Appendix

Table of Contents

In the

United States Court of Appeals
For the Seventh Circuit

No. 23-1792

TINA GERLACH,

Plaintiff-Appellant,

v.

TODD ROKITA, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
No. 1:22-cv-00072 – **Tanya Walton Pratt**, *Chief Judge*.

ARGUED JANUARY 25, 2024 – DECIDED MARCH 6, 2024

Before WOOD, SCUDDER, and ST. EVE, *Circuit Judges*.

ST. EVE, *Circuit Judge*. Tina Gerlach alleges that Indiana officials violated her right to just compensation under the Fifth Amendment's Takings Clause. She brings claims seeking declaratory and injunctive relief against and just compensation from various current and former Indiana state officers in their official and individual capacities. Because her claim for prospective relief is now moot and her claims for retrospective relief are barred by the Eleventh

Amendment and unavailable under 42 U.S.C. § 1983, we affirm the district court's dismissal.

I. Background

A. Factual Background

Under the Revised Indiana Unclaimed Property Act (the "Act"), Indiana takes custody of unclaimed property belonging to Indiana citizens after a specified period of dormancy. This property can include unclaimed wages, unclaimed insurance proceeds, and uncashed checks held by private and public entities such as banks and insurance companies. Ind. Code § 32-34-1.5-4. The Indiana attorney general takes possession of and deposits the unclaimed property in an account, which in turn is used to satisfy claims made by rightful owners for their property. Ind. Code §§ 32-34-1.5-14, 32-34-1.5-42. The attorney general then transfers any amount beyond what is necessary to satisfy those claims to the Indiana state treasurer, who places them in Indiana's abandoned property fund. Ind. Code § 32-34-1.5-42. At periodic intervals, the treasurer transfers any amount over $500,000 to Indiana's general fund. Ind. Code § 32-34-1.5-44(b).

In the past, Indiana did not compensate owners for interest the property earned while in state custody when satisfying claims for that property. After a previous lawsuit challenging this practice, Indiana began paying interest on reclaimed funds so long as the property also earned interest prior to Indiana taking custody. *See Cerajeski v. Zoeller*, 735 F.3d 577, 582 (7th Cir. 2013). Indiana, however, maintained its policy of not paying interest on property that did not earn interest before coming into state custody. Subsequent decisions from this court have clarified

that *any* failure to pay interest on reclaimed property, even if that property was not interest bearing prior to state custody, violates the Fifth Amendment of the United States Constitution. *See Goldberg v. Frerichs*, 912 F.3d 1009 (7th Cir. 2019); *Kolton v. Frerichs*, 869 F.3d 532 (7th Cir. 2017).

Pursuant to the Act, the Indiana attorney general took custody of two separate pieces of dormant property owned by Tina Gerlach. Both are valued at over $100. Gerlach reclaimed one of those pieces of property valued at $100.93, and after approving her claim, Indiana returned that property. She has not yet asserted a claim for the second piece of property. Neither piece of property earned interest prior to being in state custody, and when Indiana returned Gerlach's reclaimed property, it did not compensate her for interest accrued while in state custody.

B. Procedural Background

In 2022, Gerlach sued several current and former state officials in federal court, alleging violations of the Fifth Amendment Takings Clause. Count I of Gerlach's complaint seeks declaratory and injunctive relief against Indiana Attorney General Todd Rokita and Indiana Treasurer Kelly Mitchell[1] in their official capacities. Count II is a direct suit for compensation pursuant to the Fifth Amendment as applied to the states by the Fourteenth Amendment, and, like Count I, is against Rokita and Mitchell in their official capacities. Count III seeks compensatory relief under

[1] Mitchell's term in office has since ended. The current Indiana Treasurer is Daniel Elliott. Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Treasurer Elliott is hereby substituted for Mitchell.

42 U.S.C. § 1983 for alleged constitutional violations by Rokita, former acting Attorney General Aaron Negangard, and former Attorney General Curtis Hill, in their individual capacities.

In June 2022, Rokita, Mitchell, Negangard, and Hill ("Defendants") moved for judgment on the pleadings under Federal Rule of Civil Procedure 12(c), arguing that Gerlach's claim for prospective relief was moot and her claims for retrospective relief were barred by the Eleventh Amendment. In support of their assertion that Gerlach's claim for prospective relief was moot, Defendants attached an affidavit from Amy Hendrix, the Director of Indiana's Unclaimed Property Division, explaining that beginning that same month, the attorney general's policy was to pay interest on all returned property, regardless of whether it earned interest prior to recovery by the state.

The district court granted Defendants' motion for judgment on the pleadings and dismissed Gerlach's complaint with prejudice. Relying on the policy change described in Hendrix's affidavit, the district court found that Gerlach's claim for prospective relief was moot. As for her claim for just compensation against Rokita and Mitchell in their official capacities, the district court explained that the Eleventh Amendment bars any claim for compensation against state employees in their official capacities. The district court also dismissed Gerlach's claim against Rokita, Negangard, and Hill in their individual capacities for two reasons. First, it relied on *Vicory v. Walton*, 730 F.2d 466, 467 (6th Cir. 1984), to find that an individual cannot be held liable for a violation of the Takings Clause. And second, it found that the suit

was really against the state because Indiana alone benefited from the unpaid interest and must pay any compensation owed.

Gerlach appealed, and while that appeal was pending, Indiana passed new legislation, effective July 1, 2023, codifying the policy described in Hendrix's affidavit. The Indiana attorney general must now pay interest on all property recovered under the Act, even if that property did not earn interest prior to Indiana taking custody. Ind. Code § 32-34-1.5-33(c).

II. Analysis

The Takings Clause of the Fifth Amendment prohibits the taking of private property "for public use, without just compensation." U.S. Const. amend. V. Gerlach's claims arise under this clause, presenting legal questions which we review de novo. *Loertscher v. Anderson*, 893 F.3d 386, 392 (7th Cir. 2018). We also review a district court's decision granting a Rule 12(c) judgment on the pleadings de novo. *Buchanan-Moore v. Cnty. of Milwaukee*, 570 F.3d 824, 827 (7th Cir. 2009).

A. Prospective Relief

In Count I, Gerlach seeks a declaration that Indiana's failure to pay interest on all property, including property not accumulating interest before being taken into state custody, violates the Takings Clause. She also requests an order enjoining the state and its officials from future violations encompassed by the declaration. The parties do not dispute that the specific relief sought in Count I is moot after legislative changes during the pendency of this appeal. Indiana now requires payment of interest on

all property recovered under the Act, even if that property did not earn interest prior to Indiana taking custody of it. Ind. Code § 32-34-1.5-33(c). Consequently, there is no relief this court can award that Indiana law does not already provide. *See Ozinga v. Price*, 855 F.3d 730, 734 (7th Cir. 2017) ("When a plaintiff's complaint is focused on a particular statute, regulation, or rule and seeks only prospective relief, the case becomes moot when the government repeals, revises, or replaces the challenged law and thereby removes the complained-of defect.").[2]

On appeal, Gerlach suggests for the first time that Indiana's method of calculating interest may nevertheless violate the Takings Clause requirement that compensation be "just." But any declaratory relief related to the calculation of interest is distinct from the relief she sought in her complaint. As such, she cannot raise this claim for the first time on appeal. *See Joyce v. Morgan Stanley & Co., Inc.*, 538 F.3d 797, 802 (7th Cir. 2008) (noting that a plaintiff "may not amend the complaint on appeal to state a new claim" (internal quotations omitted)).

B. Compensatory Relief Against Employees as Officers

Gerlach's claim for compensatory relief in Count II against the attorney general and treasurer faces two

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[2] The district court similarly found Gerlach's claims for prospective relief moot, though on different grounds. Gerlach asks that we vacate that ruling, but because the district court's decision raises no preclusion concerns, we decline to do so. *See Mitchell v. Wall*, 808 F.3d 1174, 1176 (7th Cir. 2015) (explaining that vacatur is appropriate "to prevent the district court's unreviewed decision from having a preclusive effect in subsequent litigation between the parties").

obstacles. First, because she brings this claim directly under the Fifth Amendment, she must demonstrate that the Fifth Amendment Takings Clause creates an implied direct cause of action by its text alone. *Compare Davis v. Passman*, 442 U.S. 228, 242–44 (1979) (finding an implied direct cause of action in the text of the Fifth Amendment Due Process Clause), *with Egbert v. Boule*, 596 U.S. 482, 491 (2022) (explaining the Court's reticence to create additional implied causes of action for constitutional violations because, "[a]t bottom, creating a cause of action is a legislative endeavor"). Neither we nor the Supreme Court have ever recognized a direct cause of action for compensation under the Takings Clause. We are aware that the Supreme Court is considering this very question in *Texas v. Devillier*, No. 22-913 (argued Jan. 16, 2024). But even if the Court does find a direct cause of action, the second obstacle—Eleventh Amendment sovereign immunity—disposes of Gerlach's claim.

Indiana enjoys "the privilege of the sovereign not to be sued without its consent." *Driftless Area Land Conservancy v. Valcq*, 16 F.4th 508, 520 (7th Cir. 2021) (quoting *Va. Off. for Prot. & Advoc. v. Stewart*, 563 U.S. 247, 253 (2011)). The Eleventh Amendment prohibits suits against a state in federal court, whether by its own citizens or citizens of another state. U.S. Const. amend. XI; *Edelman v. Jordan*, 415 U.S. 651, 662–63 (1974). That protection extends to state employees sued in their official capacities. *See Lewis v. Clarke*, 581 U.S. 155, 162 (2017) ("In an official-capacity claim, the relief sought is only nominally against the official and in fact is against the official's office and thus the sovereign itself.").

States' sovereign immunity, however, is not without exception. *Ex parte Young* permits a narrow set of claims against state officials "when a plaintiff seeks prospective relief against an ongoing violation of federal law." *Driftless*, 16 F.4th at 520–21 (citing *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 281 (1997)); *see also Ex parte Young*, 209 U.S. 123 (1908). As for claims seeking a monetary judgment, only congressional abrogation or waiver by the state itself can overcome a state's sovereign immunity. *Ind. Prot. & Advoc. Servs. v. Ind. Family & Soc. Servs. Admin.*, 603 F.3d 365, 371 (7th Cir. 2010); *Garrett v. Illinois*, 612 F.2d 1038, 1040 (7th Cir. 1980).

Here, Gerlach seeks monetary relief for past Takings Clause violations from state-employee defendants in their official capacities. These claims are, in effect, claims against the State of Indiana itself and thus barred absent an applicable exception to Indiana's sovereign immunity. *See Lewis*, 581 U.S. at 162. Gerlach seeks retrospective relief, so *Ex parte Young* cannot help her. *See Pavlock v. Holcomb*, 35 F.4th 581, 591 (7th Cir. 2022). Nor has Indiana waived its immunity, and Congress has not abrogated it, either.

Gerlach nevertheless argues that because Indiana courts are closed to her claim for compensation, she must have recourse in federal court. We are not persuaded. Even if there is a viable exception to a state's sovereign immunity where its courts are not open to Takings Clause compensation claims—an exception this court has never recognized—Indiana

courts are open to hear Gerlach's claim for just compensation.[3]

Courts recognizing this exception have made clear that the critical issue, for purposes of determining whether state courts are open to Takings Clause claims, is whether state law recognizes a cause of action for a takings claim. The cases do not turn on whether a plaintiff is likely to succeed in state court. *See O'Connor v. Eubanks*, 83 F.4th 1018, 1024 (6th Cir. 2023) (concluding that a remedy is available in state court because "the Michigan Supreme Court has adjudicated takings claims against the State under the Fifth and Fourteenth Amendments," and consequently the Eleventh Amendment protects the state from suit in federal court); *EEE Minerals, LLC v. North Dakota*, 81 F.4th 809, 816 (8th Cir. 2023) (explaining that a suit for injunctive relief against the state in federal court is unavailable because the state provides for compensation through the state courts); *Williams v. Utah Dep't of Corr.*, 928 F.3d 1209, 1213–14 (10th Cir. 2019) (holding that because Utah state courts address Fifth Amendment takings claims, those courts are open); *see also Skatemore, Inc. v. Whitmer*, 40 F.4th 727, 735 (6th Cir. 2022) (concluding

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[3] Because Indiana courts are open to Gerlach's claims, we need not decide whether she could bring a claim *for compensation* in federal court if no state provision for compensation existed. We have noted that other circuits have held that sovereign immunity protects states "from takings claims for damages in federal court, so long as state courts remain open to those claims," implying that if state courts were closed, a federal court could force a state to pay damages. *Pavlock*, 35 F.4th at 589. But we ourselves have never held that the unavailability of a state court remedy opens the doors of the federal courthouse to not just prospective relief under *Ex parte Young* but also retrospective relief and payment of money compensation.

that because Michigan state courts do hear federal takings claims against the State of Michigan, state courts "remain open").

Under this standard, Indiana state courts are open to Gerlach's claims because the state allows for inverse condemnation and uncompensated takings claims. *See Murray v. City of Lawrenceburg*, 925 N.E.2d 728, 731 (Ind. 2010) (explaining the availability of a suit for inverse condemnation and recovery of compensation); *see also State v. Kimco of Evansville, Inc.*, 902 N.E.2d 206, 210–11 (Ind. 2009) (explaining that the Fifth Amendment Takings Clause and a parallel provision in the Indiana Constitution are "textually indistinguishable and are to be analyzed identically," and outlining the analysis Indiana courts apply when a takings claim is brought under either); Ind. Code § 32-24-1-16 (authorizing inverse-condemnation suits against the State of Indiana for compensation).[4]

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[4] Gerlach urges us to adopt a more exacting test to determine whether Indiana state courts are open to her claims. She points to *Kolton*, in which we analyzed whether Illinois state courts were open to hear similar claims of Takings Clause violations seeking damages from state employees in their official capacities under § 1983. *See* 869 F.3d at 533, 535. But that analysis came in the context of a now-overruled Supreme Court case requiring plaintiffs to exhaust state court remedies for takings violations prior to bringing those same claims in federal court. *See Williamson Cnty. Reg'l Plan. Comm'n v. Hamilton Bank*, 473 U.S. 172, 195 (1985), *overruled by Knick v. Township of Scott*, 139 S. Ct. 2162, 2167 (2019). We concluded that *Williamson County*'s exhaustion rule did not apply "when state law unequivocally denies compensation," as Illinois statutory law and an Illinois Supreme Court ruling did, even though Illinois provided a cause of action for takings more generally. *Kolton*, 869 F.3d at 535.

Because Indiana state courts are open to hear Gerlach's claims and because no exception to Eleventh Amendment sovereign immunity applies, she cannot obtain compensation in federal court from the Indiana-official defendants.

C. Compensatory Relief Against Employees as Individuals

Gerlach finally brings a § 1983 claim for compensatory relief against current and former Indiana officials Rokita, Negangard, and Hill in their individual capacities. Section 1983 makes a "person" liable for statutory and constitutional violations committed "under color" of state law. But even though Gerlach names individual current and former state employees, we are "obliged to consider whether [this claim] may really and substantially be against the state." *Luder v. Endicott*, 253 F.3d 1020, 1023 (7th Cir. 2001) (citing *Coeur d'Alene Tribe*, 521 U.S. at 270); *see also Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 (1984) (noting that even when a suit is nominally against individual state employees, "a question arises as to whether the suit is a suit against the State itself"). A plaintiff cannot circumvent the sovereign immunity enjoyed by states and their

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As *Kolton* itself makes clear, this (now defunct) rule of exhaustion was a separate question from whether a plaintiff could overcome sovereign immunity when suing a state. There, we explained that the exhaustion requirement in *Williamson County* did not disturb the immunity enjoyed by states and state officials. *Id.* at 535–36. Consequently, we decline to adopt *Kolton*'s exhaustion test for whether state courts are open for purposes of sovereign immunity, although we again note that it is unsettled whether lack of recourse in state courts could overcome sovereign immunity to permit a federal court to force a state to pay compensation.

employees in their official capacities simply by pleading a cause of action against those same employees as individuals.

Where "the judgment sought would expend itself on the public treasury or domain," the suit is against the sovereign, not the individual. *Pennhurst*, 465 U.S. at 101 n.11 (quoting *Dugan v. Rank*, 372 U.S. 609, 620 (1963)); *see also Haynes v. Indiana Univ.*, 902 F.3d 724, 732 (7th Cir. 2018) (explaining that a suit is really against the state when "[t]he money will flow from the state treasury to the plaintiff[]" (quoting *Luder*, 253 F.3d at 1024)). Even if the sought after compensation would not definitively be paid out of the state treasury, if the amount the plaintiff seeks "should have been paid by the State," the suit is likely one against the state itself. *See Lenea v. Lane*, 882 F.2d 1171, 1172, 1178 (7th Cir. 1989) (quoting *Dwyer v. Regan*, 777 F.2d 825, 836 (2d Cir. 1985)).

Any compensation Gerlach seeks correlates directly to the interest her property earned while in state custody—interest that flowed to the state, not individual state employees.[5] The money Gerlach seeks is in the state coffers, not the personal bank accounts of Indiana's current and former attorneys general. Targeting individual state employees for those funds does not change the fact that the amount she claims she is owed should have been paid by the state. *See*

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[5] At oral argument, Gerlach's counsel admitted that "the damages would obviously be tied … nearly one hundred percent to the underlying just compensation calculation," and conceded that she could not win double recovery. In other words, if Gerlach could recover compensation from the state under Count II, then she would be barred from recovery under Count III. This supports that Count III is "really and substantially … against the state." *See Luder*, 253 F.3d at 1023.

Lenea, 882 F.2d at 1178. Because the State of Indiana benefited from retaining interest earned on Gerlach's property, we conclude that Gerlach's suit for compensatory relief is actually against the State of Indiana. *See Kolton*, 869 F.3d at 536.

Since Gerlach's claim for compensatory relief is against the state, her claim is doubly barred—first because § 1983 does not create a cause of action against a state and second because Indiana enjoys sovereign immunity under the Eleventh Amendment. *Id.* at 535; *see also Will v. Mich. Dep't of State Police*, 491 U.S. 58 (1989). Finding that Gerlach's claim is really against the state, we need not resolve whether an individual can be held liable for a Fifth Amendment takings violation. Accordingly, the district court correctly dismissed her claim for compensation under § 1983.

III. Conclusion

For these reasons, we AFFIRM the district court's dismissal of Gerlach's claims.

Filed March 29, 2023

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

TINA GERLACH, Plaintiff, v. TODD ROKITA, in his official capacity as Indiana Attorney General and his individual capacity, KELLY MITCHELL, in her official capacity as Indiana Treasurer, CURTIS HILL, in his individual capacity, and AARON NEGANGARD, in his individual capacity, Defendants.	Case No. 1:22-cv-00072-TWP-MG

ENTRY ON PENDING MOTIONS

This matter is before the Court on a Motion for Judgment on the Pleadings pursuant to Federal Rule of Civil Procedure 12(c), filed by Defendants Todd Rokita ("Rokita"), Kelly Mitchell ("Mitchell"), Curtis Hill ("Hill"), and Aaron Negangard's "(Negangard") (collectively, "Defendants") (Filing No. 32). Also before the Court is Plaintiff Tina Gerlach's ("Gerlach") Motion to Strike, or Alternatively, for Leave to File a Surreply (Filing No. 42), and Motion for Oral

Argument (Filing No. 43). Gerlach initiated this lawsuit bringing claims under the Fifth and Fourteenth Amendments and 42 U.S.C. § 1983 for violation of the Takings Clause. The Defendants, after filing their Answer (Filing No. 22), moved for judgment on the pleadings. Gerlach filed a response (Filing No. 36) and, following the filing of the Defendants' reply (Filing No. 41), filed a Motion to Strike (Filing No. 42) and Motion for Oral Argument (Filing No. 43). For the following reasons, the Motion for Judgment on the Pleadings is **granted**, and the Motions to strike and for oral argument are **denied**.

I. BACKGROUND

The following facts are not necessarily objectively true, but as required when reviewing a motion for judgment on the pleadings, the Court accepts as true the factual allegations in the Complaint and draws all inferences in favor of Gerlach as the non-moving party. *See Emergency Servs. Billing Corp. v. Allstate Ins. Co.*, 668 F.3d 459, 464 (7th Cir. 2012).

The Defendants are the current Indiana Attorney General Todd Rokita, former acting Attorney General Aaron Negangard, former Attorney General Curtis Hill, and former Indiana State Treasurer Kelly Mitchell.[1]

The Revised Indiana Unclaimed Property Act, just like its predecessors, is a custodial act: it collects and ostensibly safeguards property belonging to private citizens that has lain dormant for a specified period of time with banks, insurance companies, and other

[1] At the time the Complaint in this suit was filed, Ms. Mitchell held the office of Indiana State Treasurer. Her term has since ended.

public and private firms. (Filing No. 1 at 4, ¶ 12.) Under the Revised Indiana Unclaimed Property Act, the Attorney General is authorized to take possession of certain unclaimed property. Ind. Code § 32-34-1.5-12; Ind. Code § 32-34-1.5-13. The Attorney General maintains an account "with an amount of funds the attorney general reasonably estimates is sufficient to pay claims" and is required to transfer remaining funds or proceeds from sale of the property to the Indiana State Treasurer who is required to place those funds into the State's abandoned property fund. Ind. Code § 32-34-1.5-42. The Treasurer is further required to transfer the balance of the abandoned property fund in excess of $500,000.00 to the State's general fund at least once per year. Ind. Code § 32-34-1.5-44. The Attorney General administers these statutory provisions through the Attorney General Office's Unclaimed Property Division (Filing No. 1 at 4, ¶ 13).

Gerlach, is a current Kentucky resident and former Indiana resident. *Id.* at 1. She had two pieces of property valued over $100.00 that were turned over to the Indiana Unclaimed Property Division pursuant to the Act. (Filing No. 1 at 6, ¶ 25). Ms. Gerlach claimed one of these pieces, and the State of Indiana approved the claim and paid $100.93 to Ms. Gerlach on November 8, 2021. *Id.* at ¶ 26. Ms. Gerlach was not paid interest earned by the property while held by the State. *Id.* The second piece of property remains in the custody of the Attorney General. *Id.* To date, no claim has been made by Ms. Gerlach on this property through the Unclaimed Property Division. *Id.* Neither piece of property was held in an interest-bearing account before the Attorney General took possession of the funds. *Id.* While Defendants held Gerlach's property, it earned income. *Id.* at ¶ 28. Gerlach alleges

that the Defendants and the State have taken that income and refuse to compensate her for the time value of that property. *Id.* at ¶ 27.

Gerlach initiated this action on January 12, 2022, asserting the Defendants violated the Fifth and Fourteenth Amendments "by taking earnings on unclaimed property while in state custody and failing to compensate owners" for those earnings. *Id.* at 1. Gerlach makes requests for injunctive and declaratory relief including a declaration that failure to pay interest on all property claimed under the Revised Indiana Unclaimed Property Act is a violation of the Takings Clause, an order enjoining the Attorney General and Treasurer from further violations, and an order that Indiana must keep separate unclaimed property from the State's general fund. Further, she asks the Court to award just compensation for income earned by her still unclaimed property and damages against the current and former Indiana Attorneys General for violations of the Takings Clause.

The Defendants filed their Answer to the Complaint on April 12, 2022 (Filing No. 22) and their Motion for Judgment on the Pleadings on June 30, 2022 (Filing No. 32). The Defendants attached to their Motion and to their reply in support of their Motion (Filing No. 41) affidavits from Amy Hendrix ("Hendrix"), Director of the Unclaimed Property Division of the Office of the Indiana Attorney General (Filing No. 32-1 and Filing No. 41-1), and Michael Frick, Chief Deputy Treasurer and Portfolio Manager for the Indiana State Treasurer's Office (Filing No. 41-2). These affidavits state that on June 18, 2022, the Unclaimed Property Division began paying interest on claims for funds taken from non-interest-bearing

accounts (Filing No. 32-1). The Division pays interest matching the State's "internal rate of return" (Filing No. 32-1 at 2), which is calculated as the "aggregated investment rate" on the State's general fund and other accounts not invested separately (Filing No. 41-2 at 3). The abandoned property fund is not separately invested from the State's general fund (Filing No. 41-2 at 2). Hendrix affirms that the Attorney General Office's Unclaimed Property Division has no intention of ending these interest payments (Filing No. 32-1 at 4).

II. LEGAL STANDARD

Federal Rule of Civil Procedure 12(c) permits a party to move for judgment after the parties have filed a complaint and an answer and the pleadings are closed. Rule 12(c) motions are analyzed under the same standard as a motion to dismiss under Rule 12(b)(6). *Pisciotta v. Old Nat'l Bancorp.*, 499 F.3d 629, 633 (7th Cir. 2007); *Frey v. Bank One*, 91 F.3d 45, 46 (7th Cir. 1996). The complaint must allege facts that are "enough to raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). Although "detailed factual allegations" are not required, mere "labels," "conclusions," or "formulaic recitation[s] of the elements of a cause of action" are insufficient. *Id.* Stated differently, the complaint must include "enough facts to state a claim to relief that is plausible on its face." *Hecker v. Deere & Co.*, 556 F.3d 575, 580 (7th Cir. 2009) (internal citation and quotation marks omitted). To be facially plausible, the complaint must allow "the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S.

662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (citing *Twombly*, 550 U.S. at 556, 127 S. Ct. 1955).

Like a Rule 12(b)(6) motion, the court will grant a Rule 12(c) motion only if "it appears beyond doubt that the plaintiff cannot prove any facts that would support his claim for relief." *N. Ind. Gun & Outdoor Shows, Inc. v. City of S. Bend*, 163 F.3d 449, 452 (7th Cir. 1998) (quoting *Craigs, Inc. v. Gen. Elec. Capital Corp.*, 12 F.3d 686, 688 (7th Cir. 1993)). The factual allegations in the complaint are viewed in a light most favorable to the non-moving party; however, the court is "not obliged to ignore any facts set forth in the complaint that undermine the plaintiff's claim or to assign any weight to unsupported conclusions of law." *Id.* (quoting *R.J.R. Serv., Inc. v. Aetna Cas. & Sur. Co.*, 895 F.2d 279, 281 (7th Cir. 1989)). "As the title of the rule implies, Rule 12(c) permits a judgment based on the pleadings alone. . . . The pleadings include the complaint, the answer, and any written instruments attached as exhibits." *Id.* (internal citations omitted).

III. DISCUSSION

On January 12, 2022, Gerlach filed the instant Complaint challenging the Defendants' retention of the earnings on her property held as unclaimed property by them under the Indiana Revised Unclaimed Property Act, Ind. Code § 32-34-1.5, *et seq.*, and its predecessors (the "Act"). Count I is a Claim for declaratory and injunctive relief, against Defendants Rokita and Mitchell in their official capacities, on behalf of Plaintiff and the Rule 23(b)(2) Class; Count II is a Claim for just compensation, against Defendants Rokita and Mitchell in their official capacities, on behalf of Plaintiff Gerlach and the Rule 23(b)(3) Class; and Count III is Claim for

compensatory relief, against Defendants Rokita, Hill, and Negangard in their individual capacities, on behalf of Gerlach and the Rule 23(b)(3) Class. (Filing No. 1 at 7-14.) Gerlach alleges the Defendants violate the Fifth and Fourteenth Amendments of the United States Constitution by taking earnings on unclaimed property while in state custody and failing to compensate owners, thereby violating the Constitution's protection of the earnings and the time value of money. (Filing No. 1 at 1).

The Defendants seek a judgment on the pleadings and dismissal of Gerlach's Complaint for two reasons: first, the Court lacks jurisdiction under Article III over Gerlach's claim for prospective relief because the Office of the Attorney General has changed its practice to ensure payment of interest on non-interest-bearing unclaimed property; and second, the Eleventh Amendment bars Gerlach's claims for retrospective monetary relief because any such relief would be paid from the State's treasury.

The Court will first address Gerlach's Motion to Strike and Motion for Oral Argument and then turn to the Defendants' Motion for Judgment on the Pleadings.

A. Motion to Strike and Motion for Oral Argument

Gerlach asks the Court to strike the two affidavits attached to the Defendants' reply and to strike arguments made by the Defendants in reply. In the alternative, she asks for leave to file a surreply brief. She also request[s] oral argument on the pending motions.

1. Motion to Strike Defendants' Affidavits

The "purpose for having a motion, response, and reply is to give the movant the final opportunity to be heard and to rebut the non-movant's response, thereby persuading the court that the movant is entitled to the relief requested by the motion." *Lady Di's, Inc. v. Enhanced Servs. Billing, Inc.*, 2010 U.S. Dist. LEXIS 29463, at *4 (S.D. Ind. Mar. 25, 2010). "New arguments and evidence may not be raised for the first time in a reply brief. Reply briefs are for replying, not raising new arguments or arguments that could have been advanced in the opening brief." *Reis v. Robbins*, 2015 WL 846526, at *2 (S.D. Ind. Feb. 26, 2015) (citations omitted). "Courts allow a surreply brief only in limited circumstances to address new arguments or evidence raised in the reply brief or objections to the admissibility of the evidence cited in the response." *Lawrenceburg Power, LLC v. Lawrenceburg Mun. Utilities*, 410 F. Supp. 3d 943, 949 (S.D. Ind. 2019).

In considering a motion to dismiss the court may also consider affidavits and other documentary evidence which have been filed, so long as any factual disputes are resolved in favor of the non-movant. *See Int'l Medical Group v. American Arbitration Ass'n* 149 F. Supp 2d 615 (SDIN May 25, 2001) citing, *McIlwee v. ADM Indus., Inc.*, 17 F.3d 222, 223 (7th Cir. 1994); *Nelson v. Park Indus., Inc.*, 717 F.2d 1120, 1122 (7th Cir. 1983).

Federal Rule of Civil Procedure 12(f) allows the Court to "strike from a pleading an insufficient defense or redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). Motions to strike are generally disfavored; however, "where . . .

motions to strike remove unnecessary clutter from the case, they serve to expedite, not delay." *Heller Fin., Inc. v. Midwhey Powder Co., Inc.*, 883 F.2d 1286, 1294 (7th Cir. 1989).

Gerlach argues that Defendants improperly included new evidence in their reply brief and this new evidence should be stricken, or, in the alternative, the Court should afford her leave to file a surreply brief so that she may refute the new facts alleged and explain why the affidavits remain insufficient to support the Defendants' Motion (Filing No. 42 at 3). Gerlach asserts that the affidavits attached to the Defendants' reply brief included information that was "known [to the Defendants] and obviously relevant to the Defendants' motion," and therefore should have been included in the brief supporting the Motion. *Id.* Gerlach relies on *Sapperstein v. Hager*, 188 F.3d 852 (7th Cir. 1999) in support of her argument that the Court is required to disregard the reply brief affidavits because she has had no opportunity to contest the facts alleged in the affidavits. (Filing No. 51 at 2.)

The Defendants respond that the arguments made in their reply brief and the newly presented affidavits are proper replies to Gerlach's arguments in her response brief (Filing No. 49 at 6). They point out that their Motion and supporting brief laid out two reasons for dismissal, mootness and Eleventh Amendment bar, and Defendants argue that these reasons were merely expanded upon in their reply brief in order to rebut Gerlach's arguments. *Id.* at 7–8. The Defendants contend that the affidavits attached to their reply respond directly to issues brought up by Gerlach in her response brief, and are offered to assist

the Court in determin[ing] whether it has subject matter jurisdiction over the claims. *Id.* at 8.

In *Sapperstein*, the Seventh Circuit held that the district court abused its discretion in deciding against the plaintiff on subject matter jurisdiction based on an affidavit submitted by an employee of the defendant. 188 F.3d at 856. The court noted that "[w]here evidence pertinent to subject matter jurisdiction has been submitted, . . . 'the district court may properly look beyond the jurisdictional allegations of the complaint . . . to determine whether in fact subject matter jurisdiction exists.'" *Id.* at 855 (quoting *United Transportation Union v. Gateway Western Railway Co.*, 78 F.3d 1208, 1210 (7th Cir. 1996)). The court determined however, that "[g]iven its source and content, in the circumstances the affidavit was not by itself credible, and the trial court erred in relying upon it without further inquiry" for two reasons: 1) the affiant's status as an employee of the business putting forward the affidavit made her "not a disinterested witness" and "subject to their influence, in a sense in their power" rendering difficult a credibility determination "from the face of an affidavit," and 2) the affidavit indicated that the business fell $2,500.00 short of the $500,000.00 in sales required to satisfy the statute's jurisdictional minimum leaving open the possibility that this shortfall was a mere accounting error and provided a basis for doubt as to the veracity of the facts alleged. *Id.* at 856.

The circumstances here, however, are different from those in *Sapperstein*; and the Court concludes that the affidavits are responsive to Gerlach's arguments and are not new evidence that requires additional briefing. Here, the affidavits filed by the

Defendants are directly responsive to concerns raised by Gerlach in her response brief. In her response brief, Gerlach questions the meaning and calculation method of "internal rate of return" as used by the affiant in the Defendants' exhibit attached to their opening brief. (Filing No. 36 at 9–12.) The Defendants' affidavits attached in their reply respond directly to this concern. The affidavits also clarify the definition of "internal rate of return," explain the calculation method, and even contain a chart with the results of such a calculation (*see* Filing No. 41-1; Filing No. 41-2).

Further, neither of the factors from *Sapperstein* raising doubt as to the facts alleged in that affidavit applies here. While in this case both affiants are employees of the State of Indiana, their credibility is not diminished by that status. Instead, the positions of authority the affiants hold in the Office of the Indiana Attorney General and the Indiana State Treasurer's Office enhance their credibility with regard to internal practices of these offices. Secondly, there is no indicia of error, accounting or otherwise, that would give rise to doubts as to the veracity of the facts in the affidavits. The Court is well within its discretion to consider the contents of the affidavits attached to the Defendants' reply without further briefing, and there is no basis for them to be stricken.

2. Motion to Strike Defendants' Arguments

Gerlach also contests consideration of arguments put forward by the Defendants in their reply brief that 1) Gerlach does not have standing to ask the Court for injunctive relief prohibiting commingling of the State's general and unclaimed property funds, and 2) Gerlach does not have standing for this suit against

former Attorneys General Negangard and Hill (Filing No. 42 at 4–5). She also challenges arguments regarding the viability of claims against individuals for violations of the Takings Clause under § 1983 (Filing No. 51 at 4). She asserts that these arguments were raised for the first time in the reply brief, giving her no opportunity to respond (Filing No. 42 at 4). Gerlach asks for the arguments concerning standing and individual liability for Takings Clause violations to be stricken or for leave to file a surreply. *Id.*

Standing is a jurisdictional element that a plaintiff must satisfy. "Establishing standing is the plaintiff's burden and 'must be secured at each stage of the litigation.'" *Prairie Rivers Network v. Dynegy Midwest Generation, LLC*, 2 F.4th 1002, 1007–08 (7th Cir. 2021) (quoting *Bazile v. Finance System of Green Bay, Inc.*, 983 F.3d 274, 278 (7th Cir. 2020)). "This is because the elements of standing are 'not mere pleading requirements but rather an indispensable part of the plaintiff's case.'" *Id.* at 1008 (quoting *Lujan v. Defs. Of Wildlife*, 504 U.S. 555, 561 (1992)). "While the Court normally considers issues raised for the first time on reply to be waived, standing is a jurisdictional issue that the Court must address." *Schunn v. Zoeller*, 2012 WL 5462679 (S.D. Ind. Nov. 8, 2012), *rev'd on other grounds sub nom. Cerajeski v. Zoeller*, 765 F.3d 577 (7th Cir. 2013).

Because the standing requirement is indispensable to Gerlach's case, all arguments regarding standing are responsive to essential claims by Gerlach in her Complaint, and Gerlach was inherently on notice to any challenge to her standing. Gerlach's claims must survive challenges to her standing at all stages of the litigation, including each

stage of briefing on a motion for judgment on the pleadings. The Court will consider these arguments without the necessity of further briefing.

Lastly, in response to Gerlach's claim that the Defendants' argument that individuals cannot be liable for Takings Clause violations was brought up for the first time in reply, the Defendants contend that they raised Eleventh Amendment immunity as one of two central arguments in support of their Motion. Gerlach was thus placed on notice that they were challenging her assertion that the Defendants were subject to her suit. (Filing No. 33.)

The Court agrees. Defendants put forward the argument that the named individuals and elected officials were not subject to this suit in their Motion and opening brief. Gerlach was then afforded the opportunity to respond as to why the individuals named were subject to suit and did so in her response brief. (Filing No. 36 at 18–20.) The Defendants then, in reply, further explained their reasoning why the individuals were immune from suit. (Filing No. 41 at 17.) The Defendants are permitted to "expand upon and clarif[y] the arguments made in [their] opening motion" so long as they do not "raise wholly new arguments." *Ripberger v. Corizon, Inc. v. Corizon, Inc.*, 2012 WL 4340716, at *1 n.1 (S.D. Ind. Sept. 20, 2012). Although the Court always tries to allow litigants a full and fair opportunity to respond to arguments made by their adversary, including allowing surreplies, surreplies are not allowed under the local rules unless they are to address newly raised evidence or arguments. *Chaib v. GEO Group, Inc.*, 92 F. Supp. 3d 829, 835 (S.D. Ind. 2015)[.] Because the Defendants' reply argument was contained within the

reasoning put forward in their opening brief, the Defendants did not stray into impermissible new arguments which would allow a surreply.

Accordingly, the motion to strike and alternative request to file a surreply is **denied**.

3. Motion for Oral Argument

Having reviewed the Motion and the parties' briefs, the Court determines that oral argument is not necessary to decide the Defendants' Motion for Judgment on the Pleadings. The parties have thoroughly briefed the issues raised, and the Court is prepared to rule on the Motion. Accordingly, the Motion for Oral Argument (Filing No. 43) is **denied**.

B. Defendants' Motion for Judgment on the Pleadings

Gerlach alleges that, following *Goldberg v. Frerichs*, 912 F.3d 1009 (7th Cir. 2019), the Takings Clause requires the State of Indiana to pay interest on unclaimed property even when the property was non-interest-bearing before coming into the possession of the Indiana Attorney General. In *Goldberg*, the Seventh Circuit ruled that owners of property taken by a state as unclaimed are "entitled to 'income that the property earns' less custodial fees" regardless of whether the property was earning interest before it came into the hands of the state. *Id.* at 1011. Gerlach asserts that the Attorney General's Division of Unclaimed Property has failed to comply with this ruling and has refused to pay the interest on this category of property (Filing No. 1 at 1–2).

The Defendants do not take issue with Gerlach's contentions on the constitutional requirements of the Takings Clause and do not raise any question that,

prior to June 18, 2022, the Unclaimed Property Division had not included interest in payments made to owners of non-interest-bearing unclaimed property, including the payment made to Gerlach on November 8, 2021 (Filing No. 22 at 10). Rather, the Defendants present two bases for judgment on the pleadings addressing the requested injunctive and declaratory relief and damages request separately (Filing No. 32). They contend that Gerlach's requests for injunctive and declaratory relief should be dismissed as moot, and her request for damages is barred by the Eleventh Amendment. *Id.* The Court will address each of these contentions in turn.

1. Injunctive and Declaratory Relief

The Defendants rely on affidavits submitted by officials from the Indiana Attorney General's Office and the Office of the Indiana State Treasurer to demonstrate that any practices causing injury to Gerlach have ended. The Defendants argue that since the alleged conduct has ended, there is no longer anything for the Court to enjoin, therefore, Gerlach's requests for injunctive and declaratory relief are moot. Defendants argue that nothing in the Complaint demonstrates that Gerlach is harmed in any way by the statutorily mandated method of handling funds derived from unclaimed property. Since no harm by this system is alleged in the Complaint, Gerlach does not have standing to ask for an injunction mandating any change in the state government's handling of funds.

Gerlach contends that the affidavits do not sufficiently demonstrate mootness and that the Court should not consider the affidavits as they are not part of the pleadings. (Filing No. 36 at 1–2.) She argues

that it would be improper for the Court to consider anything beyond the Complaint and Answer when ruling on a Rule 12(c) motion, and the Court is limited to ruling based on allegations in the Complaint. *Id.* at 6. Gerlach points out that voluntary cessation of an activity does not moot a case unless it is absolutely clear that the practice cannot resume, and she argues the Defendants have not met that heavy burden. *Id.* at 9. She points out that the new practice could be overridden by the Indiana General Assembly, altered by a future Attorney General, or simply abandoned. *Id.* at 12–13, 16. She contends the change here is unlike the changes in *Speech First, Inc. v. Killeen*, 968 F.3d 628 (7th Cir. 2020), which rendered that case moot, because those changes were analogous to legislation whereas the changes here were merely changes to internal governmental practice.

Because the facts in the affidavits go to the Court's subject matter jurisdiction, the Court has authority to consider the Defendants' affidavits to render a determination on mootness. Article III of the Constitution grants jurisdiction to federal courts only where there is an "actual, ongoing controversy." *Stotts v. Community Unit School Dist. No. 1*, 230 F.3d 989, 990 (7th Cir. 2000). "The requirement that a case have an actual, ongoing controversy extends throughout the pendency of the action." *Id.* Where there is no actual, ongoing controversy, the case is moot and must be dismissed for lack of jurisdiction. *Federation of Advertising Industry Representatives, Inc. v. City of Chicago*, 326 F.3d 924, 929 (7th Cir. 2003). "[F]ederal courts have an independent obligation to ensure that they do not exceed the scope of their jurisdiction." *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 434 (2011). Moreover, when considering a motion

concerning subject matter jurisdiction, courts "may properly look beyond the jurisdictional allegations of the complaint and view whatever evidence has been submitted on the issue to determine whether in fact subject matter jurisdiction exists," *Grafon Corp. v. Hausermann*, 602 F.2d 781 (7th Cir. 1979).

Because the issue of mootness is a matter of the Court's subject matter jurisdiction over this case, the Court may, and indeed must, consider all evidence on mootness at each stage of litigation. The Court rejects Gerlach's contention that it would be improper to consider the Defendants' affidavits.

That said, the Court finds that the affidavits demonstrate that the Court does not have subject matter jurisdiction because the case is moot. "To establish Article III standing, a plaintiff must show that it has suffered an 'injury in fact' that is 'fairly traceable' to the defendant's conduct and would likely be 'redressed by a favorable decision.'" *Collins v. Yellen*, 210 L. Ed. 2d 432, 141 S. Ct. 1761, 1779 (2021) (quoting *Lujan*, 504 U.S. at 560–61). Gerlach cannot make a showing that the Court can issue relief that would repair ongoing injury to her as the Defendants have ceased any practice violating the Takings Clause. The affidavits demonstrate that Gerlach, along with any other claimant of unclaimed property, would receive the income earned by the property regardless of the source of the property. The Court cannot issue any declaratory or injunctive relief beyond what is already current practice of the Division of Unclaimed Property.

Gerlach correctly points out the general principle that "a defendant's voluntarily cessation of challenged conduct will not render a case moot because the

defendant remains 'free to return to his old ways.'" *Fed'n of Advert. Indus. Representatives, Inc. v. City of Chicago*, 326 F.3d 924, 929 (7th Cir. 2003) (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 632–33, 73 S. Ct. 894, 97 L. Ed. 1303 (1953)). On the other hand, "[w]hen the defendants are public officials, however, we place greater stock in their acts of self-correction, so long as they appear genuine." *Magnuson v. City of Hickory Hills*, 933 F.2d 562, 565 (7th Cir. 1991). Government actors are granted a presumption that their changes in policy and practice are made in good faith. *See Speech First, Inc.*, 968 F.3d at 646. "A defendant seeking dismissal based on its voluntary change of practice or policy must clear a high bar. 'A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Ciarpaglini v. Norwood*, 817 F.3d 541, 545 (7th Cir. 2016) (quoting *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203, 89 S. Ct. 361, 21 L. Ed. 2d 344 (1968)).

The Court is persuaded that Defendants have cleared the high bar necessary for dismissal. As arms of the state government, the Office of the Attorney General and Indiana State Treasurer's Office, are granted the presumption that their change in practice was done in good faith. Hendrix expressed that her office has no intention of changing tack and will not resume refusing to issue interest claims on any category of unclaimed property. (Filing No. 32-1 at 4.) Although the change in practice came after the initiation of this lawsuit, the change appears to be an attempt by government officials to comply with the law rather than circumvent a lawsuit. The policy has been put into actual effect, and, according to Hendrix,

payments have been made to claimants as required by *Goldberg* for interest earned by property held by the Attorney General even when not in interest-bearing accounts prior to the State's possession.

The method of calculation as outlined in the affidavits complies with the requirement that claimants receive the income earned by the property because it is the exact investment return that the State received while the property was in its possession. There is little reason to believe that Gerlach or any other property claimant would not receive such payments today or in the future. Although the changes here were made administratively and not by legislation or regulation, changes in policy need not be put into place in a manner similar to legislation to moot a case, and the Court does not find any reason beyond speculation to believe the Division of Unclaimed Property will not follow *Goldberg* in the future or to believe that the administrative change will be overridden legislatively. Because the Defendants have demonstrated that it is clear that the prior conduct will not resume, the Unclaimed Property Division's change in practice renders as moot all claims for declaratory and injunctive relief related to the payment of interest on prior non-interest-bearing property and the calculation method for such payments.

Furthermore, the Defendants' arguments on standing related to Gerlach's claims for injunctive relief are well taken. In her Complaint Gerlach asks the Court to enjoin the commingling of the State's general fund and unclaimed property in the State's possession (Filing No. 1 at 10). The Defendants argue

that the pleadings do not demonstrate any reason why Gerlach is harmed by the State's fund management system. A plaintiff "bears the burden of establishing Article III standing." *Silha v. ACT, Inc.*, 807 F.3d 169, 173 (7th Cir. 2015). And to do so a plaintiff must show that she has "suffered an 'injury in fact.'" *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000) (citing *Lujan*, 504 U.S. at 560–61). Gerlach here has not shown any injury resulting from the origin of any payment she may receive from the State of Indiana for her claim on unclaimed property or any interest earned by that property. Therefore, she has not established standing to pursue an order from the Court requiring the State to engage in certain accounting practices.

Accordingly, the Court grants the Defendants' Motion for Judgment on the Pleadings with regard to injunctive and declaratory relief. All of Gerlach's requests for injunctive and declaratory relief are denied.

2. Damages Claims

The Defendants argue that Gerlach's claims for damages are barred by the Eleventh Amendment. The Eleventh Amendment prohibits suits for damages against the State and its officers in their official capacity. *Pennhurst v. Halderman*, 465 U.S. 89, 101–102 (1984). However, the Eleventh Amendment does not block a suit for damages against a state official in his or her individual capacity. *Hafer v. Melo*, 502 U.S. 21, 30–31 (1991); *Kentucky v. Graham*, 473 U.S. 159, 165–67 (1985). Gerlach argues that her claims against the individuals are well pled allegations of violations under 42 U.S.C. § 1983, which allow her to secure

judgments against the individuals themselves and not against the State. (Filing No. 36 at 18–19.)

The Defendants point out that although Gerlach has styled her Complaint to make claims against Indiana officials in their individual capacities, any damages that may be awarded would be paid from the State's treasury. Thus, the Defendants argue, these are in effect claims against the State. Where claims are in fact against the State, Eleventh Amendment immunity from suit has been held to apply. (Filing No. 33 at 12–15.) Defendants assert that because a taking for "public use" can only be done by the State and not by an individual, the Takings Clause cannot be violated by an individual (a taking by an individual would instead be conversion, they claim) (Filing No. 41 at 14–15).

Gerlach next argues that the Eleventh Amendment is inapplicable to Takings Clause violations because the Fourteenth Amendment permitted superseding federal court jurisdiction. She argues that the Fourteenth Amendment altered the balance between the federal government and the states and should be viewed as creating an exception to the Eleventh Amendment by incorporating a self-executing Takings Clause. (Filing No. 36 at 23–27.) The Court is not persuaded. The Defendants point to *Pavlock v. Holcomb*, 35 F.4th 581, 589 (7th Cir. 2022) in which the Seventh Circuit noted that "so long as courts remain open to [Takings Clause] claims," Eleventh Amendment immunity still applies. The Seventh Circuit noted that although the United States Supreme Court held in *Knick v. Twp. of Scott, Pennsylvania*, 204 L. Ed. 2d 558, 139 S. Ct. 2162 (2019) that a Takings Clause plaintiff need not seek

redress in state court against a defendant municipality before filing suit in federal court, no Circuit has held that this case or the Fourteenth Amendment upset the federal-state balance undergirded by the Eleventh Amendment. *Pavlock*, 35 F.4th at 589; *see also Garrett v. State of Illinois*, 612 F.2d 1038, 1040 (7th Cir. 1980).

Gerlach further argues that state courts are not in fact open to Takings Clause claims alleging the State failed to pay income earned by unclaimed property. She contends that federal courts must have jurisdiction because Indiana courts have foreclosed the issue. Gerlach argues that *Smyth v. Carter*, 845 N.E.2d 219 (Ind. Ct. App. 2006) (holding that the Fifth Amendment does not require the state to pay interest on unclaimed property that originated in non-interest bearing accounts), is still controlling law in Indiana and that filing a claim would be frivolous and perhaps sanctionable. (Filing No. 36 at 21–22.) The Defendants respond that the Indiana Supreme Court has not spoken on this issue, and its denial of transfer in *Smyth* cannot be interpreted as any statement on the merits, so no final word has come down from Indiana courts on the issue. They contend this opens up Indiana courts for these claims.

Gerlach argues that the ruling in *Kolton v. Frerichs*, 869 F.3d 532 (7th Cir. 2017), demonstrates that Indiana courts are closed to her claims. In *Kolton*, the court analyzed whether a state court remedy is available on the plaintiff's claim for compensation for interest earned on an interest-bearing account. *Id.* at 533. At the time, the since-overruled holding of *Williamson County* that Takings Clause violations do not occur until a state has taken property and all state

administrative and legal procedures had been exhausted was controlling. *Williamson Cnty. Reg'l Plan. Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 195, 105 S. Ct. 3108, 3121, 87 L. Ed. 2d 126 (1985), *overruled by Knick*, 204 L. Ed. 2d 558, 139 S. Ct. 2162. The court noted that both an Illinois statute and Supreme Court decision clearly denied compensation for income on interest-bearing unclaimed property in its holding that Illinois courts were closed to these Takings Clause claims. *Id.*

This Court cannot conclude that Indiana courts are foreclosed to Takings Clause claims for interest earned by unclaimed property. The court in *Kolton* did not analyze whether the state court is open to this claim for the purposes of the Eleventh Amendment, and the case does not present analogous facts. Both *Williamson County* and *Knick* dealt with Takings Clause claims against a municipality rather than the state. *Williamson County*, 473 U.S. at 175; *Knick*, 139 S. Ct. at 2168. Municipalities do not enjoy Eleventh Amendment sovereign immunity, *Jinks v. Richland County*, 538 U.S. 456, 466, 123 S. Ct. 1667, 155 L. Ed. 2d 631 (2003), so the court did not conduct any analysis under the Eleventh Amendment. Further, even if the state court exhaustion analysis were applied to the Eleventh Amendment, the facts of *Kolton* cannot demonstrate unavailability of a state court remedy here. *Kolton*, 869 F.3d at 535. While *Smyth* does remain controlling law in Indiana, the Indiana Supreme Court has not spoken on the issue, and Gerlach cannot point to any Indiana statute expressly prohibiting the requested compensation. Further, the Seventh Circuit holding requiring such payments was issued in 2019, thirteen years after *Smyth*. There is little reason for this Court to find that

Indiana courts would fail to follow controlling federal rulings on federal constitutional law or that they would find suits presenting such arguments to be frivolous after a change in controlling precedent.

Moreover, the Court declines to conclude that the Eleventh Amendment cannot apply to Takings Clause claims. Neither the Seventh Circuit nor any other circuit has come to such a conclusion. Because the Eleventh Amendment bars claims against a state for damages, Gerlach's claims for just compensation and other damages cannot proceed against Defendants Rokita and Mitchell in their official capacities.

The Court finds that the claims against Defendants Rokita, Negangard, and Hill in their individual capacities cannot proceed. An individual cannot be held liable for a violation of the Takings Clause. *See Vicory v. Walton*, 730 F.2d 466, 467 (6th Cir. 1984) (A "wrongful 'taking,' detention or theft by an individual of the property of another is not a constitutional 'taking' as that term has been defined by the fifth amendment and commonly understood by the courts.").

Additionally, because any taking was done for the benefit of the State, any judgment for just compensation would be paid out by the State treasury. In *Kolton*, the Seventh Circuit signaled that the Eleventh Amendment bars money damages against an official in his individual capacity by recognizing: "after all, [the Treasurer] did not pocket any earnings on Kolton's money. Illinois did." *Kolton* at 536. Because any judgment would have to come from the State rather than the named individuals, the individual capacity claims are in reality claims against the State barred by the Eleventh Amendment

regardless of how it is pled. It is well established that the State is not a "person" who is subject to suit under § 1983. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71, 109 S. Ct. 2304, 2312, 105 L. Ed. 2d 45 (1989) ("We hold that neither a State nor its officials acting in their official capacities are 'persons' under § 1983."). This Court cannot issue a judgment for violation of § 1983 against the State of Indiana; so all claims against the named individuals must be dismissed.

Because Gerlach's claims for damages are barred by the Eleventh Amendment and are not proper under § 1983, the Court grants the Defendants' Motion for Judgment on the Pleadings related to damages claims against the Defendants. Accordingly, all claims against all Defendants[2] for damages, attorney's fees,[3] and just compensation are now **dismissed**.

IV. CONCLUSION

Gerlach has fallen short of her burden to establish that this Court has subject matter jurisdiction over her claim for prospective relief and the Eleventh

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[2] The Defendants have argued that Gerlach does not have standing for her claim against Attorneys General Negangard and Hill as she did not make a claim on unclaimed property while they held the office of Attorney General, and she was therefore not denied interest payments on the property by Negangard or Hill. As the claims against Negangard and Hill are now dismissed, the Court need not address this issue. In addition, since no claims for relief remain, Ms. Gerlach's request for class certification is also dismissed.

[3] Gerlach requests an award of attorney's fees under 42 U.S.C. § 1988. This section allows attorney's fees to be awarded only where a plaintiff is successful under certain statutes including 42 U.S.C. § 1983. Since Gerlach alleges only that attorney's fees are appropriate under § 1988, and all § 1983 claims are now dismissed, her attorneys' fees request is also dismissed.

Amendment bars her claims for damages. For the reasons explained above, the Defendants' Motion for Judgment on the Pleadings (Filing No. 32), is **GRANTED**. Plaintiff Tina Gerlach's Motion to Strike, or Alternatively, for Leave to File a Surreply (Filing No. 42), and Motion for Oral Argument (Filing No. 43) are **DENIED**.

All claims are dismissed with prejudice as no amount of revision could cure their legal deficiencies[.][4] Final judgment will issue under separate order.

SO ORDERED.

Date: 3/29/2023

/s/ Tanya Walton Pratt
Hon. Tanya Walton Pratt, Chief Judge
United States District Court
Southern District of Indiana

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[4] *Cf. Barry Aviation Inc. v. Land O'Lakes Municipal Airport Comm'n*, 377 F.3d 682, 687 & n. 3 (7th Cir. 2004) ("Unless it is certain from the face of the complaint that any amendment would be futile or otherwise unwarranted, the district court should grant leave to amend after granting a motion to dismiss.").

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Filed January 12, 2022

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

Tina Gerlach, on behalf of herself and all others similarly situated, Plaintiff, v. **Todd Rokita**, in his official capacity as the Attorney General of Indiana and in his individual capacity; **Curtis Hill**, in his individual capacity; **Aaron Negangard**, in his individual capacity; and **Kelly Mitchell**, in her official capacity as the Treasurer of State of Indiana, Defendants.	Case No. 1:22-cv-72

COMPLAINT
Demand for Jury Trial

1. This suit challenges the Defendants' retention of the earnings on Plaintiff's property held as unclaimed property by them under the Indiana Revised Unclaimed Property Act, IC 32-34-1.5, *et seq.* and its predecessors (the "Act"). Defendants violate the Fifth and Fourteenth Amendments of the United

States Constitution by taking earnings on unclaimed property while in state custody and failing to compensate owners, thereby violating the Constitution's protection of the earnings and the time value of money.

2. In so doing, Defendants have, and are, violating clearly established constitutional rights. As stated in *Goldberg v. Frerich*, 912 F.3d 1009, 1010–11 (7th Cir. 2019):

> The Supreme Court has held that the Takings Clause protects the time value of money just as much as it does money itself. *Brown v. Legal Foundation of Washington*, 538 U.S. 216, 235, 123 S. Ct. 1406, 155 L. Ed. 2d 376 (2003); *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 165–72, 118 S. Ct. 1925, 141 L. Ed. 2d 174 (1998); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 162–65, 101 S. Ct. 446, 66 L. Ed. 2d 358 (1980). In *Cerajeski v. Zoeller*, 735 F.3d 577 (7th Cir. 2013), we applied these precedents to an Indiana statute like the Illinois statute in this case. **We held that a state may not take custody of property and retain income that the property earns.** *Id.* at 578–80.

(emphasis added). Despite these unambiguous holdings, Defendants do actually take custody of property in Indiana, invest it, and then retain the income that property earns, refusing to compensate unclaimed property owners.

PARTIES

3. Plaintiff Tina M. Gerlach is a citizen and resident of Shelby County, Kentucky. Gerlach

formerly resided at 1900 Woodland Drive and 24630 Aric Way in Elkhart, Indiana. Gerlach has property valued at over $100 currently held in custody by the Defendants in the Indiana Abandoned Property Fund. Gerlach also previously made a claim for a second piece of property held in the Abandoned Property Fund and was paid $100.93.

4. Defendant Todd Rokita is the Attorney General of the State of Indiana. Under the Act, since assuming office in January 2021, Defendant Rokita is responsible for implementing the Act and administration of the Abandoned Property Fund. Because Plaintiff is suing Defendant in his official capacity, Defendant resides in and is subject to suit in this District. On information and belief, in his individual capacity, Defendant is a citizen of Indiana who resides in and is subject to suit in this District.

5. Defendant Curtis Hill is the former Attorney General of the State of Indiana. Under the Act, Defendant Hill was responsible for implementing the Act and administration of the Abandoned Property Fund from January 2017 until January 2021, with the exception of the period from May 18, 2020 to June 17, 2020. On information and belief, Defendant is a citizen of Indiana who resides in and is subject to suit in this District.

6. Defendant Aaron Negangard served as the Acting Attorney General of the State of Indiana from May 18, 2020 to June 17, 2020. Under the Act, Defendant Negangard was responsible for implementing the Act and administration of the Abandoned Property Fund during that time. On information and belief, Defendant is a citizen of

Indiana who resides in and is subject to suit in this District.

7. Defendant Kelly Mitchell is the Treasurer of State for Indiana. Under the Act, Defendant is responsible for the custody of unclaimed property within the Abandoned Property Fund and is responsible for the investment and management of that fund. Defendant Mitchell, in her official capacity should track the income and earnings on unclaimed property invested by her or her office but, on information and belief, does not do so with respect to each individual piece of property held by her. Because Plaintiff is suing Defendant in her official capacity, Defendant resides in and is subject to suit in this District.

JURISDICTION AND VENUE

8. This Court has jurisdiction for this case under 28 U.S.C. § 1331 and 28 U.S.C. § 1343 because Plaintiff brings this suit under the Fifth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983.

9. This Court also has jurisdiction under CAFA, 28 U.S.C. § 1332(d)(2), because Plaintiff seeks to represent a class of similarly situated persons and entities under F.R.C.P. 23 and the class claims have amounts in controversy exceeding $5 million.

10. This Court also has jurisdiction under 28 U.S.C. § 2201, *et seq*. because Count I of this Complaint involves a claim for a Declaratory Judgment.

11. This District is the proper venue for this case because Defendants reside in, and are subject to, suit in this District. Furthermore, a substantial portion, or

perhaps all, of the events that underlie the claims here occurred in this District.

STATEMENT OF FACTS

12. The Revised Indiana Unclaimed Property Act, just like its predecessors, is a custodial act: it collects and ostensibly safeguards property belonging to private citizens that has lain dormant for a specified period of time with banks, insurance companies, and other public and private firms.

13. The Attorney General has the ultimate responsibility for administration and payment of claims to property owners who file claims with his office. The Attorney General administers the Act through the Indiana Unclaimed Property Division.

14. Throughout Indiana, private and public entities hold property for other private individuals. Banks are a prime example. The Act requires these "holders" to turn over property held for others to the Indiana Unclaimed Property Division after a period of inactivity specified in the Act.

15. After receiving the property, the Attorney General transfers it to the Treasurer who deposits the property into the "Abandoned Property Fund." In the case of non-monetary property, such as valuables in a safe deposit box, marketable securities, or real property, the Attorney General sells the property and delivers the cash proceeds to the Treasurer.

16. The Treasurer invests all property held in the Abandoned Property Fund in accounts that earn actual income.

17. For the property at issue here, the Act is not an escheat statute. It is custodial in nature and the State does not take title to the unclaimed property.

18. Any administrative expense or bookkeeping expense for each piece of property is *de minimis*, and upon information and belief, the bookkeeping cost of tracking unclaimed property has at all relevant times been far less than the income earned on that property, both in the aggregate and for each separate piece of unclaimed property.

19. The Act does not authorize deductions of any bookkeeping or administrative expenses from amounts paid to unclaimed property claimants.

20. Every U.S. state has an unclaimed property program. Unclaimed property programs generate much more revenue from property that is ultimately never claimed than the cost to administer the program.

21. Many states' unclaimed property programs pay unclaimed property owners the time value of the money held by the state. In these states, the unclaimed property programs still generate net revenue for those states because the majority of property turned over to a state as unclaimed property is never claimed.

22. A majority of unclaimed property turned over to Indiana under the Act and its predecessors has never been, and will never likely be, claimed.

23. If Defendants here paid claimants the time value of their money while held in custody by Defendants, Indiana's unclaimed property program would still generate millions of dollars in revenue for the State.

24. Under the color of law, Defendants have, and continue to, refuse to compensate unclaimed property claimants for the time value of their property. Instead, they confiscate all the earnings on that property for the State of Indiana.

25. Plaintiff Gerlach had two separate pieces of property that were taken into custody by the Unclaimed Property Division. Each property was valued at over $100 when taken into custody.

26. Gerlach claimed one of the properties through the Act's procedure. It was previously held in a non-interest-bearing account, and it amounted to $100.93 at the time the Defendants took custody of the property. After Plaintiff Gerlach's claim was approved, she was paid $100.93 on November 8, 2021. Gerlach was not compensated for the earnings or time value of that property while held by Defendants.

27. While Defendants held the property, it earned income. The State has taken that income and refuses to compensate Gerlach for the time value of that property.

28. Gerlach has another piece of property currently being held by the Defendants Rokita and Mitchell. That unclaimed property is valued at over $100 and was not in an interest-bearing account prior to the Defendants' taking custody. Gerlach's unclaimed property has earned income while in the Defendants' custody and, on information and belief, the Treasurer has not tracked how much interest it has earned while in its possession. Defendant Rokita will not compensate Gerlach for the income earned or time value of her money while in the Defendants' possession when she claims it.

29. On information and belief, the Defendants Rokita and Mitchell have no current method of crediting the time value of the unclaimed funds taken from accounts other than interest-bearing accounts and have no plans to do so in the future. Defendants could easily track and credit all earnings and interest on unclaimed property if they chose to do so.

30. Upon information and belief, Defendants Rokita, Hill, and Negangard knew of or were made aware of the Supreme Court decisions regarding the Takings Clause's protection of the time value of money in *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003), *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998), and *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), in addition to the Seventh Circuit's decisions applying these precedents to state unclaimed property funds in *Cerajeski v. Zoeller*, 735 F.3d 577 (7th Cir. 2013), *Kolton v. Frerichs*, 869 F.3d 532 (7th Cir. 2017), and *Goldberg v. Frerichs*, 912 F.3d 1009, 1010–11 (7th Cir. 2019). In the alternative, Defendants Rokita, Hill, and Negangard should have known of these decisions and the clear unconstitutionality of their conduct.

COUNT I

Claim for declaratory and injunctive relief, against Defendants Rokita and Mitchell in their official capacities, on behalf of Plaintiff and the Rule 23(b)(2) Class

31. Plaintiff Gerlach realleges Paragraphs 1–30 as though fully set forth herein.

32. Plaintiff Gerlach brings Count I of this action on her own behalf and on behalf of a class of similarly situated persons or entities under Rule 23(a) and

(b)(2) of the Federal Rules of Civil Procedure seeking declaratory and prospective injunctive relief. The Rule 23(b)(2) Class consists of:

> All persons or entities (including their heirs, assignees, legal representatives, guardians, administrators, and successors in interest) who are owners of unclaimed property currently held in custody by Defendants Rokita and Mitchell under the Indiana Revised Unclaimed Property Act and whose property was not in an interest-bearing account at the time the Unclaimed Property Division took custody of it.

33. There are at least tens-of-thousands of persons who meet the proposed definition of the Rule 23(b)(2) Class and so the members are so numerous that joinder would be impossible. Indiana currently holds millions of dollars in unclaimed property, and the average amount of compensation to which members of the proposed class are entitled is too small to warrant individual actions.

34. Plaintiff Gerlach's claims are typical of the claims of the members of the Rule 23(b)(2) Class because she has property held in custody under the Act by Defendants Rokita and Mitchell and meets all the definitional requirements of the proposed Rule 23(b)(2) Class.

35. Plaintiff Gerlach will fairly and adequately protect the interests of the Rule 23(b)(2) Class, as demonstrated by her retention of competent counsel with experience in both constitutional and class-action litigation.

36. There are questions of law and fact common to the Rule 23(b)(2) Class, including the following:

- whether Defendants Rokita's and Mitchell's retention of interest and other earnings on unclaimed property is a taking for which just compensation is due;
- whether the State's use of unclaimed property in its custody for public purposes is a taking for which just compensation is due;
- the proper measure of compensation for the Rule 23(b)(2) Class; and
- the appropriate injunctive and declaratory relief for the Rule 23(b)(2) Class.

37. Defendants Rokita's and Mitchell's actions in failing to account for, track, or pay unclaimed property owners constitute a common course of conduct equally applicable to Plaintiff as to all other members of the proposed Rule 23(b)(2) Class, and this course of conduct is what gives rise to Plaintiff's and the Class's claims. Furthermore, because of the generally applicable nature of these Defendants' conduct towards the proposed Rule 23(b)(2) Class, injunctive and declaratory relief are appropriate.

38. Without a declaration from this Court that Defendants Rokita's and Mitchell's conduct violates the Plaintiffs' constitutional rights and an injunction to prevent that conduct, these Defendants will continue their unlawful course of conduct.

39. Plaintiffs and the members of the Class are entitled to a judgment declaring their rights with respect to the conduct set forth in this Complaint.

Therefore, this Court may issue a declaration under 28 U.S.C. § 2201, *et seq*.

WHEREFORE, Plaintiff prays that the Court enter judgment in her and the proposed Class's favor and against Defendants Rokita and Mitchell as follows:

A. Declaring that Count I may be maintained as a class action pursuant to Rule 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure on behalf of the Rule 23(b)(2) Class defined above, appointing Plaintiff Gerlach as the Class representative, and designating Gerlach's counsel as Class Counsel;

B. Declaring that Defendants Rokita's and Mitchell's failure to compensate for the income earned and the time value of property held by it in custody under the Act is a taking of property under the Fifth Amendment to the U.S. Constitution and established Seventh Circuit and Supreme Court precedent;

C. Declaring the proper measure of just compensation;

D. Enjoining Defendants Rokita and Mitchell from violating this Court's Declarations regarding the administration of payments under the Act and requiring these Defendants to track the earnings on each piece of property while in their custody;

E. Order that the unclaimed property be placed into a separate account held in trust for the benefit of the property owners;

F. Awarding Plaintiff and her attorneys their attorney's fees and reimbursement of expenses, pursuant to 42 U.S.C. § 1988 and applicable principles of equity; and

G. Awarding such other and further relief as the Court deems just and proper.

COUNT II

Claim for just compensation, against Defendants Rokita and Mitchell in their official capacities, on behalf of Plaintiff Gerlach and the Rule 23(b)(3) Class

40. Plaintiff Gerlach realleges Paragraphs 1–30 as though fully set forth herein.

41. Count II is brought pursuant to the Fifth and Fourteenth Amendments. In this count, Plaintiff seeks just compensation for the taking of her property in violation of her Fifth Amendment right.

42. Relief is unavailable in Indiana state courts. The Indiana Court of Appeals held that "the retention of interest by the State pursuant to [the Indiana Unclaimed Property Act] does not constitute an unconstitutional taking." *Smyth v. Carter*, 845 N.E.2d 219, 225 (Ind. Ct. App. 2006). The Indiana Supreme Court denied transfer to review this decision. *Smyth v. Carter*, 860 N.E.2d 588 (Ind. 2006).

43. Plaintiff Gerlach brings this action for herself and on behalf of a class of similarly situated persons and entities under Rule 23(a) and (b)(3) of the Federal Rules of Civil Procedure. This Rule 23(b)(3) Class consists of:

> All persons or entities (including their heirs, assignees, legal representatives, guardians, or

> administrators) who filed claims for unclaimed property under Indiana's Unclaimed Property Act and were reimbursed the principal amount of property that was held in custody by the State, but who were not compensated for the earnings or time value of their property while held in State custody.

44. There are thousands, perhaps tens-of-thousands, of claimants who meet the class definition of the Rule 23(b)(3) Class and so they are so numerous that joinder of all members is impracticable.

45. The average amount of each claim is too small to warrant individual actions.

46. Plaintiff Gerlach's claims are typical of the claims of the Rule 23(b)(3) Class. Gerlach's claimed property was held in custody under the Act, earned interest, and Gerlach was not compensated for the earnings or time value of her property when she filed her claim under the Act.

47. Plaintiff Gerlach will fairly and adequately protect the interests of the Rule 23(b)(3) Class and has retained counsel competent and experienced in both constitutional and class-action litigation.

48. There are questions of law and fact common to the Rule 23(b)(3) Class, including the following:

- whether the Indiana Attorney General and Treasurer may retain the earnings or time value of money earned while in their custody under the Act;
- whether the State's taking of earning on unclaimed property amounts to a use for

public purposes for which just compensation is due; and

- the proper measure of just compensation for the Rule 23(b)(3) Class.

WHEREFORE, Plaintiff prays that the Court enter judgment in her favor and against Defendants Rokita and Mitchell as follows:

A. Declaring that Count II may be maintained as a class action pursuant to Rule 23(a) and 23(b)(3) of the Federal Rules of Civil Procedure on behalf of the Rule 23(b)(3) Class defined above, appointing Plaintiff Gerlach as the Class representative, and designating Gerlach's counsel as Class Counsel;

B. Finding that Defendants Rokita's and Mitchell's confiscation of the earnings or time value of the Class's property held under the Act, including income, is a violation of the Fifth Amendment to the U.S. Constitution;

C. Awarding the Class just compensation based on a formula determined by this Court; and

D. Awarding such other and further relief as the Court deems just and proper.

COUNT III

Claim for compensatory relief, against Defendants Rokita, Hill, and Negangard in their individual capacities, on behalf of Plaintiff Gerlach and the Rule 23(b)(3) Class

49. Plaintiff Gerlach realleges Paragraphs 1–30 as though fully set forth herein.

50. Count III is brought pursuant to 42 U.S.C § 1983 for violations of the Fifth and Fourteenth Amendments.

51. Since 2013, at the very latest, the Seventh Circuit's decision in *Cerajeski v. Zoeller*, 735 F.3d 577 (7th Cir. 2013), the law has been clearly established that "a state may not take custody of property and retain income that the property earns." *Id.* at 578–80. This principle was reiterated in *Goldberg v. Frerich*, 912 F.3d 1009, 1010–11 (7th Cir. 2019).

52. Defendants have ignored these decisions and continue to take Plaintiff's and the Class's earnings on the property held in custody.

53. Defendants have promulgated and applied rules that result in the taking of Plaintiff's and the Class's earnings on the property held in custody. These rules were kept in place even after the clear holdings of *Cerajeski* and *Goldberg*.

54. Defendants Rokita, Hill, and Negangard have committed this constitutional violation under the color of law while in office as Indiana Attorney General.

55. Plaintiff Gerlach brings this action for herself and on behalf of a class of similarly situated persons and entities under Rule 23(a) and (b)(3) of the Federal Rules of Civil Procedure. This Rule 23(B)(3) Class consists of:

> All persons or entities (including their heirs, assignees, legal representatives, guardians, or administrators) who filed claims for unclaimed property under Indiana's Unclaimed Property Act and were reimbursed the principal amount of property that was held in custody by the

State, but who were not compensated for the income earned and the time value of their property while held in State custody.

56. There are thousands, perhaps tens-of-thousands, of claimants who meet the class definition of the Rule 23(b)(3) Class and so they are so numerous that joinder of all members is impracticable.

57. The average amount of each claim is too small to warrant individual actions challenging Defendants Rokita's, Hill's, and Negangard's conduct.

58. Plaintiff Gerlach's claims are typical of the claims of the members of the Rule 23(b)(3) Class. Gerlach's claimed property was held in custody under the Act by Defendants, was valuable enough to earn interest, did earn interest or earnings while in the State's custody, and the State kept the time value of Gerlach's property without compensating her when she filed her claim under the Act.

59. Plaintiff Gerlach will fairly and adequately protect the interests of the Rule 23(b)(3) Class and has retained counsel competent and experienced in both constitutional and class-action litigation.

60. There are questions of law and fact common to the Rule 23(b)(3) Class, including the following:

- whether Defendants Rokita, Hill, and Negangard violated clearly established federal law by refusing to pay unclaimed property claimants the time value of their money while held in state custody;
- the amount of compensation due class members; and

- whether each individual defendant was reckless in his disregard of the class's constitutional rights and whether that recklessness warrants a punitive damage award.

WHEREFORE, Plaintiff prays that the Court enter judgment in her favor and against Defendants Rokita, Hill and Negangard as follows:

A. Declaring that Count III may be maintained as a class action pursuant to Rule 23(a) and 23(b)(3) of the Federal Rules of Civil Procedure on behalf of the Rule 23(b)(3) Class defined above, appointing Plaintiff Gerlach as the Class representative, and designating Gerlach's counsel as Class Counsel;

B. Finding that these Defendants' failure to pay time value of the Class's money was a violation of 42 U.S.C. § 1983 and the Fifth and Fourteenth Amendments to the U.S. Constitution;

C. Awarding the Class just compensation based on a formula determined by this Court;

D. Awarding the Class punitive damages against each individual defendant for his reckless and flagrant violation of a clearly established constitutional right;

E. Awarding the Class attorney's fees under 28 U.S.C. § 1988; and

F. Awarding any other relief the Court deems appropriate.

Demand for Jury Trial

Plaintiff demands, on any issue of fact, a trial by jury.

Respectfully submitted,

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