

No. 425A21

TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

HOKE COUNTY BOARD OF)
EDUCATION; et al.,)
Plaintiffs,)

and)

CHARLOTTE-MECKLENBURG)
BOARD OF EDUCATION,)
Plaintiff-Intervenor,)

and)

RAFAEL PENN, CHARLOTTE-)
MECKLENBURG BRANCH OF THE)
STATE CONFERENCE OF THE)
NAACP *et al.*,)
Plaintiffs-Intervenors,)

v.)

STATE OF NORTH CAROLINA and)
the STATE BOARD OF EDUCATION,)
Defendants-Appellees,)

and)

CHARLOTTE-MECKLENBURG)
BOARD OF EDUCATION,)
Realigned Defendant.)

From Wake County
No. P21-511

PLAINTIFFS-INTERVENORS' PETITION FOR WRIT OF CERTIORARI

INDEX

TABLE OF AUTHORITIES	iii
STATEMENT OF FACTS	2
PETITION FOR WRIT OF CERTIORARI	8
REASONS WHY THE WRIT SHOULD ISSUE	9
I. The Court of Appeal’s Order Blocking the Superior Court’s Remedial Order to Ensure the Fundamental Right to a Sound Basic Education Presents Matters of Significant Public Interest, Involves Legal Principles of Major Significance, and Is in Conflict with Decisions of the Supreme Court.	9
A. Significant Public Interest	10
B. Legal Principles of Major Significance	11
C. In Conflict With Decisions of the Supreme Court	14
II. The Order Issuing the Extraordinary Writ of Prohibition Without a Showing of the Requisite Necessity Conflicts with Decisions of the Supreme Court and Involves a Legal Principle of Major Significance to the Jurisprudence of the State.	18
III. In Its Flouting of the Rules of Appellate Procedure—Depriving, with No Cause, the Parties of Their Opportunity to Be Fully and Fairly Heard—the Order Involves and Offends Basic Legal Principles of Justice of Major Significance to the Jurisprudence of the State.	20
ATTACHMENTS	22
ISSUES FOR WHICH REVIEW IS SOUGHT	22
VERIFICATION	25
CERTIFICATE OF SERVICE	26

TABLE OF AUTHORITIES

Cases

<i>Able Outdoor, Inc. v. Harrelson</i> , 341 N.C. 167, 459 S.E.2d 626 (1995)	17
<i>In re Alamance Cty. Ct. Facilities</i> , 329 N.C. 84, 405 S.E.2d 125 (1991)	13, 14, 16
<i>Beard v. N. Carolina State Bar</i> , 320 N.C. 126, 357 S.E.2d 694 (1987)	13
<i>Hickory v. Catawba County</i> , 206 N.C. 165, 173 S.E. 56 (1934).....	15
<i>Hoke County Board of Education v. State</i> , 358 N.C. 605, 599 S.E.2d 365 (2004)	<i>passim</i>
<i>Hoke Cty. Bd. of Ed., et al. v. State</i> , No. 95-CVS-1158 (N.C. Super. Ct., 10 November 2021).....	<i>passim</i>
<i>Holly Shelter R. Co. v. Newton</i> , 133 N.C. 132, 45 S.E. 549 (1903).....	19
<i>Leandro v. State</i> , 346 N.C. 336, 488 S.E.2d 249 (1997)	<i>passim</i>
<i>Mebane Graded School District v. Alamance County</i> , 211 N.C. 213, 189 S.E. 873 (1937).....	15
<i>State v. Smith</i> , 300 N.C. 303, 222 S.E.2d 412 (1976)	17, 18
<i>White v. Worth</i> , 126 N.C. 570, 36 S.E. 132 (1900).....	15

Statutes

N.C.G.S. § 7A-32 (b)	8
----------------------------	---

Rules

N.C.R. App. P. 21 (a)(2)	8, 9
N.C.R. App. P. 22 (c)	8
N.C.R. App. P. 27 (b)	8

Constitutional Provisions

N.C. Const. §, § 15	22
N.C. Const. art. I, § 18	12, 13, 24
N.C. Const. art. IV, § 1	12, 13, 24
N.C. Const. art. IX, § 2 (1)	24
N.C. Const. art. IX, § 2	13
N.C. Const. art. IX, § 6	13
N.C. Const. art. IX, § 7	13

Other Authorities

Madison, J., <i>The Federalist</i> , No. 48 (1966)	14
Story, J., <i>Commentaries on the Constitution of the United States</i> 22 (1833)	14
Scherer & Leerberg, <i>North Carolina Appellate Practice and Procedure</i> § 16.04 (2018)	9

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TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Petitioners Charlotte-Mecklenburg Branch of the North Carolina State Conference of the NAACP, Rafael Penn, Clifton Jones, Donna Jenkins Dawson, and Tyler Anthony Hough-Jenkins (“Penn-Intervenors”) include students who are among the hundreds of thousands of at-risk students across North Carolina currently deprived of the opportunity for a sound basic education—a fundamental right guaranteed by Article I, § 15 and Article IX, § 2 (1) of the North Carolina Constitution and this Court’s decision in *Leandro v. State*, 346 N.C. 336, 354, 488 S.E.2d 249, 259 (1997) (“*Leandro I*”). Petitioners respectfully petition the Court for its writ of certiorari to review the 30 November 2021 Order issuing a writ of prohibition blocking the trial court’s remedial order of 10 November 2021. In support of their petition, Penn-Intervenors show the following:

STATEMENT OF FACTS

In *Leandro I* and *II*, the Supreme Court of North Carolina first found and then reaffirmed that children in the state are guaranteed the right “to receive a sound basic education in our public schools.” *Leandro I*, 346 N.C. at 347, 488 S.E.2d at 255; accord *Hoke County Board of Education v. State*, 358 N.C. 605, 649, 599 S.E.2d 365, 397 (2004) (*Leandro II*). In *Leandro I*, the North Carolina Supreme Court held that the state constitution’s right to education “is a right to a sound basic education. An education that does not serve the

purpose of preparing students to participate and compete in the society in which they live and work is devoid of substance and is constitutionally inadequate.” *Leandro I*, 346 N.C. at 345, 488 S.E.2d at 253.

In *Leandro II*, the Supreme Court held that the State had “failed in [its] constitutional duty to provide such students with the opportunity to obtain a sound basic education” and ordered the State to develop and implement a *Leandro*-compliant remedial plan to correct the deficiencies. *Leandro II*, 358 N.C. at 647-48, 599 S.E.2d at 396. The Court warned that the legislative and executive branches’ “authority to establish and maintain a public school system that ensures all the state's children will be given their chance” to get a constitutionally compliant education would not go unchecked by the judicial branch:

Certainly, when the State fails to live up to its constitutional duties, a court is empowered to order the deficiency remedied, and if the offending branch of government or its agents either fail to do so or have consistently shown an inability to do so, a court is empowered to provide relief by imposing a specific remedy and instructing the recalcitrant state actors to implement it.

Leandro II, 358 N.C. at 642, 599 S.E.2d at 393.

In its 10 November 2021 Order, the trial court recounted the deplorable 2004 status of many North Carolina schools, which has worsened over the past decade and a half:

At the time, North Carolina was replete with classrooms unstaffed by qualified, certified teachers and schools that were not led by

well-trained principals. Districts across the State continued to lack the resources necessary to ensure that all students, especially those at-risk, have an equal opportunity to receive a *Leandro*-conforming education. In fact, the decade after *Leandro II* made plain that the State's actions regarding education not only failed to address its *Leandro* obligations, but exacerbated the constitutional harms experienced by another generation of students across North Carolina, who moved from kindergarten to 12th grade since the Supreme Court's 2004 decision.

App. 4.

Several years later, in 2015 and 2018, the court re-examined the status of these schools and found that the State was continuing to fail to meet *Leandro*'s mandates. *Id.* It ordered the parties to engage a consultant to make detailed recommendations for specific actions necessary to achieve compliance. *Id.* Based on the consultant's report, all parties, including the State Defendants, agreed that "the time has come to take decisive and concrete action" to bring the State into compliance. App. 5.

In January 2020, the court ordered the State Defendants to work "expeditiously and without delay" to create and implement a system of education and educational reforms that would satisfy the State's constitution obligations. *Id.* On June 15, 2020, the parties submitted a Year One Plan to address the State's constitutional deficiencies, recognizing also that the COVID-19 pandemic had exacerbated many of the inequities and challenges that are the focus of this case, particularly for at-risk students including students of color, English Language Learners, and economically-disadvantaged students. *Id.*

On September 11, 2020, the court ordered the State Defendants to implement the Year One Plan and further, to develop and present a Comprehensive Remedial Plan to be fully implemented by the end of 2028 with the objective of fully satisfying the State's *Leandro* obligations by 2030. *Id.* The State Defendants submitted their Comprehensive Remedial Plan on March 15, 2021, App. 6, representing to the Court that the actions prescribed therein were "necessary and appropriate actions that must be implemented to address the continuing constitutional violations." App. 9, (quoting State's March 2021 Submission at 3, 4 (emphasis added by court)).

The court approved the Plan, App. 7-8, which sets out the specific actions necessary for the State to remedy its continuing constitutional violations, the timeline required for successful implementation, and the resources and funding necessary for implementation. App. 8-9. On 7 June 2021, the court ordered the State Defendants to implement the plan. App. 11. Defendants did not appeal that order.

The Plan addresses each of the "*Leandro* tenets" by setting forth specific actions to be implemented over the next eight years to achieve the following:

- A system of teacher development and recruitment that ensures each classroom is staffed with a high-quality teacher who is supported with early and ongoing professional learning and provided competitive pay;
- A system of principal development and recruitment that ensures each school is led by a high-quality principal who is supported with

early and ongoing professional learning and provided competitive pay;

- A finance system that provides adequate, equitable, and predictable funding to school districts and, importantly, adequate resources to address the needs of all North Carolina schools and students, especially at-risk-students as defined by the *Leandro* decisions;
- An assessment and accountability system that reliably assesses multiple measures of student performance against the *Leandro* standard and provides accountability consistent with the *Leandro* standard;
- An assistance and turnaround function that provides necessary support to low-performing schools and districts;
- A system of early education that provides access to high-quality pre-kindergarten and other early childhood learning opportunities to ensure that all students at-risk of educational failure, regardless of where they live in the State, enter kindergarten on track for school success; and
- An alignment of high school to postsecondary and career expectations, as well as the provision of early postsecondary and workforce learning opportunities, to ensure student readiness to all students in the State.

App. 7.

The State further assured the Court in August 2021 that sufficient funds were available to execute the Plan, including \$8 billion in the State's reserve balance and \$5 billion in forecasted revenues that exceed the State's existing base budget. App. 9. The General Assembly, however refused to budge. Consequently, the State failed to implement most actions in the Plan and secure the resources to fully implement the Plan. App. 10. At the time of the court's 10 November 2021 Order, "the State's implementation of the

Comprehensive Remedial Plan is already behind the contemplated timeline, and the State has failed yet another class of students.” App. 9.

After more than seventeen years of deferring to the State, and equipped with ample foundational support evidencing both the means to achieve constitutional compliance as well as the State’s repeated failure to remedy the constitutional violations as ordered by this Court in 2004, the trial court issued its 10 November 2021 Order in accordance with the relief required by the North Carolina Constitution. *See Leandro II*, 358 N.C. at 642 - 645, 599 S.E.2d at 393 – 395 (discussing the proper “juncture” for court to “impos[e] a specific remedy and instruct[] the recalcitrant state actors to implement it”). The court ordered the requisite State officers to take the necessary actions to transfer the funds needed to effectuate years two and three of the Comprehensive Remedial Plan (the State having already failed to fully enact year one of its plan due to lack of financial support and COVID-19). App. 19. The funds were to be transferred from the unappropriated balance in the General Fund to the State actors with fiscal responsibility for implementing the Comprehensive Remedial Plan. *Id.* However, the court stayed the Order for 30 days -- providing the State yet another opportunity to fund the plan. App. 20.

In response to the Order, Linda Combs, Controller for the State of North Carolina, did not present herself before the Superior Court but instead petitioned the North Carolina Court of Appeals for a Writ of Prohibition, Writ

of Supersedeas and a Temporary Stay of the Order on 24 November 2021. *See* App. 21.

North Carolina Rule of Appellate Procedure 22(c) affords 10 days for a response to such a petition and allows the Court of Appeals to shorten that time “for good cause shown” N.C.R. App. P. 22(c). Additionally, 3 days are added to the prescribed 10-day period as a result of North Carolina Rule of Appellate Procedure 27 (b). N.C.R. App. P. 27(b). Given the 13 days total to respond, the deadline would have been 7 December 2021. Nevertheless, on the next business day following the filing of the petition, 29 November 2021, the Court of Appeals ordered all responses to the petition be filed by 9:00 A.M. the following day, *see* App. 82, thereby allowing “only one day for a response, without a full briefing schedule, no public calendaring of the case, and no opportunity for arguments and on the last day this panel is constituted.” App. 84. On 30 November 2021, the Court of Appeals (with a dissent) entered an order allowing the petition and issuing the writ of prohibition restraining the trial court from enforcing its order. App. 84.

PETITION FOR WRIT OF CERTIORARI

Penn-Intervenors respectfully petition the Supreme Court to issue a writ of certiorari, pursuant to N.C.G.S. § 7A-32 (b) and Rule 21 (a)(2) of the North Carolina Rules of Appellate Procedure, allowing review of the 30 November 2021 order of the Court of Appeals. Rule 21 (a) (2) allows writs of certiorari “to

permit review of the decisions and orders of the Court of Appeals when the right to prosecute an appeal of right or to petition for discretionary review has been lost by failure to take timely action, or for review of orders of the Court of Appeals when no right of appeal exists.” N.C.R. App. P. 21(a)(2).

“[A]n *opinion* of the Court of Appeals is subject to further review in the Supreme Court by way of a petition for discretionary review,” or, in some cases, a notice of appeal. However, “it is generally understood that an *order* of the Court of Appeals, is subject to further review in the Supreme Court by way of a petition for *writ of certiorari*.” 1-16 Elizabeth Scherer & Matt Leerberg, *North Carolina Appellate Practice and Procedure* § 16.04 (2018) (emphasis in original).

REASONS WHY THE WRIT SHOULD ISSUE

If it determines that Penn-Intervenors have no statutory right of appeal, this Court should issue its writ of certiorari on grounds that (1) the subject matter of this appeal has significant public interest, (2) the cause involves legal principles of major significance to the jurisprudence of the State; and (3) the Court of Appeals’ Order appears likely to be in conflict with a decision of the Supreme Court.

- I. The Court of Appeal’s Order Blocking the Superior Court’s Remedial Order to Ensure the Fundamental Right to a Sound Basic Education Presents Matters of Significant Public Interest, Involves Legal Principles of Major Significance, and Is in Conflict with Decisions of the Supreme Court.**

A. Significant Public Interest

This Court should grant the petition for writ of certiorari because this case presents a matter of undeniably significant public interest—the failure of the State to afford North Carolina children their fundamental constitutional right to a sound basic education. *See Leandro I*, 346 N.C. at 347, 488 S.E.2d at 255. Following an extensive trial on the merits where Plaintiffs prevailed, the *Leandro II* Court recognized in 2004:

The children of North Carolina are our state’s most valuable renewable resource. If inordinate numbers of them are wrongfully being denied their constitutional right to the opportunity for a sound basic education, our state courts cannot risk further and continued damage because the perfect civil action has proved elusive. We note that the instant case commenced ten years ago. If in the end it yields a clearly demonstrated constitutional violation, ten classes of students as of the time of this opinion will have already passed through our state’s school system without benefit of relief. We cannot similarly imperil even one more class unnecessarily.

Id. 358 N.C. at 616, 599 S.E.2d at 366. As this Court has recognized, the matter presented by this case is not just of significant public interest, it is “paramount.” *Id.* at 649, 599 S.E.2d at 397 (“Assuring that our children are afforded the chance to become contributing, constructive members of society is paramount.”) This Court’s opinions in *Leandro I* and *II* describe in stark detail the profound importance of education not only to children but to the State at large:

The world economy and technological advances of the twenty-first century mandate the necessity that the State step forward, boldly and decisively, to see that all children, without regard to their socio-economic circumstances, have an educational opportunity and experience that not only meet the constitutional mandates set forth in *Leandro*, but fulfill the dreams and aspirations of the founders of our state and nation. Assuring that our children are afforded the chance to become contributing, constructive members of society is paramount. Whether the State meets this challenge remains to be determined.

Leandro II, 358 N.C. at 649, 599 S.E.2d at 397.

The constitution's devotion of Article IX to education further recognizes the significant interests at stake. Multiple provisions of Article IX also expressly require the General Assembly to adequately fund a sound basic education. *See* N.C. Const. art. IX, §§ 2, 6, 7.

B. Legal Principles of Major Significance

In blocking the remedy ordered by the trial court following 17 years of State recalcitrance to correct its constitutional violations, the Court of Appeals' judgment implicates legal principles of major significance to the jurisprudence of the State and conflicts with the this Court's decision in *Leandro II* that "when the State fails to live up to its constitutional duties, a court is empowered to order the deficiency remedied, and if the offending branch of government or its agents either fail to do so or have consistently shown an inability to do so, a court is empowered to provide relief by imposing a specific remedy and instructing the recalcitrant state actors to implement it." 358 N.C.

at 642, 599 S.E.2d. 393. Moreover, the North Carolina Constitution explicitly provides that “every person for an injury done him in his lands, goods, person, or reputation *shall have a remedy by due course of law . . .*” N.C. Const. art. I, § 18 (emphasis added).

As noted earlier, the Defendant State of North Carolina proposed the Plan as its remedy for the constitutional violations at hand and the Superior Court approved the Plan. When the General Assembly failed to provide the resources needed to fully implement the Plan, the Superior Court issued its order on 10 November 2021, prescribing “necessary and appropriate actions that must be implemented to address the continuing constitutional violations.” App. 9. By blocking that remedy, the Court of Appeals decision contradicts the core constitutional principle that every person for harm done “shall have a remedy by due course of law.” N.C. Const. art. I, § 18. And it suggests, contrary to the explicit language of the Constitution, that the legislature may deprive courts of their inherent remedial powers. *See* N.C. Const. art. IV, § 1 (“The General Assembly shall have no power to deprive the judicial department of any power or jurisdiction that rightfully pertains to it as a co-ordinate department of the government . . .”).

In its 10 November 2021 Order, the court made careful and extensive findings of fact. The findings detail the State’s perpetual, substantial failure to live up to its constitutional duties and the State’s failure to remedy that

deficiency for seventeen long years despite extreme and prolonged deference on the part of the court. *See* App. 3-11,. As the trial court noted, its equitable powers to fashion an appropriate remedy derive from the judiciary's position as "one of three separate, coordinate branches of the government." App. 17, (citing *Ex Parte McCown*, 139 N.C. 95, 105-06, 51 S.E. 957, 961 (1905)). The court's inherent powers, including its power to fashion remedies, are expressly protected by the North Carolina Constitution. *See* N.C. Const. art. IV, § 1; *Beard v. N. Carolina State Bar*, 320 N.C. 126, 129, 357 S.E.2d 694, 696 (1987) ("The inherent power of the Court has not been limited by our constitution; to the contrary, the constitution protects such power."). Those inherent powers "give courts their 'authority to do all things that are reasonably necessary for the proper administration of justice.'" App. 17.

The legislature cannot, by inaction or otherwise, deprive the courts of their inherent power to ensure that every person injured "shall have a remedy by due course of law." N.C. Const. art. I, § 18. "Inherent powers are critical to the court's autonomy and to its functional existence: 'If the courts could be deprived by the Legislature of these powers, which are essential in the direct administration of justice, they would be destroyed for all efficient and useful purposes.'" *In re Alamance Cty. Ct. Facilities*, 329 N.C. 84, 94, 405 S.E. 2d 125, 130 (1991) (citing *Ex Parte Schenck*, 65 N.C. 353, 355 (1871)).

C. In Conflict With Decisions of the Supreme Court

The Court of Appeals' 30 November 2021 decision adopts a bright-line rule restricting courts from ordering the transfer of unappropriated funds from the State Treasury in exercise of their remedial authority. *See* App. 84 ("Simply put, the trial court's conclusion that it may order petitioner to pay unappropriated funds from the State Treasury is constitutionally impermissible and beyond the power of the trial court."). This overly restrictive view of courts' inherent remedial powers contradicts established precedent from this Court: "The scope of the inherent power of a court does not, in reality, always stop neatly short of explicit, exclusive powers granted to the legislature, *but occasionally must be exercised in the area of overlap between branches.*" *In re Alamance Cty. Ct. Facilities*, 329 N.C. at 96, 405 S.E. 2d at 130 (emphasis added). As the Supreme Court explained in *Alamance*:

An overlap of powers constitutes a check and preserves the tripartite balance, as two hundred years of constitutional commentary note. "Unless these [three branches of government] be so far connected and blended as to give to each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained." *The Federalist* No. 48, at 308 (J. Madison) (Arlington House ed. 1966). This "constant check ... preserv[ing] the mutual relations of one [branch] with the other.... can be best accomplished, if not solely accomplished, by an occasional mixture of the powers of each department with that of the others, while the separate existence, and constitutional independence of each are fully provided for." 2 J. Story, *Commentaries on the Constitution of the United States* 22 (1833).

Id. at 96–97, 405 S.E. 2d at 130.

Consistent with this longstanding principle of North Carolina jurisprudence, the Supreme Court in other cases has recognized judicial authority to order the necessary governmental actors to transfer funds for education. In *Hickory v. Catawba County*, 206 N.C. 165, 173 S.E. 56 (1934), for example, where county commissioners had failed to provide for the maintenance of public schools, the Court affirmed a writ of mandamus compelling county officials to assume indebtedness for school property and to levy taxes to pay for such indebtedness. *Id.* at 174, 173 S.E. at 61.

In *Mebane Graded School District v. Alamance County*, 211 N.C. 213, 189 S.E. 873 (1937), the Court recognized the State’s constitutional duty to provide a general and uniform education as a “sacred duty [that] was neglected by the state for long years, for various reasons, chiefly on account of the lack of means,” 211 N.C. at 224, 189 S.E. at 880, and it upheld a writ of mandamus compelling the defendant counties, which acted as administrative agencies of the legislature in providing funding for the schools, to assume the indebtedness of a school district within its jurisdiction. *See id.* 211 N.C. at 227, 189 S.E. at 882.

Likewise, in another context, the Court in *White v. Worth*, 126 N.C. 570, 36 S.E. 132 (1900), affirmed a writ of mandamus compelling the State auditor and treasurer to pay the State’s chief inspector for the oyster industry what he

was owed. *See id.* 126 N.C. at 584, 36 S.E. at 136. As the Superior Court did below, the Court first ascertained that “there is now money in the hands of the treasurer more than sufficient to pay the plaintiff” *Id.*

The Supreme Court has also recognized that when courts are considering judicial remedies that may encroach upon the powers of the other branches, alternative remedies should be explored as well as minimizing the encroachment to the extent possible. *See Alamance*, 329 N.C. at 100-01, 405 S.E.2d at 133. The Court of Appeals failed to consider the fact that the trial court provided the State *seventeen years* to present an alternate remedy-- to no avail-- and that the only remedy on the table proposed by the State is the Plan. App. 18. The Court of Appeals also failed to consider the substantial deference shown by the court to avoid encroaching on the legislature’s authority through the least intrusive manner, including but not limited the following actions:

- a. The court has given the State seventeen years to arrive at a proper remedy and numerous opportunities proposed by the State have failed to live up to their promise. Seventeen classes of students have since gone through schooling without a sound basic education;
- b. The court deferred to State Defendants and the other parties to recommend an independent consultant to provide comprehensive, specific recommendations to remedy the existing constitutional violations;
- c. The court deferred to State Defendants and the other parties to recommend a remedial plan and the proposed duration of the plan, including recommendations from the Governor’s Commission on Access to Sound Basic Education;

- d. The court deferred to State Defendants to propose an action plan and remedy for the first year and then allowed the State Defendants additional latitude in implementing its actions in light of the pandemic's effect on education;
- e. The court deferred to State Defendants to propose the long-term comprehensive remedial plan, and to determine the resources necessary for full implementation. (*See* March 2021 Order);
- f. The court also gave the State discretion to seek and secure the resources identified to fully implement the Comprehensive Remedial Plan. (*See* June 2021 Order);
- g. The court has further allowed for extended deliberations between the executive and legislative branches over several months to give the State an additional opportunity to implement the Comprehensive Remedial Plan;
- h. The status conferences, including more recent ones held in September and October 2021, have provided the State with additional notice and opportunities to implement the Comprehensive Remedial Plan, to no avail. The Court has further put State on notice of forthcoming consequences if it continued to violate students' fundamental rights to a sound basic education.

App. 18-19.

The Court of Appeals cited two Supreme Court cases in support of its bright-line rule restricting courts from ordering the transfer of unappropriated funds. *See* App. 84, (citing *State v. Smith*, 289 N.C. 303, 222 S.E.2d 412, 424 (1976) and *Able Outdoor, Inc. v. Harrelson*, 341 N.C. 167, 459 S.E.2d 626, 629 (1995)). However, those cases were decided several years before the Supreme Court's opinion in *Leandro II*, in which the Court mapped out the circumstances that would justify further, more specific remedial action by the

court for the State's constitutional violations, *see Leandro II*, 358 N.C. at 642 - 645, 599 S.E.2d at 393 - 395 — circumstances that were not present in the cases cited by the Court of Appeals, and that are present now. Unlike here, the opinions cited by the Court of Appeals did not involve the State's failure to live up to its constitutional duties or long-term failure of the State to redress its constitutional violations. *See Smith*, 289 N.C. at 309, 222 S.E. 2d. at 417 (action for breach of contract); *Harrelson*, 341 N.C. at 169, 459 S.E.2d at 627 (action for attorney's fees). Perhaps most importantly, neither case involves the "denial of a fundamental right," as is present here. *Leandro I*, 346 N.C. at 357.

In sum, this Court has recognized that while appropriations and related actions are generally reserved to the legislative branch, courts equipped with foundational evidentiary support and after exhibiting due deference to the legislative branch, have the power to remedy longstanding constitutional violations by ordering that unappropriated funding be made available to the State actors responsible for carrying out the necessary remedial actions.

II. The Order Issuing the Extraordinary Writ of Prohibition Without a Showing of the Requisite Necessity Conflicts with Decisions of the Supreme Court and Involves a Legal Principle of Major Significance to the Jurisprudence of the State.

The Court of Appeals decision is devoid of the requisite circumstances justifying issuance of a writ of prohibition. As the Supreme Court has long made clear, a writ of prohibition "issues only in cases of extreme necessity."

Holly Shelter R. Co. v. Newton, 133 N.C. 132, 45 S.E. 549, 550 (1903). “It will not issue when there is any sufficient remedy by ordinary methods, as appeal, injunction, etc., or when no irreparable damage will be done.” *Id.* Seeking relief through ordinary process before a lower court is a “sufficient remedy by ordinary means” making a writ of prohibition inappropriate. *See id.*

This Court should grant discretionary review because the Court of Appeals ignored this standard in granting the extraordinary writ of prohibition, establishing a precedent for the Court of Appeals to inject itself into the proceedings of the lower courts before the subject issues may be resolved below in the ordinary course. Such action contradicts this Court’s clear instruction that writs of prohibition should not issue when the petitioner, as here, may raise its arguments before the trial court and thereby avoid the harm that the petitioner claims. *See id.* (holding that “there can be no call for this court to interfere with the regular proceedings of the court below” when those proceedings may avoid the harm that the petitioner claims). The State Controller, the petitioner before the Court of Appeals, could and should have challenged the 10 November 2021 order for the first time before the Superior Court and then appealed, if necessary. These ordinary methods of seeking to protect its claimed interests were available to the Controller. That is, there existed “sufficient remedy by ordinary methods” to avoid the harm the

Controller claimed, and there was no “extreme necessity” for a writ of prohibition. *Id.*

III. In Its Flouting of the Rules of Appellate Procedure—Depriving, with No Cause, the Parties of Their Opportunity to Be Fully and Fairly Heard—the Order Involves and Offends Basic Legal Principles of Justice of Major Significance to the Jurisprudence of the State.

As the dissenting opinion recognized, the Court of Appeals acted arbitrarily and capriciously in denying Penn-Intervenors’ procedural rights by drastically shortening the time for their response to the Petition for Writ of Prohibition without the “good cause” required by N.C.R. App. P. 22(c). Further, the panel apparently did so only so that it could rule on the matter before the end of the panel’s term. App. 84. (Arrowood, J., dissenting) (“While the rules allow the Court to shorten a response time for ‘good cause shown[,]’ in my opinion such action in this case was arbitrary, capricious and lacked good cause and instead designed to allow this panel to rule on this petition during the month of November.”).

This case is significant to the jurisprudence of the State because shortening the response time without good cause violates a clearly established appellate rule and creates a precedent for disregarding litigants’ procedural rights when a particular panel wishes to address the merits of a particular case rather than leaving the matter, as the appellate rules otherwise would provide, to the next panel of judges.

The Rules of Appellate Procedure provide parties with fair opportunities and time to present full arguments to the Court and for the Court to have a full and fair opportunity to consider those arguments. As stated in the dissent to the 30 November 2021 Order, the Court of Appeals violated these principles, “unreasonably shortening the time for respondents to file a response” as “a mechanism to permit the majority to hastily decide this matter on the merits, with only one day for a response, without a full briefing schedule, no public calendaring of the case, and no opportunity for arguments and on the last day this panel is constituted,” all “in the absence of any real time pressure or immediate [risk of] prejudice to the parties, giving a party in essence one day to respond, following a holiday weekend, and then deciding the matter on the merits the day the response is filed . . .” App. 84 (Arrowood, J., dissenting).

Such arbitrary and capricious actions are unfair to parties and add a measure of unpredictability to the appellate process that should not be allowed in the present instance nor in future instances. And because the “shortening [of] the time for a response was a mechanism to permit the majority to hastily decide this matter on the merits” and “a classic case of deciding a matter on the merits using a shadow docket of the courts,” App. 84, allowing the decision below to stand will encourage future politically motivated flouting of litigants’ procedural rights and undermine the people’s faith in the fairness of the State’s judiciary.

ATTACHMENTS

For the Court's consideration, attached to this Petition of Writ of Certiorari is an Appendix containing the following:

Order on Remedy (Nov. 10, 2021)	1
Defendant's Petition for Writ of Prohibition, Temporary Stay and Writ of Supersedeas (Nov. 24, 2021).....	21
Order on Responses to Petition for Writ of Prohibition, Temporary Stay and Writ of Supersedeas (Nov. 29, 2021)	82
Order Issuing Writ of Prohibition and Dissent (Nov. 30, 2021)	83
Response of Plaintiffs and Penn-Intervenors in Opposition to Petition for Writ of Prohibition, Temporary Stay and Writ of Supersedeas (Nov. 30, 2021).....	86
State of North Carolina's Response to the Petition for Writ of Prohibition, Temporary Stay and Writ of Supersedeas (Nov. 30, 2021).....	128

Wherefore, Petitioners respectfully urge this Court issue its writ of certiorari to review to permit review of the Court of Appeals' 30 November 2021 Order on the issues stated as follows:

ISSUES FOR WHICH REVIEW IS SOUGHT

1. Whether under N.C. Const. art. I, §§ 15 and 18; N.C. Const. art. IV, § 1; and N.C. Const. art. IX, § 2 (1) the trial court had authority to order the transfer of funds from the State Treasury to the appropriate State agencies responsible for carrying out the State's constitutional obligation to provide for a sound basic education, following the State's repeated failure to remedy its constitutional violation and in light of substantial foundational support in the record.

2. Whether the Court of Appeals erred in issuing the extraordinary writ of prohibition in the absence of “extreme necessity,” where the remedy petitioner sought was available “by ordinary methods,” such as challenging the order, for the first time, before the Superior Court and then on appeal, and no “irreparable damage” would have been done by thus proceeding.
3. Whether the Court of Appeals erred in arbitrarily and capriciously denying Penn-Intervenors’ procedural rights by drastically shortening the time for their response to the Petition for Writ of Prohibition without the “good cause shown” required by N.C.R. App. P. 22(c).

If their petition is allowed, Petitioners will pray this Court vacate the 30 November 2021 judgment of the Court of Appeals and enter a temporary stay to allow the Court to consider the merits, and for all further relief that the Court may consider proper.

Respectfully submitted this 16th day of December 2021.

LAWYERS’ COMMITTEE FOR CIVIL
RIGHTS UNDER LAW

Electronically submitted

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N.C. R. App. P. 33(b) Certification:
I certify that all the attorney listed below
has authorized me to list his names on

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Motion

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VERIFICATION

The undersigned petitioner, after being duly sworn, says:

The contents of the foregoing Petition for Writ of Certiorari are true to my knowledge, except those matters stated upon information and belief and, as to those matters, I believe them to be true.

Corinne Mack

Rev. Corinne Mack, President
Charlotte-Mecklenburg Branch of the
State Conference of the NAACP

Mecklenburg, North Carolina

Sworn to (or affirmed) and subscribed before me by Rev. Corinne Mack

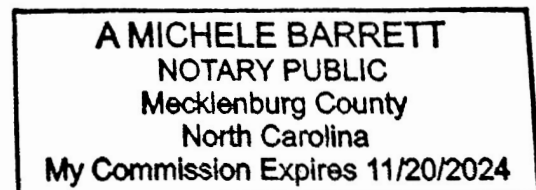
Date: 16 December 2021

A. Michele Barrett

A. Michele Barrett, Notary Public

My Commission expires

11/20/2024



CERTIFICATE OF SERVICE

Pursuant to North Carolina Rule of Appellate Procedure 26, I hereby certify that I have this day served a copy of the foregoing by email, addressed to the following counsel:

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This the 16th day of December, 2021.

Electronically Submitted
Elizabeth Haddix

APPENDIX

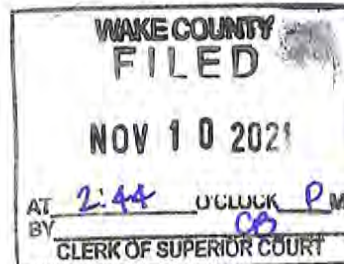
STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

95-CVS-1158

COUNTY OF WAKE

HOKE COUNTY BOARD OF
EDUCATION; HALIFAX COUNTY BOARD
OF EDUCATION; ROBESON COUNTY
BOARD OF EDUCATION; CUMBERLAND
COUNTY BOARD OF EDUCATION;
VANCE COUNTY BOARD OF
EDUCATION; RANDY L. HASTY,
individually and as Guardian Ad Litem of
RANDELL B. HASTY; STEVEN R.
SUNKEL, individually and as Guardian Ad
Litem of ANDREW J. SUNKEL; LIONEL
WHIDBEE, individually and as Guardian
Ad Litem of JEREMY L. WHIDBEE;
TYRONE T. WILLIAMS, individually and
as Guardian Ad Litem of TREVELYN L.
WILLIAMS; D.E. LOCKLEAR, JR.,
individually and as Guardian Ad Litem of
JASON E. LOCKLEAR; ANGUS B.
THOMPSON II, individually and as
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THOMPSON; MARY ELIZABETH
LOWERY, individually and as Guardian Ad
Litem of LANNIE RAE LOWERY, JENNIE
G. PEARSON, individually and as
Guardian Ad Litem of SHARESE D.
PEARSON; BENITA B. TIPTON,
individually and as Guardian Ad Litem of
WHITNEY B. TIPTON; DANA HOLTON
JENKINS, individually and as Guardian Ad
Litem of RACHEL M. JENKINS; LEON R.
ROBINSON, individually and as Guardian
Ad Litem of JUSTIN A. ROBINSON,



Plaintiffs,
and
CHARLOTTE-MECKLENBURG BOARD
OF EDUCATION,
Plaintiff-Intervenor,
and
RAFAEL PENN; CLIFTON JONES,
individually and as Guardian Ad Litem
of CLIFTON MATTHEW JONES;
DONNA JENKINS DAWSON,
individually and as Guardian Ad Litem
of NEISHA SHEMAY DAWSON and
TYLER ANTHONY HOUGH-JENKINS,
Plaintiff-Intervenors,
v.
STATE OF NORTH CAROLINA and the
STATE BOARD OF EDUCATION,
Defendants,
and
CHARLOTTE-MECKLENBURG BOARD
OF EDUCATION,
Realigned Defendant.

ORDER

Over seventeen years ago, Justice Orr, on behalf of a unanimous Supreme Court, wrote:

The world economy and technological advances of the twenty-first century mandate the necessity that the State step forward, *boldly and decisively*, to see that all children, without regard to their socio-economic circumstances, have an educational opportunity and experience that not only meet the constitutional mandates set forth in *Leandro*, but fulfill the dreams and aspirations of the founders of our

state and nation. Assuring that our children are afforded the chance to become contributing, constructive members of society is paramount. *Whether the State meets this challenge remains to be determined.*

Hoke County Bd. of Educ. v. State, 358 N.C. 605, 649 (2004) (“*Leandro II*”) (emphasis added). As of the date of this Order, the State has not met this challenge and, therefore, has not met its constitutional obligation to the children of North Carolina.

The orders of our Supreme Court are not advisory. This Court can no longer ignore the State’s constitutional violation. To do so would render both the North Carolina State Constitution and the rulings of the Supreme Court meaningless.

This Court, having held a hearing on October 18, 2021 at which it ordered Plaintiffs and Plaintiff-Intervenors to submit proposed order(s) and supporting legal authorities by November 1, 2021 and Defendants State of North Carolina (“State”) and State Board of Education (“State Board,” and collectively with the State, “State Defendants”) to respond by November 8, 2021, finds and concludes as follows¹:

I. Findings of Fact

1. In its unanimous opinion in *Leandro II*, the Supreme Court held, “an inordinate number” of students had failed to obtain a sound basic education and that the State had “failed in [its] constitutional duty to provide such students with the opportunity to obtain a sound basic education.” In light of that holding, the Supreme Court ordered that “the State must act to correct those deficiencies that were deemed by the trial court as contributing to the State’s failure of providing a Leandro-comporting educational opportunity.” *Id.* at 647-48.

2. Since 2004, this Court has given the State countless opportunities, and unfettered discretion, to develop, present, and implement a *Leandro*-compliant remedial plan. For over eleven (11) years and in over twenty (20) compliance hearings, the State demonstrated its inability, and repeated failure, to develop, implement, and maintain any kind of substantive structural initiative designed to remedy the established constitutional deficiencies.

3. For more than a decade, the Court annually reviewed the academic performance of every school in the State, teacher and principal population data, and the programmatic resources made available to at-risk students. This Court concluded from over a decade of undisputed evidence that “in way too many school

¹ The findings and conclusions of the Court’s prior Orders—including the January 21, 2020 Consent Order (“January 2020 Order”), September 11, 2020 Consent Order (“September 2020 Order”), June 7, 2021 Order on Comprehensive Remedial Plan (“June 2021 Order”), September 22, 2021 Order (“September 2021 Order”), and October 22, 2021 Order (“October 2021 Order”)—are incorporated herein.

districts across this state, thousands of children in the public schools have failed to obtain and are not now obtaining a sound basic education as defined and required by the *Leandro* decision.” March 17, 2015 Order.

4. At that time, North Carolina was replete with classrooms unstaffed by qualified, certified teachers and schools that were not led by well-trained principals. Districts across the State continued to lack the resources necessary to ensure that all students, especially those at-risk, have an equal opportunity to receive a *Leandro*-conforming education. In fact, the decade after *Leandro II* made plain that the State’s actions regarding education not only failed to address its *Leandro* obligations, but exacerbated the constitutional harms experienced by another generation of students across North Carolina, who moved from kindergarten to 12th grade since the Supreme Court’s 2004 decision.

5. This Court examined the record again and in 2018 found that “the evidence before this court . . . is wholly inadequate to demonstrate . . . substantial compliance with the constitutional mandate of *Leandro* measured by applicable educational standards.” See March 13, 2018 Order. The State Board did not appeal the ruling. Consequently, the Court ordered the parties to identify an independent, third-party consultant to make detailed comprehensive written recommendations for specific actions necessary to achieve sustained compliance with the constitutional mandates articulated in the holdings of *Leandro v. State*, 346 N.C. 336, 357 (1997) (“*Leandro I*”) and *Leandro II*. The State, along with the Plaintiffs and Penn Intervenors, recommended WestEd to serve in that capacity. The Governor also created the Commission on Access to a Sound Basic Education (the “Commission”) at that time “to gather information and evidence to assist in the development of a comprehensive plan to address compliance with the constitutional mandates.” Governor Roy Cooper Exec. Order No. 27 (Nov. 15, 2017).

6. By Order dated March 13, 2018, the Court appointed WestEd to serve as the Court’s consultant, and all parties agreed that WestEd was qualified to serve in that capacity. See January 2020 Order at 10. In support of its work, WestEd also engaged the Friday Institute for Educational Innovation at North Carolina State University and the Learning Policy Institute (LPI), a national education policy and research organization with extensive experience in North Carolina. WestEd presented its findings and recommendations to the Court in December 2019 in an extensive report entitled, “*Sound Basic Education for All: An Action Plan for North Carolina*,” along with 13 underlying studies (collectively, the “WestEd Report”). The WestEd Report represents an unprecedented body of independent research and analysis of the North Carolina educational system that has further informed the Court’s approach in this case.

7. The WestEd Report concluded, and this Court found, that the State must complete considerable, systematic work to deliver fully the opportunity to obtain a sound basic education to all children in North Carolina. See January 2020 Order at 2-3. The WestEd Report found, for example, that hundreds of thousands of North Carolina

children continue to be denied the opportunity for a sound basic education. Indeed, the State is in many ways further away from constitutional compliance than it was when the Supreme Court issued its *Leandro I* decision almost 20 years ago. (WestEd Report, p. 31). Minimal progress has been made, as evidenced by multiple data sources on two of the primary educational outputs identified in *Leandro*: (i) the proficiency rates of North Carolina's students, especially at-risk students, in core curriculum areas, and (ii) the preparation of students, especially at-risk students, for success in postsecondary degree and credential programs. (Report, p. 31).

8. Based on the WestEd Report, the Court found that due to the increase in the number of children with higher needs, who require additional supports to meet high standards, the State faces greater challenges than ever before in meeting its constitutional obligations. January 2020 Order at 15. For example, North Carolina has 807 high-poverty districts schools and 36 high-poverty charter schools, attended by over 400,000 students (more than a quarter of all North Carolina students). *Id.* The Court also found that state funding for education has not kept pace with the growth and needs of the PreK-12 student body. *Id.* at 17. And promising initiatives since the *Leandro II* decision were neither sustained nor scaled up to make a substantial impact. *Id.*

9. Plaintiffs and Penn Intervenors (collectively, "Plaintiffs") as well as State Defendants all agreed that "the time has come to take decisive and concrete action . . . to bring North Carolina into constitutional compliance so that all students have access to the opportunity to obtain a sound basic education." January 2020 Order at 3. The Court agreed and, therefore, ordered State Defendants to work "expeditiously and without delay" to create and fully implement a system of education and educational reforms that will provide the opportunity for a sound basic education to all North Carolina children.

10. The parties submitted a Joint Report to the Court on June 15, 2020 that acknowledged that the COVID-19 pandemic has exacerbated many of the inequities and challenges that are the focus of this case, particularly for students of color, English Language Learners, and economically-disadvantaged students. The Joint Report set forth specific action steps that "the State *can and will* take in Fiscal Year 2021 (2020-21) to begin to address the constitutional deficiencies previously identified by this Court" (the "Year One Plan"). The parties all agreed that the actions specified in the Year One Plan were necessary and appropriate to remedy the constitutional deficiencies in North Carolina public schools.

11. On September 11, 2020, the Court ordered State Defendants to implement the actions identified in the Year One Plan. September 2020 Order, Appendix A. The Court further ordered State Defendants, in consultation with Plaintiff parties, to develop and present a Comprehensive Remedial Plan to be fully implemented by the end of 2028 with the objective of fully satisfying State Defendants' *Leandro* obligations by the end of 2030. Lastly, to assist the Court in entering this order and to promote transparency, the Court

ordered State Defendants to submit quarterly status reports of progress made toward achieving each of the actions identified in the Year One Plan.

12. State Defendants submitted their First Status Report on December 15, 2020. The Court was encouraged to see that some of the initial action items were successfully implemented and that the SBE had fulfilled its obligations. However, the Court noted many shortcomings in the State's accomplishments and the State admitted that the Report showed that it had failed to implement the Year One Plan as ordered. For example, House Bill 1096 (SL 2020-56), which was enacted by the General Assembly and signed into law by the Governor on June 30, 2020, implemented the identified action of expanding the number of eligible teacher preparation programs for the NC Teaching Fellows Program from 5 to 8. Increased funding to support additional Teaching Fellows for the 2021-22 academic year, however, was not provided. Similarly, Senate Bill 681 (SL 2020-78) was enacted by the General Assembly and signed into law by the Governor on July 1, 2020 to create a permanent Advanced Teaching Roles program that would provide grants and policy flexibility to districts seeking to implement a differentiated staffing model. Senate Bill 681, however, did not provide any new funding to provide additional grants to school districts, as required by the Year One Plan.²

13. The State Defendants submitted their Comprehensive Remedial Plan (which includes the Appendix) on March 15, 2021. As represented by State Defendants, the Comprehensive Remedial Plan identifies the programs, policies, and resources that "are necessary and appropriate actions that must be implemented to address the continuing constitutional violations and to provide the opportunity for a sound basic education to all children in North Carolina." Specifically, in *Leandro II*, the Supreme Court unanimously affirmed the trial court's finding that the State had not provided, and was not providing, competent certified teachers, well-trained competent principals, and the resources necessary to afford all children, including those at-risk, an equal opportunity to obtain a sound basic education, and that the State was responsible for these constitutional violations. See January 2020 Order at 8; 358 N.C. at 647-48. Further, the trial court found, and the Supreme Court unanimously affirmed, that at-risk children require more resources, time, and focused attention in order to receive a sound basic education. *Id.*; *Leandro II*, 358 N.C. at 641. Regarding early childhood education, the Supreme Court affirmed the trial court's findings that the "State was providing inadequate resources" to "'at-risk' prospective enrollees" ("pre-k" children), "that the State's failings were contributing to the 'at-risk' prospective enrollees' subsequent failure to avail themselves of the opportunity to obtain a sound basic education," and that "State efforts towards providing remedial aid to 'at-risk' prospective enrollees were inadequate." *Id.* at 69, *Leandro II*. 358 N.C. at 641-42.

² The First Status Report also detailed the federal CARES Act funds that the Governor, the State Board, and the General Assembly directed to begin implementation of certain Year One Plan actions. The Court notes, however, that the CARES Act funding and subsequent federal COVID-related funding is nonrecurring and cannot be relied upon to sustain ongoing programs that are necessary to fulfill the State's constitutional obligation to provide a sound basic education to all North Carolina children.

Consequently, the Comprehensive Remedial Plan addresses each of the “*Leandro* tenets” by setting forth specific actions to be implemented over the next eight years to achieve the following:

- A system of teacher development and recruitment that ensures each classroom is staffed with a high-quality teacher who is supported with early and ongoing professional learning and provided competitive pay;
- A system of principal development and recruitment that ensures each school is led by a high-quality principal who is supported with early and ongoing professional learning and provided competitive pay;
- A finance system that provides adequate, equitable, and predictable funding to school districts and, importantly, adequate resources to address the needs of all North Carolina schools and students, especially at-risk-students as defined by the *Leandro* decisions;
- An assessment and accountability system that reliably assesses multiple measures of student performance against the *Leandro* standard and provides accountability consistent with the *Leandro* standard;
- An assistance and turnaround function that provides necessary support to low-performing schools and districts;
- A system of early education that provides access to high-quality pre-kindergarten and other early childhood learning opportunities to ensure that all students at-risk of educational failure, regardless of where they live in the State, enter kindergarten on track for school success; and
- An alignment of high school to postsecondary and career expectations, as well as the provision of early postsecondary and workforce learning opportunities, to ensure student readiness to all students in the State.

January 2020 Order at 4-5.

14. The Appendix to the Comprehensive Remedial Plan identifies the resources necessary, as determined by the State, to implement the specific action steps to provide the opportunity for a sound basic education. This Court has previously observed “that money matters provided the money is spent in a way that is logical and the results of the expenditures measured to see if the expected goals are achieved.” Memorandum of Decision, Section One, p. 116. The Court finds that the State Defendants’ Comprehensive Remedial Plan sets forth specific, comprehensive, research-based and logical actions, including creating an assessment and accountability system to measure the expected goals for constitutional compliance.

15. WestEd advised the parties and the Court that the recommendations contained in its Report are not a “menu” of options, but a comprehensive set of fiscal, programmatic, and strategic steps necessary to achieve the outcomes for students required by our State Constitution. WestEd has reviewed the Comprehensive Remedial Plan and has advised the Court that the actions set forth in the Plan are necessary and appropriate for implementing the recommendations contained in WestEd Report. The Court concurs with WestEd’s opinion and also independently reaches this conclusion based on the entire record in this case.

16. The Supreme Court held in 1997 that if this Court finds “from competent evidence” that the State is “denying children of the state a sound basic education, a denial of a fundamental right will have been established.” *Leandro I*, 346 N.C. at 357. This Court’s finding was upheld in *Leandro II* and has been restated in this Court’s Orders in 2015 and 2018. It is, therefore, “incumbent upon [the State] to establish that their actions denying this fundamental right are ‘necessary to promote a compelling government interest.’” *Id.* The State has not done so.

17. To the contrary, the State has repeatedly acknowledged to the Court that additional State actions are required to remedy the ongoing denial of this fundamental right. *See, e.g.*, State’s March 15, 2021 Submission to Court at 1 (State acknowledging that “this constitutional right has been and continues to be denied to many North Carolina children”); *id.* (“North Carolina’s PreK-12 education system leaves too many students behind, especially students of color and economically disadvantaged students.”); *id.* (“[T]housands of students are not being prepared for full participation in the global, interconnected economy and the society in which they will live, work, and engage as citizens.”); State’s August 16, 2021 Submission to Court at 1 (acknowledging that additional State actions are required to remedy the denial of the constitutional right). *See also, e.g.*, January 2020 Order at 15 (noting State’s acknowledgment that it has failed to meet its “constitutional duty to provide all North Carolina students with the opportunity to obtain a sound basic education.”); *id.* (“[T]he Parties do not dispute [] that many children across North Carolina, especially at-risk and economically-disadvantaged students, are not now receiving a *Leandro*-conforming education.”); *id.* at 17 (State has “yet to achieve the promise of our Constitution and provide all with the opportunity for a sound basic education”); June 2021 Order at 6 (“State Defendants have acknowledged that additional State actions are required to remedy the denial of this fundamental right.”).

18. After seventeen years, State Defendants presented to the Court a Comprehensive Remedial Plan outlining those additional State actions necessary to comply with the mandates of the State Constitution.

19. The Comprehensive Remedial Plan sets out the “nuts and bolts” for how the State will remedy its continuing constitutional failings to North Carolina’s children. It sets out (1) the specific actions identified by the State that must be

implemented to remedy the continuing constitutional violations, (2) the timeline developed by the State required for successful implementation, and (3) the necessary resources and funding, as determined by the State, for implementation.

20. The Comprehensive Remedial Plan is the *only* remedial plan that the State Defendants have presented to the Court in response its January 2020, September 2020, and June 2021 Orders. The State Defendants have presented no alternative remedial plan.

21. With regard to the Comprehensive Remedial Plan, the State has represented to this Court that the actions outlined in the Plan are the “necessary and appropriate actions that must be implemented to address the continuing constitutional violations.” See State’s March 2021 Submission at 3, 4 (emphasis added). The State further represented to the Court that the full implementation of each year of the Remedial Plan was required to “provide the opportunity for a sound basic education to all children in North Carolina.” *Id.* at 3. The State assured the Court that it was “committed” to fully implementing its Comprehensive Remedial Plan and within the time frames set forth therein. *Id.*

22. The State has represented to the Court that more than sufficient funds are available to execute the current needs of the Comprehensive Remedial Plan. See, e.g., State’s August 6, 2021 Report to Court. The State of North Carolina concedes in its August progress report to the Court that the State’s reserve balance included \$8 billion and more than **\$5 billion** in forecasted revenues at that time that exceed the existing base budget. Yet, the State has not provided the necessary funding to execute the Comprehensive Remedial Plan.

23. The Court understands that those items required by the Year One Plan that were not implemented as ordered in the September 2020 Order have been included in, or “rolled over” to, the Comprehensive Remedial Plan. The Court notes that the WestEd Report contemplated that its recommendations would be implemented gradually over eight years, with later implementation building upon actions to be taken in the short term. Failure to implement all of the actions in the Year One Plan will necessarily make it more difficult for State Defendants to implement all the actions described in the Comprehensive Remedial Plan in a timely manner. The urgency of implementing the Comprehensive Remedial Plan on the timeline currently set forth by State Defendants cannot be overstated. As this Court previously found:

[T]housands of students are not being prepared for full participation in the global, interconnected economy and the society in which they live, work and engage as citizens. The costs to those students, individually, and to the State are considerable and if left unattended will result in a North Carolina that does not meet its vast potential.

January 2020 Order.

24. Despite the urgency, the State has failed to implement most actions in the Comprehensive Remedial Plan and has failed to secure the resources to fully implement the Comprehensive Remedial Plan.

25. The Comprehensive Remedial Plan would provide critical supports for at-risk students, such as:

- comprehensive induction services for beginning teachers in low performing, high poverty schools;
- costs of National Board certification for educators in high need, low-performing schools;
- critical supports for children with disabilities that could result from increasing supplemental funding to more adequate levels and removing the funding cap;
- ensuring greater access to key programs for at-risk students by combining the DSSF and at-risk allotments for all economically disadvantaged students; and
- assisting English learner students by eliminating the funding cap, simplifying the formula and increasing funding to more adequate levels.

26. As of the date of this Order, therefore, the State's implementation of the Comprehensive Remedial Plan is already behind the contemplated timeline, and the State has failed yet another class of students. Time is of the essence.

27. The Court has granted "every reasonable deference" to the legislative and executive branches to "establish" and "administer a system that provides the children of the various school districts of the state a sound basic education," 346 N.C. at 357, including, most recently, deferring to State Defendants' leadership in the collaborative development of the Comprehensive Remedial Plan over the past three years.

28. Indeed, in the seventeen years since the *Leandro II* decision, this Court has afforded the State (through its executive and legislative branches) discretion to develop its chosen *Leandro* remedial plan. The Court went to extraordinary lengths in granting these co-equal branches of government time, deference, and opportunity to use their informed judgment as to the "nuts and bolts" of the remedy, including the identification of the specific remedial actions that required implementation, the time frame for such implementation, the resources necessary for the implementation, and the manner in which to obtain those resources.

29. On June 7, 2021, this Court issued an Order cautioning: “If the State fails to implement the actions described in the Comprehensive Remedial Plan—actions which it admits are necessary and which, over the next biennium, the Governor’s proposed budget and Senate Bill 622 confirm are attainable—‘it will then be the duty of this Court to enter a judgment granting declaratory relief and such other relief as needed to correct the wrong’” June 2021 Order (quoting *Leandro I*, 346 N.C. at 357).

30. The 2021 North Carolina legislative session began on January 13, 2021 and, as of the date of this Order, no budget has passed despite significant unspent funds and known constitutional violations. In addition, with the exception of N.C.G.S. § 115C-201(c2) related to enhancement teacher allotment funding, no stand-alone funding measures have been enacted to address the known constitutional violations, despite significant unspent funds.

31. The failure of the State to provide the funding necessary to effectuate North Carolina’s constitutional right to a sound basic education is consistent with the antagonism demonstrated by legislative leaders towards these proceedings, the constitutional rights of North Carolina children, and this Court’s authority.

32. This Court has provided the State with ample time and every opportunity to make meaningful progress towards remedying the ongoing constitutional violations that persist within our public education system. The State has repeatedly failed to act to fulfill its constitutional obligations.

33. In the seventeen years since the *Leandro II* decision, a new generation of school children, especially those at-risk and socio-economically disadvantaged, were denied their constitutional right to a sound basic education. Further and continued damage is happening now, especially to at-risk children from impoverished backgrounds, and that cannot continue. As Justice Orr stated, on behalf of a unanimous Supreme Court, “the children of North Carolina are our state’s most valuable renewable resource.” *Leandro II*, 358 N.C. at 616. “If inordinate numbers of them are wrongfully being denied their constitutional right to the opportunity for a sound basic education, our state courts cannot risk further and continued damage. . . .” *Id.* (emphasis added).

II. Conclusions of Law

1. The people of North Carolina have a constitutional right to an opportunity to a sound basic education. It is the duty of the State to guard and

maintain that right. N.C. Const. art. 1, sec. 15 (“The people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right.”); *id.* art. IX, sec. 2(1) (“The General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools, which shall be maintained at least nine months in every year, and wherein equal opportunities shall be provided for all students.”); 346 N.C. at 345 (1997) (holding that the Constitution guarantees the “right to a sound basic education”).

2. The “State” consists of each branch of our tripartite government, each with a distinctive purpose. *State v. Berger*, 368 N.C. 633, 635 (2016) (citations and internal quotation marks omitted) (“The General Assembly, which comprises the legislative branch, enacts laws that protect or promote the health, morals, order, safety, and general welfare of society. The executive branch, which the Governor leads, faithfully executes, or gives effect to, these laws. The judicial branch interprets the laws and, through its power of judicial review, determines whether they comply with the constitution.”). Here the judicial branch, by constitutional necessity, exercises its inherent power to ensure remedies for constitutional wrongs and compels action by the two other components of the “State”—the legislative and executive branches of government. See *Leandro II*, 358 N.C. at 635 (“[B]y the State we mean the legislative and executive branches which are constitutionally responsible for public education . . .”).

3. Our constitution and laws recognize that the executive branch is comprised of many public offices and officials. The Treasurer and State Superintendent of Public Instruction are two such officials. See N.C. Const. art. III, §7 and *Cooper v. Berger*, 371 N.C. 799,800 (2018). The Office of State Budget and Management, the Office of the State Controller, and the Department of Health and Human Services are also within the executive branch. See generally, N.C. Const. art. III, §§ 5(10), 11; N.C. Gen. Stat. § 143C-2-1; N.C. Gen. Stat. § 143B-426.35 – 426.39B; and N.C. Gen. Stat. § 143-B-136.1 – 139.7. The University of North Carolina System is also constitutionally responsible for public education. See N.C. Const. art. IX, § 8.

4. The Court concludes that the State continues to fail to meet the minimum standards for effectuating the constitutional rights set forth in article I, section 15 and article IX, section 2 of our State constitution and recognized by our Supreme Court in *Leandro I* and *II*. The constitutional violations identified in *Leandro I* and *II* are ongoing and persist to this day.

5. The General Assembly has a duty to guard and maintain the right to sound basic education secured by our state constitution. See N.C. Const. art. 1, sec. 15. As the arm of the State responsible for legislation, taxation, and appropriation,

the General Assembly's principal duty involves adequately funding the minimum requirements for a sound basic education. While the General Assembly could also choose to enact new legislation to support a sound basic education, the General Assembly has opted to largely ignore this litigation.

6. Thus, the General Assembly, despite having a duty to participate in guarding and maintaining the right to an opportunity for a sound basic education, has failed to fulfill that duty. This failure by one branch of our tripartite government has contributed to the overall failure of the State to meet the minimum standards for effectuating the fundamental constitutional rights at issue.

7. “[W]hen inaction by those exercising legislative authority threatens fiscally to undermine” the constitutional right to a sound basic education “a court may invoke its inherent power to do what is reasonably necessary for the orderly and efficient exercise of the administration of justice.” *See In re Alamance County Court Facilities*, 329 N.C. 84, 99 (1991) (citation and internal quotation marks omitted).

8. Indeed, in *Leandro II* a unanimous Supreme Court held that “[c]ertainly, when the State fails to live up to its constitutional duties, a court is empowered to order the deficiency remedied, and if the offending branch of government or its agents either fail to do so or have consistently shown an inability to do so, a court is empowered to provide relief by imposing a specific remedy and instructing the recalcitrant state actors to implement it.” 358 N.C. at 642.

9. Article I, section 18 of the North Carolina Constitution’s Declaration of Rights—which has its origins in the Magna Carta—states that “every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay.” N.C. Const. art. I, § 18; *see Lynch v. N.C. Dept. of Justice*, 93 N.C. App. 57, 61 (1989) (explaining that article I, section 18 “guarantees a remedy for legally cognizable claims”); *cf. Craig ex rel. Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 342 (2009) (noting the Supreme Court of North Carolina’s “long-standing emphasis on ensuring redress for every constitutional injury”).

10. Article I, section 18 of the North Carolina Constitution recognizes the core judicial function to ensure that right and justice—including the constitutional right to the opportunity to a sound basic education—are not delayed or denied.

11. Because the State has failed for more than seventeen years to remedy the constitutional violation as the Supreme Court ordered, this Court must provide a remedy through the exercise of its constitutional role. Otherwise, the State’s

repeated failure to meet the minimum standards for effectuating the constitutional right to obtain a sound basic education will threaten the integrity and viability of the North Carolina Constitution by:

- a. nullifying the Constitution's language without the people's consent, making the right to a sound basic education merely aspirational and not enforceable;
- b. ignoring rulings of the Supreme Court of North Carolina setting forth authoritative and binding interpretations of our Constitution; and
- c. violating separation of powers by preventing the judiciary from performing its core duty of interpreting our Constitution. *State v. Berger*, 368 N.C. 633, 638 (2016) ("This Court construes and applies the provisions of the Constitution of North Carolina with finality.").

12. It appears that the General Assembly believes the Appropriations Clause, N.C. Const. art. V, section 7, prevents any court-ordered remedy to obtain the minimum amount of State funds necessary to ensure the constitutionally-required opportunity to obtain a sound basic education.

13. Our Supreme Court has recognized that the Appropriations Clause ensures "that the people, through their elected representatives in the General Assembly, ha[ve] full and exclusive control over the allocation of the state's expenditures." *Cooper v. Berger*, 376 N.C. 22, 37 (2020). In *Richmond County Board of Education v. Cowell*, 254 NC App 422 (2017) our Court of Appeals articulated that Article 5 Section 7 of the North Carolina Constitution permits state officials to draw money from the State Treasury only when an appropriation has been "made by law." This court concludes that Article 1 Section 15 of the North Carolina Constitution represents an ongoing constitutional appropriation of funds sufficient to create and maintain a school system that provides each of our State's students with the constitutional minimum of a sound basic education. This constitutional provision may therefore be deemed an appropriation "made by law."

14. In *Cooper v. Berger*, 376 N.C. 22 (2020) our Supreme Court noted that the General Assembly's authority over appropriations was grounded in its function as the voice of the people. *See* 376 N.C. at 37. It must also be noted, however, that the Constitution itself "expresses the will of the people in this State and is, therefore, the supreme law of the land." *In re Martin*, 295 N.C. 291, 299 (1978); *see also Gannon v. Kansas*, 368 P.3d 1024, 1057 (Kan. 2016) (explaining that "[t]he constitution is the direct mandate of the people themselves"). Accordingly, the Court concludes that

Article I, § 15 represents a constitutional appropriation, such an appropriation may be considered to have been made by the people themselves, through the Constitution, thereby allowing fiscal resources to be drawn from the State Treasury to meet that requirement. The Constitution reflects the direct will of the people; an order effectuating Article I, § 15's constitutional appropriation is fully consistent with the framers desire to give the people ultimate control over the state's expenditures. *Cooper*, 376 N.C. at 37.

15. If the State's repeated failure to meet the minimum standards for effectuating the constitutional right to obtain a sound basic education goes unchecked, then this matter would merely be a political question not subject to judicial enforcement. Such a contention has been previously considered—and rejected—by our Supreme Court. *Leandro I*, 346 N.C. at 345. Accordingly, it is the Court's constitutional duty to ensure that the ongoing constitutional violation in this case is remedied. N.C. Const. art. I, § 18.

16. Indeed, the State Budget Act itself recognizes that it should not be construed in a manner to “abrogate[] or diminish[] the inherent power” of any branch of government. N.C. Gen. Stat. § 143C-1-1(b). The inherent power of the judicial branch to ensure and effectuate constitutional rights cannot be disputed. *Cf. Ex Parte McCown*, 139 N.C. 95 (1905) (“[L]aws without a competent authority to secure their administration from disobedience and contempt would be vain and nugatory.”).

17. “It is axiomatic that the terms or requirements of a constitution cannot be in violation of the same constitution—a constitution cannot violate itself.” *Leandro I*, 346 N.C. at 352; accord *Stephenson v. Bartlett*, 355 N.C. 354, 397 (2002). As a result, the appropriations clause cannot be read to override the people's right to a sound basic education.

18. This Court cannot permit the State to continue failing to effectuate the right to a sound basic education guaranteed to the people of North Carolina, nor can it indefinitely wait for the State to act. Seventeen years have passed since *Leandro II* and, in that time, too many children have been denied their fundamental constitutional rights. Years have elapsed since this Court's first remedial order. And nearly a year has elapsed since the adoption of the Comprehensive Remedial Plan. This has more than satisfied our Supreme Court's direction to provide “every reasonable deference to the legislative and executive branches,” *Leandro I*, 346 N.C. at 357, and allow “unimpeded chance, ‘initially at least,’ to correct constitutional deficiencies revealed at trial,” *Leandro II*, 358 N.C. at 638 (citation omitted).

19. To allow the State to indefinitely delay funding for a *Leandro* remedy when adequate revenues exist would effectively deny the existence of a constitutional right to a sound basic education and effectively render the Constitution and the Supreme Court's *Leandro* decisions meaningless. The North Carolina Constitution, however, guarantees that right and empowers this Court to ensure its enforcement. The legislative and executive branches of the State, as creations of that Constitution, are subject to its mandates.

20. Accordingly, this Court recognizes, as a matter of constitutional law, a continuing appropriation from the State Treasury to effectuate the people's right to a sound basic education. The North Carolina Constitution repeatedly makes school funding a matter of constitutional—not merely statutory—law. Our Constitution not only recognizes the fundamental right to the privilege of education in the Declaration of Rights, but also devotes an entire article to the State's education system. Despite the General Assembly's general authority over appropriations of State funds, article IX specifically directs that proceeds of State swamp land sales; grants, gifts, and devises made to the State; and penalties, fines, and forfeitures collected by the State shall be used for maintaining public education. N.C. Const. art. IX, §§ 6, 7. Multiple provisions of article IX also expressly require the General Assembly to adequately fund a sound basic education. *See* N.C. Const. art. IX, §§ 2, 6, 7. When the General Assembly fulfills its constitutional role through the normal (statutory) budget process, there is no need for judicial intervention to effectuate the constitutional right. As the foregoing findings of fact make plain, however, this Court must fulfill its constitutional duty to effect a remedy at this time.

21. The right to a sound basic education is one of a very few affirmative constitutional rights that, to be realized, requires the State to supply adequate funding. The State's duty to carry out its obligation of ensuring this right has been described by the Supreme Court as both "paramount" (*Leandro II*, 358 N.C. at 649 and "sacred." *Mebane Graded Sch. Dist. v. Alamance Cty.*, 211 N.C. 213-(1937). The State's ability to meet this constitutional obligation is not in question. The unappropriated funds in the State Treasury greatly exceed the funds needed to implement the Comprehensive Remedial Plan. Consequently, there is no need to make impossible choices among competing constitutional priorities.

22. The Court further concludes that in addition to the aforementioned constitutional appropriation power and mandate, the Court has inherent and equitable powers that allow it to enter this Order. The North Carolina Constitution provides, "All courts shall be open; every person for an injury done him in his lands, goods, person, or reputation *shall have remedy by due course of law*; and right and justice shall be administered without favor, denial, or delay." N.C. CONST. art. I, § 18

(emphasis added). The North Carolina Supreme Court has declared that “[o]bedience to the Constitution on the part of the Legislature is no more necessary to orderly government than the exercise of the power of the Court in requiring it when the Legislature inadvertently exceeds its limitations.” *State v. Harris*, 216 N.C. 746, 764 (1940). Further, “the courts have power to fashion an appropriate remedy ‘depending upon the right violated and the facts of the particular case.’” *Simeon v. Hardin*, 339 N.C. 358, 373 (1994) (quoting *Corum v. Univ. of N.C.*, 330 N.C. 761, 784, *cert. denied*, 506 U.S. 985 (1992)).

23. As noted above, the Court’s inherent powers are derived from being one of three separate, coordinate branches of the government. *Ex Parte McCown*, 139 N.C. 95, 105-06 (1905) (citing N.C. Const. art. I, § 4)). The constitution expressly restricts the General Assembly’s intrusion into judicial powers. See N.C. Const. art. IV, § 1 (“The General Assembly shall have no power to deprive the judicial department of any power or jurisdiction that rightfully pertains to it as a co-ordinate department of the government....”); see also *Beard v. N. Carolina State Bar*, 320 N.C. 126, 129 (1987) (“The inherent power of the Court has not been limited by our constitution; to the contrary, the constitution protects such power.”). These inherent powers give courts their “authority to do all things that are reasonably necessary for the proper administration of justice.” *State v. Buckner*, 351 N.C. 401, 411 (2000); *Beard*, 320 N.C. 126, 129.

24. In fact, it is the separation of powers doctrine itself which undergirds the judicial branch’s authority to enforce its order here. “Inherent powers are critical to the court’s autonomy and to its functional existence: ‘If the courts could be deprived by the Legislature of these powers, which are essential in the direct administration of justice, they would be destroyed for all efficient and useful purposes.’” *Matter of Alamance Cty. Ct. Facilities*, 329 N.C. 84, 93–94 (1991) (“*Alamance*”) (citing *Ex Parte Schenck*, 65 N.C. 353, 355 (1871)). The Supreme Court’s analysis of the doctrine in *Alamance* is instructive:

An overlap of powers constitutes a check and preserves the tripartite balance, as two hundred years of constitutional commentary note. “Unless these [three branches of government] be so far connected and blended as to give to each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained.”

Id. at 97 (quoting *The Federalist* No. 48, at 308 (J. Madison) (Arlington House ed. 1966)).

25. The Supreme Court has recognized that courts should ensure when considering remedies that may encroach upon the powers of the other branches, alternative remedies should be explored as well as minimizing the encroachment to the extent possible. *Alamance*, 329 N.C. at 100-01. The relief proposed here carefully balances these interests with the Court's constitutional obligation of affording relief to injured parties. First, there is no alternative or adequate remedy available to the children of North Carolina that affords them the relief to which they are so entitled. State Defendants have conceded that the Comprehensive Remedial Plan's full implementation is necessary to provide a sound basic education to students and there is nothing else on the table. *See, e.g.*, March 2021 Order.

26. Second, this Court will have minimized its encroachment on legislative authority through the least intrusive remedy. Evidence of the Court's deference over seventeen years and its careful balancing of the interests at stake includes but is not limited to:

- a. The Court has given the State seventeen years to arrive at a proper remedy and numerous opportunities proposed by the State have failed to live up to their promise. Seventeen classes of students have since gone through schooling without a sound basic education;
- b. The Court deferred to State Defendants and the other parties to recommend to the Court an independent, outside consultant to provide comprehensive, specific recommendations to remedy the existing constitutional violations;
- c. The Court deferred to State Defendants and the other parties to recommend a remedial plan and the proposed duration of the plan, including recommendations from the Governor's Commission on Access to Sound Basic Education;
- d. The Court deferred to State Defendants to propose an action plan and remedy for the first year and then allowed the State Defendants additional latitude in implementing its actions in light of the pandemic's effect on education;
- e. The Court deferred to State Defendants to propose the long-term comprehensive remedial plan, and to determine the resources necessary for full implementation. (*See* March 2021 Order);
- f. The Court also gave the State discretion to seek and secure the resources identified to fully implement the Comprehensive Remedial Plan. (*See* June 2021 Order);

- g. The Court has further allowed for extended deliberations between the executive and legislative branches over several months to give the State an additional opportunity to implement the Comprehensive Remedial Plan;
- h. The status conferences, including more recent ones held in September and October 2021, have provided the State with additional notice and opportunities to implement the Comprehensive Remedial Plan, to no avail. The Court has further put State on notice of forthcoming consequences if it continued to violate students' fundamental rights to a sound basic education.

The Court acknowledges and does not take lightly the important role of the separation of powers. In light of the foregoing, and having reviewed and considered all arguments and submissions of Counsel for all parties and all of this Court's prior orders, the findings and conclusions of which are incorporated herein, it is hereby **ORDERED** that:

1. The Office of State Budget and Management and the current State Budget Director ("OSBM"), the Office of the State Controller and the current State Comptroller ("Controller"), and the Office of the State Treasurer and the current State Treasurer ("Treasurer") shall take the necessary actions to transfer the total amount of funds necessary to effectuate years 2 & 3 of the Comprehensive Remedial Plan, from the unappropriated balance within the General Fund to the state agents and state actors with fiscal responsibility for implementing the Comprehensive Remedial Plan as follows:

- (a) Department of Health and Human Services ("DHHS"): \$189,800,000.00;
- (b) Department of Public Instruction ("DPI"): \$1,522,053,000.00; and
- (c) University of North Carolina System: \$41,300,000.00.

2. OSBM, the Controller, and the Treasurer, are directed to treat the foregoing funds as an appropriation from the General Fund as contemplated within N.C. Gen. Stat. § 143C-6-4(b)(2)(a) and to carry out all actions necessary to effectuate those transfers;

3. Any consultation contemplated by N.C. Gen. Stat. § 143C-6-4(b1) shall take no longer than five (5) business days after issuance of this Order;

4. DHHS, the University of North Carolina System, the State Superintendent of Public Instruction, and all other State agents or State actors

receiving funds under the Comprehensive Remedial Plan are directed to administer those funds to guarantee and maintain the opportunity of a sound basic education consistent with, and under the time frames set out in, the Comprehensive Remedial Plan, including the Appendix thereto;

5. In accordance with its constitutional obligations, the State Board of Education is directed to allocate the funds transferred to DPI to the programs and objectives specified in the Action Steps in the Comprehensive Remedial Plan and the Superintendent of Public Instruction is directed to administer the funds so allocated in accordance with the policies, rules or and regulations of the State Board of Education so that all funds are allocated and administered to guard and maintain the opportunity of a sound basic education consistent with, and under the time frames set out in, the Comprehensive Remedial Plan, including the Appendix thereto, and

6. OSBM, the Controller, and the Treasurer are directed to take all actions necessary to facilitate and authorize those expenditures;


7. To the extent any other actions are necessary to effectuate the year 2 & 3 actions in the Comprehensive Remedial Plan, any and all other State actors and their officers, agents, servants, and employees are authorized and directed to do what is necessary to fully effectuate years 2 and 3 of the Comprehensive Remedial Plan;

8. The funds transferred under this Order are for maximum amounts necessary to provide the services and accomplish the purposes described in years 2 and 3 of the Comprehensive Remedial Plan. Savings shall be effected where the total amounts appropriated are not required to perform these services and accomplish these purposes and the savings shall revert to the General Fund at the end of fiscal year 2023, unless the General Assembly extends their availability; and

9. This Order, except the consultation period set forth in paragraph 3, is hereby stayed for a period of thirty (30) days to preserve the *status quo*, including maintaining the funds outlined in Paragraph 1 (a)-(c) above in the State Treasury, to permit the other branches of government to take further action consistent with the findings and conclusions of this Order.

This Order may not be modified except by further Order of this Court upon proper motion presented. The Court shall retain jurisdiction over this matter.

This the 10th day of November, 2021.


The Honorable W. David Lee
North Carolina Superior Court Judge

No. 21- 511

TENTH JUDICIAL DISTRICT

NORTH CAROLINA COURT OF APPEALS

IN RE: The 10 November 2021 Order
in Hoke County Board of Education et
al. vs. State of North Carolina and W.
David Lee (Wake County File 95 CVS
1158)

**PETITION FOR WRIT OF PROHIBITION, TEMPORARY STAY AND
WRIT OF SUPERSEDEAS**

INDEX

TABLE OF CASES AND AUTHORITIES	ii
INTRODUCTION	1
STATE OF RELEVANT FACTS AND PROCEDURAL HISTORY	3
ISSUES PRESENTED	4
REASONS WHY THE WRITS SHOULD BE ISSUED	4
I. <u>Lack of Jurisdiction Over the Controller</u>	8
II. <u>Order is Contrary to the Express Language of the Constitution</u>	11
III. <u>Order is Contrary to the Express Language of the General Statutes</u>	13
IV. <u>Order is Contrary to Controlling Precedents of the Appellate Division</u>	17
RELIEF REQUESTED	18
ATTACHMENTS	20
VERIFICATION OF COUNSEL AND PETITIONER	21
CERTIFICATE OF SERVICE	22

TABLE OF CASES AND AUTHORITIES

Cases:

<i>Allred v. Tucci</i> , 85 N.C. App. 138, 354 S.E.2d 291 (1987)	10
<i>City of New Bern v. Walker</i> , 255 N.C. 355 (1961)	6
<i>Cooper v. Berger</i> , 268 N.C. App. 468, 837 S.E.2d 7 (2019).....	17
<i>Cooper vs Berger</i> , 376 N.C. 22, 37 (2020)	17
<i>Craver v. Craver</i> , 298 N.C. 231 (1979)	6
<i>Garner v. Worth</i> , 122 N.C. 250, 29 S.E. 364 (1898)	17
<i>Gardner v. Board of Trustees</i> , 226 N.C. 465, 38 S.E.2d 314 (1946)	17
<i>Hoke County Bd. of Educ v State</i> , 358 N.C. 605, 399 S.E.2d 355 (2004).....	3
<i>Hoke Cty. Bd. of Educ. v. State</i> , 198 N.C. App. 274, 679 S.E.2d 512 (2009)	3
<i>Hoke Cty. Bd. of Educ. v. State</i> , 222 N.C. App. 406, 731 S.E.2d 691 (2012)	3
<i>Hoke Cty. Bd. of Educ. v. State</i> , 367 N.C. 156, 749 S.E.2d 451 (2013)	3
<i>In Re Alamance Court Facilities</i> , 329 N.C. 84, 405 S.E.2d 125 (1991)	8, 9, 17
<i>In re Separation of Powers</i> , 305 N.C. 767, 295 S.E.2d. 589, (1982, as corrected May 11, 2000).....	14
<i>In Re T.R.P.</i> , 360 N.C. 588, 636 S.E.2d. 787 (2006)	9
<i>Leandro vs State</i> , 122 N.C. App. 1, 468 S.E.2d 543 (1996)	3
<i>Leandro vs State</i> , 346 N.C. 336, 488 S.E.2d 249 (1996).....	3
<i>Martin v. Clark</i> , 135 N.C. 178, 47 S.E. 397 (1904)	17

<i>Russell v. Bea Staple Manufacturing Co.,</i> 266 N.C. 531, 146 S.E.2d 459 (1966)	10
<i>Sandhill Amusements, Inc et al. v. North Carolina</i> No. P17-693 (2017).....	11
<i>State v. Allen,</i> 24 N.C. 183 (1841)	3, 7
<i>State v. Davis,</i> 270 N.C. 1, 153 S.E.2d 749,	17
<i>State v. Dorton,</i> 182 N.C. App. 34 (2007)	6
<i>Swenson v. All American Assurance Co.,</i> 33 N.C. App. 458, 235 S.E.2d 793 (1977)	10
<i>Virmani v. Presbyterian Health Services Corp.,</i> 350 N.C. 449, 515 S.E.2d 675 (1999)	5

Statutes:

N.C. Gen Stat. § 7A-32	<i>passim</i>
N.C. Gen. Stat. § 143C-2-1	15
N.C. Gen. Stat § 143C-6-1	15
N.C. Gen. Stat. § 143C-6-4	2, 16-17
N.C. Gen. Stat. § 143C-7	16
N.C. Gen. Stat. § 143-10-1.....	16
N.C. Gen. Stat. § 143-10-3.....	16
N.C. Gen. Stat. § 143-11-7.....	17

Rules:

N.C. R. App. P. 22	5
N.C. R. App. P. 23	6-7

Other Authorities:

N.C. Const. Art. III	<i>passim</i>
N.C. Const. Art. IV.....	5, 7

N.C. Const. Art. V	11, 15
5 Am. Jur. 2D Appellate Review § 370	6
63C Am. Jur. 2d <i>Prohibition</i> § 8 (2017)	7
BLACK’S LAW DICTIONARY (11th Ed. 2019).....	6
ELIZABETH BROOKS SCHERER & MATTHEW NIS Leerbert, <i>North Carolina Appellate Practice and Procedure</i> § 20	5
SHUFORD <i>North Carolina Civil Practice and Procedure</i> , 6th Ed.	10
<i>The North Carolina State Constitution</i> , ORTH AND NEWBY 2 nd Ed.....	12

No. 21- 511

TENTH JUDICIAL DISTRICT

NORTH CAROLINA COURT OF APPEALS

IN RE. The 10 November 2021 Order
in Hoke County Board of Education et
al. vs. State of North Carolina and W.
DAVID LEE (Wake County File 95
CVS 1158)

**PETITION FOR WRIT OF PROHIBITION, TEMPORARY STAY AND
WRIT OF SUPERSEDEAS**

TO THE HONORABLE NORTH CAROLINA COURT OF APPEALS:

NOW COMES Linda Combs, Controller of the State of North Carolina and a taxpayer, pursuant to Rules 22 and 23 of the North Carolina Rules of Appellate Procedure and N.C. Gen. Stat. § 7A-32(b) and (c), and respectfully petitions this Court to issue a writ of prohibition, temporary stay and writ of supersedeas. In support thereof, Petitioner shows the following:

INTRODUCTION

On 10 November 2021, the Honorable Superior Court Judge W. David Lee entered an order in the 10th Judicial District in “Hoke County Board of Education vs State of North Carolina” (95 CVS 1158). (A certified copy of this order is attached to this Petition as Exhibit A and incorporated as if fully set out herein). The Order followed a Memorandum of Law dated 8

November 2021 supplied to Judge Lee by the Attorney General of North Carolina, a copy of which is attached to this Petition as Exhibit B and incorporated as if fully set out herein.

The Order requires the Petitioner to do the following:

“The Office of State Budget and Management and the current State Budget Director (“OSBM”), the Office of the State Controller and the current State Comptroller [sic] (“Controller”), and the Office of the State Treasurer and the current State Treasurer (“Treasurer”) shall take the necessary actions to transfer the total amount of funds necessary to effectuate years 2 & 3 of the Comprehensive Remedial Plan, from the unappropriated balance within the General Fund to the state agents and state actors with fiscal responsibility for implementing the Comprehensive Remedial Plan as follows:

- (a) Department of Health and Human Services (“DHHS”): \$189,800,000.00;
- (b) Department of Public Instruction (“DPI”): \$1,522,053,000.00; and
- (c) University of North Carolina System: \$41,300,000.00.

OSBM, the Controller, and the Treasurer, are directed to treat the foregoing funds as an appropriation from the General Fund as contemplated within N.C. Gen. Stat. § 143C-6-4(b)(2)(a) and to carry out all actions necessary to effectuate those transfers;

Any consultation contemplated by N.C. Gen. Stat. § 143C-6-4(b1) shall take no longer than five (5) business days after issuance of this Order”

Petitioner and her counsel seek this writ on three independent grounds: (1) Ordering the Controller to take actions provided for in the Order is not within the court’s jurisdiction, (2) the Order is at variance with the rules prescribed by law, or (3) or the Order requires the Petitioner to act in “a

manner which will defeat a legal right.” *State v. Allen*, 24 N.C. 183, 189 (1841).

STATEMENT OF RELEVANT FACTS AND PROCEDURAL HISTORY

Plaintiffs in the *Leandro* case filed their complaint on 25 May 1994. The relevant historical facts and procedural history are contained in the following appellate division cases; *Leandro vs State*, 122 N.C. App. 1, 468 S.E.2d 543 (1996); *aff’d in part, rev. in part, and remanded by Leandro vs State*, 346 N.C. 336, 488 S.E.2d 249 (1996); *Hoke County Bd. of Educ v State*, 358 N.C. 605, 399 S.E.2d 355 (2004). *Hoke Cty. Bd. of Educ. v. State*, 198 N.C. App. 274, 679 S.E.2d 512 (2009); *Hoke Cty. Bd. of Educ. v. State*, 222 N.C. App. 406, 731 S.E.2d 691 (2012); *Hoke Cty. Bd. of Educ. v. State*, 367 N.C. 156, 749 S.E.2d 451 (2013). The 10 November 2021 Order contains the recent procedural history of the case. (¶ 1 to 17 Exhibit A.)

During the history of the *Leandro* case, Petitioner has never been served with any legal process involving either *Leandro vs State* or *Hoke Cty Bd. Of Educ. v. State*. Petitioner is not a party to either case. Petitioner has not been served with the Order attached as Exhibit A. Petitioner has not been made aware of any enactment by the General Assembly which would authorize her to legally distribute funds from the Treasury to comply with the Court’s order in any amount. Petitioner is aware the Current Operation Appropriations Act for

Fiscal Years 2021-23 (SB-105) has been recently ratified and signed by the Governor on November 18, 2021, but she is unsure how the funds required to be distributed by the Order should be credited in the recently ratified Appropriations Act. It is unclear from the Order what credit, if any, should be given for the funds recently appropriated by the General Assembly and how the funds would be accounted for in the current operation budget.

ISSUES PRESENTED

Whether the 10 November, 2021 Order is a proper exercise of the trial Court's authority, where the Court mandated non-parties to withdraw funds from the North Carolina Treasury without any notice or opportunity to be heard?

Whether a Writ of Prohibition should issue from this Court with regard to such Order?

Whether the 10 November, 2021 Order is a proper exercise of that Court's authority, given the Constitutional, Statutory and Precedential authorities to the contrary?

REASONS WHY THE WRITS SHOULD ISSUE

N.C. Gen Stat. § 7A-32(b) and (c) grants this court statutory jurisdiction to grant extraordinary writs – including writs for prohibition.

Article IV, section 12(1) of the N.C. Constitution confers jurisdiction on the N.C. Supreme Court to “issue any remedial writs necessary to give it general supervision and control over the proceedings of the other courts.” See also G.S. 7A-32(b) (same). The General Assembly exercised its authority under article IV, section 12(2) to confer jurisdiction on the N.C. Court of Appeals “to issue the prerogative writs, including mandamus, prohibition, certiorari, and supersedeas, in aid of its own jurisdiction, or to supervise and control the proceedings of any of the trial courts” See G.S. 7A-32(c). For further discussion of the history and origins of these four writs, see ELIZABETH BROOKS SCHERER & MATTHEW NIS LEERBERT, *North Carolina Appellate Practice and Procedure* § 20 (Remedial, Prerogative, and Extraordinary Writs of the Appellate Courts) (2018).

The petition for the writ should be directed to the appellate court to which an appeal of right might lie from a final judgment entered in the cause. N.C. R. App. P. 22(a).

The Supreme Court of North Carolina has held a nonparty can seek to protect its rights by “extraordinary writ practice”. *Virmani v. Presbyterian Health Services Corp.*, 350 N.C. 449, 515 S.E.2d 675 (1999).

A writ of supersedeas and temporary stay are an extraordinary writ that issues from an appellate court to a lower court “to preserve the status

quo pending the exercise of the appellate court's jurisdiction." *City of New Bern v. Walker*, 255 N.C. 355, 356 (1961). The literal translation of the Latin word "supersedeas" is "you shall desist." BLACK'S LAW DICTIONARY (11th Ed. 2019). Supersedeas suspends the power of the lower court to issue an execution on the judgment or decree appealed from. See 5 Am. Jur. 2D Appellate Review § 370; see also *State v. Dorton*, 182 N.C. App. 34 (2007) (trial judge properly held hearing after N.C. Court of Appeals remanded the case for resentencing; fact that defendant had filed a petition for discretionary review in the N.C. Supreme Court did not divest the trial court of jurisdiction where defendant failed to file a petition for writ of supersedeas to stay enforcement of the remand order). The writ "is issued only to hold the matter in abeyance pending review and may be issued only by the court in which an appeal is pending." *Walker*, 255 N.C. 355, 356; see also N.C. R. App. P. 23(a) (an appeal or a petition for mandamus, prohibition, or certiorari must be pending in the appellate court where the application for writ of supersedeas is filed); *Craver v. Craver*, 298 N.C. 231, 237–38 (1979) ("The writ of supersedeas may issue only in the exercise of, and as ancillary to, the revising power of an appellate court . . ."). The N.C. Supreme Court and the N.C. Court of Appeals have jurisdiction, exercisable by one or more judges or justices, to issue a writ of supersedeas "to supervise and control the

proceedings” of inferior courts. G.S. 7A-32(b), (c); see also N.C. Const. Art. IV, § 12(1), (2). A petition for the writ should be made in the N.C. Court of Appeals in all cases except those originally docketed in the N.C. Supreme Court. N.C. R. App. P. 23(a)(2)

A writ of prohibition lies most appropriately to prohibit the impending exercise of jurisdiction not possessed by the judge to whom issuance of the writ has been sought. Thus, an appellate court may use a writ of prohibition to restrain lower court judges (1) “from proceeding in a matter not within their jurisdiction,” (2) from taking judicial action at variance with the rules prescribed by law, or (3) or from proceeding in “a manner which will defeat a legal right.” *State v. Allen*, 24 N.C. 183, 189 (1841). In these situations, the petitioner should demonstrate that (1) an official “is about to exercise judicial or quasi-judicial power,” (2) that the power is not authorized by law, and (3) if the power is exercised, the petitioner will suffer an injury, and (4) no other adequate remedy exists to address that injury. 63C Am. Jur. 2d *Prohibition* § 8 (2017). The 10 November Order shows clearly Judge Lee is about to use judicial power without personal jurisdiction or legal authority to do so which will harm the Petitioner, and Petitioner not being a named party to the lawsuit, has no other practical adequate remedy to address her injury.

I. Lack of Jurisdiction Over the Controller

Based upon the caption headings, the certificate of service in the Order and this petition sworn to by the Petitioner, it is clear Petitioner is not a party to *Hoke County Board of Education vs State*. The trial court therefore lacks jurisdiction to order the Controller to take any action. Binding precedent from the North Carolina Supreme Court in *In Re Alamance Court Facilities*, 329 N.C. 84, 405 S.E.2d 125 (1991), a case cited in the Order holds as follows:

“[I]n order that there be a valid adjudication of a party's rights, the latter must be given notice of the action and an opportunity to assert his defense, and he *must be a party to such proceeding*.” *In re Wilson*, 13 N.C. App. 151, 153, 185 S.E.2d 323, 325 (1971) (*emphasis added*) (quoting 2 Strong's N.C. Index 2d, *Constitutional Law* § 24). “[A]ny judgment which may be rendered in . . . [an] action will be wholly ineffectual as against [one] who is not a party to such action.” *Scott v. Jordan*, 235 N.C. 244, 249, 69 S.E.2d 557, 561 (1952). The exercise of the court's inherent power to do what is reasonably necessary for the proper administration of justice must stop where constitutional guarantees of justice and fair play begin. “The law of the land clause . . . guarantees to the litigant in every kind of judicial proceeding the right to an adequate and fair hearing before he can be deprived of his claim or defense by judicial decree.” *In re Custody of Gupton*, 238 N.C. 303, 304, 77 S.E.2d 716, 717 (1953). “The instant that the court perceives that it is exercising, or is about to exercise, a forbidden or ungranted power, it ought to stay its action, and, if it does not, such action is, in law, a nullity.” *Burroughs v. McNeill*, 22 N.C. at 301. Such was the effect of the superior court order here.

Because the commissioners were not parties to the action from which the order issued, they are not bound by its mandates. Having so held, this Court need not address additional issues raised by petitioners.

“In order that there be a valid adjudication of a party's rights, the latter must be given notice of the action and an opportunity to assert his defense, and he must be a party to such proceeding. Any judgment which may be rendered in an action will be wholly ineffectual as against one who is not a party to such action. The law of the land clause guarantees to the litigant in every kind of judicial proceeding the right to an adequate and fair hearing before he can be deprived of his claim or defense by judicial decree. *Id.* at 108

This case is factually distinct from the *Alamance Facilities* case. In *Alamance Facilities*, Judge Height had served the Commissioners with his order, a consideration missing in this case. When the Alamance Commissioners presented themselves to him to defend themselves, the Judge then ruled they were not parties and therefore had no standing to present a defense. Here the 10 November order was never served on the Controller or the other State Executive Branch Officials charged with distributing treasury funds.

Jurisdiction is “[t]he legal power and authority of a court to make a decision that binds the parties to any matter properly brought before it.” *In Re T.R.P.*, 360 N.C. 588, 590, 636 S.E.2d. 787, 789 (2006) (internal citations omitted). A court must have personal jurisdiction over the parties to “bring [them] into its adjudicative process.” *Id.* at 14 590, 636 S.E.2d. at 790 (internal citations omitted). It is also well-established that “[t]he court may not grant a restraining order unless it has proper jurisdiction of the matter.”

SHUFORD *North Carolina Civil Practice and Procedure*, 6th Ed., p. 1195.

When a court lacks jurisdiction, it is “without authority to enter any order granting any relief.” *Swenson v. All American Assurance Co.*, 33 N.C. App. 458, 465, 235 S.E.2d 793, 797 (1977) (finding the court was without authority to enter a temporary restraining order when it had no jurisdiction over the defendant). When a court lacks authority to act, its acts are void. *Russell v. Bea Staple Manufacturing Co.*, 266 N.C. 531, 534, 146 S.E.2d 459, 461 (1966). As the Supreme Court stated in *Allred v. Tucci*, 85 N.C. App. 138, 142, 354 S.E.2d 291, 294 (1987): “If the court was without authority, its judgment ... is void and of no effect. A lack of jurisdiction or power in the court entering a judgment always voids the judgment [citations omitted] and a void judgment may be attacked whenever and wherever it is asserted.” (citations omitted)

In this case, the Court did not have personal jurisdiction over the Petitioners for several reasons, including: 1) they were not parties to the litigation; 2) they received no notice of any hearing; and consequently 3) they were denied the opportunity to be heard in violation of due process.

Our legal system is predicated on lawful notice and the opportunity to be heard prior to being forced to comply with court orders. The Petitioners were not given the same basic legal rights like notice and an opportunity to be heard which are given to litigants across the State. As a result of being denied this

right, the Petitioners are now faced with Hobson's choice. Either neglect to perform their sworn duties to enforce the law, or be subject to criminal charges or motions to show cause for contempt of court for performing their sworn duties. This double bind stems from Orders which were never served on them, and on which they were never given an opportunity to be heard, issuing from a proceeding in which they were never parties. Without a Writ being granted, the Petitioners are confronted with either neglecting to enforce the laws of North Carolina or being held in contempt.

This court in strikingly similar circumstances has issued a Writ of Prohibition to prevent a trial court from acting without jurisdiction. No. P17-693 *Sandhill Amusements, Inc et al. v. North Carolina*, (2017). This Writ was appealed and certiorari was denied by the Supreme Court.

While the jurisdictional issue is sufficient in and of itself, to decide this order, even if, the Court did have jurisdiction over the Controller, the acts which the order mandates the Controller undertake are beyond the Court's authority as discussed hereinafter.

II. Order is Contrary to the Express Language of the Constitution

North Carolina's Constitution in Article V, Section 7, reads as follows: **"Drawing public money.** (1) State treasury. No money shall be drawn from the State treasury but in consequence of appropriations made by law, and an accurate account of the receipts and expenditures of State funds shall be published annually.

As noted in the leading treatise on the North Carolina Constitution, *The North Carolina State Constitution*, ORTH AND NEWBY 2nd Ed., pg. 154,

“The power of the purse is the exclusive power of the General Assembly. Colonial Americans were acutely aware of the long struggle between the English Parliament and the Crown over public finance and were determined to secure the power of the purse for their elected representatives. Subsection 1 dates from the 1776 Constitution.”

The duties of the Legislative and Judicial Branches with regard to appropriations are clear, explicit and binding. The constitution does not provide the judicial department with the authority to appropriate funds. The plain language of the constitution is clear. There was no reason for the trial court to interpret or find within the penumbra of other more general sections of the Constitution the power to appropriate money in the Judicial Branch.¹

III. Order is Contrary to the Express Language of the General Statutes

The architecture for the state budget process is set out in the constitution and detailed in the statute. Under the separation of powers doctrine, the judicial branch has no role in that budget process. The North Carolina Constitution sets out a specific, multi-step budget process. The key constitutional budget provision is Article III, § 5(3), which states in pertinent

¹ A court's declaration its judgment is an appropriation or legislative enactment lacks a basis in fact over law. (See Exhibit A, ¶ 2, page 19).

part: “(3) *Budget*. The Governor shall prepare and recommend to the General Assembly a comprehensive budget of the anticipated revenue and proposed expenditures of the State for the ensuing fiscal period. **The budget as enacted by the General Assembly shall be administered by the Governor.**” N.C. Const. Art. III, § 5(3) (*emphasis added*).

Every word of constitutional provisions must be given effect and, as a result, the plain language of Article III, § 5(3) limits the creation and execution of the budget to the legislative and executive branches respectively. Article III, § 5(3) contains 5 key provisions: (1) the Governor is required to propose a budget; (2) the General Assembly enacts the State budget; (3) the Governor is required to administer the budget as actually enacted by the General Assembly; (4) the State is compelled to operate on a balanced budget; and (5) the Governor is empowered to effect the necessary economies in State expenditures to prevent a budget deficit. This architecture has been explained in an advisory opinion explaining the process by which the state budget is developed, enacted and executed, the North Carolina Supreme Court has articulated the steps of the budget process thusly:

“Our Constitution mandates a three-step process with respect to the State's budget. (1) Article III, Section 5(3) directs that the ‘Governor shall prepare and recommend to the General Assembly a comprehensive budget . . . for the ensuing fiscal period.’ (2) Article II vests in the General Assembly the power to enact a budget [one recommended by the Governor or one of its own

making]. (3) After the General Assembly *enacts* a budget, Article III, Section 5(3) then provides that the Governor shall administer the budget “as enacted by the General Assembly.” In re Separation of Powers, 305 N.C. 767, 776, 295 S.E.2d. 589, 594 (1982, as corrected May 11, 2000) (quoting N.C. Const. art. III, § 5(3)).

After a budget for a specific “fiscal period” is enacted into law, the Governor as *ex officio* Director of the Budget administers it, *i.e.*, he is responsible for disbursing the tax revenue in accordance with legislative directives. N.C. Const. Art. III, § 5(3).

At no point does the North Carolina Constitution give the judicial branch the authority to either enact or execute the state budget. The legislative and executive branches must ensure that their respective roles in creating the budget and executing the budget as enacted are carried out.

The General Assembly established a statutory mechanism to distribute and allocate funds from the Treasury. N. C. Gen. Stat. § 143C-1-2. (a) reads as follows:

“In accordance with Section 7 of Article V of the North Carolina Constitution, no money shall be drawn from the State treasury but in consequence of appropriations made by law. **A law enacted by the General Assembly that expressly appropriates funds from the State treasury is an appropriation;** however, an enactment by the General Assembly that describes the purpose of a fund, authorizes the use of funds, allows the use of funds, or specifies how funds may be expended, is not an appropriation. (*emphasis added*).”

This defines the word “appropriations.” A judgment or order by a judge is definitionally not an appropriation.

The General Assembly and the Constitution have established a budgetary process, including the provision for the Governor to delegate Budgetary authority to the Office of State Budget and Management. By N.C. Gen. Stat. 143C-2-1 (a), the Governor administers “the Budget as enacted by the General Assembly”, furthermore “The ***Governor shall ensure that appropriations are expended in strict accordance with the budget enacted by the General Assembly.***” (*emphasis added*). N.C. Gen. Stat §143C-6.1(a). There is an extraordinary events provision which provides for the Governor to comply with a court order, G.S. 143C-6-4(b)(2)a. The amount transferred may not “**cause General Fund expenditures, excluding expenditures from General Fund receipts, to exceed General Fund appropriations for a department.**” (*emphasis added*).” G.S. 143C-6-4(b2) The order either ignores the Statute or seems to confuse subsection (b)(2) with section (b2). Section (b2) renders subsection (b)(2) as inapplicable.

The General Assembly’s statutory mechanism for enforcement of these acts includes penalty provisions. These include a requirement the Budget Director report the spending of any unauthorized funds in apparent violation of a penal law to the Attorney General. See 143C-6-7. Furthermore, to

“withdraw funds from the State treasury for any purpose not authorized by an act of appropriation” or to “fail or refuse to perform a duty” in violation of this Chapter is a Class 1 misdemeanor which subjects the wrongdoer to a criminal liability, forfeiture of office or impeachment. § 143C-10-1(a)(1) and (4) and 143C-10-3.

The Petitioner or her staff would be subject to these penalties in the event she were compelled by the Order to comply with its term. Compliance with the court’s order would violate the Controller’s oath of office. See G.S. 11-7.²

IV. Order is Contrary to Controlling Precedents of the Appellate Division.

Controlling precedents of the Supreme Court of North Carolina support Petitioner’s view a withdrawal of funds from the Treasury cannot be made without an appropriation enacted by the General Assembly. *In Re Alamance*

² Article VIII of the Articles of Impeachment of Governor Holden “charges that the accused, as Governor, made his warrants for large sums of money on the public treasurer for the unlawful purpose of paying the armed men before mentioned -- caused and procured said Treasurer to deliver to one A. D. Jenkins, appointed by the accused to be paymaster, the sum of forty thousand dollars; that the Honorable Anderson Mitchell, one of the superior court judges, on application to him made, issued writs of injunction which were served upon the said treasurer and paymaster, restraining them from paying said money to the said troops; that thereupon the accused incited and procured the said A. D. Jenkins paymaster, to disobey the injunction of the court and to deliver the money to another agent of the accused, to-wit: one John B. Neathery ; and thereupon the accused ordered and caused the said John B. Neathery to disburse and pay out the money so delivered to him, for the illegal purpose of paying the expenses of, and keeping on foot the illegal military force aforesaid.” *Holden, Impeachment Proceedings*, I, 110-112. A complete text of the Articles of Impeachment can be found in the *Impeachment Proceedings*, I, 9-17. See also *Articles Against W. W. Holden (Raleigh: James H. Moore, State Printer and Binder), 1871.*

County Court Facilities, Id. and *Cooper vs Berger*, 376 N.C. 22, 37 (2020). *White v. Hill*, 125 N.C. 194, 34 S.E. 432 (1899), *Garner v. Worth*, 122 N.C. 250, 29 S.E. 364 (1898) *Gardner v. Board of Trustees*, 226 N.C. 465, 38 S.E.2d 314 (1946); *State v. Davis*, 270 N.C. 1, 153 S.E.2d 749, *cert. denied*, 389 U.S. 828, 88 S. Ct. 87, 19 L. Ed. 2d 84 (1967), *State v. Davis*, 270 N.C. 1, 153 S.E.2d 749, *Martin v. Clark*, 135 N.C. 178, 47 S.E. 397 (1904), *Cooper v. Berger*, 268 N.C. App. 468, 837 S.E.2d 7 (2019), *affd*, 376 N.C. 22, 852 S.E.2d 46, 2020 N.C. LEXIS 1133 (2020).

RELIEF REQUESTED

For the foregoing reasons, Petitioner respectfully requests that this Court issue its writ of prohibition (1) vacating the 10 November 2021 and/or (2) enjoining Judge Lee from compelling the Petitioner, in her official capacity as Controller of the State of North Carolina, and those serving under her supervision, from performing any action required by the trial court's 10 November 2021 order attached hereto. Petitioner also requests the Court issue a temporary stay and writ of supersedes to prevent the time for appeal from expiring for aggrieved parties.

Additionally, should the Court desire briefing and argument on these issues, then Petitioners request the Court order a temporary stay and writ of supersedeas of the 10 November 2021 Order until this Writ of Prohibition has

been finally determined, and time for review to the North Carolina Supreme Court of any such determination has expired.

Respectfully submitted this 24th day of November, 2021.

HIGGINS BENJAMIN, PLLC

Electronically Submitted

Robert N. Hunter, Jr.

N.C. State Bar No. 5679

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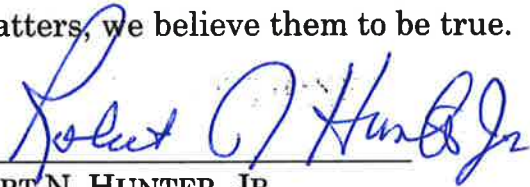
ATTACHMENTS

Attached to this Petition for Writ of Prohibition, Temporary Stay and Writ of Supersedeas are copies of the following documents from the court records:

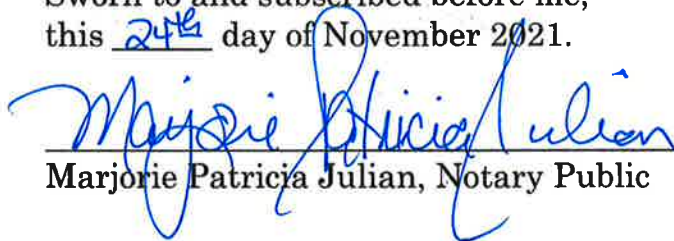
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| Exhibit A | Order entered by the Honorable Superior Court Judge W. David Lee in the 10th Judicial District in “Hoke County Board of Education vs State of North Carolina” (Wake County File No. 95 CVS 1158) dated 10 November 2021. |
| Exhibit B | Memorandum of Law dated 8 November 2021 supplied to Judge Lee by the Attorney General of North Carolina |

VERIFICATION OF COUNSEL AND PETITIONER

Robert N. Hunter, Jr. and Linda Combs., being first duly sworn, deposes and says that he has read the foregoing Petition for Writ of Certiorari and that the same is true to his own knowledge except as to matters alleged upon information and belief, and as to these matters, we believe them to be true.


ROBERT N. HUNTER, JR.

Sworn to and subscribed before me,
this 24th day of November 2021.



Marjorie Patricia Julian, Notary Public



My commission expires: October 20, 2025


LINDA COMBS

Sworn to and subscribed before me,
this 24th day of November 2021.


Kourtney Batot, Notary Public
(Print Name)



My commission expires: July 19, 2024

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Petition for Writ of Prohibition, Temporary Stay and Writ of Supersedeas was served on counsel for the parties via email and U.S. Mail, postage prepaid, addressed as follows:

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-and-

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This 24th day of November, 2021.

HIGGINS BENJAMIN, PLLC

Electronically Submitted

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Attorney for Petitioner

EXHIBIT A

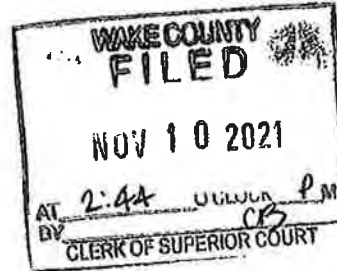
STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

95-CVS-1158

COUNTY OF WAKE

HOKE COUNTY BOARD OF
EDUCATION; HALIFAX COUNTY BOARD
OF EDUCATION; ROBESON COUNTY
BOARD OF EDUCATION; CUMBERLAND
COUNTY BOARD OF EDUCATION;
VANCE COUNTY BOARD OF
EDUCATION; RANDY L. HASTY,
individually and as Guardian Ad Litem of
RANDELL B. HASTY; STEVEN R.
SUNKEL, individually and as Guardian Ad
Litem of ANDREW J. SUNKEL; LIONEL
WHIDBEE, individually and as Guardian
Ad Litem of JEREMY L. WHIDBEE;
TYRONE T. WILLIAMS, individually and
as Guardian Ad Litem of TREVELYN L.
WILLIAMS; D.E. LOCKLEAR, JR.,
individually and as Guardian Ad Litem of
JASON E. LOCKLEAR; ANGUS B.
THOMPSON II, individually and as
Guardian Ad Litem of VANDALIAH J.
THOMPSON; MARY ELIZABETH
LOWERY, individually and as Guardian Ad
Litem of LANNIE RAE LOWERY, JENNIE
G. PEARSON, individually and as
Guardian Ad Litem of SHARESE D.
PEARSON; BENITA B. TIPTON,
individually and as Guardian Ad Litem of
WHITNEY B. TIPTON; DANA HOLTON
JENKINS, individually and as Guardian Ad
Litem of RACHEL M. JENKINS; LEON R.
ROBINSON, individually and as Guardian
Ad Litem of JUSTIN A. ROBINSON,



Plaintiffs,
and
CHARLOTTE-MECKLENBURG BOARD
OF EDUCATION,

Plaintiff-Intervenor,

and
RAFAEL PENN; CLIFTON JONES,
individually and as Guardian Ad Litem
of CLIFTON MATTHEW JONES;
DONNA JENKINS DAWSON,
individually and as Guardian Ad Litem
of NEISHA SHEMAY DAWSON and
TYLER ANTHONY HOUGH-JENKINS,

Plaintiff-Intervenors,

v.

STATE OF NORTH CAROLINA and the
STATE BOARD OF EDUCATION,

Defendants,

and

CHARLOTTE-MECKLENBURG BOARD
OF EDUCATION,

Realigned Defendant.

ORDER

Over seventeen years ago, Justice Orr, on behalf of a unanimous Supreme Court, wrote:

The world economy and technological advances of the twenty-first century mandate the necessity that the State step forward, *boldly and decisively*, to see that all children, without regard to their socio-economic circumstances, have an educational opportunity and experience that not only meet the constitutional mandates set forth in *Leandro*, but fulfill the dreams and aspirations of the founders of our

state and nation. Assuring that our children are afforded the chance to become contributing, constructive members of society is paramount. *Whether the State meets this challenge remains to be determined.*

Hoke County Bd. of Educ. v. State, 358 N.C. 605, 649 (2004) (*Leandro II*) (emphasis added). As of the date of this Order, the State has not met this challenge and, therefore, has not met its constitutional obligation to the children of North Carolina.

The orders of our Supreme Court are not advisory. This Court can no longer ignore the State's constitutional violation. To do so would render both the North Carolina State Constitution and the rulings of the Supreme Court meaningless.

This Court, having held a hearing on October 18, 2021 at which it ordered Plaintiffs and Plaintiff-Intervenors to submit proposed order(s) and supporting legal authorities by November 1, 2021 and Defendants State of North Carolina ("State") and State Board of Education ("State Board," and collectively with the State, "State Defendants") to respond by November 8, 2021, finds and concludes as follows¹:

I. Findings of Fact

1. In its unanimous opinion in *Leandro II*, the Supreme Court held, "an inordinate number" of students had failed to obtain a sound basic education and that the State had "failed in [its] constitutional duty to provide such students with the opportunity to obtain a sound basic education." In light of that holding, the Supreme Court ordered that "the State must act to correct those deficiencies that were deemed by the trial court as contributing to the State's failure of providing a Leandro-comporting educational opportunity." *Id.* at 647-48.

2. Since 2004, this Court has given the State countless opportunities, and unfettered discretion, to develop, present, and implement a *Leandro*-compliant remedial plan. For over eleven (11) years and in over twenty (20) compliance hearings, the State demonstrated its inability, and repeated failure, to develop, implement, and maintain any kind of substantive structural initiative designed to remedy the established constitutional deficiencies.

3. For more than a decade, the Court annually reviewed the academic performance of every school in the State, teacher and principal population data, and the programmatic resources made available to at-risk students. This Court concluded from over a decade of undisputed evidence that "in way too many school

¹ The findings and conclusions of the Court's prior Orders—including the January 21, 2020 Consent Order ("January 2020 Order"), September 11, 2020 Consent Order ("September 2020 Order"), June 7, 2021 Order on Comprehensive Remedial Plan ("June 2021 Order"), September 22, 2021 Order ("September 2021 Order"), and October 22, 2021 Order ("October 2021 Order")—are incorporated herein.

districts across this state, thousands of children in the public schools have failed to obtain and are not now obtaining a sound basic education as defined and required by the *Leandro* decision.” March 17, 2015 Order.

4. At that time, North Carolina was replete with classrooms unstaffed by qualified, certified teachers and schools that were not led by well-trained principals. Districts across the State continued to lack the resources necessary to ensure that all students, especially those at-risk, have an equal opportunity to receive a *Leandro*-conforming education. In fact, the decade after *Leandro II* made plain that the State’s actions regarding education not only failed to address its *Leandro* obligations, but exacerbated the constitutional harms experienced by another generation of students across North Carolina, who moved from kindergarten to 12th grade since the Supreme Court’s 2004 decision.

5. This Court examined the record again and in 2018 found that “the evidence before this court . . . is wholly inadequate to demonstrate . . . substantial compliance with the constitutional mandate of *Leandro* measured by applicable educational standards.” See March 13, 2018 Order. The State Board did not appeal the ruling. Consequently, the Court ordered the parties to identify an independent, third-party consultant to make detailed comprehensive written recommendations for specific actions necessary to achieve sustained compliance with the constitutional mandates articulated in the holdings of *Leandro v. State*, 346 N.C. 336, 357 (1997) (“*Leandro I*”) and *Leandro II*. The State, along with the Plaintiffs and Penn Intervenors, recommended WestEd to serve in that capacity. The Governor also created the Commission on Access to a Sound Basic Education (the “Commission”) at that time “to gather information and evidence to assist in the development of a comprehensive plan to address compliance with the constitutional mandates.” Governor Roy Cooper Exec. Order No. 27 (Nov. 15, 2017).

6. By Order dated March 13, 2018, the Court appointed WestEd to serve as the Court’s consultant, and all parties agreed that WestEd was qualified to serve in that capacity. See January 2020 Order at 10. In support of its work, WestEd also engaged the Friday Institute for Educational Innovation at North Carolina State University and the Learning Policy Institute (LPI), a national education policy and research organization with extensive experience in North Carolina. WestEd presented its findings and recommendations to the Court in December 2019 in an extensive report entitled, “*Sound Basic Education for All: An Action Plan for North Carolina*,” along with 13 underlying studies (collectively, the “WestEd Report”). The WestEd Report represents an unprecedented body of independent research and analysis of the North Carolina educational system that has further informed the Court’s approach in this case.

7. The WestEd Report concluded, and this Court found, that the State must complete considerable, systematic work to deliver fully the opportunity to obtain a sound basic education to all children in North Carolina. See January 2020 Order at 2-3. The WestEd Report found, for example, that hundreds of thousands of North Carolina

children continue to be denied the opportunity for a sound basic education. Indeed, the State is in many ways further away from constitutional compliance than it was when the Supreme Court issued its *Leandro I* decision almost 20 years ago. (WestEd Report, p. 31). Minimal progress has been made, as evidenced by multiple data sources on two of the primary educational outputs identified in *Leandro*: (i) the proficiency rates of North Carolina's students, especially at-risk students, in core curriculum areas, and (ii) the preparation of students, especially at-risk students, for success in postsecondary degree and credential programs. (Report, p. 31).

8. Based on the WestEd Report, the Court found that due to the increase in the number of children with higher needs, who require additional supports to meet high standards, the State faces greater challenges than ever before in meeting its constitutional obligations. January 2020 Order at 15. For example, North Carolina has 807 high-poverty districts schools and 36 high-poverty charter schools, attended by over 400,000 students (more than a quarter of all North Carolina students). *Id.* The Court also found that state funding for education has not kept pace with the growth and needs of the PreK-12 student body. *Id.* at 17. And promising initiatives since the *Leandro II* decision were neither sustained nor scaled up to make a substantial impact. *Id.*

9. Plaintiffs and Penn Intervenors (collectively, "Plaintiffs") as well as State Defendants all agreed that "the time has come to take decisive and concrete action . . . to bring North Carolina into constitutional compliance so that all students have access to the opportunity to obtain a sound basic education." January 2020 Order at 3. The Court agreed and, therefore, ordered State Defendants to work "expeditiously and without delay" to create and fully implement a system of education and educational reforms that will provide the opportunity for a sound basic education to all North Carolina children.

10. The parties submitted a Joint Report to the Court on June 15, 2020 that acknowledged that the COVID-19 pandemic has exacerbated many of the inequities and challenges that are the focus of this case, particularly for students of color, English Language Learners, and economically-disadvantaged students. The Joint Report set forth specific action steps that "the State *can and will* take in Fiscal Year 2021 (2020-21) to begin to address the constitutional deficiencies previously identified by this Court" (the "Year One Plan"). The parties all agreed that the actions specified in the Year One Plan were necessary and appropriate to remedy the constitutional deficiencies in North Carolina public schools.

11. On September 11, 2020, the Court ordered State Defendants to implement the actions identified in the Year One Plan. September 2020 Order, Appendix A. The Court further ordered State Defendants, in consultation with Plaintiff parties, to develop and present a Comprehensive Remedial Plan to be fully implemented by the end of 2028 with the objective of fully satisfying State Defendants' *Leandro* obligations by the end of 2030. Lastly, to assist the Court in entering this order and to promote transparency, the Court

ordered State Defendants to submit quarterly status reports of progress made toward achieving each of the actions identified in the Year One Plan.

12. State Defendants submitted their First Status Report on December 15, 2020. The Court was encouraged to see that some of the initial action items were successfully implemented and that the SBE had fulfilled its obligations. However, the Court noted many shortcomings in the State's accomplishments and the State admitted that the Report showed that it had failed to implement the Year One Plan as ordered. For example, House Bill 1096 (SL 2020-56), which was enacted by the General Assembly and signed into law by the Governor on June 30, 2020, implemented the identified action of expanding the number of eligible teacher preparation programs for the NC Teaching Fellows Program from 5 to 8. Increased funding to support additional Teaching Fellows for the 2021-22 academic year, however, was not provided. Similarly, Senate Bill 681 (SL 2020-78) was enacted by the General Assembly and signed into law by the Governor on July 1, 2020 to create a permanent Advanced Teaching Roles program that would provide grants and policy flexibility to districts seeking to implement a differentiated staffing model. Senate Bill 681, however, did not provide any new funding to provide additional grants to school districts, as required by the Year One Plan.²

13. The State Defendants submitted their Comprehensive Remedial Plan (which includes the Appendix) on March 15, 2021. As represented by State Defendants, the Comprehensive Remedial Plan identifies the programs, policies, and resources that "are necessary and appropriate actions that must be implemented to address the continuing constitutional violations and to provide the opportunity for a sound basic education to all children in North Carolina." Specifically, in *Leandro II*, the Supreme Court unanimously affirmed the trial court's finding that the State had not provided, and was not providing, competent certified teachers, well-trained competent principals, and the resources necessary to afford all children, including those at-risk, an equal opportunity to obtain a sound basic education, and that the State was responsible for these constitutional violations. See January 2020 Order at 8; 358 N.C. at 647-48. Further, the trial court found, and the Supreme Court unanimously affirmed, that at-risk children require more resources, time, and focused attention in order to receive a sound basic education. *Id.*; *Leandro II*, 358 N.C. at 641. Regarding early childhood education, the Supreme Court affirmed the trial court's findings that the "State was providing inadequate resources" to "'at-risk' prospective enrollees" ('pre-k' children), "that the State's failings were contributing to the 'at-risk' prospective enrollees' subsequent failure to avail themselves of the opportunity to obtain a sound basic education," and that "State efforts towards providing remedial aid to 'at-risk' prospective enrollees were inadequate." *Id.* at 69, *Leandro II*. 358 N.C. at 641-42.

² The First Status Report also detailed the federal CARES Act funds that the Governor, the State Board, and the General Assembly directed to begin implementation of certain Year One Plan actions. The Court notes, however, that the CARES Act funding and subsequent federal COVID-related funding is nonrecurring and cannot be relied upon to sustain ongoing programs that are necessary to fulfill the State's constitutional obligation to provide a sound basic education to all North Carolina children.

Consequently, the Comprehensive Remedial Plan addresses each of the “*Leandro* tenets” by setting forth specific actions to be implemented over the next eight years to achieve the following:

- A system of teacher development and recruitment that ensures each classroom is staffed with a high-quality teacher who is supported with early and ongoing professional learning and provided competitive pay;
- A system of principal development and recruitment that ensures each school is led by a high-quality principal who is supported with early and ongoing professional learning and provided competitive pay;
- A finance system that provides adequate, equitable, and predictable funding to school districts and, importantly, adequate resources to address the needs of all North Carolina schools and students, especially at-risk-students as defined by the *Leandro* decisions;
- An assessment and accountability system that reliably assesses multiple measures of student performance against the *Leandro* standard and provides accountability consistent with the *Leandro* standard;
- An assistance and turnaround function that provides necessary support to low-performing schools and districts;
- A system of early education that provides access to high-quality pre-kindergarten and other early childhood learning opportunities to ensure that all students at-risk of educational failure, regardless of where they live in the State, enter kindergarten on track for school success; and
- An alignment of high school to postsecondary and career expectations, as well as the provision of early postsecondary and workforce learning opportunities, to ensure student readiness to all students in the State.

January 2020 Order at 4-5.

14. The Appendix to the Comprehensive Remedial Plan identifies the resources necessary, as determined by the State, to implement the specific action steps to provide the opportunity for a sound basic education. This Court has previously observed “that money matters provided the money is spent in a way that is logical and the results of the expenditures measured to see if the expected goals are achieved.” Memorandum of Decision, Section One, p. 116. The Court finds that the State Defendants’ Comprehensive Remedial Plan sets forth specific, comprehensive, research-based and logical actions, including creating an assessment and accountability system to measure the expected goals for constitutional compliance.

15. WestEd advised the parties and the Court that the recommendations contained in its Report are not a “menu” of options, but a comprehensive set of fiscal, programmatic, and strategic steps necessary to achieve the outcomes for students required by our State Constitution. WestEd has reviewed the Comprehensive Remedial Plan and has advised the Court that the actions set forth in the Plan are necessary and appropriate for implementing the recommendations contained in WestEd Report. The Court concurs with WestEd’s opinion and also independently reaches this conclusion based on the entire record in this case.

16. The Supreme Court held in 1997 that if this Court finds “from competent evidence” that the State is “denying children of the state a sound basic education, a denial of a fundamental right will have been established.” *Leandro I*, 346 N.C. at 357. This Court’s finding was upheld in *Leandro II* and has been restated in this Court’s Orders in 2015 and 2018. It is, therefore, “incumbent upon [the State] to establish that their actions denying this fundamental right are ‘necessary to promote a compelling government interest.’” *Id.* The State has not done so.

17. To the contrary, the State has repeatedly acknowledged to the Court that additional State actions are required to remedy the ongoing denial of this fundamental right. *See, e.g.*, State’s March 15, 2021 Submission to Court at 1 (State acknowledging that “this constitutional right has been and continues to be denied to many North Carolina children”); *id.* (“North Carolina’s PreK-12 education system leaves too many students behind, especially students of color and economically disadvantaged students.”); *id.* (“[T]housands of students are not being prepared for full participation in the global, interconnected economy and the society in which they will live, work, and engage as citizens.”); State’s August 16, 2021 Submission to Court at 1 (acknowledging that additional State actions are required to remedy the denial of the constitutional right). *See also, e.g.*, January 2020 Order at 15 (noting State’s acknowledgment that it has failed to meet its “constitutional duty to provide all North Carolina students with the opportunity to obtain a sound basic education.”); *id.* (“[T]he Parties do not dispute [] that many children across North Carolina, especially at-risk and economically-disadvantaged students, are not now receiving a *Leandro*-conforming education.”); *id.* at 17 (State has “yet to achieve the promise of our Constitution and provide all with the opportunity for a sound basic education”); June 2021 Order at 6 (“State Defendants have acknowledged that additional State actions are required to remedy the denial of this fundamental right.”).

18. After seventeen years, State Defendants presented to the Court a Comprehensive Remedial Plan outlining those additional State actions necessary to comply with the mandates of the State Constitution.

19. The Comprehensive Remedial Plan sets out the “nuts and bolts” for how the State will remedy its continuing constitutional failings to North Carolina’s children. It sets out (1) the specific actions identified by the State that must be

implemented to remedy the continuing constitutional violations, (2) the timeline developed by the State required for successful implementation, and (3) the necessary resources and funding, as determined by the State, for implementation.

20. The Comprehensive Remedial Plan is the *only* remedial plan that the State Defendants have presented to the Court in response its January 2020, September 2020, and June 2021 Orders. The State Defendants have presented no alternative remedial plan.

21. With regard to the Comprehensive Remedial Plan, the State has represented to this Court that the actions outlined in the Plan are the “necessary and appropriate actions that must be implemented to address the continuing constitutional violations.” See State’s March 2021 Submission at 3, 4 (emphasis added). The State further represented to the Court that the full implementation of each year of the Remedial Plan was required to “provide the opportunity for a sound basic education to all children in North Carolina.” *Id.* at 3. The State assured the Court that it was “committed” to fully implementing its Comprehensive Remedial Plan and within the time frames set forth therein. *Id.*

22. The State has represented to the Court that more than sufficient funds are available to execute the current needs of the Comprehensive Remedial Plan. See, e.g., State’s August 6, 2021 Report to Court. The State of North Carolina concedes in its August progress report to the Court that the State’s reserve balance included \$8 billion and more than *\$5 billion* in forecasted revenues at that time that exceed the existing base budget. Yet, the State has not provided the necessary funding to execute the Comprehensive Remedial Plan.

23. The Court understands that those items required by the Year One Plan that were not implemented as ordered in the September 2020 Order have been included in, or “rolled over” to, the Comprehensive Remedial Plan. The Court notes that the WestEd Report contemplated that its recommendations would be implemented gradually over eight years, with later implementation building upon actions to be taken in the short term. Failure to implement all of the actions in the Year One Plan will necessarily make it more difficult for State Defendants to implement all the actions described in the Comprehensive Remedial Plan in a timely manner. The urgency of implementing the Comprehensive Remedial Plan on the timeline currently set forth by State Defendants cannot be overstated. As this Court previously found:

[T]housands of students are not being prepared for full participation in the global, interconnected economy and the society in which they live, work and engage as citizens. The costs to those students, individually, and to the State are considerable and if left unattended will result in a North Carolina that does not meet its vast potential.

January 2020 Order.

24. Despite the urgency, the State has failed to implement most actions in the Comprehensive Remedial Plan and has failed to secure the resources to fully implement the Comprehensive Remedial Plan.

25. The Comprehensive Remedial Plan would provide critical supports for at-risk students, such as:

- comprehensive induction services for beginning teachers in low performing, high poverty schools;
- costs of National Board certification for educators in high need, low-performing schools;
- critical supports for children with disabilities that could result from increasing supplemental funding to more adequate levels and removing the funding cap;
- ensuring greater access to key programs for at-risk students by combining the DSSF and at-risk allotments for all economically disadvantaged students; and
- assisting English learner students by eliminating the funding cap, simplifying the formula and increasing funding to more adequate levels.

26. As of the date of this Order, therefore, the State's implementation of the Comprehensive Remedial Plan is already behind the contemplated timeline, and the State has failed yet another class of students. Time is of the essence.

27. The Court has granted "every reasonable deference" to the legislative and executive branches to "establish" and "administer a system that provides the children of the various school districts of the state a sound basic education," 346 N.C. at 357, including, most recently, deferring to State Defendants' leadership in the collaborative development of the Comprehensive Remedial Plan over the past three years.

28. Indeed, in the seventeen years since the *Leandro II* decision, this Court has afforded the State (through its executive and legislative branches) discretion to develop its chosen *Leandro* remedial plan. The Court went to extraordinary lengths in granting these co-equal branches of government time, deference, and opportunity to use their informed judgment as to the "nuts and bolts" of the remedy, including the identification of the specific remedial actions that required implementation, the time frame for such implementation, the resources necessary for the implementation, and the manner in which to obtain those resources.

29. On June 7, 2021, this Court issued an Order cautioning: “If the State fails to implement the actions described in the Comprehensive Remedial Plan—actions which it admits are necessary and which, over the next biennium, the Governor’s proposed budget and Senate Bill 622 confirm are attainable—it will then be the duty of this Court to enter a judgment granting declaratory relief and such other relief as needed to correct the wrong” June 2021 Order (quoting *Leandro I*, 346 N.C. at 357).

30. The 2021 North Carolina legislative session began on January 13, 2021 and, as of the date of this Order, no budget has passed despite significant unspent funds and known constitutional violations. In addition, with the exception of N.C.G.S. § 115C-201(c2) related to enhancement teacher allotment funding, no stand-alone funding measures have been enacted to address the known constitutional violations, despite significant unspent funds.

31. The failure of the State to provide the funding necessary to effectuate North Carolina’s constitutional right to a sound basic education is consistent with the antagonism demonstrated by legislative leaders towards these proceedings, the constitutional rights of North Carolina children, and this Court’s authority.

32. This Court has provided the State with ample time and every opportunity to make meaningful progress towards remedying the ongoing constitutional violations that persist within our public education system. The State has repeatedly failed to act to fulfill its constitutional obligations.

33. In the seventeen years since the *Leandro II* decision, a new generation of school children, especially those at-risk and socio-economically disadvantaged, were denied their constitutional right to a sound basic education. Further and continued damage is happening now, especially to at-risk children from impoverished backgrounds, and that cannot continue. As Justice Orr stated, on behalf of a unanimous Supreme Court, “the children of North Carolina are our state’s most valuable renewable resource.” *Leandro II*, 358 N.C. at 616. “If inordinate numbers of them are wrongfully being denied their constitutional right to the opportunity for a sound basic education, our state courts cannot risk further and continued damage. . . .” *Id.* (emphasis added).

II. Conclusions of Law

1. The people of North Carolina have a constitutional right to an opportunity to a sound basic education. It is the duty of the State to guard and

maintain that right. N.C. Const. art. 1, sec. 15 (“The people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right.”); *id.* art. IX, sec. 2(1) (“The General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools, which shall be maintained at least nine months in every year, and wherein equal opportunities shall be provided for all students.”); 346 N.C. at 345 (1997) (holding that the Constitution guarantees the “right to a sound basic education”).

2. The “State” consists of each branch of our tripartite government, each with a distinctive purpose. *State v. Berger*, 368 N.C. 633, 635 (2016) (citations and internal quotation marks omitted) (“The General Assembly, which comprises the legislative branch, enacts laws that protect or promote the health, morals, order, safety, and general welfare of society. The executive branch, which the Governor leads, faithfully executes, or gives effect to, these laws. The judicial branch interprets the laws and, through its power of judicial review, determines whether they comply with the constitution.”). Here the judicial branch, by constitutional necessity, exercises its inherent power to ensure remedies for constitutional wrongs and compels action by the two other components of the “State”—the legislative and executive branches of government. See *Leandro II*, 358 N.C. at 635 (“[B]y the State we mean the legislative and executive branches which are constitutionally responsible for public education . . .”).

3. Our constitution and laws recognize that the executive branch is comprised of many public offices and officials. The Treasurer and State Superintendent of Public Instruction are two such officials. See N.C. Const. art. III, §7 and *Cooper v. Berger*, 371 N.C. 799,800 (2018). The Office of State Budget and Management, the Office of the State Controller, and the Department of Health and Human Services are also within the executive branch. See generally, N.C. Const. art. III, §§ 5(10), 11; N.C. Gen. Stat. § 143C-2-1; N.C. Gen. Stat. § 143B-426.35 – 426.39B; and N.C. Gen. Stat. § 143-B-136.1 – 139.7. The University of North Carolina System is also constitutionally responsible for public education. See N.C. Const. art. IX, § 8.

4. The Court concludes that the State continues to fail to meet the minimum standards for effectuating the constitutional rights set forth in article I, section 15 and article IX, section 2 of our State constitution and recognized by our Supreme Court in *Leandro I* and *II*. The constitutional violations identified in *Leandro I* and *II* are ongoing and persist to this day.

5. The General Assembly has a duty to guard and maintain the right to sound basic education secured by our state constitution. See N.C. Const. art. 1, sec. 15. As the arm of the State responsible for legislation, taxation, and appropriation,

the General Assembly's principal duty involves adequately funding the minimum requirements for a sound basic education. While the General Assembly could also choose to enact new legislation to support a sound basic education, the General Assembly has opted to largely ignore this litigation.

6. Thus, the General Assembly, despite having a duty to participate in guarding and maintaining the right to an opportunity for a sound basic education, has failed to fulfill that duty. This failure by one branch of our tripartite government has contributed to the overall failure of the State to meet the minimum standards for effectuating the fundamental constitutional rights at issue.

7. "[W]hen inaction by those exercising legislative authority threatens fiscally to undermine" the constitutional right to a sound basic education "a court may invoke its inherent power to do what is reasonably necessary for the orderly and efficient exercise of the administration of justice." *See In re Alamance County Court Facilities*, 329 N.C. 84, 99 (1991) (citation and internal quotation marks omitted).

8. Indeed, in *Leandro II* a unanimous Supreme Court held that "[c]ertainly, when the State fails to live up to its constitutional duties, a court is empowered to order the deficiency remedied, and if the offending branch of government or its agents either fail to do so or have consistently shown an inability to do so, a court is empowered to provide relief by imposing a specific remedy and instructing the recalcitrant state actors to implement it." 358 N.C. at 642.

9. Article I, section 18 of the North Carolina Constitution's Declaration of Rights—which has its origins in the Magna Carta—states that "every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay." N.C. Const. art. I, § 18; *see Lynch v. N.C. Dept. of Justice*, 93 N.C. App. 57, 61 (1989) (explaining that article I, section 18 "guarantees a remedy for legally cognizable claims"); *cf. Craig ex rel. Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 342 (2009) (noting the Supreme Court of North Carolina's "long-standing emphasis on ensuring redress for every constitutional injury").

10. Article I, section 18 of the North Carolina Constitution recognizes the core judicial function to ensure that right and justice—including the constitutional right to the opportunity to a sound basic education—are not delayed or denied.

11. Because the State has failed for more than seventeen years to remedy the constitutional violation as the Supreme Court ordered, this Court must provide a remedy through the exercise of its constitutional role. Otherwise, the State's

repeated failure to meet the minimum standards for effectuating the constitutional right to obtain a sound basic education will threaten the integrity and viability of the North Carolina Constitution by:

- a. nullifying the Constitution's language without the people's consent, making the right to a sound basic education merely aspirational and not enforceable;
- b. ignoring rulings of the Supreme Court of North Carolina setting forth authoritative and binding interpretations of our Constitution; and
- c. violating separation of powers by preventing the judiciary from performing its core duty of interpreting our Constitution. *State v. Berger*, 368 N.C. 633, 638 (2016) ("This Court construes and applies the provisions of the Constitution of North Carolina with finality.").

12. It appears that the General Assembly believes the Appropriations Clause, N.C. Const. art. V, section 7, prevents any court-ordered remedy to obtain the minimum amount of State funds necessary to ensure the constitutionally-required opportunity to obtain a sound basic education.

13. Our Supreme Court has recognized that the Appropriations Clause ensures "that the people, through their elected representatives in the General Assembly, ha[ve] full and exclusive control over the allocation of the state's expenditures." *Cooper v. Berger*, 376 N.C. 22, 37 (2020). In *Richmond County Board of Education v. Cowell*, 254 NC App 422 (2017) our Court of Appeals articulated that Article 5 Section 7 of the North Carolina Constitution permits state officials to draw money from the State Treasury only when an appropriation has been "made by law." This court concludes that Article 1 Section 15 of the North Carolina Constitution represents an ongoing constitutional appropriation of funds sufficient to create and maintain a school system that provides each of our State's students with the constitutional minimum of a sound basic education. This constitutional provision may therefore be deemed an appropriation "made by law."

14. In *Cooper v. Berger*, 376 N.C. 22 (2020) our Supreme Court noted that the General Assembly's authority over appropriations was grounded in its function as the voice of the people. *See* 376 N.C. at 37. It must also be noted, however, that the Constitution itself "expresses the will of the people in this State and is, therefore, the supreme law of the land." *In re Martin*, 295 N.C. 291, 299 (1978); *see also Gannon v. Kansas*, 368 P.3d 1024, 1057 (Kan. 2016) (explaining that "[t]he constitution is the direct mandate of the people themselves"). Accordingly, the Court concludes that

Article I, § 15 represents a constitutional appropriation, such an appropriation may be considered to have been made by the people themselves, through the Constitution, thereby allowing fiscal resources to be drawn from the State Treasury to meet that requirement. The Constitution reflects the direct will of the people; an order effectuating Article I, § 15's constitutional appropriation is fully consistent with the framers desire to give the people ultimate control over the state's expenditures. *Cooper*, 376 N.C. at 37.

15. If the State's repeated failure to meet the minimum standards for effectuating the constitutional right to obtain a sound basic education goes unchecked, then this matter would merely be a political question not subject to judicial enforcement. Such a contention has been previously considered—and rejected—by our Supreme Court. *Leandro I*, 346 N.C. at 345. Accordingly, it is the Court's constitutional duty to ensure that the ongoing constitutional violation in this case is remedied. N.C. Const. art. I, § 18.

16. Indeed, the State Budget Act itself recognizes that it should not be construed in a manner to "abrogate[] or diminish[] the inherent power" of any branch of government. N.C. Gen. Stat. § 143C-1-1(b). The inherent power of the judicial branch to ensure and effectuate constitutional rights cannot be disputed. *Cf. Ex Parte McCown*, 139 N.C. 95 (1905) ("[L]aws without a competent authority to secure their administration from disobedience and contempt would be vain and nugatory.").

17. "It is axiomatic that the terms or requirements of a constitution cannot be in violation of the same constitution—a constitution cannot violate itself." *Leandro I*, 346 N.C. at 352; *accord Stephenson v. Bartlett*, 355 N.C. 354, 397 (2002). As a result, the appropriations clause cannot be read to override the people's right to a sound basic education.

18. This Court cannot permit the State to continue failing to effectuate the right to a sound basic education guaranteed to the people of North Carolina, nor can it indefinitely wait for the State to act. Seventeen years have passed since *Leandro II* and, in that time, too many children have been denied their fundamental constitutional rights. Years have elapsed since this Court's first remedial order. And nearly a year has elapsed since the adoption of the Comprehensive Remedial Plan. This has more than satisfied our Supreme Court's direction to provide "every reasonable deference to the legislative and executive branches," *Leandro I*, 346 N.C. at 357, and allow "unimpeded chance, 'initially at least,' to correct constitutional deficiencies revealed at trial," *Leandro II*, 358 N.C. at 638 (citation omitted).

19. To allow the State to indefinitely delay funding for a *Leandro* remedy when adequate revenues exist would effectively deny the existence of a constitutional right to a sound basic education and effectively render the Constitution and the Supreme Court's *Leandro* decisions meaningless. The North Carolina Constitution, however, guarantees that right and empowers this Court to ensure its enforcement. The legislative and executive branches of the State, as creations of that Constitution, are subject to its mandates.

20. Accordingly, this Court recognizes, as a matter of constitutional law, a continuing appropriation from the State Treasury to effectuate the people's right to a sound basic education. The North Carolina Constitution repeatedly makes school funding a matter of constitutional—not merely statutory—law. Our Constitution not only recognizes the fundamental right to the privilege of education in the Declaration of Rights, but also devotes an entire article to the State's education system. Despite the General Assembly's general authority over appropriations of State funds, article IX specifically directs that proceeds of State swamp land sales; grants, gifts, and devises made to the State; and penalties, fines, and forfeitures collected by the State shall be used for maintaining public education. N.C. Const. art. IX, §§ 6, 7. Multiple provisions of article IX also expressly require the General Assembly to adequately fund a sound basic education. See N.C. Const. art. IX, §§ 2, 6, 7. When the General Assembly fulfills its constitutional role through the normal (statutory) budget process, there is no need for judicial intervention to effectuate the constitutional right. As the foregoing findings of fact make plain, however, this Court must fulfill its constitutional duty to effect a remedy at this time.

21. The right to a sound basic education is one of a very few affirmative constitutional rights that, to be realized, requires the State to supply adequate funding. The State's duty to carry out its obligation of ensuring this right has been described by the Supreme Court as both "paramount" (*Leandro II*, 358 N.C. at 649 and "sacred." *Mebane Graded Sch. Dist. v. Alamance Cty.*, 211 N.C. 213-(1937). The State's ability to meet this constitutional obligation is not in question. The unappropriated funds in the State Treasury greatly exceed the funds needed to implement the Comprehensive Remedial Plan. Consequently, there is no need to make impossible choices among competing constitutional priorities.

22. The Court further concludes that in addition to the aforementioned constitutional appropriation power and mandate, the Court has inherent and equitable powers that allow it to enter this Order. The North Carolina Constitution provides, "All courts shall be open; every person for an injury done him in his lands, goods, person, or reputation *shall have remedy by due course of law*; and right and justice shall be administered without favor, denial, or delay." N.C. CONST. art. I, § 18

(emphasis added). The North Carolina Supreme Court has declared that “[o]bedience to the Constitution on the part of the Legislature is no more necessary to orderly government than the exercise of the power of the Court in requiring it when the Legislature inadvertently exceeds its limitations.” *State v. Harris*, 216 N.C. 746, 764 (1940). Further, “the courts have power to fashion an appropriate remedy ‘depending upon the right violated and the facts of the particular case.’” *Simeon v. Hardin*, 339 N.C. 358, 373 (1994) (quoting *Corum v. Univ. of N.C.*, 330 N.C. 761, 784, *cert. denied*, 506 U.S. 985 (1992)).

23. As noted above, the Court’s inherent powers are derived from being one of three separate, coordinate branches of the government. *Ex Parte McCown*, 139 N.C. 95, 105-06 (1905) (citing N.C. Const. art. I, § 4)). The constitution expressly restricts the General Assembly’s intrusion into judicial powers. See N.C. Const. art. IV, § 1 (“The General Assembly shall have no power to deprive the judicial department of any power or jurisdiction that rightfully pertains to it as a co-ordinate department of the government....”); see also *Beard v. N. Carolina State Bar*, 320 N.C. 126, 129 (1987) (“The inherent power of the Court has not been limited by our constitution; to the contrary, the constitution protects such power.”). These inherent powers give courts their “authority to do all things that are reasonably necessary for the proper administration of justice.” *State v. Buckner*, 351 N.C. 401, 411 (2000); *Beard*, 320 N.C. 126, 129.

24. In fact, it is the separation of powers doctrine itself which undergirds the judicial branch’s authority to enforce its order here. “Inherent powers are critical to the court’s autonomy and to its functional existence: ‘If the courts could be deprived by the Legislature of these powers, which are essential in the direct administration of justice, they would be destroyed for all efficient and useful purposes.’” *Matter of Alamance Cty. Ct. Facilities*, 329 N.C. 84, 93-94 (1991) (“*Alamance*”) (citing *Ex Parte Schenck*, 65 N.C. 353, 355 (1871)). The Supreme Court’s analysis of the doctrine in *Alamance* is instructive:

An overlap of powers constitutes a check and preserves the tripartite balance, as two hundred years of constitutional commentary note. “Unless these [three branches of government] be so far connected and blended as to give to each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained.”

Id. at 97 (quoting *The Federalist* No. 48, at 308 (J. Madison) (Arlington House ed. 1966)).

25. The Supreme Court has recognized that courts should ensure when considering remedies that may encroach upon the powers of the other branches, alternative remedies should be explored as well as minimizing the encroachment to the extent possible. *Alamance*, 329 N.C. at 100-01. The relief proposed here carefully balances these interests with the Court's constitutional obligation of affording relief to injured parties. First, there is no alternative or adequate remedy available to the children of North Carolina that affords them the relief to which they are so entitled. State Defendants have conceded that the Comprehensive Remedial Plan's full implementation is necessary to provide a sound basic education to students and there is nothing else on the table. *See, e.g.*, March 2021 Order.

26. Second, this Court will have minimized its encroachment on legislative authority through the least intrusive remedy. Evidence of the Court's deference over seventeen years and its careful balancing of the interests at stake includes but is not limited to:

- a. The Court has given the State seventeen years to arrive at a proper remedy and numerous opportunities proposed by the State have failed to live up to their promise. Seventeen classes of students have since gone through schooling without a sound basic education;
- b. The Court deferred to State Defendants and the other parties to recommend to the Court an independent, outside consultant to provide comprehensive, specific recommendations to remedy the existing constitutional violations;
- c. The Court deferred to State Defendants and the other parties to recommend a remedial plan and the proposed duration of the plan, including recommendations from the Governor's Commission on Access to Sound Basic Education;
- d. The Court deferred to State Defendants to propose an action plan and remedy for the first year and then allowed the State Defendants additional latitude in implementing its actions in light of the pandemic's effect on education;
- e. The Court deferred to State Defendants to propose the long-term comprehensive remedial plan, and to determine the resources necessary for full implementation. (*See* March 2021 Order);
- f. The Court also gave the State discretion to seek and secure the resources identified to fully implement the Comprehensive Remedial Plan. (*See* June 2021 Order);

- g. The Court has further allowed for extended deliberations between the executive and legislative branches over several months to give the State an additional opportunity to implement the Comprehensive Remedial Plan;
- h. The status conferences, including more recent ones held in September and October 2021, have provided the State with additional notice and opportunities to implement the Comprehensive Remedial Plan, to no avail. The Court has further put State on notice of forthcoming consequences if it continued to violate students' fundamental rights to a sound basic education.

The Court acknowledges and does not take lightly the important role of the separation of powers. In light of the foregoing, and having reviewed and considered all arguments and submissions of Counsel for all parties and all of this Court's prior orders, the findings and conclusions of which are incorporated herein, it is hereby **ORDERED** that:

1. The Office of State Budget and Management and the current State Budget Director ("OSBM"), the Office of the State Controller and the current State Comptroller ("Controller"), and the Office of the State Treasurer and the current State Treasurer ("Treasurer") shall take the necessary actions to transfer the total amount of funds necessary to effectuate years 2 & 3 of the Comprehensive Remedial Plan, from the unappropriated balance within the General Fund to the state agents and state actors with fiscal responsibility for implementing the Comprehensive Remedial Plan as follows:

- (a) Department of Health and Human Services ("DHHS"): \$189,800,000.00;
- (b) Department of Public Instruction ("DPI"): \$1,522,053,000.00; and
- (c) University of North Carolina System: \$41,300,000.00.

2. OSBM, the Controller, and the Treasurer, are directed to treat the foregoing funds as an appropriation from the General Fund as contemplated within N.C. Gen. Stat. § 143C-6-4(b)(2)(a) and to carry out all actions necessary to effectuate those transfers;

3. Any consultation contemplated by N.C. Gen. Stat. § 143C-6-4(b1) shall take no longer than five (5) business days after issuance of this Order;

4. DHHS, the University of North Carolina System, the State Superintendent of Public Instruction, and all other State agents or State actors

receiving funds under the Comprehensive Remedial Plan are directed to administer those funds to guarantee and maintain the opportunity of a sound basic education consistent with, and under the time frames set out in, the Comprehensive Remedial Plan, including the Appendix thereto;

5. In accordance with its constitutional obligations, the State Board of Education is directed to allocate the funds transferred to DPI to the programs and objectives specified in the Action Steps in the Comprehensive Remedial Plan and the Superintendent of Public Instruction is directed to administer the funds so allocated in accordance with the policies, rules or and regulations of the State Board of Education so that all funds are allocated and administered to guard and maintain the opportunity of a sound basic education consistent with, and under the time frames set out in, the Comprehensive Remedial Plan, including the Appendix thereto, and

6. OSBM, the Controller, and the Treasurer are directed to take all actions necessary to facilitate and authorize those expenditures;

7. To the extent any other actions are necessary to effectuate the year 2 & 3 actions in the Comprehensive Remedial Plan, any and all other State actors and their officers, agents, servants, and employees are authorized and directed to do what is necessary to fully effectuate years 2 and 3 of the Comprehensive Remedial Plan;

8. The funds transferred under this Order are for maximum amounts necessary to provide the services and accomplish the purposes described in years 2 and 3 of the Comprehensive Remedial Plan. Savings shall be effected where the total amounts appropriated are not required to perform these services and accomplish these purposes and the savings shall revert to the General Fund at the end of fiscal year 2023, unless the General Assembly extends their availability; and

9. This Order, except the consultation period set forth in paragraph 3, is hereby stayed for a period of thirty (30) days to preserve the *status quo*, including maintaining the funds outlined in Paragraph 1 (a)-(c) above in the State Treasury, to permit the other branches of government to take further action consistent with the findings and conclusions of this Order.

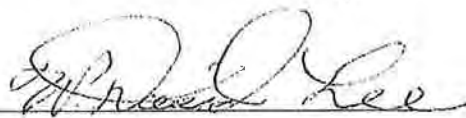
This Order may not be modified except by further Order of this Court upon proper motion presented. The Court shall retain jurisdiction over this matter.

This the 10th day of November, 2021.

CERTIFIED TRUE COPY FROM ORIGINAL
Clerk of Superior Court, Wake County

09
Assistant Deputy Clerk of Superior Court

11/15/2021


The Honorable W. David Lee
North Carolina Superior Court Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing document was served on the persons indicated below by
hand delivery:

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This the 10th day of November, 2021.



Caitlin E. Beal
Wake County Deputy Clerk – Tenth Judicial District
PO Box 1916, Raleigh, NC 27602
Caitlin.E.Beal@nccourts.org

EXHIBIT B

STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

95-CVS-1158

COUNTY OF WAKE

HOKE COUNTY BOARD OF
EDUCATION; HALIFAX COUNTY BOARD
OF EDUCATION; ROBESON COUNTY
BOARD OF EDUCATION; CUMBERLAND
COUNTY BOARD OF EDUCATION;
VANCE COUNTY BOARD OF
EDUCATION; RANDY L. HASTY,
individually and as Guardian Ad Litem of
RANDELL B. HASTY; STEVEN R.
SUNKEL, individually and as Guardian Ad
Litem of ANDREW J. SUNKEL; LIONEL
WHIDBEE, individually and as Guardian
Ad Litem of JEREMY L. WHIDBEE;
TYRONE T. WILLIAMS, individually and
as Guardian Ad Litem of TREVELYN L.
WILLIAMS; D.E. LOCKLEAR, JR.,
individually and as Guardian Ad Litem of
JASON E. LOCKLEAR; ANGUS B.
THOMPSON II, individually and as
Guardian Ad Litem of VANDALIAH J.
THOMPSON; MARY ELIZABETH
LOWERY, individually and as Guardian Ad
Litem of LANNIE RAE LOWERY, JENNIE
G. PEARSON, individually and as
Guardian Ad Litem of SHARESE D.
PEARSON; BENITA B. TIPTON,
individually and as Guardian Ad Litem of
WHITNEY B. TIPTON; DANA HOLTON
JENKINS, individually and as Guardian Ad
Litem of RACHEL M. JENKINS; LEON R.
ROBINSON, individually and as Guardian
Ad Litem of JUSTIN A. ROBINSON,

Plaintiffs,
and
CHARLOTTE-MECKLENBURG BOARD
OF EDUCATION,
Plaintiff-Intervenor,
and
RAFAEL PENN; CLIFTON JONES,
individually and as Guardian Ad Litem
of CLIFTON MATTHEW JONES;
DONNA JENKINS DAWSON,
individually and as Guardian Ad Litem
of NEISHA SHEMAY DAWSON and
TYLER ANTHONY HOUGH-JENKINS,
Plaintiff-Intervenors,
v.
STATE OF NORTH CAROLINA and the
STATE BOARD OF EDUCATION,
Defendants,
and
CHARLOTTE-MECKLENBURG BOARD
OF EDUCATION,
Realigned Defendant.

Memorandum of Law on behalf of the State of North Carolina

Twenty-four years ago, in 1997, the North Carolina Supreme Court held that the children of this State have been, and are being denied, “a constitutionally guaranteed sound basic education.” *Leandro v. State*, 346 N.C. 336, 347 (1997). Seventeen years ago, the Court reaffirmed that opinion in *Leandro II. Hoke Cnty. Bd. of Educ. v. State*, 358 N.C. 605 (2004). As the court

of last resort, the Supreme Court has opined with finality on the issue of the constitutional status of public education in North Carolina, which “concern[s] the proper construction and application of North Carolina laws and the Constitution of North Carolina.” *State ex rel. Martin v. Preston*, 325 N.C. 438, 449 (1989).

This Court has concluded that the State, despite these rulings, continues to fail to meet that constitutional requirement. This Court has also made clear that the current reason for this ongoing constitutional violation is that the necessary and sufficient funding has not been provided to satisfy the State’s obligations. The State of North Carolina and State Board of Education (collectively, “State Defendants”) have acknowledged that additional measures must be taken to satisfy the constitutional mandate. This Court has indicated that it intends to fashion a remedy.

Consequently, the question before this Court now is the appropriate remedy for the State’s ongoing failure to meet the constitutional requirement. In fashioning a remedy, the court should take note of two important features of the current situation. First, an appropriate remedy does not require generating additional revenue. That is because the State Treasury currently contains, in unspent funds, amounts well in excess of what is required to fulfill the State’s constitutional obligation for Years 2 and 3 of the Comprehensive Remedial Plan.

Second, compliance with this Court’s order to fulfill the constitutional mandate does not require new legislative action. That is because the people of North Carolina, through their Constitution, have already established that requirement. The General Assembly’s ongoing failure to heed that constitutional command leaves it to this Court to give force to it. The Court can do that by recognizing that the constitutional mandate of Article I, § 15 is, itself, an appropriation made by law.

In fashioning a remedy, the State urges the Court to give due consideration to three relevant precedents that may serve as a guide to the Court's consideration of the Proposed Order. When understood together, these precedents note that the duty and obligation of ensuring sufficient appropriations usually falls to the legislature. At the same time, however, these cases reveal that there exist limited—and perhaps unique—circumstances where the people of North Carolina, through the North Carolina Constitution, can be said to have required certain appropriations despite the General Assembly's repeated defiance of a Constitutional mandate. As a separate and coequal branch of government, this Court has inherent authority to order that the State abide by the Constitution's commands to meet its constitutional obligations. In doing so, the Court's Order will enable the State to meet its obligations to students, while also avoiding encroachment upon the proper role of the legislature.

***Richmond County Board of Education v. Cowell*, 254 N.C. App. 422 (2017)**

In *Richmond County*, the North Carolina Court of Appeals held that the appropriations clause dictates that a court cannot “order the executive branch to pay out money that *has not been appropriated*.” 254 N.C. App. at 423 (emphasis added). *Richmond County* involved a claim by the Richmond County Board of Education that the State had impermissibly used “fees collected for certain criminal offenses” to “fund county jail programs,” rather than returning those fees to the Board for use by public schools as required by Article IX, § 7 of the North Carolina Constitution. *Id.* The funds accorded to the county jail program were expended, and the General Assembly did not appropriate additional funds to the Board. *Id.* at 424. The Superior Court ordered several state officials, including the State Treasurer and State Controller, to transfer funds from the State Treasury to the Board to make the Board whole. *Id.* at 425.

The Court of Appeals reversed. *Id.* at 425. Although the Court of Appeals agreed that a trial court could remedy the Board's constitutional harm by ordering the State to *return* the money the Constitution committed to the Board, *id.* at 427–28, the Court of Appeals explained that courts could not order the State to give the Board “*new* money from the State Treasury,” *id.* at 428 (emphasis added). The Court of Appeals further articulated that Article V, Section 7 of the North Carolina Constitution permits state officials to draw money from the State Treasury only when an appropriation has been “made by law.” *Id.*

While assessing the lower court's error, and noting that that the funds designated for return were unavailable, the Court of Appeals acknowledged that where the Constitution mandates funds be used for a particular purpose, “it is well within the judicial branch's power to order” that those funds be expended in accordance with constitutional dictates. *Id.* at 427–28.

In light of *Richmond County*, any order entered by this Court directing state officials to draw money from the State Treasury must identify available funds, and must be tied to an appropriation “made by law.” In most instances, the General Assembly is the body that passes appropriations laws and thereby, subject to the Governor's veto, sets “appropriation[s] made by law.” But the Constitution is the supreme law of the land, and any appropriation by the Constitution also constitutes an appropriation made by law.

If this Court concludes that Article I, § 15 represents an ongoing constitutional appropriation of funds sufficient to create and maintain a school system that provides each of our State's students with the constitutional minimum of a sound, basic education, then it may be deemed an appropriation “made by law.”

***Cooper v. Berger*, 376 N.C. 22 (2020)**

In *Cooper*, the Supreme Court addressed the limits of constitutional authority of state actors, other than the General Assembly, to make new appropriations. In that case, the Supreme Court rejected the Governor’s argument that the General Assembly “overstep[ped] its constitutional authority by appropriating the relevant federal block grant money in a manner that differs from the Governor’s preferred method for distributing the funds.” *Cooper*, 376 N.C. at 23.

After concluding that the use of Federal Block Grants “‘is largely left to the discretion of the recipient state’ as long as that use falls within the broad statutory requirements of each grant,” *Cooper*, 376 N.C. at 33–34 (quoting *Legis. Rsch. Comm’n ex rel. Prather v. Brown*, 664 S.W. 907, 928 (Ky. 1984)), the Supreme Court held that the General Assembly properly exercised its constitutional authority by deciding how to appropriate the federal funds. *Cooper*, 376 N.C. at 36–38. The appropriations clause, the Supreme Court reasoned, supplied the General Assembly’s broad authority to decide how to appropriate funds in the State Treasury because the appropriations clause represents the framers’ intent “to ensure that the people, through their elected representatives in the General Assembly, had full and exclusive control over the allocation of the state’s expenditures.” *Id.* at 37.

Cooper noted that the General Assembly’s authority over appropriations was grounded in its function as the voice of the people. *See* 376 N.C. at 37. It must also be noted, however, that the Constitution itself “expresses the will of the people of this State and is, therefore, the supreme law of the land.” *In re Martin*, 295 N.C. 291, 299 (1978); *see also Gannon v. Kansas*, 368 P.3d 1024, 1057 (Kan. 2016) (explaining that “[t]he constitution is the direct mandate of the people themselves”). Accordingly, if the Court concludes that Article I, § 15 represents a

constitutional appropriation, such an appropriation may be considered to have been made by the people themselves, through the Constitution, thereby allowing fiscal resources to be drawn from the State Treasury to meet that requirement. The Constitution reflects the direct will of the people; an order effectuating Article I, § 15's constitutional appropriation is fully consistent with the framers desire to give the people ultimate control over the state's expenditures. *Cooper*, 376 N.C. at 37.

***In re Alamance County Court Facilities*, 329 N.C. 84 (1991)**

In *Alamance County*, the Supreme Court held that although the judicial branch may invoke its inherent power and “seize purse strings otherwise held exclusively by the legislative branch” where the integrity of the judiciary is threatened, the employment of that inherent power is subject to certain limitations. Namely, the judiciary may infringe on the legislature’s traditional authority to appropriate state funds “*no more* than reasonably necessary” and in a way that is “no more forceful or invasive than the exigency of the circumstances requires.” *Alamance Cnty. Ct. Facilities*, 329 N.C. at 99–100.¹ In addition, the Supreme Court held that a court using “its inherent power to reach toward the public purse,” “must recognize two critical limitations: first, it must bow to established procedural methods where these provide an alternative to the extraordinary exercise of its inherent power. Second, . . . the court in exercising that power must minimize the encroachment upon those with legislative authority in appearance and in fact.” *Id.* at 100–01. When considering the Proposed Order in light of the limitations designed to

¹ Although the Supreme Court held that a court could invoke its inherent authority to require the spending of state funds, it reversed the Superior Court’s order directing county commissioners to provide adequate court facilities after concluding that the Superior Court’s order exceeded what “was reasonably necessary to administer justice” because it failed to include necessary parties, was entered *ex parte*, and too specifically defined what constituted “adequate facilities” without seeking parties’ input. *Alamance Cnty. Ct. Facilities*, 329 N.C. at 89.

“minimize the encroachment” on the legislative branch, this Court should consider the unique role education was given in our Constitution.

The Constitution’s Declaration of Rights—which the State Supreme Court has recognized as having “primacy . . . in the minds of the framers,” *Corum v. University of North Carolina*, 330 N.C. 761, 782 (1992)—includes the “right to the privilege of education.” N.C. Const. art. I, § 15. The Constitution later devotes an entire section to education. *See generally* N.C. Const. art. IX. This section commands the General Assembly to “provide by taxation and otherwise for a general uniform system of free public schools,” N.C. Const. art. IX, § 2(1); and requires the General Assembly to appropriate certain state funds, N.C. Const. art. IX, § 6, or county funds “exclusively for maintaining free public schools,” N.C. Const. art. IX, § 7(1). These prescriptions may provide the Court with further guidance about the framers’ intent to cabin the legislature’s discretion with respect to funding.

Throughout this litigation’s 27-year history, the Court has granted exceptional deference to the General Assembly’s determinations about how to satisfy the State’s constitutional obligation to provide North Carolina’s children a sound basic education. Because the Court has determined that the State remains noncompliant, ordering state officials to effectuate Article I, § 15’s constitutional appropriation would be “no more forceful or invasive than the exigency of the circumstances requires.” *Alamance Cnty. Ct. Facilities*, 329 N.C. at 99–100.

* * *

The State understands that this Court intends to fashion an equitable remedy to bring the State Defendants into compliance with the constitutional mandate of providing North Carolina’s schoolchildren with the constitutionally required sound, basic education. The State further understands that the Courts and the Legislature are coordinate branches of the State government

and neither is superior to the other. *Nicholson v. Educ. Assistance Auth.*, 275 N.C. 439 (1969). Likewise, if there exists a conflict between legislation and the Constitution, it is acknowledged that the Court “must determine the rights and liabilities or duties of the litigants before it in accordance with the Constitution, because the Constitution is the superior rule of law in that situation.” *Green v. Eure*, 27 N.C. App. 605, 608 (1975).

Respectfully submitted, this the 8th day of November, 2021.

JOSHUA H. STEIN
ATTORNEY GENERAL

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of Memorandum of Law of Law on behalf of the State of North Carolina was delivered to the Court and the following parties on this day by email (agreed-to form of service):

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This the 8th day of November, 2021.

/s/ Amar Majmundar
Amar Majmundar
Senior Deputy Attorney General



North Carolina Court of Appeals

EUGENE H. SOAR, Clerk

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(95CVS1158)

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No. P21-511

IN RE. THE 10 NOVEMBER 2021 ORDER
IN HOKE COUNTY BOARD OF EDUCATION ET
AL. VS. STATE OF NORTH CAROLINA AND
W. DAVID LEE (WAKE COUNTY FILE 95
CVS 1158)

ORDER

The following order was entered:

All parties appearing in the underlying action that is the subject of the above-captioned petition for a writ of prohibition are directed to file a response to the petition for a writ of prohibition and accompanying petition for a writ of supersedeas and motion for a temporary stay no later than 9:00 a.m. on 30 November 2021, if they wish to file a response.

By order of the Court this the 29th of November 2021.

WITNESS my hand and the seal of the North Carolina Court of Appeals, this the 29th day of November 2021.

Eugene H. Soar
Clerk, North Carolina Court of Appeals

Copy to:

Hon. Robert Neal Hunter, Jr., Attorney at Law, For Combs, Linda, State Controller
Hon. W. David Lee, Senior Resident Judge
Mr. Amar Majmundar, Senior Deputy Attorney General
Mr. Matthew Tulchin, Special Deputy Attorney General
Ms. Tiffany Y. Lucas, Deputy General Counsel
Mr. Thomas J. Ziko
Mr. Neal A. Ramee, Attorney at Law
David Nolan
Hon. Donna Stroud, Chief Judge
Hon. Frank Blair Williams, Clerk of Superior Court



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No. P21-511

**IN RE. THE 10 NOVEMBER 2021 ORDER
IN HOKE COUNTY BOARD OF EDUCATION ET
AL. VS. STATE OF NORTH CAROLINA AND
W. DAVID LEE (WAKE COUNTY FILE 95
CVS 1158)**

From Wake
(95CVS1158)

ORDER

The following order was entered:

The petition for a writ of prohibition is decided as follows: we allow the petition and issue a writ of prohibition as described below.

This Court has the power to issue a writ of prohibition to restrain trial courts "from proceeding in a matter not within their jurisdiction, or from acting in a matter, whereof they have jurisdiction, by rules at variance with those which the law of the land prescribes." State v. Allen, 24 N.C. 183, 189 (1841); N.C. Gen. Stat. s. 7A-32.

Here, the trial court recognized this Court's holding in Richmond County Board of Education v. Cowell that "[a]ppropriating money from the State treasury is a power vested exclusively in the legislative branch" and that the judicial branch lacked the authority to "order State officials to draw money from the State treasury." 254 N.C. App. 422, 803 S.E.2d 27 (2017). Our Supreme Court quoted and relied on this language from our holding in Cooper v. Berger, 376 N.C. 22, 47, 852 S.E.2d 46, 64 (2020).

The trial court, however, held that those cases do not bar the court's chosen remedy, by reasoning that the Education Clause in "Article I, Section 15 of the North Carolina Constitution represents an ongoing constitutional appropriation of funds."

We conclude that the trial court erred for several reasons.

First, the trial court's interpretation of Article I would render another provision of our Constitution, where the Framers specifically provided for the appropriation of certain funds, meaningless. The Framers of our Constitution dedicated an entire Article--Article IX--to education. And that Article provides specific means of raising funds for public education and for the appropriation of certain monies for that purpose, including the proceeds of certain land sales, the clear proceeds of all penalties, forfeitures, and fines imposed by the State, and various grants, gifts, and devises to the State. N.C. Const. Art. IX, Sec 6, 7. Article IX also permits, but does not require, the General Assembly to supplement these sources of funding. Specifically, the Article provides that the monies expressly appropriated by our Constitution for education may be supplemented by "so much of the revenue of the State as may be set apart for that purpose." Id. Article IX then provides that all such funds "shall be faithfully appropriated and used exclusively for establishing and maintaining a uniform system of free public schools." Id. If, as the trial court reasoned, Article I, Section 15 is, itself, "an ongoing constitutional appropriation of funds"--and thus, there is no need for the General Assembly to faithfully appropriate the funds--it would render these provisions of Article IX unnecessary and meaningless.

Second, and more fundamental, the trial court's reasoning would result in a host of ongoing constitutional appropriations, enforceable through court order, that would devastate the clear separation of powers between the Legislative and Judicial branches and threaten to wreck the carefully crafted checks and balances that are the genius of our system of government. Indeed, in addition to the right to education, the Declaration of Rights in our Constitution contains many other, equally vital protections, such as the right to open courts. There is no principled reason to treat the Education Clause as "an ongoing constitutional appropriation of funds" but to deny that treatment to these other, vital protections in our Constitution's Declaration of Rights. Simply put, the trial court's conclusion that it may order petitioner to pay unappropriated funds from the State Treasury is constitutionally impermissible and beyond the power of the trial court.

We note that our Supreme Court has long held that, while our judicial branch has the authority to enter a money judgment against the State or another branch, it had no authority to order the appropriation of monies to satisfy any execution of that judgment. See *State v. Smith*, 289 N.C. 303, 321, 222 S.E.2d 412, 424 (1976) (stating that once the judiciary has established the validity of a claim against the State, "[t]he judiciary will have performed its function to the limit of its constitutional powers. Satisfaction will depend upon the manner in which the General Assembly discharges its constitutional duties."); *Able Outdoor v. Harrelson*, 341 N.C. 167, 172, 459 S.E.2d 626, 629 (1995) (holding that "the Judicial Branch of our State government [does not have] the power to enforce an execution [of a judgment] against the Executive Branch").

We therefore issue the writ of prohibition and restrain the trial court from enforcing the portion of its order requiring the petitioner to treat the \$1.7 billion in unappropriated school funding identified by the court "as an appropriation from the General Fund as contemplated within N.C. Gen. Stat. s. 143C-6-4(b)(2)(a) and to carry out all actions necessary to effectuate those transfers." Under our Constitutional system, that trial court lacks the power to impose that judicial order.

Our issuance of this writ of prohibition does not impact the trial court's finding that these funds are necessary, and that portion of the judgment remains. As we explained in *Richmond County*, "[t]he State must honor that judgment. But it is now up to the legislative and executive branches, in the discharge of their constitutional duties, to do so. The Separation of Powers Clause prevents the courts from stepping into the shoes of the other branches of government and assuming their constitutional duties. We have pronounced our judgment. If the other branches of government still ignore it, the remedy lies not with the courts, but at the ballot box." 254 N.C. App. 422, 429, 803 S.E.2d 27, 32.

Panel consisting of Judge DILLON, Judge ARROWOOD, and Judge GRIFFIN.

ARROWOOD, Judge, dissenting.

I dissent from the majority's order granting a Writ of Prohibition. I vote to allow the Motion for Temporary Stay which is the only matter that I believe is properly before the panel at this time. This matter came to the panel for consideration of a non-emergency Motion for Temporary Stay that was ancillary to petitions for a Writ of Prohibition under Rule 22 of the Rules of Appellate Procedure and for Writ of Supersedeas under Rule 23 of the Rules of Appellate Procedure on 29 November 2021. The trial court had stayed the order at issue until 10 December 2021, the date when the time to appeal from the order would expire. Thus, there are no immediate consequences to the petitioner about to occur.

Under Rules 22 and 23 of the Rules of Appellate Procedure, a respondent has ten days (plus three for service by email) to respond to a petition. This time period runs by my calculation through 7 December 2021, before the trial court's stay of the order expires. However, the majority of this panel--ex meru motu--caused an order to be entered unreasonably shortening the time for respondents to file a response until only 9:00 a.m. today. While the rules allow the Court to shorten a response time for "good cause shown[.]" in my opinion such action in this case was arbitrary, capricious and lacked good cause and instead designed to allow this panel to rule on this petition during the month of November.

Rather, as the majority's order shows shortening the time for a response was a mechanism to permit the majority to hastily decide this matter on the merits, with only one day for a response, without a full briefing schedule, no public calendaring of the case, and no opportunity for arguments and on the last day this panel is constituted. This is a classic case of deciding a matter on the merits using a shadow docket of the courts.

I believe this action is incorrect for several reasons. The Rules of Appellate Procedure are in place to allow parties to fully and fairly present their arguments to the Court and for the Court to fully and fairly consider those arguments. In my opinion, in the absence of any real time pressure or immediate prejudice to the parties, giving a party in essence one day to respond, following a holiday weekend, and then deciding the matter on the merits the day the response is filed violates these principles. My concerns are exacerbated in this case by the fact that no adverse actions would occur to the petitioner during the regular response time

as the trial court had already stayed its own order until several days after responses were due. In addition, this Court also has the tools through the issuance of a temporary stay to keep any adverse actions from occurring until it rules on the matter on the merits.

Therefore, I dissent from the majority's shortening the time for a response and issuing an order that decides the the merits of the entire appeal without adequately allowing for briefing or argument. My vote is to issue a temporary stay of the trial court's order.

By order of the Court this the 30th of November 2021.

WITNESS my hand and the seal of the North Carolina Court of Appeals, this the 30th day of November 2021.



Eugene H. Soar
Clerk, North Carolina Court of Appeals

Copy to:

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Hon. Frank Blair Williams, Clerk of Superior Court

No. 21-511

DISTRICT

TENTH JUDICIAL

NORTH CAROLINA COURT OF APPEALS

IN RE: The 10 November 2021 Order
in Hoke County Board of Education et
al. vs. State of North Carolina and W.
David Lee (Wake County File 95 CVS 1158)

RESPONSE OF PLAINTFFS AND PENN-INTERVENORS IN
OPPOSITION TO PETITION FOR WRIT OF PROHIBITION,
TEMPORARY STAY AND WRIT OF SUPERSEDEAS

INDEX

Table of Cases and Authorities	ii
Issues Presented	1
Statement of Relevant Facts and Procedural History	3
Reasons Why the Writs Should Not Be Issued	3
I. WRITS OF PROHIBITION AND SUPERSEDEAS ARE EXTRAORDINARY FORMS OF RELIEF AND SHOULD NOT BE GRANTED WHERE THEY ARE PREMATURE AND FAIL TO MEET THE REQUIREMENTS WARRANTING THE ISSUANCE OF SUCH WRITS AND STAYS.	3
II. THE STATE CONTROLLER IS A STATE ACTOR, PART OF THE STATE DEFENDANT, PROPERLY NAMED IN THE TRIAL COURT’S ORDER	7
III. THE ORDER IS CONSISTENT WITH OBLIGATIONS AND DUTIES OWED UNDER THE NORTH CAROLINA CONSTITUTION	11
A. Courts Retain Inherent Powers to not Only Declare Acts Invalid, but to Ensure Injured Parties Receive Adequate Remedies, Including the Relief Entered Here.....	13
B. The Constitution, Itself, Commands an Appropriation to Ensure a Sound Basic Education is Established and Maintained	22
C. The Court’s Broad Equitable Relief Powers, Including Powers to Issue Legislative Injunctions, Further Support the Order Entered in this Case	29
Conclusion	33
Certificate of Service.....	33

TABLE OF CASES AND AUTHORITIES

Cases

<i>Beard v. N. Carolina State Bar</i> , 320 N.C. 126 (1987)	12
<i>Catawba County</i> , 206 N.C. 165 (1934)	15, 16
<i>Cooper v. Berger</i> , 376 N.C. 22 (2020)	25, 27
<i>Corum v. Univ. of</i> , N.C., 330 N.C. 761	12
<i>Craig ex rel. Craig v. New Hanover Cty. Bd. of Educ.</i> , 363 N.C. 334 (2009)	8, 24
<i>Ex Parte McCown</i> , 139 N.C. 95 (1905)	12
<i>Ex Parte Schenck</i> , 65 N.C. 353 (1871)	10, 13
<i>Gannon v. Kansas</i> , 368 P.3d 1024 (Kan. 2016).....	27
<i>Griffin v. County School Board</i> , 377 U.S. 218 (1964).....	32
<i>Hoke County Bd. of Educ. v. State</i> , 358 N.C. 605, 599 S.E.2d 365 (2004).....	passim
<i>Holly Shelter R. Co. v. Newton</i> , 133 N.C. 132, 45 S.E. 549 (1903).....	5, 6
<i>In re Martin</i> , 295 N.C. 291 (1978)	27
<i>Jenkins v. Missouri</i> , 672 F. Supp. 400 (W.D. Mo. 1987).....	30

<i>Leandro v. State</i> , 346 N.C. 336 (1997)	9, 14, 26, 28
<i>Lynch v. N.C. Dept. of Justice</i> , 93 N.C. App. 57 (1989).....	8, 24
<i>Matter of Alamance Cnty. Ct. Facilities</i> , 329 N.C. 84 (1991)	passim
<i>Mebane Graded School District v. Alamance County</i> , 211 N.C. 213, 189 S.E. 873 (1937)	16
Revolutionary War. <i>Bayard v. Singleton</i> , 3 N.C. (1787)	14
<i>Richmond County Board of Education v. Cowell</i> , 254 N.C. App 422 (2017).....	26
<i>Simeon v. Hardin</i> , 339 N.C. 358 (1994)	12
<i>Spallone v. United States</i> , 493 U.S. 265 (1990).....	30
<i>State v. Berger</i> , 368 N.C. 633 (2016)	25
<i>State v. Buckner</i> , 351 N.C. 401 (2000)	10, 12
<i>State v. Harris</i> , 216 N.C. 746 (1940)	12
<i>Stephenson v. Bartlett</i> , 355 N.C. 354 (2002)	26, 30
<i>Sutton v. Figgatt</i> , 280 N.C. 89	4

Statutes

N.C. Const. art. IV, § 1	12, 18, 22
N.C. Const. art. IX, §§ 2, 6, 7	28
N.C. Const. art. I, § 4	12
N.C. Const. Art. IX § 6	15, 28
N.C. Const. art. V, § 7	25, 26

Rules

N.C. R. App. P. 23(a)(1)	4
N.C. R. App. P. 33(b)	33
N.C.R. Civ. P. 12(b)	6
North Carolina Rule of Appellate Procedure 23	4
Rule 28(j) of the North Carolina Rules of Appellate Procedure	34
N.C. Const. art. I, § 15, art. IX, § 2 (1)	14, 22, 26, 27
N.C. Const. art. I, §18	passim
N.C.G.S. §§ 143B-426.37, 143B-426.39	7

Other Authorities

<i>Implementing Structural Injections: Getting a Remedy When Local Officials Resist,</i> 80 Geo. L.J. 2227 (1992)	48
SB 105	13

<i>The Legislative Injunction: A Remedy for Unconstitutional Legislative Inaction,</i> 99 Yale L.J. 231 (1989)	47
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No. 21-511
DISTRICT

TENTH JUDICIAL

NORTH CAROLINA COURT OF APPEALS

IN RE: The 10 November 2021 Order
in Hoke County Board of Education et
al. vs. State of North Carolina and W.
David Lee (Wake County File 95 CVS 1158)

**PENN-INTERVENORS' RESPONSE IN OPPOSITION TO PETITION
FOR WRIT OF PROHIBITION, TEMPORARY STAY AND WRIT OF
SUPERSEDEAS**

ISSUES PRESENTED

1. Whether this Court should deny the State Controller's Writ of Prohibition, Temporary Stay and Writ of Supersedeas on the grounds that the petition fails to allege sufficient grounds warranting issuance of a writ and stay.

2. Whether this Court should deny the State Controller's Writ of Prohibition, Temporary Stay and Writ of Supersedeas on the grounds that the petitioner has failed to exhaust relief in the Superior Court prior to filing her petition.

3. Whether the 10 November 2021 Order Should be Stopped, despite its consistency with the Court's duties and responsibilities under the North Carolina Constitution and the positive, fundamental right to a sound basic education at stake in this case.

Pursuant to the Court's Order dated November 29, 2021 shortening the time to respond,¹ Plaintiffs and Penn-Intervenors (collectively, "Plaintiff Parties") hereby respond to the Petition for Writ of Prohibition, Temporary Stay and Writ of Supersedeas filed on Wednesday, November 24, 2021 as follows:

INTRODUCTION

Plaintiffs are the rural and low-wealth county school boards drastically in need of the resources necessary to provide the sound basic education required under the State Constitution. Penn-Intervenors are among the hundreds of thousands of students across North Carolina currently deprived of the opportunity to acquire that constitutionally compliant education. After waiting seventeen years for a remedy, the Superior Court issued its 10 November 2021 Order ("the November 10 Order") to provide the relief required under the North Carolina Constitution.

The November 10 Order has not been appealed. Instead, Linda Combs, Controller of the State of North Carolina ("Petitioner"), seeks a Writ of Prohibition, Writ of Supersedeas and a temporary stay of the Order. The Petition should be denied because: (1) it does not present the requisite case of

¹ Plaintiff Parties were not included in the initial recipient list to receive the Court's Order.

extreme necessity required by law governing the extraordinary issuance of writs and temporary stays and there exists for Petitioner's claimed grievance sufficient remedy by ordinary methods before the Superior Court; (2) it is premature; (3) the trial court has jurisdiction over the State of North Carolina, of which Petitioner is an employee and agent; and (4) the trial court acted within constitutional and inherent authority to order a remedy after years of deferring to the State to implement a remedy that would finally address the constitutional harms inflicted upon North Carolina's school children.

STATEMENT OF RELEVANT FACTS AND PROCEDURAL HISTORY

The Plaintiff Parties incorporate by reference the Superior Court's Findings of Fact in the 10 November 2021 Order (Petition for Writ of Prohibition, Temporary Stay and Writ of Supersedeas, Ex. A).

REASONS WHY THE WRITS SHOULD NOT ISSUE

I. Writs of Prohibition and Supersedeas Are Extraordinary Forms of Relief and Should Not Be Granted Where They Are Premature and Fail to Meet the Requirements Warranting the Issuance of Such Writs and Stays.

The Petition should be denied as a premature request for intervention by the Court of Appeals into ongoing proceedings before the Superior Court. The requested writs of supersedeas and prohibition, and the requested stay, are not appropriate at this time, and Petitioner has not identified any "extraordinary circumstances" warranting such relief.

North Carolina Rule of Appellate Procedure 23 permits writs of supersedeas to stay the execution or enforcement of an order only if “(1) a stay order or entry has been sought by the applicant by deposit of security or by motion in the trial tribunal and such order or entry has been denied or vacated by the trial tribunal, or (2) extraordinary circumstances make it impracticable to obtain a stay by deposit of security or by application to the trial tribunal for a stay order.” N.C. R. App. P. 23(a)(1) (“Application—When Appropriate”). Petitioner has not sought a stay of the November 10 Order before the Superior Court, nor has she identified any “extraordinary circumstances” that would make it impracticable to obtain a stay from the Superior Court. Indeed, no such extraordinary circumstances exist. The Superior Court stayed its November 10 Order for 30 days to permit the State to take further actions consistent with its terms, no enforcement action is imminent, and there remains adequate time for the Petitioner to move for an additional stay before the Superior Court so that its arguments may be heard by that court.²

A writ of prohibition, like a writ of mandamus, is a “personal action” against the trial court judge and is granted “only in the case of necessity.” *Sutton v. Figgatt*, 280 N.C. 89, 93, 185 S.E.2d 97, 99 (1971) (affirming denial of petition for writ of

² Plaintiffs have sought a further extension of the Superior Court’s stay so that the Superior Court may consider the impact of the Current Operations Appropriations Act of 2021, which was passed on November 18, 2021—eight days after the court’s entry of its Order.

mandamus). Like the petition for writ of supersedeas, the petition for a writ of prohibition is premature, as Petitioner fails to present a case of “extreme necessity” and may still avail herself of ordinary process before the Superior Court to challenge the 10 November 2021 Order. A writ of prohibition “issues only in cases of extreme necessity.” *Holly Shelter R. Co. v. Newton*, 133 N.C. 132, 45 S.E. 549, 550 (1903). “It will not issue when there is any sufficient remedy by ordinary methods, as appeal, injunction, etc., or when no irreparable damage will be done.” *Id.* As the North Carolina Supreme Court made clear in *Holly Shelter*, seeking relief through ordinary process before a lower court is a “sufficient remedy by ordinary means” making a writ of prohibition inappropriate. *Id.*

In *Holly Shelter*, the petitioner sought a writ of prohibition from the Supreme Court to avoid condemnation of land for a railway. *See id.* Because the petition was brought before the conclusion of the regular proceedings below, which included the appointment of commissioners to consider condemnation requests, the Supreme Court denied the petition as premature: “Certainly there can be no call for this court to interfere with the regular proceedings of the court below by prohibiting the clerk from appointing commissioners. *The defendants have complained before they are hurt.*” *Id.* (emphasis added).

Here, as in *Holly Shelter*, Petitioner seeks a writ before seeking a remedy through “ordinary means,” by filing, for example, a motion before the Superior Court to further stay the 10 November Order so that the Superior Court can address challenges to the Order. As such the Petitioner has complained before she faces any real harm, and a writ of prohibition is therefore inappropriate.

Petitioner also argues that a writ of prohibition is appropriate to keep the Superior Court from exercising jurisdiction over her, as, she argues, she was not properly served with the Order and the Superior Court therefore lacks personal jurisdiction. Even setting aside the substantive failures of this argument—Petitioner is but an officer of the State, which already is a party—a claimed lack of personal jurisdiction cannot by itself provide sufficient grounds for a writ of prohibition, or every Rule 12 motion based on lack of jurisdiction in every civil case could be brought first to the Court of Appeals. *See* N.C.R. Civ. P. 12(b) (permitting motions to dismiss for lack of jurisdiction).

Because Petitioner does not present a case of “extreme necessity,” and there exists for her claimed grievance “sufficient remedy by ordinary methods” before the Superior Court, *Holly Shelter*, 45 S.E. at 550, her petition should be denied.

II. The State Controller Is a State Actor, Part of the State Defendant, and Properly Named in the Trial Court's Order.

The State Defendant includes the legislative and executive branches. *See Hoke County Bd. of Educ. v. State*, 358 N.C. 605, 635, 599 S.E.2d 365, 389 (2004) (“*Leandro II*”) (“[B]y the State we mean the legislative and executive branches which are constitutionally responsible for public education”). The trial court has personal jurisdiction over Petitioner, because she is identified by statute and by the State Defendant as the State actor with the authority and responsibility to perform certain tasks necessary to implement the court’s remedial order in this case. *See* N.C.G.S. §§ 143B-426.37, 143B-426.39. Petitioner, who is appointed by the Governor for a seven-year term, *id.* § 143B-426.37(b), “shall maintain the State accounting system and shall administer the State disbursing system.” *Id.* § 143B-426.37(a). *See also id.* § 143B-426.39 (powers and duties of the State Controller).

Perhaps most importantly, the law of this case supports jurisdiction over all the State actors identified in the November 10 Order. *See* Order at 12, ¶ 3. The North Carolina Supreme Court made clear in *Leandro II* that “when the State fails to live up to its constitutional duties, a court is empowered to order the deficiency remedied, and if the offending branch of government or its agents either fail to do so or have consistently shown an inability to do so, *a court is empowered to provide relief by imposing a specific remedy and*

instructing the recalcitrant state actors to implement it.” 358 N.C. at 642-43 (emphasis added). The Court recognized that the courts “remain the ultimate arbiters of our state’s Constitution, and vigorously attend to our duty of protecting the citizenry from abridgments and infringements of its provisions,” and it clearly affirmed the inherent judicial power to ensure implementation of a remedy to stop the State from continuing to violate students’ fundamental rights to a sound basic education. *Id.* at 645.

If this Court grants the extraordinary writ Petitioner seeks, it will forsake its *own* constitutional obligation to ensure a remedy for the State’s now decades-old constitutional violation of North Carolina children’s right to a sound, basic education. See November 10 Order at 13, ¶ 9.³ The State Defendants did not appeal the 7 June 2021 Order on Comprehensive Remedial Plan, which warned that “if the State fails to implement the actions described in the Comprehensive Remedial Plan . . . ‘it will then be the duty of this Court to enter a judgment granting declaratory relief and such other relief as needed to correct the wrong.’” November 10 Order, at 11 (quoting June 2021 Order

³ The Order quotes N.C. Const. art. I, section 18 (“every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay”) and cites *Lynch v. N.C. Dept. of Justice*, 93 N.C. App. 57, 61 (1989) (explaining that article I, section 18 “guarantees a remedy for legally cognizable claims”) and *Craig ex rel. Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 342 (2009) (noting the Supreme Court of North Carolina’s “long-standing emphasis on ensuring redress for every constitutional injury”).

(quoting *Leandro v. State*, 346 N.C. 336, 357 (1997) (“*Leandro I*”). And while the Governor did comply with the Order by proposing a budget sufficient to fund two years of the Comprehensive Remedial Plan (“CRP”), the General Assembly ignored the Order completely, compelling the court to issue its November 10 Order.⁴ That order fulfills the Supreme Court’s promise in *Leandro II* to “provide relief by imposing a specific remedy and instructing the recalcitrant state actors to implement it.” *Leandro II*, 358 N.C. at 642-43.

Petitioner is correct that *Matter of Alamance Cnty. Ct. Facilities*, 329 N.C. 84 (1991) (“*Alamance*”) is “factually distinct” from the present case. Pet’n p. 9. In *Alamance*, there were no parties at all; instead, there was a *sua sponte* order from a trial court judge, who, after directing a Grand Jury to inspect the Alamance County jail and court facilities and reviewing its subsequent report on the numerous deficiencies and inadequacies of those facilities, ordered the five county commissioners “to offer evidence or contentions regarding the adequacy of court facilities ‘to provide for the proper administration of justice in Alamance County.’” *Alamance*, 329 N.C. at 89.

⁴ Eight days later, the General Assembly passed and the Governor enacted the *Current Operation Appropriations Act of 2021* (Session Law 2021-180, SB 105) (“Appropriations Act”), which appears to provide for some—but not all—the resources and funds required to implement years 2 and 3 of the Comprehensive Remedial Plan.

As the subject order in the present case observed, the North Carolina Supreme Court has held that the scope of a court’s inherent power is its “authority to do all things that are reasonably necessary for the proper administration of justice,” November 10 Order, at 17 (quoting *State v. Buckner*, 351 N.C. 401, 411 (2000)), affirming over a century of precedent establishing that “[i]nherent powers are critical to the court’s autonomy and to its functional existence” *Id.* (quoting *Alamance*, 329 N.C. at 93-94 (quoting *Ex Parte Schenck*, 65 N.C. 353, 366 (1871) (“If the courts could be deprived by the Legislature of these powers, which are essential in the direct administration of justice, they would be destroyed for all efficient and useful purposes.”))).

Thus, had the County been a defendant in an action brought to remedy the injustice as the State is here, the Court would have certainly affirmed the trial court’s order. *See Alamance*, 329 N.C. at 88 (“We hold that such power exists, but that the order invoking it here is procedurally and substantively flawed.”). Here, there is no similar procedural or substantive flaw: the State is a defendant; it was given ample deference and opportunity by the court to design a remedy for its decades-old constitutional violation; and it did design a remedy, which the court then ordered the requisite State actors to implement. The November 10 Order properly asserts jurisdiction over the requisite State actors consistent with the Supreme Court’s holdings in *Leandro*

I and *II* and *Alamance*. As discussed in Section III below, that jurisdiction is also supported by earlier holdings.

After waiting patiently for 17 years and repeatedly showing deference to the State, the trial court thus properly named the requisite State actors and ordered them to exercise their respective statutory and constitutional obligations to implement the Comprehensive Remedial Plan.

III. The Order is Consistent with Obligations and Duties Owed Under the North Carolina Constitution.

Even if this Court considers the petition's merits, the Court should deny the relief sought because the November 10 Order is well within courts' powers to not only decide cases, but to ensure appropriate remedies are enacted and enforced to remedy constitutional violations. That authority includes the power to require State officers to order the transfer of funds from unappropriated General Fund balances to the appropriate agencies to ensure that constitutional obligations involving fundamental, positive rights to school children are fulfilled. Contrary to Petitioner's arguments, the Order is consistent with the fulfillment of courts' constitutional role to ensure justice is fulfilled to harmed parties (in this case, school children).

The North Carolina Constitution provides, "All courts shall be open; every person for an injury done him in his lands, goods, person, or reputation *shall have remedy by due course of law*; and right and justice shall be

administered without favor, denial, or delay.” N.C. CONST. art. I, § 18 (emphasis added). The North Carolina Supreme Court has declared that “[o]bedience to the Constitution on the part of the Legislature is no more necessary to orderly government than the exercise of the power of the Court in requiring it when the Legislature inadvertently exceeds its limitations.” *State v. Harris*, 216 N.C. 746, 764 (1940). Further, “the courts have power to fashion an appropriate remedy ‘depending upon the right violated and the facts of the particular case.’” *Simeon v. Hardin*, 339 N.C. 358, 373 (1994) (quoting *Corum v. Univ. of N.C.*, 330 N.C. 761, 784 *cert. denied*, 506 U.S. 985 (1992)).

Courts’ inherent powers are derived from being one of three separate, coordinate branches of the government. *Ex Parte McCown*, 139 N.C. 95, 105-06 (1905) (citing N.C. Const. art. I, § 4)). The constitution expressly restricts the General Assembly’s intrusion into judicial powers. See N.C. Const. art. IV, § 1 (“The General Assembly shall have no power to deprive the judicial department of any power or jurisdiction that rightfully pertains to it as a co-ordinate department of the government”); *Beard v. N. Carolina State Bar*, 320 N.C. 126, 129 (1987) (“The inherent power of the Court has not been limited by our constitution; to the contrary, the constitution protects such power.”). These inherent powers give courts their “authority to do all things that are reasonably necessary for the proper administration of justice.” *State v. Buckner*, 351 N.C. 401, 411 (2000); *Beard*, 320 N.C. at 129.

In fact, it is the separation of powers doctrine itself which undergirds the judicial branch's authority to enforce its order here. "Inherent powers are critical to the court's autonomy and to its functional existence: 'If the courts could be deprived by the Legislature of these powers, which are essential in the direct administration of justice, they would be destroyed for all efficient and useful purposes.'" *Alamance* , 329 N.C. at 93–94 (citing *Ex Parte Schenck*, 65 N.C. 353, 355 (1871)). The Supreme Court's analysis of the doctrine in *Alamance* is instructive:

An overlap of powers constitutes a check and preserves the tripartite balance, as two hundred years of constitutional commentary note. "Unless these [three branches of government] be so far connected and blended as to give to each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained."

Id. at 97 (quoting *The Federalist* No. 48, at 308 (J. Madison) (Arlington House ed. 1966)).

A. Courts Retain Inherent Powers to Not Only Declare Acts Invalid, but to Ensure Injured Parties Receive Adequate Remedies, Including the Relief Entered Here.

The courts have frequently invoked their inherent judicial powers when necessary to protect both constitutional and statutory rights. Even before *Marbury v. Madison*, the North Carolina courts have exercised their role to interpret and review legislation against the state constitution in live controversies. In 1787, the North Carolina Supreme Court reviewed widely

popular legislation that sought to strip British loyalists of their land following the Revolutionary War. *Bayard v. Singleton*, 3 N.C. 42 (1787). Nevertheless, the Court struck down the law, consistent with the separation of powers doctrine, noting that the courts could not “dispense with the duty they owed the public, in consequence of the trust they were invested with under the solemnity of their oaths.” *Id.* at 44.

In *Marbury v. Madison*, the United States Supreme Court famously held, “It is emphatically the province and duty of the judicial department to say what the law is.” 5 U.S. 137, 177 (1803). But perhaps more importantly for this case, the Court also held, “It is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress.” *Id.* at 147. In ruling such, the Court acknowledged that a writ of mandamus could properly issue on a Secretary of State when the Secretary overstepped his bounds by denying a commission to a duly appointed and confirmed justice of the peace. *Id.* at 137-38.

Here, the Court may also issue an order to the Office of State Budget and Management (OSBM), the State Treasurer and the State Controller to order the transfer of funds from the unappropriated fund balance to the appropriate agencies identified in the State’s CRP and action plan. First, the State has an affirmative duty to provide the opportunity for a sound basic education. *Leandro I*, 346 N.C. at 348; N.C. Const. art. I, § 15, art. IX, § 2 (1). Second,

State Defendants have recognized as much and presented the CRP to remedy its constitutional violation. Third, the State has acknowledged it has more than enough funds in unappropriated surplus revenue to cover the cost of years 2 and 3 of the CRP. State of North Carolina's Progress Report (August 6, 2021). Fourth, the North Carolina Constitution also requires the state to pay certain proceeds into the State Treasury and together with other revenue from the State, the State is required to "faithfully appropriate[] and use[]" those collective funds "exclusively for establishing and maintaining a uniform system of free public schools." N.C. Const. Art. IX § 6 (emphasis added). Finally, the State has failed to uphold its obligations under each of the aforementioned constitutional provisions, thumbing its nose at the courts and suggesting that the only way the trial judge can change the outcome is to run for office, join the General Assembly, and vote for appropriations. But the premise of that notion requires total disregard for our constitution, and its effect denies North Carolina school children the "remedy by due course of law." N.C. CONST. art. I, § 18. Undoubtedly, such precedent would set in force a series of actions by the General Assembly to hide behind the cover of a single clause in a manner contravened by the rest of the North Carolina Constitution.

Similar rulings in other cases recognize judicial authority to order the necessary governmental actors to transfer funds for education. In *Hickory v. Catawba County and School District v. Catawba County*, 206 N.C. 165 (1934),

the North Carolina Supreme Court found mandamus proper where county commissioners failed to provide for the maintenance of public schools. Existing laws allowed said commissioners to be indicted for the offense. However, the Court found such statutory relief insufficient because it failed to provide a remedy to the students who were without proper facilities and, thus, found mandamus appropriate. *Id.* at 174.

Similarly, a few years later, the North Carolina Supreme Court upheld a writ of mandamus compelling the defendant counties, which acted as administrative agencies of the legislature in providing funding for the schools, to assume the indebtedness of a school district within its jurisdiction. *Mebane Graded School District v. Alamance County*, 211 N.C. 213, 223, 189 S.E. 873, 880 (1937). The Court recognized the State's constitutional duty to provide a general and uniform education as a "*sacred duty* [that] was neglected by the state for long years, for various reasons, chiefly on account of the lack of means." *Id.*, 189 S.E. at 882. The Court concluded, "Under the facts in this case and the findings of the jury, it would be inequitable and unconscionable for defendants to assume part and not all of the indebtedness of the school districts of Alamance and not assume the plaintiffs' indebtedness and give them the relief demanded." *Id.*, 189 S.E. at 882.

In another case, *White v. Worth*, the Supreme Court addressed whether the lower court could order the state auditor and treasurer to pay the state's

chief inspector for the oyster industry, whose request for payment of salary and travel expenses was denied. 126 N.C. 570, 36 S.E. 132 (1900). Pursuant to a state law passed in 1897, the plaintiff was appointed chief inspector for a term of four years. *Id.*, 36 S.E. at 132. In 1899, the legislature passed an act that provided for the general supervision of the shellfish industry of the state and appointed four other people but did not abolish the chief inspector position. *Id.*, 36 S.E. at 132. When the plaintiff requested payment, the state auditor and state treasurer denied the request. *Id.*, 36 S.E. at 132. The plaintiff sought a writ of mandamus against the state auditor and state treasurer, “requiring and compelling” them to pay what he was owed. *Id.*, 36 S.E. at 132.

The Court first determined that the record and precedent validated his title and that the 1899 act did not abolish the 1897 act. *Id.*, 36 S.E. at 132. The Court then examined the legislation to determine the plaintiff’s salary and how he was to be paid, finding that the plaintiff was “to be paid by the treasurer of the state out of the oyster fund appropriated by the act of 1897 and the act of 1899.” *Id.*, 36 S.E. at 134. The Court found the amount of “money in the hands of the treasurer more than sufficient to pay the plaintiff.” *Id.*, 36 S.E. at 136. In affirming the issuance of the mandamus to the state auditor and treasurer, the Court held that “[t]he legislature having general powers of legislation, all these acts must be observed and enforced, unless they conflict with the vested constitutional rights of the plaintiff.” *Id.*, 36 S.E. at 134.

The North Carolina Supreme Court plainly recognizes that while appropriations and related actions are generally reserved to the legislative branch, the Court will step in when the “sacred” constitutional rights to a general and uniform education are at stake.

More recently, in *Alamance*, the Supreme Court addressed whether the Alamance Superior Court’s *ex parte* order requiring the Alamance County Commissioners to immediately provide adequate court facilities (including specific rooms of a specific minimum square footage), exceeded judicial authority and violated the separation of powers doctrine. *Id.* at 91. Although the Court found that the *ex parte* order failed to provide proper notice to the Commissioners, the Court recognized that an appropriately noticed order to the Commissioners would have sufficed, reasoning that “the inherent power of the judicial department is expressly protected by the constitution.” *Id.* at 93-94 (quoting N.C. Const. art. IV, § 1). After thoroughly analyzing the separation of powers doctrine, the Court recognized that “when inaction by those exercising legislative authority threatens fiscally to undermine the integrity of the judiciary, a court may invoke its inherent power to do what is reasonably necessary for the orderly and efficient exercise of the administration of justice.” *Id.* at 99.

In the present case, the State not only has had considerable and proper notice, but it is and has been a defendant for nearly 30 years.⁵ The long overdue nature of the remedial posture of this case makes the Supreme Court's analysis in *Alamance* uniquely applicable. There is no dispute that mandating full implementation of the CRP is properly within the court's authority. The predicament created by the General Assembly's failure to fund or provide appropriate resources for the CRP was foreseen and addressed by the Supreme Court in this case seventeen years ago. As noted earlier, the Supreme Court declared that if the State failed to fulfill its constitutional duties and consistently showed an inability to remedy the deficiency, "a court is empowered to provide relief by imposing a specific remedy and instructing the recalcitrant state actors to implement it. *Leandro II*, 358 N.C. at 642, 599 S.E.2d at 393.

The Supreme Court has recognized that, when considering remedies that may encroach upon the powers of the other branches, alternative remedies should be explored and encroachment minimized to the extent possible. *Alamance*, 329 N.C. at 100-01, 405 S.E.2d at 133. The relief proposed here carefully balances these interests with the judiciary's constitutional obligation

⁵ This Court has already determined that no individual state actor need be named as a defendant, because both the legislative and executive branches are included in the State Defendant. *See* Sept. 2, 2011 Order Denying Motion to Intervene.

to afford relief to injured parties. First, there is no alternative or adequate remedy available to Plaintiff Parties that affords them the relief to which they are entitled. State Defendants conceded that the CRP's full implementation is necessary to provide a sound basic education to students and there is nothing else on the table. *See, e.g.*, March 2021 Order. The trial court correctly found that, unless the CRP is implemented, students will be left without those essential opportunities-- and that deprivation will harm at-risk students most through lack of adequately trained teachers and principals, access to quality programs for English Learners, appropriate educational supports for students with disabilities, and compensatory education programs for at-risk students, among several other meaningful educational opportunities. *See* June 2021 Order.

Second, the court minimized its encroachment on legislative authority through the least intrusive remedy. Evidence of the court's deference over seventeen years and its careful balancing of the interests at stake includes but is not limited to:

- Giving the State seventeen years to arrive at a proper remedy (seventeen classes of students have since gone through schooling without a sound basic education, continuing through the present day with no end in sight);
- Deferring to State Defendants and the parties to recommend to the Court an independent, outside consultant to provide analysis of North Carolina education data and information and present comprehensive,

specific recommendations to remedy the existing constitutional violations;

- Deferring to State Defendants and the parties to recommend a remedial plan and the proposed duration of the plan, including recommendations from the Governor's Commission on Access to Sound Basic Education;
- Deferring to State Defendants to propose an action plan and remedy for the first year and then allowed the State Defendants additional latitude in implementing its actions in light of the pandemic's effect on education;
- Deferring to State Defendants to propose the long-term comprehensive remedial plan, and to determine the resources and costs necessary for full implementation;
- Deferring to State Defendants' discretion in seeking and securing the appropriate resources to fully implement the CRP;
- Deferring to further, extended deliberations between the executive and legislative branches over several months to give the State yet another opportunity to implement the CRP (this latitude was provided, despite the State's failure to adopt a budget over the past two years as the State continued to operate on the 2018 budget);
- Deferring to the legislative and executive branches yet again during the status conferences held in September and October 2021 to implement a full remedy, to no avail; and the Court has further put State Defendants on notice of forthcoming consequences if it continued to violate students' fundamental rights to a sound basic education; and
- Deferring to the State in its November 10 Order by staying the Order for 30 days to allow the State to take any additional action to satisfy its constitutional duties.

As these facts demonstrate, the November 10 Order aligns with precedent. By failing to provide the resources needed to remedy the outstanding violation, the General Assembly has attempted to usurp the

judiciary's power to ensure compliance with its mandatory constitutional duties owed to students. If permitted to continue its intentional neglect of its constitutional obligations, the executive and legislative branches will have "deprived the judicial department of any power or jurisdiction that rightfully pertains to it as a co-ordinate department of the government" in violation of article IV, Section 1 of the North Carolina Constitution. N.C. Const. art. IV, § 1, and closed the door to the courts to every student in spite of the injury done, denying all students their remedy, right and justice in direct contravention of article I, Section 18, and article IV, section 1 of the North Carolina Constitution.

B. The Constitution Commands an Appropriation to Ensure a Sound Basic Education is Established and Maintained.

The court's inherent powers to effectuate the November 10 Order are explicitly supported by the North Carolina Constitution. The Superior Court has found, and the State has conceded, that it has failed to fulfill its obligation to provide a sound basic education for all schoolchildren. The State also has a duty to guard and maintain the right to sound basic education secured by the state constitution. *See* N.C. Const. art. 1, sec. 15. As the arm of the State responsible for legislation, taxation, and appropriation, the General Assembly's principal duty involves adequately funding the minimum requirements for a sound basic education. While the General Assembly could

also choose to enact new legislation to support a sound basic education, the General Assembly has opted to largely ignore the litigation and the court's orders.⁶

Thus, the General Assembly, despite having a duty to participate in guarding and maintaining the right to an opportunity for a sound basic education, has failed to fulfill that duty. This failure by one branch of the state's tripartite government has contributed to the overall failure of the State to meet the minimum standards for effectuating the fundamental constitutional rights at issue. It is the court's constitutional duty to ensure that the ongoing constitutional violation in this case is remedied. N.C. Const. art. I, § 18. "[W]hen inaction by those exercising legislative authority threatens fiscally to undermine" the constitutional right to a sound basic education "a court may invoke its inherent power to do what is reasonably necessary for the orderly and efficient exercise of the administration of justice." *In re Alamance County Court Facilities*, 329 N.C. 84, 99 (1991) (citation and internal quotation marks omitted).

Indeed, in *Leandro II* a unanimous Supreme Court held that "[c]ertainly, when the State fails to live up to its constitutional duties, a court is empowered

⁶ Estimates reported here note that *Leandro*-related spending in the budget was only \$933 million over the biennium, well short of the \$1.75 billion ordered. Leslie, Laura *State budget falls well short of Leandro order*. WRAL (Nov. 22, 2021).

to order the deficiency remedied, and if the offending branch of government or its agents either fail to do so or have consistently shown an inability to do so, a court is empowered to provide relief by imposing a specific remedy and instructing the recalcitrant state actors to implement it.” 358 N.C. at 642.

Article I, section 18 of the North Carolina Constitution’s Declaration of Rights—which has its origins in the Magna Carta—states that “every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay.” N.C. Const. art. I, § 18; *see Lynch v. N.C. Dept. of Justice*, 93 N.C. App. 57, 61 (1989) (explaining that article I, section 18 “guarantees a remedy for legally cognizable claims”); *cf. Craig ex rel. Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 342 (2009) (noting the Supreme Court of North Carolina’s “long-standing emphasis on ensuring redress for every constitutional injury”). Article I, section 18 recognizes that the core judicial function is to ensure that right and justice—including the constitutional right to the opportunity to a sound basic education—are not delayed or denied.

Because the State has failed for more than seventeen years to remedy the constitutional violation as the Supreme Court ordered, the Superior Court provided a remedy through the exercise of its constitutional role. Were it not to have done so, the State’s repeated failure to meet the minimum standards

for effectuating the constitutional right to obtain a sound basic education would have threatened the integrity and viability of the North Carolina Constitution by, for example: 1) nullifying the Constitution's language without the people's consent, making the right to a sound basic education merely aspirational and not enforceable; 2) ignoring rulings of the Supreme Court of North Carolina setting forth authoritative and binding interpretations of our Constitution; and 3) violating separation of powers by preventing the judiciary from performing its core duty of interpreting our Constitution. *See State v. Berger*, 368 N.C. 633, 638 (2016) ("This Court construes and applies the provisions of the Constitution of North Carolina with finality.").

The General Assembly, and Petitioner, seemingly suggest that the Appropriations Clause, N.C. Const. art. V, section 7, prevents any court-ordered remedy to ensure that all students access a constitutionally-required sound basic education with the necessary educational resources and opportunities needed to meaningfully avail themselves of that opportunity. Petitioner is correct that the courts have recognized that the Appropriations Clause ensures "that the people, through their elected representatives in the General Assembly, ha[ve] full and exclusive control over the allocation of the state's expenditures." *Cooper v. Berger*, 376 N.C. 22, 37 (2020). However, that authority is not untethered to its' concurring responsibility to fulfill its constitutional obligations. If the General Assembly's willful failure to meet the

minimum standards for effectuating the constitutional right to obtain a sound basic education goes unchecked, then this matter would merely be a political question not subject to judicial enforcement. Such a contention has been previously considered—and rejected—by the Supreme Court. *See Leandro I*, 346 N.C. at 345. And the General Assembly cannot hide behind the appropriations clause, asserting that it overrides the people’s right to a sound basic education. “It is axiomatic that the terms or requirements of a constitution cannot be in violation of the same constitution—a constitution cannot violate itself.” *Leandro I*, 346 N.C. at 352; *accord Stephenson v. Bartlett*, 355 N.C. 354, 397 (2002).

As the State discusses in its Memorandum of Law on behalf of the State of North Carolina (*see* Pet., Ex. B at 5), this Court noted in *Richmond County Board of Education v. Cowell*, 254 N.C. App 422 (2017) that Article 5 Section 7 of the North Carolina Constitution permits state officials to draw money from the State Treasury when an appropriation has been “made by law.” In most instances, the General Assembly is the body—subject to a Governor’s veto—that authorizes an appropriation “by law;” however, the North Carolina Constitution itself is the supreme law of the land and by extension, may authorize very limited transfers of unappropriated funds to ensure constitutional obligations involving positive, fundamental rights like the present are fulfilled. Article 1 Section 15 of the North Carolina Constitution

represents an ongoing constitutional appropriation of funds sufficient to create and maintain a school system that provides each of our State's students with the constitutional minimum of a sound basic education. This constitutional provision may therefore be deemed an appropriation "made by law."

The court's authority to order the transfer of unappropriated funds is further grounded in the Constitution's role as an expression of "the will of the people in this State and is, therefore, the supreme law of the land." *In re Martin*, 295 N.C. 291, 299 (1978); *see also Gannon v. Kansas*, 368 P.3d 1024, 1057 (Kan. 2016) (explaining that "[t]he constitution is the direct mandate of the people themselves"). Accordingly, because Article I, § 15 represents a constitutional appropriation, such an appropriation may be considered to have been made by the people themselves, through the Constitution, thereby allowing fiscal resources to be drawn from the State Treasury's unappropriated funds to meet that requirement. The Constitution reflects the direct will of the people; an order effectuating Article I, § 15's constitutional appropriation is fully consistent with the framers desire to give the people ultimate control over the state's expenditures. *Cooper*, 376 N.C. at 37.

The court cannot permit the State to continue failing to effectuate the right to a sound basic education guaranteed to the people of North Carolina, nor can it indefinitely wait for the State to act. Seventeen years have passed since *Leandro II* and, in that time, an entire generation of children have been

denied a fundamental constitutional right. This has more than satisfied the North Carolina Supreme Court's direction to provide "every reasonable deference to the legislative and executive branches," *Leandro I*, 346 N.C. at 357, and allow "unimpeded chance, 'initially at least,' to correct constitutional deficiencies revealed at trial," *Leandro II*, 358 N.C. at 638 (citation omitted).

To allow the State to indefinitely delay funding for a *Leandro* remedy when adequate revenues exist would effectively deny the existence of a constitutional right to a sound basic education and effectively render the Constitution and the *Leandro* decisions meaningless. The North Carolina Constitution, however, guarantees that right and empowers this Court to ensure its enforcement. The legislative and executive branches of the State, as creations of that Constitution, are subject to its mandates.

In fact, the North Carolina Constitution repeatedly makes school funding a matter of constitutional—not merely statutory—law. The Constitution devotes an entire article to the State's education system. Despite the General Assembly's general authority over appropriations of State funds, article IX specifically directs that proceeds of State swamp land sales; grants, gifts, and devises made to the State; and penalties, fines, and forfeitures collected by the State shall be used for maintaining public education. N.C. Const. art. IX, §§ 6, 7. Multiple provisions of article IX also expressly require the General Assembly to adequately fund a sound basic education. *See* N.C.

Const. art. IX, §§ 2, 6, 7. These provisions cannot and should not be read to conflict with Article III, section 5 and Article V, section 8 and N.C. Gen. Stat. § 143C as suggested by Petitioner, especially in a rare case like this one where liability has been determined, a remedy has been agreed upon and ordered, and the State actors have been provided substantial deference to comply with their constitutional duties but have failed to do so.

Accordingly, as a matter of constitutional law, the Court is authorized to ensure a continuing appropriation from the State Treasury to effectuate the people's right to a sound basic education. When the General Assembly fulfills its constitutional role through the normal (statutory) budget process, there is no need for judicial intervention to effectuate the constitutional right. But when the State fails to fulfill its obligations under a record like the one before this Court, the courts certainly have the authority to issue remedial orders such as the court's Order of 10 November 2021.

C. The Court's Broad Equitable Relief Powers, Including Powers to Issue Legislative Injunctions, Further Support the Order Entered in this Case.

Courts also have the authority to issue a "legislative injunction" ordering new legislation to implement a full remedy where there has been persistent and long-standing legislative refusal to comply with a court's remedial orders after a finding of constitutional violations. *See NOTE: The Legislative Injunction: A Remedy for Unconstitutional Legislative Inaction*, 99 Yale L.J.

231 (1989) (discussing, *inter alia*, a court-ordered tax hike to fund schools in *Jenkins v. Missouri*, 672 F. Supp. 400, 411 (W.D. Mo. 1987), *aff'd in part, rev'd in part*, 855 F.2d 1295 (8th Cir. 1988), *cert. granted*, 109 S. Ct. 1930 (1989)); *see also NOTE: Implementing Structural Injections: Getting a Remedy When Local Officials Resist*, 80 Geo. L.J. 2227 (1992) (discussing, *inter alia*, *Spallone v. United States*, 493 U.S. 265 (1990)). The North Carolina Supreme Court acknowledged this authority in its discussion of the separation of powers doctrine in *Alamance*, recognizing “incidental powers” (where one branch exercises some activities customarily assigned to another branch) may become necessary “in order to fully and properly discharge its duties.” *Alamance*, 329 N.C. at 97 (citing C. Baar, *Separate But Subservient—Court Budgeting in the American States* 155 (1975)).

North Carolina courts have recognized broad equitable powers to adjudicate constitutional wrongs, powers that have been described as far broader than a court’s general inherent power. *See* Felix F. Stumpf, *INHERENT POWERS OF THE COURTS*, 37-38 (1994). As noted above in the discussion of *Leandro I* and *II*, the North Carolina Supreme Court has noted repeatedly that should the State fail to carry out its obligations, the courts should be prepared to ensure the constitutional violations are addressed. Such action is not without precedent. In *Stephenson v. Bartlett*, the North Carolina Supreme Court directed the lower court to be prepared to enact its own remedial plan

“for the North Carolina Senate and North Carolina House of Representatives, and seek preclearance thereof, for the use in the 2002 election cycle” if the General Assembly failed to develop a new, constitutional redistricting plan in time for the upcoming election. 355 N.C. 354, 385 (2002).

The judiciary’s broad equitable powers have been instrumental in assisting the federal courts in striking down unconstitutional segregated school systems and in the process, effectuating orders that ordinarily deferred to the judgment of local school and state officials. In the second *Brown v. Board of Education* decision, the United States Supreme Court directed the federal district courts to be “guided by equitable principles” in effectuating relief, stating:

Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. . . . Courts of equity may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner. *But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them.*

349 U.S. 294, 300 (1955) (emphasis added).

Ten years later, faced with a defiant Virginia legislature that refused to open schools and comply with *Brown*’s desegregation mandates, the Supreme Court authorized the district court to order local officials to not only “reopen, operate and maintain without racial discrimination a public school system” but

also to, if necessary, *direct local taxing authorities* to “exercise the power that is theirs to levy taxes to raise funds” to pay for the appropriate operation of the schools. *Griffin v. County School Board*, 377 U.S. 218, 233 (1964). And closer to home, the Supreme Court held in the desegregation case, *Swann v. Mecklenburg Board of Education*, that “[o]nce a right and a violation have been shown, the scope of a district court’s equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.” 402 U.S. 1, 15 (1971).

The November 10 Order is consistent with the North Carolina Constitution and the decisions in this case, as well as the cases delineating the boundaries of the separation of powers. Indeed, failure to effectuate an appropriate, narrow remedy—one that State Defendants presented to the court and for which the State has more than sufficient funds to implement—would itself reflect a violation of the separation of powers: the judiciary failing to exercise its role to keep recalcitrant state actors in check with constitutional requirements.

As Justice Marshall stated in *Marbury v. Madison*, and the same equally applies to the state courts under the North Carolina Constitution:

Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government? if it is closed upon him, and cannot be inspected by him?

Marbury, 5 U.S. at 180, 2 L. Ed. 60.

CONCLUSION

For the above stated reasons, Plaintiff Parties respectfully urge the Court to deny Petitioner's requests for writs of prohibition and supersedeas and for a temporary stay. Intervenor's further ask the Court for additional time to provide the Court with additional briefing should the Court so desire.

This 30th day of November, 2021.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the North Carolina Rules of Appellate Procedure, counsel for Petitioner-Appellant certifies that the foregoing brief, which is prepared using a proportional font, is less than 8,750 words (excluding cover, caption, index, table of authorities, signature block, certificate of service, and this certificate of compliance) as reported by the word-processing software.

This the 30th day of November, 2021.

/s/ Elizabeth Haddix
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CERTIFICATE OF SERVICE

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NO. COA21-511

TENTH JUDICIAL DISTRICT

NORTH CAROLINA COURT OF APPEALS

IN RE: The 10 November 2021 Order)
in Hoke County Board of Education et)
al. vs. State of North Carolina and W.)
David Lee (Wake County File 95 CVS)
1158))

THE STATE OF NORTH CAROLINA'S RESPONSE TO THE
PETITION FOR WRIT OF PROHIBITION,
TEMPORARY STAY AND WRIT OF SUPERSEDEAS

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES	ii
INTRODUCTION	2
I. THE CONTROLLER’S ARGUMENT THAT SHE IS NOT BOUND BY THE LOWER COURT’S ORDER APPEARS AT ODDS WITH THE RULES OF CIVIL PROCEDURE AND OUR SUPREME COURT’S <i>LEANDRO II</i> DECISION.....	3
II. PETITIONER’S REMAINING OBJECTIONS TO THE APPLICABILITY OF THE 10 NOVEMBER 2021.	6
CONCLUSION.....	6
CERTIFICATE OF SERVICE.....	8
ATTACHMENT	10

TABLE OF CASES AND AUTHORITIES

Cases

<i>Hoke County Board of Education v. State</i> , 358 N.C. 605 (2004)	2, 5
<i>Gannon v. State</i> , 368 P.3d 1024 (Kan. 2016).....	5
<i>Pennsylvania v. West Virginia</i> , 262 U.S. 623 (1923).....	5
<i>State ex rel. Grimsley v. W. Lake Dev., Inc.</i> , 71 N.C. App. 779, review den'd denied sub nom.'d, 313 N.C. 514 (1984)	4
<i>United States v. Texas</i> , 340 U.S. 900 (1950).....	5, 6

Statutes

N.C. Gen. Stat. § 1A-1, 65(d)	4
N.C. Gen. Stat. § 7A-32(b)	1
N.C. Gen. Stat. § 7A-32(c)	1

Rules

N.C. R. App. P. 22	1, 3
N.C. R. App. P. 23	1, 3

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TEMPORARY STAY AND WRIT OF SUPERSEDEAS

TO THE HONORABLE NORTH CAROLINA COURT OF APPEALS:

NOW COMES the State of North Carolina, and pursuant to Rule 22 and 23 of the North Carolina Rules of Appellate Procedure, and N.C. Gen. Stat. § 7A-32(b) and (c), hereby responds to the Petition for Writ of Prohibition, Temporary Stay, and Writ of Supersedeas filed by Linda Combs, Controller of the State of North Carolina. The State agrees that a temporary stay and writ of supersedeas are warranted given the extraordinary history and gravity of this case.

INTRODUCTION

On 10 November 2021, the Honorable W. David Lee entered an order in the matter of *Hoke County Board of Education, et al. v. State of North Carolina, et al.* (95 CVS 1158, Wake County). That order adopted, with several modifications, a proposed order submitted by Plaintiffs and Plaintiff-Intervenors (collectively, “Plaintiffs”) on 1 November 2021 at the direction of the court. The court had already made abundantly clear that it intended to enter a remedial order against the State Defendants. As is customary at the remedial stage of litigation, both the State and the State Board of Education were permitted an opportunity to provide comments to the court on Plaintiffs’ proposed order. *See* Order entered by the Honorable Superior Court Judge W. David Lee in the 10th Judicial District in *Hoke County Board of Education v. State of North Carolina*, (Wake County File No. 95 CVS 1158) dated 18 October 2021, attached hereto as Ex. A. The State Defendants did not understand that opportunity as license to readdress the merits of the trial court’s decision, especially given that the merits portion of this case effectively ended in 2004 with the Supreme Court’s opinion in *Hoke County Board of Education v. State*, 358 N.C. 605 (2004) (“*Leandro II*”). Instead, the State directed its comments to the sole remaining issue to be resolved, i.e., the mechanics of how remedies could be implemented within the law.

With its 10 November 2021 order, the trial court endeavored to fashion a remedy based on its determination that the State had failed to satisfy its constitutional mandate of providing a sound, basic education to each of North Carolina's students. Specifically, the trial court's order addressed the failure of the State and the State Board of Education (collectively, "State Defendants") to secure the funding necessary to fully implement a Comprehensive Remedial Plan ("CRP") that would cause the State to meet its educational obligations. Now, Petitioner seeks relief from this Court in the form of extraordinary writs under Rules 22 and 23 of the North Carolina Rules of Appellate Procedure.

I. THE CONTROLLER'S ARGUMENT THAT SHE IS NOT BOUND BY THE LOWER COURT'S ORDER APPEARS AT ODDS WITH THE RULES OF CIVIL PROCEDURE AND OUR SUPREME COURT'S *LEANDRO II* DECISION.

Petitioner asserts that because she is not a party to this case, the trial court lacked the requisite jurisdiction to compel her performance to comply with the 10 November 2021 order. Specifically, Petitioner claims that the trial court lacked personal jurisdiction because she is not a party to the action; that she was not provided notice of any hearing; and, that she was therefore denied the opportunity to be heard in violation of due process.

The operative question would appear to be whether Petitioner is an agent of the State of North Carolina, bound by court orders that bind the State

of the North Carolina. North Carolina law speaks to that question.

The North Carolina Rules of Civil Procedure provide that “[e]very order granting an injunction . . . is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice in any manner of the order by personal service.” N.C. Gen. Stat. § 1A-1, 65(d). Applying that rule, this Court has held that an individual who does not comply with a court’s order may be subject to contempt of court despite not being named individually as a party so long as the individual has the capacity to comply with the order, has notice of the order, and is either a named party, a named party’s officer, agent, servant, employee, attorney, or is acting in concert with a named party. *State ex rel. Grimsley v. W. Lake Dev., Inc.*, 71 N.C. App. 779, 781, *review den’d denied sub nom.’d*, 313 N.C. 514 (1984).

At an earlier stage of this case, the North Carolina Supreme Court explained that “[c]ertainly, when the State fails to live up to its constitutional duties, a court is empowered to order the deficiency remedied, and if the offending branch of government or its agents either fail to do so or have consistently shown an inability to do so, a court is empowered to provide relief by imposing a specific remedy and instructing the recalcitrant state actors to implement it.” *Hoke Cnty. Bd. of Educ. v. State*, 358 N.C. 605, 642 (2004).

At least one other jurisdiction has held in a similar situation that orders against the State itself are binding on state officials. In 2015, a Kansas trial court found that the state had not complied with the Kansas Constitution's requirement that the State adequately fund public education. *See Gannon v. State*, 368 P.3d 1024, 1029 (Kan. 2016). The trial court ordered the State to spend an additional \$54 million on education to remedy the State's noncompliance. *Id.* To effectuate its remedial order, the trial court joined as defendants several state officials charged with overseeing the State's finances. *Id.* at 1030. The Kansas Supreme Court held that, because the State was a defendant, it was unnecessary for the trial court to join the state officials. *Id.* at 1038. "[R]egardless of whether the officials themselves are parties," the Kansas Supreme Court explained, Kansas's equivalent of Rule 65(d) makes clear that the state officials "would be bound by an injunction against the State because the State is a party and they are officers or agents of the State."¹ *Id.*

¹ Where a State is a defendant, courts commonly enjoin the State (or senior state officials), and expect State officials to comply with the injunction. *See, e.g., Pennsylvania v. West Virginia*, 262 U.S. 623, 624 (1923) (ordering "[t]hat the defendant state, and her several officers, agents and servants, are hereby severally enjoined from enforcing, or attempting to enforce" the challenged law, even though the State of West Virginia was the only named defendant); *United States v. South Carolina*, 11-cv-2958 at 1 (D. S.C. Mar. 4, 2014) (permanently enjoining the "State of South Carolina," including the Governor and Attorney General, even though neither the Governor nor the Attorney General were parties to the action); *cf. United States v. Texas*, 340 U.S. 900 (1950) (enjoining

II. PETITIONER’S REMAINING OBJECTIONS TO THE APPLICABILITY OF THE 10 NOVEMBER 2021.

With her remaining arguments, Petitioner suggests that the trial court’s order conflicts with the North Carolina Constitution, duly enacted General Statutes, and our State’s jurisprudence. Petitioner does not discuss *Leandro II*, in which our Supreme Court has addressed questions pertinent to that issue. In light of the history and gravity of the issues in this case, including the rulings of our Supreme Court at previous stages of this case, the State agrees that the merits of the trial court’s order warrant appropriate review on appeal before they are implemented.

CONCLUSION

The State is mindful of the unique circumstances and novel issues that this case presents. In light of the gravity of the issues in this case and the need for appropriate appellate review of the merits, the State believes that the issuance of a Writ of Supersedeas and a temporary stay is appropriate.

“the State of Texas, its privies, assigns, lessees, and other persons claiming under it” even though the State was the only named defendant in the action).

Respectfully submitted, this the 30th day of November, 2021.

JOSHUA H. STEIN
Attorney General

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the State of North Carolina's Response to the Petition for Writ of Prohibition, Temporary Stay, and Writ of Supersedeas was served upon the following parties on this day by email and US mail as follows:

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This the 30th day of November, 2021.

/s/ Amar Majmundar
Amar Majmundar
Senior Deputy Attorney General

ATTACHMENT

Ex. A Order entered by the Honorable Superior Court Judge W. David Lee in the 10th Judicial District in *Hoke County Board of Education v. State of North Carolina*, (Wake County File No. 95 CVS 1158) dated 18 October 2021.

STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

COUNTY OF WAKE

95 CVS 1158

HOKE COUNTY BOARD OF EDUCATION;
HALIFAX COUNTY BOARD OF EDUCATION;
ROBESON COUNTY BOARD OF
EDUCATION; CUMBERLAND COUNTY
BOARD OF EDUCATION; VANCE COUNTY
BOARD OF EDUCATION; RANDY L. HASTY,
individually and as Guardian Ad Litem of
RANDELL B. HASTY; STEVEN R. SUNKEL,
individually and as Guardian Ad Litem of
ANDREW J. SUNKEL; LIONEL WHIDBEE,
individually and as Guardian Ad Litem of
JEREMY L. WHIDBEE; TYRONE T.
WILLIAMS, individually and as Guardian Ad
Litem of TREVELYN L. WILLIAMS; D.E.
LOCKLEAR, JR., individually and as Guardian
Ad Litem of JASON E. LOCKLEAR; ANGUS B.
THOMPSON II, individually and as Guardian
Ad Litem of VANDALIAH J. THOMPSON;
MARY ELIZABETH LOWERY, individually
and as Guardian Ad Litem of LANNIE RAE
LOWERY, JENNIE G. PEARSON, individually
and as Guardian Ad Litem of SHARESE D.
PEARSON; BENITA B. TIPTON, individually
and as Guardian Ad Litem of WHITNEY B.
TIPTON; DANA HOLTON JENKINS,
individually and as Guardian Ad Litem of
RACHEL M. JENKINS; LEON R. ROBINSON,
individually and as Guardian Ad Litem of
JUSTIN A. ROBINSON,

Plaintiffs,

and

CHARLOTTE-MECKLENBURG BOARD OF
EDUCATION,

Plaintiff-Intervenor,

and

RAFAEL PENN; CLIFTON JONES,
individually and as Guardian Ad Litem of
CLIFTON MATTHEW JONES; DONNA

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JENKINS DAWSON, individually and as
Guardian Ad Litem of NEISHA SHEMAY
DAWSON and TYLER ANTHONY HOUGH-
JENKINS,

Plaintiff-Intervenors,

v.

STATE OF NORTH CAROLINA and the
STATE BOARD OF EDUCATION,

Defendants,

and

CHARLOTTE-MECKLENBURG BOARD OF
EDUCATION,

Realigned Defendant.

ORDER

This matter comes before the Court following the Court's entry of an Order on First Progress Reports for Implementation of Comprehensive Remedial Plan ("Order on First Progress Reports") on September 28, 2021. In the Order on First Progress Reports, this Court ordered the parties to appear before the Court on October 18, 2021, to inform the Court of the State's progress in securing the full funds necessary to implement the Comprehensive Remedial Plan. The Court conducted the hearing as scheduled on October 18, 2021, with counsel for the parties in attendance.


At the hearing, this Court was informed by counsel that an appropriations bill in which the Comprehensive Remedial Plan is fully funded has not, as of that date, been finalized and enacted. Because the full funds necessary to implement the Comprehensive Remedial Plan were not secured by October 18, 2021, the Court heard proposals for how the Court may use its remedial powers to secure such funding.

Based upon the foregoing, the Court hereby ORDERS that:

1. Plaintiffs and Plaintiff-Intervenors shall have until November 1, 2021, to submit to the Court any additional authorities, memoranda of law, or proposed orders for the Court's consideration on the use of its remedial powers, which include, but are not necessarily limited to: a writ of mandamus, a legislative injunction, sanctions, or a combination thereof.

2. State Defendants shall have until November 8, 2021, to submit to the Court a response to Plaintiffs' and Plaintiff-Intervenors' submissions, which may include any additional authorities, memoranda of law, or proposed orders for the Court's consideration.
3. The Court may, at its discretion, further order the parties to appear at a hearing prior to entering a remedial order based upon the forthcoming submissions of the parties.

SO ORDERED, this the 18th day of October, 2021.


The Honorable W. David Lee
North Carolina Superior Court Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing document was served on the persons indicated below by electronic mail transmission, addressed as follows:

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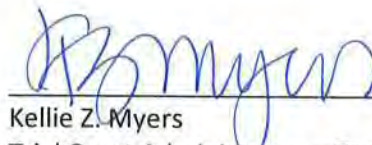
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This the 22nd day of October, 2021.



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