No. 425A21 TENTH JUDICIAL 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, et al.,
Plaintiff-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
95 CVS 11582

From the N.C. Court of Appeals
P21-511

****

RESPONSE TO PLAINTIFFS' AND PLAINTIFF-INTERVENORS' PETITIONS FOR WRIT OF CERTIORARI; MOTION TO DISMISS PLAINTIFFS' AND PLAINTIFF-INTERVENORS' NOTICES OF APPEAL AND PETITIONS FOR DISCRETIONARY REVIEW; AND CONDITIONAL CROSS PETITION FOR WRIT OF SUPERSEDEAS

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TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

NOW COMES Respondent-Petitioner Linda Combs, Controller of the State of North Carolina and a taxpayer (hereinafter "Controller", and respectfully petitions this Court to deny or dismiss Plaintiffs-Appellants (here in after "Plaintiffs") and Plaintiff-Intervenors- Movants (hereinafter "Plaintiff-Intervenors") Motion for Writ of Certiorari, Dismiss the Plaintiffs' Notice of Appeal and Petition for Discretionary Review and should the court modify the Writ of Prohibition grant Controller's Petition for a Writ of Supersedeas on the following grounds:

1. The Writ of Prohibition is justified based on the plain language of Article V, §7 of the Constitution of North Carolina and binding precedents applying this law.

2. Petitions are premature and not ripe for determination at this time. The 10 November 2021 Order of which the Controller has complained has now been timely appealed to the N.C. Court of Appeals from the trial court by both the State of North Carolina and the General Assembly. (See Exhibit 1 and 2). The time for the parties to file cross-appeals has not yet expired and all the issues which may be presented to the Appellate Division have not been articulated. The Record on Appeal in this matter has not been settled by the parties, filed or docketed in the Court of Appeals. A complete record is a

necessary predicate for a considered appellate opinion. Because the Plaintiff and Plaintiff-Intervenors have not exhausted their appeal remedies at this time, and have not lost their right to have this court review the writ of prohibition in the underlying case appeal from the November 10, 2021 order to this court under Appellate Rule 21, they are not entitled to file a Writ of Certiorari.

3. The Plaintiffs Petition for Discretionary Review and their Notice of Appeal are not the appropriate procedural vehicle to seek review of an order of the N.C. Court of Appeals.

4. All of Plaintiffs and Plaintiffs-Intervenors' argument will be the subject of extensive argument in the underlying appeal of the case of the 10 November 2021 order. Therefore, denial of their motions and writs at this time do not prejudice their ability to present their case in the Appellate Division.

5. Neither the Plaintiffs nor the Plaintiff-Intervenors have filed a by-pass motion to have this court determine this appeal. In the event they did, and this court granted the motion, the Order of 10 November, 2021 could be reviewed in an orderly manner with full briefing from all parties.

6. At the present time, the Respondent-Petitioner has obtained a Writ of Prohibition preventing the Judge in this case from executing the Order of 10 November, 2021 against her. The judge's initial stay has expired. There

is no other motion to stay or writ of supersedeas currently in place preventing the execution of the trial court's order since the judge's initial stay or since the writ of prohibition was issued and the Court of Appeals decided the writ of supersedeas was "moot". Since the Writ was issued no party has requested a stay from the trial court, a temporary stay or writ of supersedeas in this appeal. Unless the Writ of Prohibition remains in place, or the Supreme Court issues a Writ of Supersedeas staying execution of the trial court's order, execution of the order can commence. Without a Writ of Prohibition or Supersedeas Respondent-Petitioner would be prejudiced legally by requiring her to choose between complying with the court's order or violating statutes forbidding her from writing checks without an enabling statute. N. C. Gen. Stat. §143C-1-2(a). If this court were to grant any of the Plaintiff's Motions or Petitions or Plaintiff-Intervenors Petition and modify the Controller's Writ of Prohibition, the Respondent-Petitioner requests the Court to consider this filing a Cross-Petition for Writ of Superseadeas to stay execution of the trial court's order until the mandate of the case has been returned to the trial court following completion of the present appeals.

STATEMENT OF RELEVANT FACTS AND PROCEDURAL HISTORY

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 as Exhibit 3. 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 4.

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(b)(1) shall take no longer than five (5) business days after issuance of this Order."

The Order was stayed by Judge Lee for 30 days to enable the parties to prepare to comply with the order.

On 18 November 2021, the General Assembly enacted Current Operation Appropriations Act for Fiscal Years 2021-23 (SB-105) has been signed by the Governor on November 18, 2021 and enrolled. This budget act contains funds not considered by Judge Lee in his order of 10 November. See SL 2021-189 § 7.3(*a*).

After conferring with other non-parties, in late November 2021, it appeared to counsel no appeal of the Order was likely to be filed by any party. Therefore, the Controller, as a non-party, filed the Petition for Writ of Prohibition and served under Appellate Rule 26 by electronic mail on all parties, including Judge Lee to whom the Writ was directed. Judge Lee was also subsequently served by the Sheriff of Union County at his home and by certified mail. A copy of the Controller's Petition for Writ of Prohibition is attached hereto as Exhibit 5. After filing the Petition for Writ of Prohibition, the motion panel of the Court of Appeals *sua sponte* entered an order shortening the time for the Respondents to file responses. Petitioner Combs did not request a shortening of the time for consideration by the Court of Appeals. A copy of this order is attached as Exhibit 6. Following the entry of this order, the parties desiring to respond, responded to the Petition for Writ timely on 30 November 2021. The Court granted the petition by written order

including a rare discussion of the judges' views of the case. The order and discussion attached as Exhibit 7. The order is unpublished.

Subsequent to the granting of the Writ of Prohibition on 30 November 2021, the State of North Carolina filed. a Notice of Appeal serving it on all parties (Exhibit 1). Subsequently, the General Assembly through Counsel intervened in the matter and filed a Notice of Intervention as of Right and Notice of Appeal (Exhibit 2). On 16 December, 2021 the Plaintiffs filed their Notice of Appeal, Petition for Discretionary Review and Petition for Writ of Certiorari. and a verification of their appellate pleadings (https://www.ncappellatecourts.org/show-file.php?document_id=295899 https://www.ncappellatecourts.org/show-file.php?document_id=295958); and Plaintiffs-Intervenors filed a Petition for Writ of Certiorari (https://www.ncappellatecourts.org/show-file.php?document_id=295948).

REASONS WHY THE PLAINTIFF'S AND PLAINTIFF-INTERVENOR'S REQUESTED RELIEF SHOULD BE DISMISSED OR DENIED.

I. THE WRIT OF PROHIBITION IS JUSTIFIED BASED ON THE PLAIN LANGUAGE OF ARTICLE V, §7 OF THE CONSTITUTION OF NORTH CAROLINA AND THE BINDING PRECEDENTS APPLYING THIS LAW.

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

The Controller was *never* personally served with 10 November 2021 Order or its proposed terms before its issuance. She was a stranger to this litigation and presumably her interests were to be represented by the Attorney General. When a court seeks to mandamus or issue a mandatory injunction compelling a state officer or citizen to take a specific action, the state officer or citizen is entitled at a minimum to procedural due process under Article I, §19 of the Constitution of North Carolina and the 14th Amendment of the United States Constitution. 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*. Notwithstanding the Rules of Civil Procedure presumption the Controller is an agent of the

State, when the litigation is in the nature of a mandamus or mandatory injunction the necessity of minimal procedural due process is required. The Controller maintains the trial court therefore lacked 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.

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.

In addition, the 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]

The legislature has provided statutes to structure this Article and 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 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

[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).

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, and 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]

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[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

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 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), aff'd, 376 N.C. 22, 852 S.E.2d 46, 2020 N.C. LEXIS 1133 (2020). In addition to these reasons, the order provides additional discussion of how the trial judge misinterpreted *Richmond County vs Crowell*, 254 N.C. App 422, 803 S.E. 2nd 27 (2017), a precedential decision of the Court of Appeals and relied on by the trial court as authority for its order. (See Exhibits 5 and 7)

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.

II. THE PETITIONS FOR WRIT OF CERTIORARI ARE PREMATURE AND NOT RIPE AND SHOULD BE DENIED OR DISMISSED

The Constitution of North Carolina grants the Supreme Court the ability to consider extraordinary writs including writs of certiorari under Article IV, Section 12(1) See also N.C. Gen. Stat. § 7A-32(b). To provide implementing procedures for this authority, the Supreme Court has adopted the Rules of Appellate Procedure which govern its exercise. Rule 21 (2) of the N.C. Rules of Appellate Procedure reads in relevant part as follows:

> **Certiorari (a) Scope of the Writ**. **(2) Review of the Judgments and Orders of the Court of Appeals**. The writ of certiorari may be issued by the Supreme Court in **appropriate circumstances** 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.**

For further discussion of the history and origins of these four writs, see ELIZABETH BROOKS SCHERER & MATTHEW NIS LEERBERG, *North Carolina Appellate Practice and Procedure* § 20 (Remedial, Prerogative, and Extraordinary Writs of the Appellate Courts) (2018).7A-32(b).

Plaintiffs' and Plaintiff-Intervenors' right to appeal the underlying issues has not been impaired. As shown in the above cited procedural history of the case, neither the Plaintiffs nor the Plaintiff-Intervenors have lost any right to appeal or petition for discretionary review at the appropriate time in

the underlying case for failure to take timely action. The legal issues raised in Writ of Prohibition issued by the Court of Appeals can be appealed to the Supreme Court along with any other legal issues, raised in the Notices of Appeal of the 10 November 2021 Order. Neither Plaintiffs nor Plaintiffs-Intervenors have explained why their right to prosecute their appeal has been "lost by failure to take timely action". By filing a Notice of Appeal (discussed below) it is obvious the Plaintiffs litigation position is that a right to appeal exists for orders of the Court of Appeals. This is contrary to the Rules and procedures governing orders of that court. These can only be addressed by the Writ of Certiorari, like the one filed by the Plaintiff-Intervenors. All legal issues presented in their filings could be handled through regular appellate process whether by direct appeal or filing a direct appeal, after the Court of Appeals rules on all appellate issues and filing a Writ of Certiorari at a later time.

Furthermore, the Court of Appeals found, in addition to the arguments presented by counsel, the Plaintiffs and Plaintiff-Intervenors' legal arguments were unpersuasive. The legal arguments do not explain away clear legal authority to the contrary on the following issues: (1) Why without notice and an opportunity to be heard, the trial Court had personal jurisdiction over the Controller to mandamus her to do an illegal act?; (2) Why the North Carolina's

Constitution in Article V, Section 7 and the statutory provisions implementing this section are not controlling; and, (3) Why controlling precedent from both the Supreme Court and the Court of Appeals are not binding on the trial court? (For a detailed discussion of the arguments herein see Exhibits 5 and 7).

Assuming, for the sake of argument only, the decision of the motion panel of the Court of Appeals is an "unpublished" opinion of the court and has become the law of the case, the parties have a remedy they have not requested this court to invoke and that is a by-pass motion to remove the current appeal from the Court of Appeals, after it has been docketed, and to decide the full appeal on the merits after the record has been settled, filed and docketed and all briefs have been completed. Rule 21 discussed above implies the legal predicate for this court to exercise its Writ of Certiorari, there has to be an "appropriate circumstance". Currently the circumstances are not appropriate but after a decision of the Court of Appeals on all issues appropriate circumstances might then exists. Deciding this case based upon the incomplete filings of the Plaintiffs and Plaintiff-Intervenors at this stage of the appeals would be fundamentally unfair to the other litigants in this case, including the "non-parties" who have been benefited by the issuance of the Writ of Prohibition granted below.

III. PLAINTIFFS NOTICE OF APPEAL AND MOTION FOR DISCRETIONARY REVIEW SHOULD BE DISMISSED

Plaintiff's Notice of Appeal and Motion for Discretionary Review are premised upon the faulty legal contention that orders of the Court of Appeals are in fact opinions of the Court of Appeals. While it is rare the Court Appeals explains the reasons for issuance or denial of a motion in the court of appeals. Such explanations do not convert an a "order" into an "opinion" any more that the trial court could convert its judgment into an appropriation statute. As explained above, should the Supreme Court decide to overrule the motions panel on this issue and find the Court of Appeals regular panel lacked the ability to reconsider the issue, then in that event the Supreme Court can either *sua sponte* direct the case to "by-pass" the Court of Appeals and rule on all issues including the Writ of Prohibition or await a motion to do so. Rule 21 (2) of the N.C. Rules of Appellate Procedure, as discussed above, provides the sole method of judicial review of an order of the Court of Appeals.

The language of Rules 14 and 15 of the N.C. Rules of Appellate Procedure support this view. Under Rule 14 Plaintiffs' Notice of Appeal is prematurely filed. A notice of appeal relates only to "decisions" of the Court of Appeals and may be served within fifteen days after the mandate of the Court of Appeals has been issued to the trial tribunal. No decision of the Court of Appeals has been reached. No "mandate" has been issued. The Writ of Prohibition only

applies to the Controller and not to any other state official. The Controller concedes that Rule 16 would give this Court the ability to by-pass the Court of Appeals, however, the Plaintiffs want to use this device not just to review the Writ of Prohibition but to review the entire case, with a limited record. This result is not contemplated by Rule 16. However, if the court wants to convert it into a by-pass motion and allow an orderly appeal of all issues after settlement of the record and docketing of the record, it has the power to do so but judicial prudence should dictate whether or not this Court would benefit by resolution of some appellate issues in the Court of Appeals in the regular order of appeals. Put differently, the Court of Appeals regular panel may resolve the need for Supreme Court review of all issues including the constitutional issues.

IV. IN THE EVENT THE WRIT OF PROHIBITION IS MODIFIED, THIS COURT SHOULD GRANT CONTROLLER'S CONDITIONAL CROSS MOTION FOR SUPERSEDEAS

The trial court's order is currently enjoined as to the Controller at the present time only by the Writ of Prohibition. Trial Court Orders are not automatically stayed upon appeal. Normally, a party should ask the trial court for a stay however the Controller was a non-party and had no standing or unconditional right to move for a stay in the trial court. She did have standing in the Court of Appeals to seek a Writ of Prohibition and Supersedeas. When

the Controller's Petition was filed, the Controller's companion alternative motion for temporary stay and Writ of Supersedeas was also filed in the Court of Appeals. Once a favorable decision was reached in the Writ of Prohibition, the Court of Appeals panel determined the motion for temporary stay and Writ of Supersedeas to be "moot". (See Exhibit 8.) However, should the Supreme Court modify the Writ of Prohibition, as requested by the Plaintiffs and Plaintiffs-Intervenors, then in that event, Judge Lee's Order would be enforceable during the pendency of the appeal.

A writ of supersedeas and temporary stay are extraordinary writs that issue 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)

At the Court of Appeals, the State of North Carolina agreed a Writ of Superseadeas should be issued. Therefore, in the unlikely event the Court should vacate the Writ of Prohibition issued by the Court of Appeals which the Controller feels it should not do, then in that event, the Supreme Court should issue a Writ of Superseadeas because it would no longer be "moot". Therefore a Writ of Supersedeas should be issued by this Court until the Appellate

Division can reach a determination on the merits of the appeals in the underlying case.

RELIEF REQUESTED

For the foregoing reasons, Petitioner respectfully requests that this Court to dismiss the Plaintiffs; and Plaintiffs-Intervenors' petition for writ of certiorari, dismiss the Plaintiffs Notice of Appeal and Petition for Discretionary Review and, in the alternative in the event the Court vacates or modifies the Controller's Writ of Prohibition, then in that even the Court should grant the Controller's Cross Motion for a Writ of Supersedeas staying any execution on the 10 November 2021 Order until such time as the Mandate has returned to the trial court.

Respectfully submitted this 28th day of December, 2021.

HIGGINS BENJAMIN, PLLC

Electronically Submitted

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Attorney for Petitioner

APPENDIX

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

Exhibit 1	Notice of Appeal by State of North Carolina
Exhibit 2	Notice of Intervention as of Right and Appeal
Exhibit 3	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 4	Memorandum of Law dated 8 November 2021 supplied to Judge Lee by the Attorney General of North Carolina
Exhibit 5	Controllers Petition for Writ of Prohibition
Exhibit 6	Court of Appeals Order Shortening the Time for Response
Exhibit 7	Court of Appeals Order Granting the Writ of Prohibition
Exhibit 8	Court of Appeals Order Dismissing Writ of Supersedeas as moot

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 RESPONSE TO PLAINTIFFS' AND PLAINTIFF-INTERVENORS' PETITIONS FOR WRIT OF CERTIORARI; MOTION TO DISMISS PLAINTIFFS' AND PLAINTIFF-INTERVENORS' NOTICES OF APPEAL AND PETITIONS FOR DISCRETIONARY REVIEW; AND CONDITIONAL CROSS PETITION FOR WRIT OF SUPERSEDEAS 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

ROBERT N. HUNTER, JR.

Sworn to and subscribed before me,
this 28th day of December, 2021.

Marjorie Patricia Julian

Marjorie Patricia Julian, Notary Public

My commission expires: October 20, 2025

Linda Combs

LINDA COMBS

Sworn to and subscribed before me,
this 28th day of December, 2021.

Shawn Elder

Shawn Elder, Notary Public
(Print Name)

My commission expires: 5-25-25

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Response to Plaintiffs' and Plaintiff-Intervenors' Petitions for Writ of Certiorari, Motion to Dismiss Plaintiffs' Notice of Appeal and Petition for Discretionary Review and Conditional Cross Petition for Writ of Supersedeas served on counsel for the parties via email and U.S. Mail, postage prepaid, addressed as follows:

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Attorneys for Berger and Moore, Intervenors

This 28th day of December, 2021.

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Attorney for Petitioner

EXHIBIT 1

STATE OF NORTH CAROLINA

FILED

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

COUNTY OF WAKE

2021 DEC -7 P 1:39

WAKE CO., C.S.C.

BY

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,

THE STATE OF NORTH CAROLINA'S NOTICE OF APPEAL

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,

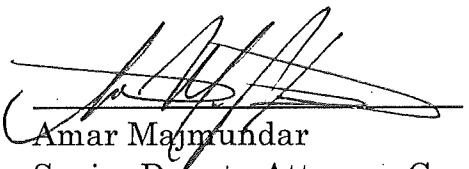
Realigned Defendant.

TO THE HONORABLE NORTH CAROLINA COURT OF APPEALS:

NOW COMES Defendant, the State of North Carolina, pursuant to N.C. Gen. Stat. § 7A-27 and N.C. Gen. Stat. § 1-277, and hereby gives notice of appeal to the North Carolina Court of Appeals from the order entered in the above-styled matter on 10 November 2021 by the Honorable W. David Lee, Superior Court, Wake County.

Respectfully submitted, this the 7th day of December, 2021.

JOSHUA H. STEIN
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the forgoing Notice of Appeal was served on the parties to this action by depositing a copy of same on the date shown below with the United States Mail, first-class postage prepaid, and email, addressed as follows:

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Attorneys for Penn-Intervenors

This the 7th day of December, 2021.

Amar Majmundar
Senior Deputy Attorney General

EXHIBIT 2

STATE OF NORTH CAROLINA

COUNTY OF WAKE

FILED
2021 DEC -8 P 4:17
WAKE CO., C.S.C.
BY

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

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.

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 Intervenors") 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 Intervenors 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.

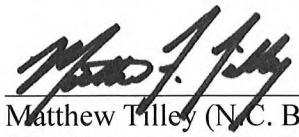
8. The Court's Order seeks to direct State officials to pay money from the State treasury in a manner contrary appropriations made in the State Budget. In doing so, the Order contravenes the doctrine of Separation of Powers reflected in Article I, Section 6 of the State Constitution, which provides that, "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 8th day of December, 2021.

WOMBLE BOND DICKINSON (US) LLP



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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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Matthew F. Tilley

STATE OF NORTH CAROLINA

COUNTY OF WAKE

FILED
2021 DEC -3 P 4:17
WAKE CO., C.S.C.
BY

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

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.

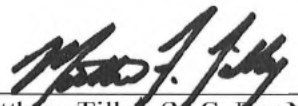
NOTICE OF APPEAL BY INTERVENOR-DEFENDANTS

TO THE HONORABLE COURT OF APPEALS OF NORTH CAROLINA:

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, hereby give notice of appeal to the Court of Appeals of North Carolina from the Order entered in this action on November 10, 2011 by the Honorable W. David Lee.

This the 8th day of December, 2021.

WOMBLE BOND DICKINSON (US) LLP



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W. Clark Goodman (N.C. Bar No. 19927)

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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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Counsel for State Board of Education

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Counsel for Charlotte-Mecklenburg Schools

Matthew F. Tilley

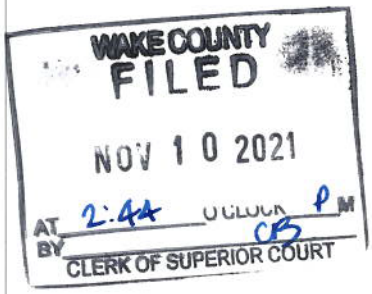
EXHIBIT 3

STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
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 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 follows[1]:

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

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[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.

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[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

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

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

EXHIBIT 4

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

EXHIBIT 5

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

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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). Ho*ke 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

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[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*

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[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), aff'd, 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
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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:

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

MARJORIE PATRICIA JULIAN NOTARY My Commission Expires 10-20-2025 PUBLIC GUILFORD COUNTY, NC

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)

KOURTNEY BATOT NOTARY PUBLIC DAVIDSON COUNTY, NC

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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This 24th day of November, 2021.

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Electronically Submitted
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Attorney for Petitioner

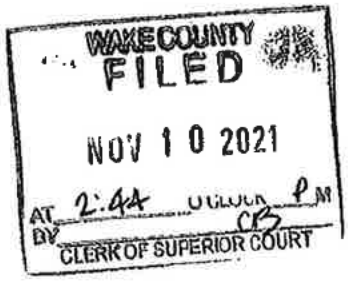
EXHIBIT A

STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
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 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 follows[1]:

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

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[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.

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[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

CERTIFIED TRUE COPY FROM ORIGINAL
Clerk of Superior Court, Wake County
Assistant Deputy Clerk of Superior Court
11/15/2021

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

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

EXHIBIT 6

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From Wake
(95CVS1158)

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)

O R D E R

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
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Hon. Donna Stroud, Chief Judge
Hon. Frank Blair Williams, Clerk of Superior Court

EXHIBIT 7

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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)

O R D E R

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:
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
Mr. David Nolan, Attorney at Law
H. Lawrence Armstrong
Ms. Melanie Black Dubis, Attorney at Law
Mr. Scott B. Bayzle
Ms. Elizabeth M. Haddix, Attorney at Law
Hon. Frank Blair Williams, Clerk of Superior Court

EXHIBIT 8

North Carolina Court of Appeals

EUGENE H. SOAR, Clerk

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From Wake
(95CVS1158)

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)

O R D E R

The following order was entered:

The petition for writ of supersedeas and motion for temporary stay filed in this cause by Linda Combs, Controller of the State of North Carolina, on 24 November 2021 are dismissed as moot.

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

WITNESS my hand and official seal this the 30th 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
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