

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  
20-CVS-8346

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**NOTICE OF APPEARANCE OF COUNSEL ON BEHALF OF**  
**LEGISLATIVE INTERVENOR-DEFENDANTS**  
**PHILIP E. BERGER AND TIMOTHY K. MOORE**

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PLEASE TAKE NOTICE that 8 December 2021, the undersigned counsel, representing Legislative Intervenor-Defendants Philip E. Berger, in his capacity as President *Pro Tempore* of the North Carolina Senate, and Timothy K. Moore, in his capacity as Speaker of the North Carolina House of Representatives, as agents of the State on behalf of the General Assembly (the “Legislative Intervenors”), filed a Notice of Intervention as of right in the Superior Court in this matter, pursuant to N.C. Gen. Stat. § 1-72.2(b), a copy of which is attached hereto as Exhibit A.

Accordingly, Matthew F. Tilley, Russ Ferguson, and W. Clark Goodman, of the law firm Womble Bond Dickinson (US) LLP hereby enter an appearance on behalf of the Legislative Intervenors in this matter and notify the Court and counsel of record that service of the Legislative Intervenors may be had at the following address:

Matthew F. Tilley  
matthew.tilley@wbd-us.com

Russ Ferguson  
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301 S. College Street  
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Phone: 704-350-6361

This the 21<sup>st</sup> day of December, 2021.

Respectfully submitted,



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*Pursuant to Rule 33(b) I certify that all of  
the attorneys listed below have authorized  
me to list their names on this document as if  
they had personally signed it.*

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*Attorneys for Legislative Intervenor-  
Defendants, Philip E. Berger and  
Timothy K. Moore*

## CERTIFICATE OF SERVICE

The undersigned certifies that on December 21, 2021, he caused a true and correct copy of the foregoing document to be served via U.S. Mail upon the following:

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\_\_\_\_\_  
Matthew F. Tilley

# **EXHIBIT A**

STATE OF NORTH CAROLINA

COUNTY OF WAKE

HOKE COUNTY BOARD OF  
EDUCATION, et al.,

Plaintiffs,

and

CHARLOTTE-MECKLENBURG BOARD  
OF EDUCATION,

Plaintiff-Intervenor,

and

RAFAEL PENN, et al.,

Plaintiff-Intervenors,

v.

STATE OF NORTH CAROLINA and the  
STATE BOARD OF EDUCATION,

Defendants,

and

CHARLOTTE-MECKLENBURG BOARD  
OF EDUCATION,

Realigned Defendant,

and

PHILIP E. BERGER, in his official capacity  
as President Pro Tempore of the North  
Carolina Senate, and TIMOTHY K. MOORE,  
in his official capacity as Speaker of the  
North Carolina House of Representatives,

Intervenor-Defendants.

FILED

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
95-CVS-1158

2021 DEC -8 P 4:17

WAKE CO., C.S.C.  
BY

**NOTICE OF INTERVENTION**

Pursuant to N.C. Gen. Stat. § 1-72.2(b), Legislative Intervenor-Defendants Philip E. Berger, in his official capacity as President *Pro Tempore* of the North Carolina Senate, and Timothy K. Moore, in his official capacity as Speaker of the North Carolina House of Representatives (the “Legislative Intervenor”) hereby give notice of their intervention, as of right, as agents of the State on behalf of the General Assembly in this matter. In support of this notice, Legislative Intervenor show the Court the following:

1. “It is the public policy of the State of North Carolina that in any action in any North Carolina State court in which the validity or constitutionality of an act of the General Assembly or a provision of the North Carolina Constitution is challenged, the General Assembly, jointly through the Speaker of the House of Representatives and the President Pro Tempore of the Senate, constitutes the legislative branch of the State of North Carolina and the Governor constitutes the executive branch of the State of North Carolina, and when the State of North Carolina is named as a defendant in such cases, both the General Assembly and the Governor constitute the State of North Carolina.” N.C. Gen. Stat. § 1-72.2(a).

2. Thus, “[t]he Speaker of the House of Representatives and the President Pro Tempore of the Senate, as agents of the State, by and through counsel of their choice, including private counsel, shall jointly have standing to intervene on behalf of the General Assembly as a party in any judicial proceeding challenging a North Carolina statute or provision of the North Carolina Constitution.” N.C. Gen. Stat. § 1-72.2(b). “Intervention pursuant to this section shall be effected upon the filing of a notice of intervention of right in the trial or appellate court in which the matter is pending regardless of the stage of the proceeding.” *Id.*

3. At issue here are challenges to both the General Assembly’s legislation and provisions of the North Carolina Constitution.

4. The Appropriations Clause of the North Carolina State Constitution provides that “[n]o 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.” N.C. Const. Art. V, § 7(1). As a result, the North Carolina Supreme Court has held “the power of the purse is the exclusive prerogative of the General Assembly.” *Cooper v. Berger*, 376 N.C. 22, 37 (2020).

5. Further, while the North Carolina Constitution requires the Governor to prepare and recommend a budget to the General Assembly, only the General Assembly can enact the budget. N.C. Const. Art. III, § 5.

6. On November 10, 2021, this Court issued an Order compelling the State Controller and the State Treasurer, along with the Office of State Budget and Management, to transfer funds to certain State agencies to be used for purposes ordered by the Court. *Id.* The Order did so despite acknowledging the North Carolina Supreme Court’s recent holding 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.” *Id.* at 14 (quoting *Cooper v. Berger*, 376 N.C. at 37). The Court stayed implementation of its Order for 30 days. *Id.*

7. On November 18, 2021, while the Court’s Order was stayed, the General Assembly, in accordance with the constitutional powers described above, enacted the Current Operations and Appropriations Act of 2021, N.C. Sess. Law. 2021-180 (the “State Budget”), which the Governor signed into law the same day. Among other things, the State Budget appropriated in Net General Funds over the biennium \$21.5 billion for K-12 public education—approximately 41% of the total biennial budget. The State Budget, however, does not contain allocations identical to the Court’s Order.



8. The Court's Order seeks to direct State officials to pay money from the State treasury in a manner contrary appropriations made in the State Budget. In doing so, the Order contravenes the doctrine of Separation of Powers reflected in Article I, Section 6 of the State Constitution, which provides that, "The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." As our Courts have held, "[b]ecause the State constitution vests the authority to appropriate money solely in the legislative branch, the Separation of Powers Clause 'prohibits the judiciary from taking public monies without statutory authorization.'" *Richmond Cty. Bd. of Educ. v. Cowell*, 254 N.C. App. 422, 427 (2017) (quoting *In re Alamance Cty. Court Facilities*, 329 N.C. 84, 99, 405 S.E.2d 125, 132 (1991)). To do otherwise would cause the judiciary to impermissibly "arrogate [to itself] a duty reserved by the constitution exclusively to another body." *Id.*

9. Because the Order now effectively challenges the both the State Budget—which constitutes an act of the General Assembly—as well as the General Assembly's authority under the State Constitution, including the Appropriations Clause as well as the doctrine of Separation of Powers, Legislative Intervenors are entitled to intervene as of right on behalf of pursuant to N.C. Gen. Stat. § 1-72.2(b).

WHEREFORE, Legislative Intervenors, as agents of the state and on behalf of the General Assembly, provide notice of their intervention as of right in this case, through the counsel listed below, pursuant to N.C. Gen. Stat. § 1-72.2(b), for the purposes of responding to the Court's November 10, 2021, Order and associated proceedings challenging act(s) of the General Assembly and provisions of the North Carolina State Constitution.

This the 8<sup>th</sup> day of December, 2021.

**WOMBLE BOND DICKINSON (US) LLP**

A handwritten signature in black ink, appearing to read "Matthew Tilley", is written over a horizontal line.

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***Attorneys for Intervenor-Defendants***

**CERTIFICATE OF SERVICE**

The undersigned certifies that on December 8, 2021, he caused a true and correct copy of the foregoing document to be served via U.S. Mail upon the following:

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