute of limitations argument.

For these reasons, Defendants do not have a valid defense based on the statute of limitations.

B. Unless the RRC agrees with the Board's decision to no longer voluntarily submit its rules for RRC approval, Defendants' justiciability defense is without merit.

It is well-settled that state government entities may bring declaratory judgment actions to challenge the exercise of authority of other state government entities. *See, e.g., N.C. Dep't of Corr. v. N.C. Med. Bd.*, 363 N.C. 189, 99, 675 S.E.2d 641, 648 (2009) (holding that a declaratory judgment was proper when the actions of the Department of Corrections and the North Carolina Medical Board, "both seeking to fulfill their statutory duties, are in irreconcilable conflict"); *Martin v. Thornburg*, 320 N.C. 533, 535, 359 S.E.2d 472, 473 (1987) (determining "the rights

and duties of the Governor and Council of State with respect to the entry of leases on behalf of the State"). In addition, North Carolina allows a plaintiff to bring claims directly under the North Carolina Constitution. *Corum v. University of North Carolina*, 330 N.C. 761, 782, 413 S.E.2d 276, 289 (1992).

Like any other plaintiff in a declaratory judgment action, a state government entity need only demonstrate that its "rights, status or other legal relations are affected." N.C. Gen. Stat. § 1-254 (2013). The plaintiff is then entitled to "obtain a declaration of rights, status, or other legal relations." *Id.* The Declaratory Judgment Act is "remedial" and must be "liberally construed and administered." N.C. Gen. Stat. § 1-264 (2013).

Unlike the federal courts, North Carolina's state courts are not constrained by the strict "case or controversy" requirements of Article III of the United States Constitution. *See Time Warner Entm't Advance/Newhouse P'ship v. Town of Landis*, 747 S.E.2d 610, 614 (N.C. Ct. App. 2013) (reversing trial court's dismissal of declaratory judgment action for lack of case or controversy). Instead, all that is required is "an actual controversy between parties having adverse interests in the matter in dispute." *Id.* (quoting *Gaston Bd. of Realtors, Inc. v. Harrison*, 311 N.C. 230, 234, 316 S.E.2d 59, 61 (1984)).

Here, the allegations of the Verified Complaint easily satisfy this low threshold. The Verified Complaint alleges that "[t]he Board as currently constituted has made the decision to exercise the full extent of its powers and duties under the North Carolina Constitution without unconstitutional interference by the RRC" and has "resolved that it will no longer voluntarily submit its rules for RRC approval." (Verified Complaint at ¶¶ 27-28). The Verified Complaint further states that "[t]he Board recognizes that its decision is in direct conflict with the RRC's

interpretation and application of both N.C. Gen. Stat. § 150B-2(1a) and the RRC's enabling legislation," and that "[a]ccordingly, a declaratory judgment is necessary to determine the proper interpretation and application of the statutory and state constitutional provisions discussed herein." (*Id.* at ¶ 29).

These facts alone more than adequately establish a justiciable case or controversy. The only way that a justiciable case or controversy would not exist is if the RRC agrees with the Board's reading of the plain language and expressly-stated intent of Article IX, Section 5. If so, then the RRC need only submit to a Consent Order resolving this action without further Court involvement. Otherwise, this action presents a case or controversy for the Court to resolve by declaratory judgment.

For these reasons, Defendants do not have a valid justiciability defense.

C. Defendants' estoppel defense is without merit because the doctrine does not apply to state entities exercising governmental powers.

Despite the Verified Complaint's sworn statement that "the Board has repeatedly questioned the constitutionality of [the] purported exercise of authority by the RRC over the Board" (*Id.* at ¶ 24), Defendants contend that the action should be dismissed for "failure to abide by principles of estoppel." This argument fails. To the best of the undersigned's knowledge, no North Carolina court has ever applied estoppel to a government entity exercising its governmental powers.

In Chief Justice Ruffin's opinion in *Candler v. Lunsford*, 20 N.C. 542 (1839), the North Carolina Supreme Court first adopted the English common law rule that "the sovereign cannot be estopped." *Id.* at 408 (explaining it is "a rule of justice and policy, equally applicable to our institutions as to those of the mother country"). In the more than 175 years since this decision, the Supreme Court of North Carolina has repeatedly held that estoppel does not apply to state

government entities exercising their "governmental" powers. *See, e.g.*, *Plant Food Co. v. Charlotte*, 214 N.C. 518, 519-20, 199 S.E. 712, 713 (1938) (holding that the doctrine only applies in limited circumstances in which the government entity is exercising a "proprietary," as opposed to a "governmental," function); *Henderson v. Gill*, 229 N.C. 313, 316, 49 S.E.2d 754, 756 (1948) (holding that "facts, however potent in creating an estoppel in ordinary transactions between individuals, do not estop the State in the exercise of a governmental or sovereign right"); *Blackwelder v. Winston-Salem*, 332 N.C. 319, 324, 420 S.E.2d 432, 435-36 (1992) (quoting *Sykes v. Belk*, 278 N.C. 106, 120, 179 S.E.2d 439, 448 (1971)) ("It is generally recognized in North Carolina that the doctrine of estoppel will not be applied against [the government] in its governmental, public, or sovereign capacity."). The rationale for this rule is that if the government were "subject to estoppel to the same extent as an individual or a private corporation . . . it might be rendered helpless to assert its powers in government" – an untenable result. *Washington v. McLawhorn*, 237 N.C. 449, 454, 75 S.E.2d 402, 405-06 (1953).

Thus, the doctrine can only be applied to a government entity if it is certain that the application of "estoppel will not impair the exercise of the governmental powers of the entity." *Fike v. Board of Trustees*, 53 N.C. App. 78, 82, 279 S.E.2d 910, 913 (1981) (quoting *Washington*, 237 N.C. at 454); *McCaskill v. Dep't of State Treasurer, Ret. Sys. Div.*, 204 N.C. App. 373, 397, 695 S.E.2d 108, 126 (2010) (same). However, this threshold showing is extraordinarily high. The doctrine cannot be applied when there is only the mere "*possibility* that [the government's] exercise of governmental powers *might* be impeded by an estoppel claim." *Kings Mt. Bd. of Educ. v. N.C. State Bd. of Educ.*, 159 N.C. App. 568, 577, 583 S.E.2d 629, 636 (2003) (emphasis added).

Here, Defendants cannot seriously argue that the application of estoppel would not impair the exercise of the Board's governmental powers. The governmental powers at issue here are the Board's constitutional powers to "supervise and administer the free public school system" and "make all needed rules and regulations in relation thereto." N.C. Const. art. IX, § 5. As a matter of law, this is a "governmental" – as opposed to "proprietary" – power. *See Bynum v. Wilson County*, 367 N.C. 355, 359, 758 S.E.2d 643, 646 (2014) (quoting *Estate of Williams v. Pasquotank County Parks & Rec. Dep't*, 366 N.C. 195, 202, 732 S.E.2d 137, 142 (2012)) (holding that "activity is necessarily governmental [as opposed to proprietary] in nature when it can only be provided by a governmental agency or instrumentality").

Likewise, there is more than the mere "*possibility*" that the Board's exercise of governmental powers "*might* be impeded by an estoppel claim." This entire case concerns the Board's core governmental function: the exercise of its constitutional rulemaking authority. Thus, there is an absolute *certainty* that the "exercise of [the Board's] governmental powers" would be "impeded" if the doctrine of estoppel were applied. *Kings Mountain*, 159 N.C. App. at 577, 583 S.E.2d at 636.

Kings Mountain illustrates this point. There, the petitioners argued that the Board had previously recognized the existence of a school district in the past and therefore was estopped from approving a plan of merger inconsistent with that recognition. *Id.* at 576, 583 S.E.2d at 635. The petitioners further argued that the Board had annually certified the number of students within that district, which determines funding allocation among the school districts; having relied on these certifications, they contended, the Board was "estopped to deny what it ha[d] implicitly recognized over the years." *Id.* at 577, 583 S.E.2d at 636. The Court of Appeals rejected those arguments. As the Court explained, "application of the estoppel doctrine would impede the State

Board from exercising its legislative power to approve or deny school mergers under N.C. Gen. Stat. § 115C-68.1(a)," regardless of what the Board may have decided in the past. *Kings Mountain*, 159 N.C. App. at 577, 583 S.E.2d at 636. To be sure, if the Board's statutory power to approve school mergers in *Kings Mountain* constituted a "governmental power" that could not be "impeded" by estoppel, then the Board's constitutional rulemaking power is surely a governmental power that cannot be impeded by estoppel.

For these reasons, Defendants' estoppel defense is without merit. Defendants' motion to dismiss should be summarily denied.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter summary judgment in its favor and deny Defendants' Motion to Dismiss.

Respectfully submitted the 25th day of June, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day e-mailed a copy of the foregoing, by agreement of the parties, to the following persons at the following address which is the last address known to me:

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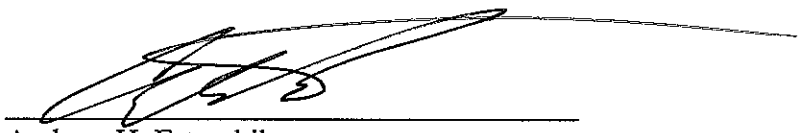

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EXHIBIT A

Model Teacher Contract Rule

All contracts between a local board of education, as defined in G.S. 115C-5(5), and a teacher, as defined in G.S. 115C-325, shall contain the following:

(a) A statement that the contract is effective only if approved by a majority of the local board at an officially called meeting of the local board.

(b) The term of the contract. Such term may be for any length permitted by law. At the conclusion of the contract term, the local board may, but is not required to, re-employ the teacher by offering the teacher a subsequent contract as provided by law.

(c) An indication of the compensation that the teacher shall receive for professional services performed pursuant to the contract. Such compensation shall be at a rate consistent with the North Carolina General Statutes, the salary schedule for teachers established by the State of North Carolina, and any local supplement that may apply. If the teacher is to be paid from local funds, the compensation will be consistent with the local salary schedule adopted pursuant to G.S. 115C-302.1(h).

(d) With respect to qualifications:
  (1) The teacher's obligation to maintain a North Carolina teaching license valid for the teacher's area of assignment.
  (2) The teacher's obligation to inform the local board's Human Resources Office in the event that the teacher's license is revoked, suspended, expired, or not renewed for any reason.
  (3) A statement that the teacher is solely responsible for obtaining and maintaining the required licensure.

(e) With respect to duties:
  (1) A requirement that the teacher shall perform all duties assigned by the superintendent and required by the laws of the State of North Carolina.
  (2) A statement that the contract does not give the teacher a right to any particular assignment or school site.
  (3) A requirement that the teacher agrees to become familiar with and abide by the policies and practices of the local board and the North Carolina State Board of Education, and to abide by the laws of the State of North Carolina and the United States.

(f) With respect to special duties:
  (1) A statement that, if there are special duties or assignments for which the local board has agreed to compensate the teacher, those will be described in a separate agreement and the additional compensation will not be considered salary for the purpose of computing the teacher's salary under the provisions of G.S. 115C-325.
  (2) A statement that any return to regular duties is not a demotion as defined by law.

(g) A provision that explains the teacher's entitlement to health care benefits, earned leave and such other benefits as are available pursuant to the laws of the State of North Carolina and the policies and practices of the local board.

(h) Any requirements for termination of the contract initiated by the teacher pursuant to the provisions and procedures provided in G.S. 115C-325.1 *et seq.*

(i) Any requirements for alteration or termination of the contract by the local board pursuant to the provisions and procedures provided in G.S. 115C-325.1 *et seq.*

(j) With respect to modification, a statement that the contract is subject to modification as a result of subsequent legislative enactments.

(k) With respect to severability, a statement that if any provision of the contract is held to be invalid or unenforceable, such provision shall be severed and shall be inoperative, and the remainder of the contract shall remain in full force and effect.

(l) A statement indicating that the contract shall be governed by the laws of the State of North Carolina.

(m) Any other provisions deemed necessary or as required by law.

STATE OF NORTH CAROLINA
OFFICE OF ADMINISTRATIVE HEARINGS

Mailing address:
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1711 New Hope Church Rd
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February 21, 2014

Via Email Only: william.cobey@dpi.nc.gov
William W. Cobey, Jr., Chairman
N.C. State Board of Education
6302 Mail Service Center
Raleigh, North Carolina 27699-6302

Re: 16 NCAC 06C .0701

Dear Chairman Cobey:

At the February 20, 2014 meeting of the Rules Review Commission, the Commission reviewed the one temporary rule filed by the N.C. State Board of Education on February 19, 2014. The Findings of Need form filed indicates that 16 NCAC 06C .0701, Model Teacher Contract, was adopted by the Board on February 6, 2014. The Commission declined to approve the above-captioned temporary rule based on the failure to comply with the Administrative Procedure Act (APA) in accordance with G.S. 150B-21.1(a) and 150B-21.9.

The findings of need for the rule states that the temporary rule was required by the Session Law 2013-360, Section 9.6(e) that states the following:

> **SECTION 9.6.(e)** The State Board of Education shall develop by rule as provided in Article 2A of Chapter 150B of the General Statutes a model contract for use by local boards of education in awarding teacher contracts. The State Board may adopt a temporary rule for a model contract as provided in G.S. 150B-21.1 to provide a contract to local boards of education no later than January 1, 2014, but shall replace the temporary rule with a permanent rule as soon as practicable.

The Commission disapproved the above-captioned rule because the adoption date was after January 1, 2014 and therefore, the N.C. State Board of Education lacked the statutory authority for temporary rule making. Furthermore, the Commission expressed concerns that

the temporary rule did not contain a model contract for use by local boards of education.

Please respond to this letter in accordance with the provisions of G.S. 150B-21.1(b1) or (b2). If you have any questions regarding the Commission's action, please do not hesitate to contact me.

Sincerely,

Abigail M. Hammond
Commission Counsel

Enclosure: Filing for 16 NCAC 06C .0701

cc: Katie Cornetto, Rule-making Coordinator – katie.cornetto@dpi.nc.gov

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Executive Director

March 17, 2014

Ms. Abigail M. Hammond
Counsel to the Rules Review Commission
Office of Administrative Hearings
1711 New Hope Church Road
Raleigh, North Carolina 27609-6285

Dear Ms. Hammond:

The State Board of Education has received the RRC's objection of the Model Teacher Contract Temporary Rule. We disagree with the objection and are considering our next course of action.

Sincerely,

W.W. Cobey Jr.

William W. Cobey Jr.

WWC/llm