No. 425A21-3 TENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

HOKE COUNTY BOARD OF EDUCATION et al.
Plaintiffs-Appellees,

and

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

and

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

v.

STATE OF NORTH CAROLINA,
Defendant-Appellee,

And

THE STATE BOARD OF EDUCATION
Defendant-Appellee,

and

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION
Realigned Defendant-Appellee,

and

PHILIP E. BERGER, in his official capacity as President *Pro Tempore* of

From Wake County
No. 95-CVS-1158
No. COA23-788

the North Carolina Senate, and TIMOTHY K. MOORE, in his official capacity as Speaker of the North Carolina House of Representatives,
Intervenor Defendants-Appellants.

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LEGISLATIVE-INTERVENOR APPELLANTS' REPLY BRIEF

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ARGUMENT

I. PLAINTIFFS LACK STANDING TO ASSERT CLAIMS OR OBTAIN INJUNCTIONS BEYOND THEIR INDIVIDUAL SCHOOL DISTRICTS.

Despite Appellees' repeated—and repetitive—assertions that *Hoke County III*[1] has already answered all of the questions presented by this appeal, the fact remains that *Hoke County III* did ***not*** address whether Plaintiffs had ***standing*** to obtain statewide relief in the form of orders requiring the State to implement and fund the CRP.[2] This is a critical problem. As shown in Legislative Defendants' opening brief, Plaintiffs never even alleged, much less proved, the existence of a statewide violation. Instead, Plaintiffs have asserted claims that, by their very nature, turn on the conditions in their individual school districts. The trial court's orders requiring the

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[1] *Hoke Cnty. Bd. of Educ. v. State*, 382 N.C. 386, 879 S.E.2d 193 (2022) ("*Hoke County III*").

[2] While Plaintiffs and Penn-Intervenors assert otherwise, the Attorney General at least concedes that *Hoke County III* did not address the issue of standing and thus, "whether Plaintiffs lack standing to seek statewide relief" or "relief outside their own school districts" is thus "properly presented for this Court's review." (Atty. Gen. Br. at 12, 15).

CRP thus raise an obvious and fundamental question: If Plaintiffs only asserted claims concerning conditions in their individual districts, how could they have standing to represent—or obtain orders on behalf of—students in districts where they do not live?

Yet, while the majority in *Hoke County III* refused to provide an answer, that does not mean this Court has not already done so. In *Hoke County I*, the Court held that, at most, Plaintiffs only had standing to obtain relief on behalf of the students in their respective school districts—not those who live anywhere else. *See Hoke Cnty. Bd. of Educ. v. State*, 358 N.C. 605, 615, 599 S.E.2d 365, 377 (2004) ("*Hoke County I*"). Thus, Plaintiffs are correct that the outcome of this appeal is dictated by the "law of the case." They just fail to recognize the law that governs was established twenty years ago in *Hoke County I*, rather than *Hoke County III*.

The conclusion that Plaintiffs lacked standing to obtain relief beyond their individual school districts has serious implications for this case. It means that the trial court lacked subject matter jurisdiction to issue orders requiring "the State" to develop, implement, and fund a statewide "remedy" in the form of the Comprehensive Remedial Plan ("CRP"). As a result of each of the orders that came after, including Judge Ammons order of April 2023, which sought to enforce the prior orders requiring the CRP by calculating the amounts the State supposedly owed to fund it, all exceeded the court's jurisdiction as well. For that reason, the entire series of orders, starting with Judge Lee's 2018 orders requiring development of the CRP through to Judge

Ammons' order on remand, should be overturned for lack of subject matter jurisdiction.

A. *Hoke County I* Held Plaintiffs Only Have Standing to Represent Students in their Individual School Districts.

Plaintiffs and the Penn-Intervenors refuse to accept the Court's holding in *Hoke County I* and instead try to twist the decision to claim it somehow held they have standing to obtain statewide relief.[3] Thus, Plaintiffs argue that "[t]he Court did not limit the 'zone of interest' [encompassed by their claims] to Hoke County in *[Hoke County I]*." (Pls.' Br. at 51).

But that is exactly what the Court held in *Hoke County I*. Indeed, the Court expressly concluded that the "zone of interest" implicated by Plaintiffs' claims was limited to just the school districts where they lived. "Consequently" the Court limited its inquiry in *Hoke County I* to "whether plaintiffs made a clear showing that harm had been inflicted on *Hoke County students—the 'zone of interest' in this declaratory judgment action*—and whether the trial court's imposed remedies serve as proper redress for such demonstrated harm." 358 N.C. at 616, 599 S.E.2d at 377 (emphasis added).

The Court's analysis in *Hoke County I* arose of out of its concern that Plaintiffs might lack standing to even assert claims on behalf of other students in Hoke County, let alone the entire State. Accordingly, the Court was likewise concerned with whether plaintiffs should be allowed to prove their claims through generalized

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[3] Notably, the Attorney General does not make any such argument.

evidence concerning the conditions in Hoke County as a whole, or instead should be required to provide individualized evidence regarding the educational opportunities they were personally offered:

> [W]e note that the evidence presented in this case reaches a broader constituency than the two designated plaintiff-school children in the case's caption. In fact, a far greater proportion of the evidence pertains to the circumstances of Hoke County's student population in general than it does to the named plaintiffs in particular. Thus, as a threshold question, we address whether the evidence presented concerning the plight of Hoke County's student population is relevant . . . .

Id. 358 N.C. at 615, 599 S.E.2d at 377. Ultimately the Court concluded the "unique procedural posture and substantive importance" of the case compelled the application of warranted "broadened . . . standing and evidentiary parameters." 358 N.C. at 615, 599 S.E.2d at 377. But the Court made clear that such broadened parameters only justified extending the "zone of interest" implicated by Plaintiffs' claims to Hoke County schools:

> [F]or this case, one of great public interest, we adopt the view that plaintiffs in this declaratory judgment action were *entitled to proceed in their efforts towards showing that students within Hoke County* have been wrongfully denied their educational rights under the North Carolina Constitution. Thus, the named plaintiffs here were not limited to presenting evidence at trial that they had suffered individual harm or that any remedy imposed specifically targeted them and them alone. Consequently, the Court will examine whether plaintiffs made a clear showing that harm had been inflicted on Hoke County students—the "zone of interest" in this declaratory judgment action—and whether the trial court's imposed remedies serve as proper redress for such demonstrated harm.

Id. (emphasis added).

To avoid *Hoke County I*'s holding, Plaintiffs try to confuse the issue by noting the trial court considered evidence from across the State as part of its original trial. (Pls' Br. at 14). Brazenly, the Penn-Intervenors then go a step further and claim that, because the trial court received statewide evidence, *Hoke County I* necessarily resulted in a judgment establishing a statewide violation. (Penn-Intervenors' Br. at 7). The Court in *Hoke County I*, however, rejected that very argument:

> The Court recognizes that the trial court took evidence on, and made conclusions about, student performance across the state. However, we remain mindful that the issues of the instant case pertain only to evidence, findings, and conclusions that apply to Hoke County in particular. As a consequence, any findings or conclusions that were intended to apply to the state's school children beyond those of Hoke County are not relevant to the inquiries at issue.

358 N.C. at 633, 599 S.E.2d at 388 n.14; *see also id.* 358 N.C. at 623, 599 S.E.2d at 382 (noting that Plaintiffs presented standardized test data "for the purposes of evaluating Hoke County's tests scores and comparing them with other test scores from around the state").

Had the Court in *Hoke County I* intended to hold that Plaintiffs have standing to assert statewide claims and seek statewide relief, it could have easily said so. Instead, the Court (1) limited Plaintiffs' standing to the zone of interest of their respective school districts, (2) limited its holding to at-risk students in Hoke County and (3) ordered that the trial court conduct further proceedings for the remaining Plaintiffs' claims. 358 N.C. at 613, 599 S.E.2d at 375, n.5 (remanding the case for

further proceedings on Plaintiffs' claims regarding the other four rural school districts). None of this would have been necessary had the Court intended its decision to be read as broadly as Plaintiffs and Penn-Intervenors now claim.

B. Plaintiffs Have Never Alleged a Claim that Would Confer Standing to Obtain Statewide Remedies.

In a moment of candor, Appellants all appear to concede that, in the words of the Attorney General, "Plaintiffs have never demanded relief outside their own school districts." (Atty. Gen. Br. at 12, 15 ("Plaintiffs do not seek statewide relief—they seek relief in their school districts"); Pls.' Br. at 53-54 (arguing that the State, rather than Plaintiffs, is to blame for statewide nature of dispute)).

The reason that Plaintiffs never demanded statewide relief, of course, is that their claims were tied to the conditions in their individual school districts. Since their original complaint, Plaintiffs have asserted claims that emphasize disparities between their school districts and better funded and others across the State. *See, e.g.*, (R pp 4, ¶ 1 (alleging that opportunities had "been denied to children in some of the poorest school districts in the State, as a result of an irrational, unfair, and unconstitutional funding system."), 27 at ¶¶ 91-92 ("[T]he quality of the educational opportunities varies substantially according to where a child happens to live. The educational opportunities offered to plaintiff schoolchildren are substantially inferior to those offered to children in wealthy school districts."), 9 at ¶ 40 (claiming that funding system "does not take sufficient account of the substantial disparities in wealth among school districts"), 13 at ¶ 46 (comparing per pupil tax base for

Plaintiffs' school districts as a "stark contrast to the tax base per pupil of wealthier counties"), 16 at ¶ 55 (referring to "large gap between poor and wealthy districts")).

Indeed, the district-specific nature of Plaintiffs' claims is precisely what led the intervening plaintiffs, as well as the Penn-Intervenors, to join this lawsuit. Because Plaintiffs sought to represent only the interests of their school districts by painting a contrast against supposedly better resourced districts, a group of students and Boards of Education for urban school districts intervened as Plaintiffs in October 1994, claiming that they, too, were different from other school districts and, as a result, needed more resources. (R pp 159-85, ¶¶ 3-4, 35-41, 50, 62 ("The cost of educating students in the urban school districts is disproportionately high."), ¶ 81 ("The State's supplemental funding scheme irrationally discriminates against school districts not defined as 'low wealth' or 'small.'"). Once again, those intervening plaintiffs sought to represent only the interests of their school districts rather than the State at large. (R p 161, ¶ 7 (filing complaint on behalf of "the students and communities they serve")). Similarly in 2005, the Penn-Intervenors filed their complaints, in which they alleged failures that had led to a failure to provide students with the opportunity for a sound basic education in poverty and low-performing high schools in the Charlotte-Mecklenburg school district. (R pp 1032-34). There would have been no need to file these intervening complaints if the original Plaintiffs had asserted statewide claims and thus had standing to seek statewide relief.

As the Attorney General acknowledges, North Carolina's standing doctrine "demand[s] that a plaintiff have a sufficient stake in the outcome of the controversy

to ensure concrete adverseness." (Atty. Gen. Br. at 16 (citing *Comm. to Elect Dan Forest v. Emps. Pol. Action Comm.*, 376 N.C. 558, 599, 853 S.E.2d 698, 728 (2021); *Cmty. Success Initiative v. Moore*, 384 N.C. 194, 206-07, 886 S.E.2d 16, 28 (2023)). This requires that a plaintiff show that he, or she, has been "injuriously affected" by the government action in question. *Goldston*, 361 N.C. at 35, 637 S.E.2d 876 ("Only those persons may call into question the validity of a statute who have been injuriously affected thereby in their persons, property, or constitutional rights.") (quoting *Piedmont Canteen Serv., Inc. v. Johnson*, 256 N.C. 155, 166, 123 S.E.2d 582 (1962) (emphasis added in *Goldston*)). But, as the Plaintiffs' own pleadings demonstrate, the only injuries they have ever claimed are not the result of statewide policies, but instead are the product of the State's failure to remedy individualized conditions that are unique to their respective school districts. Accordingly, Plaintiffs' can only claim to have "a stake" in their individual districts, not the State at large.

C. Plaintiffs Need Statewide Standing to Obtain Statewide Remedies.

Faced with the limits of Plaintiffs' original claims, Appellants argue that whether Plaintiffs had standing to assert claims outside their individual school districts is irrelevant to whether the trial court had jurisdiction to issue statewide relief. Such an argument is paradoxical at best, since it would mean that, once a plaintiff establishes a violation in one school district, he or she would have "standing" to obtain injunctions dictating the education policies that must be implemented in any of the State's 115 school districts, regardless of whether the alleged violation has been shown to extend those districts as well.

The law of standing does not work that way. As mentioned in the previous section, standing requires that a plaintiff allege "*a personal stake in the **outcome** of the controversy*." *Stanley v. Dep't of Conservation*, 284 N.C. 15, 28, 199 S.E.2d 641 (1973) (emphasis added); *accord id.* ("The 'gist of the question of standing' is whether the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.'" (quoting *Flast v. Cohen* 392 U.S. 83, 99 (1968)). Plaintiffs have no personal stake "in the outcome" of orders requiring actions in school districts where they do not live (and where conditions may be entirely different).

Simply put, statewide relief requires statewide standing. Indeed, the Court in *Hoke County I* recognized that the issue of standing (which it explained in terms of the "zone of interest" implicated by Plaintiffs' claims), was relevant to ***both*** "whether plaintiffs [had] made a clear showing that harm had been inflicted on Hoke County Students" ***and*** *"whether the trial court's imposed remedies serve as proper redress for such demonstrated harm."* 358 N.C. at 616, 599 S.E.2d at 377 (emphasis added). Thus, *Hoke County I* itself stands for the (otherwise unremarkable) proposition that courts only have jurisdiction to issue remedies for claims that plaintiffs have standing to assert.[4]

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[4] This Court has repeatedly admonished that, when fashioning remedies for constitutional violations, the court must do "no more than is reasonably necessary" to remedy the violation. *In re Alamance Cnty. Ct. Facilities*, 329 N.C. 84, 99, 405 S.E.2d 125, 132 (1991); *see also Corum v. Univ. of N. Carolina Through Bd. of*

Tellingly, the only support the Attorney General offers to claim that standing is irrelevant to the scope of a court's remedial orders are three federal cases, all of which involve statewide policies concerning the rights of prisoners—not claims that the conditions in specific school districts fell below the constitutional minimum necessary to provide student an opportunity to obtain a sound basic education. (Atty. Gen.'s Br. at 19). Setting aside that those cases are non-binding federal cases applying federal law and standards for injunctive relief, each is distinguishable.

Unlike here, *Buffkin v. Hooks* involved a *putative class action* in which the court issued a preliminary injunction after finding that the plaintiffs had standing to challenge a statewide policy concerning medical screenings of prisoners. *See Buffikin v. Hooks*, No. 1:18CV502, 2019 WL 1282785, at *1 (M.D.N.C. Mar. 20, 2019). In other words, the plaintiffs in *Buffkin* sought to represent the interests of a group of plaintiffs whose interests were so cohesive that they met the standards for class certification. *Id.* at *4. In contrast, Plaintiffs here seek relief only for their school districts and do not purport to represent the interests of all school districts across the state.

The Eleventh Circuit case the Attorney General cites is equally distinguishable. There, the United States sued the Secretary of the Florida Department of Corrections to require the Secretary to provide kosher meals to inmates. *See United States v. Sec'y, Fla. Dep't of Corr.*, 828 F.3d 1341, 1343 (11th Cir.

Governors, 330 N.C. 761, 784, 413 S.E.2d 276, 290 (1992) ("What that remedy will require, if plaintiff is successful at trial, will depend upon the facts of the case developed at trial.").

2016). Thus, the claims in that case involved a claim by the United States challenging a statewide policy that had statewide effect.

Finally, the Ninth Circuit case held, "[b]ecause the injunction is no broader than the constitutional violation, the district court properly entered a statewide injunction." *Clement v. California Dep't of Corr.*, 364 F.3d 1148, 1152 (9th Cir. 2004) (finding an unconstitutional policy had become pervasive enough to warrant system-wide relief when at least eight prisons had adopted the policy and more were considering it). Here, there has never been a trial or other judgment entered in accordance with the Rules of Civil procedure establishing a statewide violation. Consequently, there is nothing to show that imposition of the CRP is needed to remedy a constitutional violation, much less a basis to conclude that the 146 measures the CRP requires are "no broader than the constitutional violation" itself.[5] Instead, the CRP constitutes far broader mandatory injunctive relief that would require the State to implement measures in districts where no violation has ever been established (not to mention measures, such as universal home visits to new mothers, that have nothing to do with the delivery of K-12 education).

To the extent that the Attorney General wants the Court to consider federal law, it should look to the United States Supreme Court, which has held "the nature of [an equitable] remedy is to be determined by the nature and scope of the

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[5] Penn-Intervenors claim that Plaintiffs' right to an opportunity for a sound basic education is "impaired as a result of deficient statewide policies." (Penn-Intervenors' Br. at 30). But Penn-Intervenors do nothing to identify what those policies are.

constitutional violation," *Missouri v. Jenkins*, 515 U.S. 70, 88 (1995) (internal quotation marks and citation omitted), and accordingly, "only if there has been a systemwide impact may there be a systemwide remedy." *Dayton Bd. of Ed. v. Brinkman*, 433 U.S. 406, 420 (1977).

Applying these principles, the U.S. Supreme Court held in *Horne v. Flores* that a district court exceeded its jurisdiction when it issued statewide injunctions to remedy claims concerning a single school district in Arizona, because, among other things, it was not clear that Plaintiffs even had standing to seek relief outside their home school district:

> We turn, finally, to the District Court's entry of statewide relief. The Nogales district, which is situated along the Mexican border, is one of 239 school districts in the State of Arizona. Nogales students make up about one-half of one per cent of the entire State's school population.[6] The record contains no factual findings or evidence that any school district other than Nogales failed (much less continues to fail) to provide equal educational opportunities to [English Language Learner] students. Nor have respondents explained how the [Equal Educational Opportunities Act] could justify a statewide injunction when the only violation claimed or proven was limited to a single district. It is not even clear that the District Court had jurisdiction to issue a statewide injunction when it is not apparent that plaintiffs—a class of Nogales students and their parents—had standing to seek such relief.

Horne v. Flores, 557 U.S. 433, 470–71 (2009) (declining to address whether Arizona Constitution's "general and uniform public school system" provision require Arizona

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[6] There are approximately 1,442,736 students enrolled in North Carolina public schools, meaning that Hoke County's enrollment of 8,874 students in the Hoke County School District comprises about 0.6% of North Carolina's public school population.

to issue matching funding increases in other districts); *Flores v. Huppenthal*, 789 F.3d 994, 1005 (9th Cir. 2015) (affirming dismissal of statewide claims because of plaintiffs' lack of standing when the plaintiffs' claims depend on district-level evidence and they never purported to represent a statewide class).

Numerous federal courts have applied the same principles to conclude that courts lack authority to issue injunctions that extend beyond the limits of those claims plaintiffs have standing to assert. *See, e.g., L. W. by & through Williams v. Skrmetti*, 83 F.4th 460, 490 (6th Cir. 2023) (courts "should not issue relief that extends further than necessary to remedy the plaintiff's injury" and rejecting statewide relief because "[a]bsent a properly certified class action, these individuals do not represent every citizen of their States. And it is doubtful that the nature of federal judicial power—or for that matter Article III—permits such sweeping relief without the existence of a properly certified class or an extraordinary reason for ignoring these normal limits on the federal judicial power"); *In re Abbott*, 645 S.W.3d 276, 280 (Tex. 2022) (court of appeals "lacks authority to afford statewide relief to nonparties"); *Meadows on Behalf of Pro. Emps. of W. Virginia Educ. Ass'n v. Hey*, 184 W. Va. 75, 77, 399 S.E.2d 657, 659 (1990) (judge lacked authority to enjoin statewide teachers' strike because "there is no authority for a judge of one circuit to issue a statewide injunction affecting 'acts' occurring in other circuits when there is no underlying judgment or proceeding"); *Brakebill v. Jaeger*, 932 F.3d 671, 678 (8th Cir. 2019) ("statewide injunction was not warranted" when election statute may impose

excessive burdens on only *some* voters, but leaving "open the possibility that a court might have authority to enter a narrower injunction to relieve certain voters").

Put simply, these cases stand for the proposition that courts lack subject matter jurisdiction to issue remedial orders that extend to parties and claims over which plaintiffs do not have standing. Indeed, this Court already recognized as much in *Hoke County I*, when it held that Plaintiffs could not assert claims—or obtain remedies—that extended outside their individual school districts. For this reason, the Attorney General's argument that "How a court orders a defendant to remedy a constitutional violation has nothing to do with a plaintiff's standing" (Atty. Gen. Br. at 20) is without merit.

D. The Department of Public Instruction's 2002 Letter Did not Give the Court Jurisdiction to Issue Statewide Injunctions in the Form of the CRP.

In response to the jurisdictional limits imposed by the scope of their standing, Plaintiffs take a unique tack, arguing that "the State"—by which they mean the executive branch agencies represented by the Attorney General, and not the General Assembly—"told the trial court that its remedial efforts will be, and must be directed by a statewide basis, and not limited specifically to Hoke County." (Pls.' Br. at 21-22, 53-55).

To make this claim, Plaintiffs point to a July 29, 2002, letter to the Court from the Chairman of the State Board of Education and State Superintendent of the Department of Public Instruction ("DPI") following the issuance of liability judgment at the conclusion of the trial into conditions in Hoke County. (Pls.' Br. at 21-22 (citing

R pp 1491-92)). In that letter, the Chairman of the State Board and Superintendent stated that they "had never understood the Supreme Court or this Court to have ordered defendants to provide students in Hoke County or any other plaintiff or plaintiff-intervenor school districts special treatment." They also offered the assurance that the Board and DPI were "taking concrete actions to improve educational opportunities for at-risk students in the plaintiff-party LEAs along with their similarly disadvantaged peers across the State." (R pp 1491-92).

According to Plaintiffs, this letter constituted a "definitive legal position" that the State "could not" tailor a remedy specific to Hoke County and that its remedial efforts would have to be implemented on a statewide basis. (Pls.' Br. at 53-55).[7] The letter does not, however, purport to take any such "definitive legal position," nor does it indicate that a remedy specific to Hoke County would be impossible. Instead, it merely responds to the trial court's inquiry and recites the State Board and DPI's understanding of its obligation to provide an opportunity for all students to obtain a sound basic education.

Yet, even if the letter were what Plaintiffs claim it to be, it would not be sufficient by itself to bind the entirety of the executive branch and legislative branch,

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[7] Citing to R p 734, the Attorney General and Plaintiffs claim that the Urban Intervenors dismissed their claims in reliance on alleged representations that the State would provide a statewide remedy to redress any violations in Hoke County. (*See* Pls.' Br. at 23). The record does not support these claims. (*See* Pls.' Br. at 23). However, R p 734 is a generic Notice of Voluntary Dismissal dated May 4, 2006—entered nearly four years after the State Superintendent's letter—that simply says the Urban Intervenors "hereby voluntarily dismiss all claims asserted in this action," without providing any explanation why.

who was not a party at the time, to the issuance of statewide injunctive relief. Nor would it be sufficient to expand the Court's jurisdiction to issue remedial orders that extend beyond the violation at trial. As to the former point, it is well established that subject matter jurisdiction cannot be waived or created by consent of the parties. *In re T.R.P.*, 360 N.C. 588, 595 (2006) ("Jurisdiction rests upon the law and the law alone. It is never dependent upon the conduct of the parties. Subject matter jurisdiction cannot be conferred upon a court by consent, waiver or estoppel." (internal citation and quotation marks omitted)). Thus, it is irrelevant whether prior agents of certain executive branch agencies made non-binding statements about their personal interpretation of the nature of this dispute.

More importantly, whatever effect the 2002 letter had, it was superseded by this Court's decision in *Hoke County I*, which was decided two years later. There, the Court expressly held:

> The Court recognizes that the trial court took evidence on, and made conclusions about, student performance across the state. **However, we remain mindful that the issues of the instant case pertain only to evidence, findings, and conclusions that apply to Hoke County in particular. As a consequence, any findings or conclusions that were intended to apply to the state's school children beyond those of Hoke County are not relevant to the inquiries at issue.**

358 N.C. at 387, 599, S.E.2d at 387 n.14 (emphasis added).

For his part, the Attorney General offers variations on the same theme, claiming in conclusory fashion that "Courts" and "the legislature have all understood [that the State can remedy a constitutional violation only through statewide

initiatives] since at least 2002." (Atty. Gen. Br. at 13). But once again, that assertion is unsupported by the record and irrelevant to the extent it relies on statements that predate *Hoke County I* in 2004. Indeed, if Courts had understood that to be the case, then *Hoke County I* would not have limited the zone of interests to Plaintiffs' respective school districts and its holdings to at-risk students in Hoke County.

In the end, the Attorney General (who, once again, represents *only* the executive branch)[8] argues the Court should look the other way because the executive branch "chose" the CRP—not Plaintiffs. But therein lies the point. The *State* did *not* choose the CRP—the executive branch did. The executive branch, however, has no authority to consent away the need for legislative approval to change statutes or take action that require appropriations. And for the reasons discussed below, the Court lacks subject matter jurisdiction to bless this collusive end-around the legislative process. Thus, the fact that the executive branch "chose" a statewide remedy when

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[8] *See* N.C. Gen. Stat. § 1-72.2 (providing that, in actions challenging acts of the General Assembly, that the Governor, who is represented by the Attorney General, represents the executive branch, and the General Assembly, through the Speaker of the House, and President *Pro Tempore* of the Senate, represent the legislative branch.); *see also, Berger v. N. Carolina State Conf. of the NAACP,* 597 U.S. 179, 199, (2022) (explaining that N.C. Gen. Stat. § 1-72.2 was adopted specifically to address the "possibility that different branches of government may seek to vindicate different and valuable state interests."). This dynamic led Judge Robinson to conclude in his April 2022 Order Following Remand that that "the record before the Court demonstrates that, until very recently, the "State Defendants" actively participating in this action were comprised of the executive branch (the Governor's office, the State Department of Education, the State Department of Public Instruction and the State Department of Health and Human Services), ***but not the executive branch***." (R p 1186 (emphasis added)).

Plaintiffs sought relief only for their own districts undermines rather than supports the Court's subject matter jurisdiction to impose the CRP.

In sum, even if there had been an "agreement" among the parties after *Leandro*[9] to present statewide evidence, and such agreement had been of any effect, this Court's holding in *Hoke County I* superseded and rendered that agreement irrelevant when it expressly limited the trial court's "Liability Judgment" to Hoke County.

E. The Uniform Schools Provision Does Not Prohibit the Court from Ordering State-Specific Remedies.

In a final attempt to contend they had standing to obtain statewide remedies in the form of orders requiring the CRP, Appellees make the convenient, but incorrect, argument that "the State can remedy the constitutional violation" for Hoke County "only through statewide initiatives" because doing otherwise would violate the Uniform Schools provision in Article IX, Section 2(1) of the State Constitution.[10] (Atty. Gen. Br. at 13). Appellees then echo this chorus *ad nauseum* to convince the Court, and perhaps themselves, that it is true. (*See id.* at 15 ("the only legal way for the State to remedy the constitutional harms in Plaintiffs' school districts is through statewide action"), 18 ("[T]he State can remedy the . . . constitutional violations in Plaintiffs' school districts only through statewide initiatives."), 38 (the State can

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9 *Leandro v. State*, 346 N.C. 336, 488 S.E.2d 249 (1997) ("*Leandro*").

10 N.C. CONST. art IX, § 2(1) ("General and uniform system; term. 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.").

"remedy the violation only through statewide initiatives"); Pls.' Br. at 52 (same)). But it is not.

According to Plaintiffs and the Attorney General, "the State risks a [Constitutional violation] when it treats school districts differently for arbitrary or capricious reasons." (Atty. Gen. Br at 39; Pls.' Br. at 52). But that hypothetical concern does not confer standing on Plaintiffs to bring a statewide claim. *See Flores*, 789 F.3d at 1006 (rejecting argument about "the inevitability of the statewide impact that any ruling on the Plaintiffs' claims" would have because "the possible effects of a speculative, future court-ordered remedy are insufficient to confer standing . . . to bring their statewide claim in the first instance.").

Moreover, to the extent a "uniform system" is required and there is a constitutional failure to provide the opportunity for a sound basic education within Plaintiffs' school districts, but not the rest of the State, providing remedies tailored to Plaintiffs' school districts would foster, rather than undermine, a more uniform system. This was the conclusion in *Guilford Cnty. Bd. of Educ. v. Guilford Cnty. Bd. of Elections*, 110 N.C. App. 506, 514–17, 430 S.E.2d 681, 688 (1993). There, the plaintiffs claimed that an act "violates the constitutional directive to the General Assembly to provide a uniform school system throughout the State by singling out one county, purporting to cite various needs and goals of that county, and bestowing upon it benefits and mandated funding burdens not conferred upon any other county in the State." *Id.* The court rejected this argument because the act was "merely one of many statutes enacted to further this uniform system by specifically addressing

the problems of one county." *Id.* In other words, the State creates a more "uniform system" when it eliminates outliers through targeted remedies. The Court should reject the other parties' assumption that every school district in the State constitutes an outlier when there is no clear and convincing evidence of same. And as shown below, Appellees' argument is belied by their prior creation of a non-uniform remedy to address Halifax County alone. (R S pp 2671-96 ("Plan to Improve Educational Opportunities in Halifax County Public Schools")).

Ironically, the Attorney General highlights the State's ability to provide non-uniform remedies by explaining that the CRP itself is a non-uniform remedy, targeted a low-wealth school districts: "The CRP adds financial incentives for the recruitment and retention of certified teachers in high-poverty schools . . . . It also addresses funding disparities between high-wealth and low-wealth school districts." (Atty. Gen. Br. at 45). As in *Guilford Cnty. Bd. of Educ.*, Appellees "offer no support for their assertion that non-uniform funding resulting from statewide legislation is permissible, but non-uniform funding resulting from legislation directed toward one county somehow violates Article IX § 2(1)." 110 N.C. App. at 516–17, 430 S.E.2d at 688.

The Attorney General also claims that *Leandro* held that the State must provide children with "an equal opportunity to sound basic education." (Atty. Gen. Br. at 18, 39). But *Leandro* held something very different:

> [W]e are convinced that the equal opportunities clause of Article IX, Section 2(1) does not require substantially equal funding or educational advantages in all school districts. . . . A

> constitutional requirement to provide substantial equality of educational opportunities in every one of the various school districts of the state would almost certainly ensure that no matter how much money was spent on the schools of the state, at any given time some of those districts would be out of compliance. . . . We believe that even greater problems of protracted litigation resulting in unworkable remedies would occur if we were to recognize the purported right to equal educational opportunities in every one of the state's districts.

346 N.C. at 349-51, 488 S.E.2d at 256-57.

Even the Attorney General and Plaintiffs admit that the State only risks an equal protection or due process violation "when it treats school districts differently *for arbitrary or capricious reasons*." (Atty. Gen. Br. at 18) (emphasis added). Clearly, addressing a failure to provide the opportunity for a sound basic education in a specific school district would not be arbitrary or capricious. Nor would it "creat[e] a different constitutional problem in another school district" as the Attorney General contends. (Atty. Gen. Br. at 18). North Carolina courts, including *Leandro* as shown above, have repeatedly held that there is no obligation to provide equal funding because that is impossible and the Constitution itself contemplates different levels of funding. *See, e.g.*, *Guilford Cnty. Bd. of Educ.*, 110 N.C. App. at 514–15, 430 S.E.2d at 687 ("[T]he term 'uniform' does not require that every school within every county or throughout the State be identical in all respects; the term requires that a statewide system be established and made available to all children in North Carolina."); *Wake Cares, Inc. v. Wake Cnty. Bd. of Educ.*, 363 N.C. 165, 171–72, 675 S.E.2d 345, 350 (2009) (allowing year-round schools because the "constitutional requirement that the

public school system be 'uniform' in no way implicates the school calendar"); *Banks v. Cnty. of Buncombe*, 128 N.C. App. 214, 223, 494 S.E.2d 791, 797 (students "do not have a fundamental right to uniform educational opportunities."), *aff'd,* 348 N.C. 687, 500 S.E.2d 666 (1998); *Britt v. N. Carolina State Bd. of Educ.*, 86 N.C. App. 282, 289, 357 S.E.2d 432, 436 (1987) ("Any disparity between systems results in opportunities offered some students and denied others. Our Constitution clearly does not contemplate such absolute uniformity across the State."); *Kiddie Korner Day Sch., Inc. v. Charlotte-Mecklenburg Bd. of Ed.*, 55 N.C. App. 134, 138–39, 285 S.E.2d 110, 113–14 (1981) ("It is clear, therefore, that the constitutional mandate relates to the statewide scheme for public education. The mandate does not require every school within every county or throughout the State to be identical in all respects. Such a mandate would be impossible to carry out as there are differences within a given school as the caliber of teachers and students differ."); *Elliott v. Gardner*, 203 N.C. 749, 166 S.E. 918, 920 (1932) ("the term 'uniform' . . . does not relate to schools so as to require that all schools shall be of the same grade, regardless of the age or attainment of the pupils, but that the term qualifies the word 'system'; the provision contemplating the establishment of schools of like kind and available generally to the school population").

Plainly, the State can address Plaintiffs' concerns "by devoting extra resources to certain school districts alone" (Atty. Gen. Br. at 38) given that Article IX, Section 2(2) empowers the General Assembly to "assign to units of local government such responsibility for the financial support of the free public schools as it may deem

appropriate," which necessarily results in non-uniform overall funding levels of school districts. *Cf. Guilford Cnty. Bd. of Educ.*, 110 N.C. App. at 516–17, 430 S.E.2d at 688 ("Article IX, § 2(2) contradicts plaintiffs' arguments, as the governing boards of units of local government having responsibility for public education are expressly authorized to 'use local revenues to add to or supplement any public school or post-secondary program.' Thus, counties with greater financial resources are able to provide greater educational resources to its students.").

In sum, "Article IX does not require uniform schools from county to county, nor does it forbid the General Assembly from addressing public school funding in a particular county." *Id.* at 516, 430 S.E.2d at 688.

* * *

For each of the reasons set forth above, Plaintiffs lacked standing to obtain—and the Court lacked jurisdiction to enter—orders granting "relief" for counties where they did not reside and where no violation has ever been shown to exist. Instead, consistent with *Hoke County I*, the trial court's jurisdiction to enter remedial orders extended only to Hoke County, the only school district for which there has ever been a trial or judgment establishing a violation.

II. THE TRIAL COURT'S ORDERS REQUIRING AND ENFORCING THE CRP CONSTITUTE IMPERMISSIBLE ADVISORY OPINIONS.

A. The Trial Court's Orders Requiring the CRP Answered a Question that Was Not before the Court.

The trial court's imposition of the CRP violated the well-established prohibition against advisory opinions. As set forth above, *Hoke County I* expressly

limited the trial court's "liability judgment" to just Hoke County and upheld the trial court's findings that the "bulk of the core" of the State's "educational delivery system" was sufficient to meet constitutional standards. *Hoke County I*, 358 N.C. at 632, 499 S.E.2d at 387.

As a result, the CRP was not a "remedy" designed to address any claim asserted in the pleadings in this case, all of which focus on the specific and varying conditions in certain, named county school systems. Nor can it possibly be justified as an effort to remedy Constitutional violations in Hoke County and Halifax County. Instead, the CRP purported to answer an abstract policy question—*i.e.*, what statewide measures can be undertaken to improve the whole of North Carolina's educational system—that was divorced from any of the claims actually asserted or decided in this case.

Accordingly, the Court lacked authority to issue the CRP, since doing so merely constituted an advisory opinion on the purely hypothetical question of what remedies might be necessary (or constitutionally permissible) in the event Plaintiffs had shown a persistent failure to cure an (otherwise nonexistent) statewide violation of the right to a sound basic education. *Little v. Wachovia Bank & Tr. Co.,* 252 N.C. 229, 243, 113 S.E.2d 689, 700 (1960) ("The courts have no jurisdiction to determine matters purely speculative, enter anticipatory judgments, . . . deal with theoretical problems, give advisory opinions, . . ., provide for contingencies which may hereafter arise, or give abstract opinions."); *Wise v. Harrington Grove Cmty. Ass'n, Inc.*, 357 N.C. 396, 408, 584 S.E.2d 731, 740 (2003) (holding that deciding an issue not "drawn into focus by

[the court] proceedings" would "render an unnecessary advisory opinion"); *Lide v. Mears*, 231 N.C. 111, 117, 56 S.E.2d 404, 409 (1949) (Ervin, J.) (holding that, even under the Declaratory Judgment Act, litigants cannot "convert tribunals into counsellors and impose upon them a duty of giving advisory opinions to any parties whom come into court and ask for either academic enlightenment or practical guidance concerning their legal affairs." (citing *Tryon v. Duke Power Co.*, 222 N.C. 200, 22 S.E.2d 450 (1942))).

Plaintiffs and the Attorney General largely ignore the advisory nature of the trial court's order, which itself was an outgrowth of their effort to have the court issue orders in the absence of a genuine controversy.

B. The Trial Court Never Entered a Judgment Finding a Statewide Violation.

To justify a statewide remedy, Appellees gloss over the substance of the post-*Hoke County I* hearings to frame them as if they were the product of a contested, adversarial process involving statewide evidence, statewide claims, and statewide parties, that resulted in in findings of fact, conclusions of law, and a properly entered judgment finding a statewide violation.

But that did not happen. Here is what did happen:[11]

- The trial court issued its first post-*Hoke County I* Notice of Hearing and Order re: Hearing on 9 September 2004. (R S pp 1662-66).[12] In that

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[11] This recitation does not address pre-*Hoke County I* hearings, as they were modified by this Court's ruling therein.

[12] As discussed in Legislative-Intervenors' opening brief, the trial court incorrectly referred to *Hoke County I* as merely permitting—rather than requiring—further proceedings. Penn-Intervenors argue that the trial court's use of "if necessary" is consistent with the Court's instruction that the cases involving the other

notice, the trial court discussed a "demonstrated need" in "16" out of 115 school districts, which the trial court seemingly explored only because Hoke County was one of those 16 school districts. (*Id.* at 1664-65).

- In a 10 November 2004 memorandum, the trial court discussed standardized test scores and how the court was concerned about the high school test scores in the Charlotte-Mecklenburg school district, despite it ranking 4th in local spending per pupil. (*Id.* at 1681-84 (noting that Wake County spends less yet its results are "head and shoulders above Mecklenburg" and that smaller districts like Craven and Onslow are doing a good job with less money by "focus[ing] on the fundamentals"). Thus, the trial court noted that "the logical conclusion is that the proximate cause" of the poor high school test results in the Charlotte-Mecklenburg school district "is not the lack of money." (*Id.* at 1684). The trial court then instructed school districts to examine and reallocate their existing resources because "there is no 'blank check' nor is there going to be a 'spending spree.'" (*Id.* at 1685).

- On 6 January 2005, the trial court issued a notice of hearing to discuss the issues with high school test scores he discussed in the 10 November 2004 memorandum. (*Id.* at 1687). The trial court did the same on 10 February 2005. (*Id.* at 1688).

- On 3 March 2005, the trial court explained, "**The bottom line is that the hearing starting March 7 relating to high school performance problems and solutions is informational, not adversarial in nature.**" (*Id.* at 1703 (emphasis original); *see also id.* at 1700 (noting that 36% of high schools had composite scores at or above 80, and another 32% of high schools had composite scores between 70 and 79)). After this non-adversarial hearing, the trial court issued a "report from the court" on 24 May 2005, opining about its review of the test scores and high schools, in general. (*Id.* at 2325-69). Though the trial court noted that there were too many high schools in which the opportunity to obtain a sound basic education was not being provided to every student, it nevertheless pointed to 117 high-performing school

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parties' school districts "should proceed, as necessary, in a fashion that is consistent with the tenets outlined in this opinion." (Penn-Intervenors' Br. at 38, n.12). That argument ignores that the Court had just rejected extending its order outside of Hoke County even though the trial court had considered evidence from "across the state." Rather than say that no further proceedings were necessary for relief and claims outside of Hoke County, the Court ordered further proceedings. Thus, the "tents outlined in" *Hoke County I* mandated further proceedings for the other parties' school districts.

districts within the state as examples to follow. (*Id.* at 2362, 2368) (noting the need to provide "the opportunity to obtain a sound basic education similar in content and quality as those in the top 117 high schools," which are "geographically scattered from the mountains to the coast").

- On 11 July 2005, the trial court issued a notice of hearing to discuss the Charlotte-Mecklenburg 2004-05 standardized test scores and to receive "a report" from the State "on the issue of the overall *Leandro* compliance statewide at that time." (*Id.* at 2384-85). Just because the trial court requested a statewide "report" does not change Plaintiffs' standing, the Court's subject matter jurisdiction, and the fact that the trial court had not issued a statewide judgment or a statewide remedy. Hence, the trial court also requested to hear from plaintiffs' counsel about the progress in their specific school districts. (*Id.*)

- A year later, on 18 July 2006, the trial court issued a notice of hearing for an update on leadership changes and "turnaround plans" in poor performing high schools. (*Id.* at 2626-27).

- On 29 March 2007, the trial court issued a notice for a "**non-adversarial hearing**" to receive information on progress at "poor performing high schools," progress recruiting teachers in "low wealth school districts and low performing schools," and other topics. (*Id.* at 2628-29) (emphasis original).

- On 28 June 2007, the trial court issued a notice of hearing to discuss poor performing middle schools. (*Id.* at 2630).

- On 31 August 2007, the trial court issued a notice of a "**non-adversarial hearing**" to receive information on plans for "low performing high schools and middle schools" and other information. (*Id.* at 2638-39) (emphasis original).

- On 2 July 2008, the court issued a notice of hearing and order, in which it lamented (1) that, consistent with recommendations from the National Council of Teachers of Mathematics, some school districts no longer required students to memorize multiplication tables, and (2) though "'good' school systems" were using formative assessments, they were not prevalent enough. (*Id.* at 2641, 2644). The trial court's observations were based, in part, on hearsay discussions between the trial court and unnamed sources at unnamed schools. In any event, the trial court did not find a statewide violation. And the trial court concluded by giving notice of a "**non-adversarial hearing**" to provide

reports and information in response to the trial court's concerns. (*Id.* at 2650) (emphasis original).

- On 16 January 2009, the trial court issued a notice of a "**non-adversarial hearing**" to receive reports and information from the State on various issues. (*Id.* at 2652) (emphasis original).

- On 16 March 2009, the trial court issued a notice of a "**non-adversarial hearing**" to receive a report specific to Plaintiff Halifax County. (*Id.* at 2655) (emphasis original). The trial court noted, unsurprisingly, that test scores had dropped in schools after the rigor of standardized tests were increased. But rather than find a statewide violation, the trial court zeroed in on one of the Plaintiffs—Halifax County—as an "academic disaster zone." (*Id.* at 2659). The trial court found that the State "must take action to remedy this deprivation of constitutional rights" in Halifax County. (*Id.* at 2669). Less than two months later, the State Board of Education, Department of Public Instruction, and Plaintiff Halifax County entered into a Consent Order, with findings of fact, to implement a specific "Plan to Improve Educational Opportunities in Halifax County Public Schools." (*Id.* at 2671-96). In other words, a remedy was narrowly tailored to address the injury alleged by one of the Plaintiffs. Contrary to Appellees' logic, no "statewide remedy" was required to develop a plan to fix issues in Halifax County alone. Nor would the Halifax County plan have been necessary had the trial court already found a statewide violation warranting a statewide remedy.

- On 17 July 2009, the trial court issued a notice of a "non-adversarial hearing" to receive information on what K-2 assessments are being performed. (*Id.* at 2697).

- On 3 August 3, 2009, the trial court issued a notice of a "non-adversarial hearing" to receive a report on the impact of the proposed state budget, an update on Halifax County, updated standardized test results, and other information. (*Id.* at 2699-704).

- On 26 March 2010, the trial court issued a notice of hearing and order, in which it opined further on K-2 assessments, discussed test scores for school districts of Durham County, Winston-Salem/Forsyth County, and Guilford County, and scheduled a hearing to receive reports on these three school districts, which the trial court deemed noncompliant under *Hoke County I*. (*Id.* at 2705-13). Rather than find a statewide violation, the trial court noted its belief that only 3 nonparty school districts out of 115 total school districts were noncompliant.

- On 9 November 2010, the trial court issued a notice of a "non-adversarial hearing" to receive reports on the use of federal funding, updated standardized test scores, and other information. (*Id.* at 2714-18).

- On 20 May 2011, the trial court issued a notice of hearing and order on the impact of the proposed state budget, updated standardized test scores, the provision of pre-K services to at-risk students, and the State's plan to ensure that it provides the opportunity to a sound basic education in the wake of the financial crisis. (*Id.* at 2750-56).

- On 18 July 2011, the trial court issued a "memorandum of decision and order," finding that the budget interfered with the ability of at-risk four-year old children to attend prekindergarten programs required for them to have an opportunity to have a sound basic education. (*Id.* at 2779-80). As discussed above, the State chose to address this issue on a statewide basis, resulting in *Hoke County II*'s dismissal of the appeal as moot.

- Three years later, on 5 May 2014, the trial court issued a "Report from the Court re: the Reading Problem" recounting non-adversarial hearings from 2009 and 2010 about K-2 assessments, low reading performance in Halifax County, Durham County, Guilford County, and Winston-Salem/Forsyth County discussed above, and standardized scores since then. (*Id.* at 2831-68). The trial court based its report exclusively on test results, opining that "[t]he academic results of North Carolina's school children enclosed in this Report show that there are way too many thousands of school children . . . who have not obtained the sound basic education mandated." (*Id.* at 2867). The report, however, did not address whether the children had received the "opportunity" to a sound basic education. In any event, despite its length, the "Report" did not identify a statewide violation.

- On 14 November 2014, the trial court issued a notice of hearing and order discussing the new standardized testing scoring system and its implications. (*Id.* at 2870-78).

- On 17 March 2015, the trial court issued a notice of hearing and order to receive a report on any efforts to reduce "accountability standards" for standardized tests and review updated standardized test results. (*Id.* at 2879-92). The trial court did not find a statewide violation.

More than a decade after the trial and judgment for Hoke County, *Hoke County I*, and five years after the Halifax County consent order, Plaintiffs seized on this 17 March 2015 notice of hearing to file a "Motion for a Scheduling Order on Compliance

Plan Hearing." (*Id.* at 2893). In that motion, for the first time, Plaintiffs suggested that the State should propose a statewide remedy. (*Id.* at 2894). Again, Plaintiffs had no standing then and have no standing now to purport to act on behalf of the interests of all other school districts in this State.

The Attorney General also cites the trial court's statement that there are "thousands of children . . . who have not obtained [a] sound basic education." (Atty. Gen. Br. at 42 (citing R p 2867)). Again, that is not the applicable standard. *Leandro* established the right to the "opportunity" to receive a sound basic education; it did not hold that the State violates the Constitution when a single child, despite being provided with the opportunity to receive a sound basic education, fails to perform well on standardized tests.

Second, Appellees emphasize the trial court's review of statewide standardized test results. Setting aside that subject matter jurisdiction is not vested through the nature of evidence the trial court receives, test results alone are not proof of a constitutional violation:

> We note that the test score evidence, in and of itself, addresses the question of whether students are obtaining a sound basic education rather than the question of whether they were afforded their opportunity to obtain one. The distinction is important. While a clear showing of a failure to obtain a sound basic education is a prerequisite for demonstrating a legal basis for the *designated plaintiff school children's* case, the failure to obtain such an education is not the ultimate issue in dispute. In order to prevail, plaintiffs must show more than a failure on the part of Hoke County students to obtain a sound basic education. The failure to obtain such an education may be due to any number of reasons beyond the defendant State's control, not the least of which may be the student's lack of

> individual effort and a failure on the part of parents and other caregivers to meet their responsibilities. Thus, in order to show Hoke County students are being wrongfully denied their rightful opportunity for a sound basic education, plaintiffs must show that their failure to obtain such an education was due to the State's failure to provide them with the opportunity to obtain one.

Hoke County I, 358 N.C. at 625, n.11; *see also Leandro*, 346 N.C. at 355, 488 S.E.2d at 260 ("[T]he value of standardized tests is the subject of much debate. Therefore, they may not be treated as absolutely authoritative on this issue.").

Thus, statewide test results do not establish whether there has been a statewide violation. And by focusing on output-exclusive results in the form of statewide standardized testing scores, the trial court erred by failing to examine whether the State had provided the underlying students the "opportunity" to receive a sound basic education. Even if the State had failed to provide the "opportunity" to receive a sound basic education, "thousands" of students does not equate to a statewide violation when there are approximately 1,442,736 students enrolled in North Carolina public schools.

In sum, the trial court knew what to say when one of Plaintiffs' school districts failed to comply with *Leandro* during the "remedial phase." And it ordered the State to fix Halifax County in that instance, resulting in a consent order with a remedy tailored to Halifax County alone. Though it did not order the State to take specific action, the trial court also knew how to identify nonparty school districts as failing to comply with *Leandro* and did just that for Durham County, Guilford County, and Winston-Salem/Forsyth County. But despite the voluminous history of proceedings

during the "remedial phase," the Court will find no other adversary proceedings, with presentation of evidence, findings of fact and conclusions of law, as required in *Hoke County I*. And it certainly will not find such proceedings on a statewide basis or a finding of a statewide violation by clear and convincing evidence.

The lack of a judgment establishing a statewide violation means the court lacked jurisdiction to issue orders directing State educational policy in the form of the CRP. Despite Appellee's insistence to the contrary, the CRP was, in fact, a free-floating remedy that sought to address a statewide violation that was never alleged and never established. Accordingly, the trial court's order imposing the CRP should be rejected as an improper advisory opinion.

III. THE TRIAL COURT'S ORDERS REQUIRING AND ENFORCING THE CRP ARE THE PRODUCT OF A FRIENDLY SUIT.

Appellees insist this is not a friendly suit. To that end, Plaintiffs argue that "whether a suit is a 'friendly suit' is made based on the facts existing at the time a case is initiated[.]" (Pl. Br. at 45 (citations omitted)).

But neither case Plaintiffs cite addresses *these* circumstances—where, during what Plaintiffs dubbed the "remedial phase" of this litigation, they begin working together with the Attorney General to secure consent orders to address new, statewide claims that the parties never plead or proved. Accordingly, this is not a case where otherwise adversarial litigation merely resulted in agreements following a liability judgment. Instead, it is a case where Plaintiffs and the Attorney General, representing only the interests of the executive branch, used an existing caption to obtain consent orders that would give the executive branch dominion over the State's

education system without any need to secure legislative approval for its chosen initiatives.

In short, the Attorney General has supported and sought the same relief as Plaintiffs and the Penn-Intervenors since 2018 when they began seeking a statewide remedy in the form of the CRP. And the Attorney General has publicly chastised the Legislative Intervenors for even daring to appeal the Court's decision to impose the remedy he coordinated with Plaintiffs—without the General Assembly's "insight"—and to which he consented. *See* Attorney General Josh Stein, *Attorney General Josh Stein Pushes Back Against Legislators' Attempts to Relitigate Leandro Case* (11 Jan. 2024), available at https://ncdoj.gov/attorney-general-josh-stein-pushes-back-against-legislators-attempts-to-relitigate-leandro-case/; *see also* The Carolina Journal, *Attorney general echoes Leandro plaintiffs, wants Supreme Court to jump back into school funding dispute* (18 Jan. 2022), available at https://www.carolinajournal.com/attorney-general-echoes-leandro-plaintiffs-wants-supreme-court-to-jump-back-into-school-funding-dispute/.

If the executive branch is truly adverse to Plaintiffs, its active, public, and vehement opposition to the General Assembly's participation in matters of education, or its attempt to vindicate its role without our Constitutional system, tell a different story.

IV. THE POLITICAL QUESTION DOCTRINE PRECLUDES SUBJECT MATTER JURISDICTION TO ISSUE THE STATEWIDE RELIEF AT ISSUE HERE.

The Court lacks subject matter jurisdiction to answer political questions:

> Purely political questions are those questions which have been wholly committed to the sole discretion of a coordinate branch of government, and those questions which can be resolved only by making policy choices and value determinations. Purely political questions are not susceptible to judicial resolution. When presented with a purely political question, the judiciary is neither constitutionally empowered nor institutionally competent to furnish an answer

Harper v. Hall, 380 N.C. 317, 356, 868 S.E.2d 499, 529 (2022); *see also Cooper v. Berger*, 370 N.C. 392, 407–08, 809 S.E.2d 98, 107 (2018) ("The political question doctrine controls, essentially, when a question becomes not justiciable because of the separation of powers provided by the Constitution. The doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the legislative or executive branches of government." (internal citations and quotation marks omitted)).

Hoke County III claimed that "this Court squarely rejected the State's threshold argument that courts may not assess issues of educational adequacy because they are non-justiciable political questions." 382 N.C. at 473–74, 879 S.E.2d at 247–48. It is undisputed, as established in *Leandro*, that the Court may interpret the Constitution and determine when it has been violated:

> It has long been understood that it is the duty of the courts to *determine the meaning* of the requirements of our Constitution. When a government action is challenged as unconstitutional, the courts have a duty to *determine whether* that action exceeds constitutional limits.

346 N.C. at 344–45, 488 S.E.2d at 253–54 (emphasis added). *Leandro* did not, however, address whether the political question doctrine allowed the Court to determine *how* the General Assembly must attain Constitutional compliance, an issue that has been wholly committed to the sole discretion of the General Assembly. *See Hoke County I*, 358 N.C. at 638–39, 599 S.E.2d at 391 (holding that political question doctrine barred trial court from determining the proper age at which children should be permitted to attend public school).

Even *Hoke County III* elided that issue on the grounds that the CRP was "the only comprehensive plan for *Leandro* compliance presented to it by the State" and that the political question doctrine did not prohibit the Court from "assess[ing] the State's compliance with the State's own determination of constitutional educational adequacy, not the [C]ourt's." 2022-NCSC-108, ¶¶ 231, 382 N.C. at 473-74, 879 S.E.2d at 248. In other words, in apparent acknowledgement that the political question doctrine posed a problem, *Hoke County III* avoided holding that the Court itself had the authority to craft and impose the CRP, instead holding that the Court was simply honoring the State's own determination of *how* it must obtain Constitutional compliance. This ignores two important issues: (1) subject matter jurisdiction cannot be conferred upon a court by consent, *In re T.R.P.*, 360 N.C. at 595; and (2) though the Constitution commits the public education system to the General Assembly, the General Assembly had no input on the development of the CRP and therefore it is Appellee's "own determination of constitutional educational adequacy, not the [State's]."

Thus, the Court cannot avoid the political question doctrine by chalking the CRP up to the State's own choice. The Court must squarely address whether the political question doctrine deprives the Court of subject matter jurisdiction to impose the challenged CRP and issue further orders effectuating same. The answer is that it does.

V. THIS APPEAL IS PROPERLY BEFORE THIS COURT.

A. The Court has Jurisdiction Over this Appeal.

Plaintiffs and Penn-Intervenors insist that the Court settled, definitively, that it has subject matter jurisdiction to decide this case and order the novel relief it issued. (Pls.' Br. at 37, 48); (Penn-Intervenors' Br. at 27, 29). That assertion is wrong.

First, Plaintiffs challenge the timing of Legislative-Intervenors subject matter jurisdiction arguments, claiming that "[s]ubject matter jurisdiction and standing are assessed at the time a case is initiated and a pleading requesting declaratory relief is filed." (Pls.' Br. at 38). But "[e]ven legal neophytes understand that subject matter jurisdiction can never be waived and can be raised at any time." *Hoke Cnty. Bd. of Educ. v. State*, 385 N.C. 380, 383, 892 S.E.2d 594, 596 (2023) (Berger, J. concurring) (citing *Lemmerman v. A.T. Williams Oil Co.*, 318 N.C. 577, 580, 350 S.E.2d 83 (1986)). Thus, the timing of Legislative-Intervenors' appeal is irrelevant.

Appellees next rely on Rule 31 of the North Carolina Rules of Appellate Procedure, arguing that this appeal was better raised as a petition for rehearing, the timing for which has expired. (*Id.*) This, however, remains a live dispute with

ongoing proceedings, such as the April 2023 order, that require the court's exercise of subject matter jurisdiction.[13]

Plaintiffs' reliance on prior decisions in this case that addressed subject matter jurisdiction is misplaced. For example, Plaintiffs argue that *Leandro* determined subject matter jurisdiction. To the contrary, that appeal was from denial of a motion to dismiss, and thus the Court's decision was based on whether there was *any* claim for it to hear at all. And, critically, there was no consideration of potential statewide claims or relief. This appeal, however, deals with whether jurisdiction exists to grant novel, *statewide* relief in the face of only a *local* violation which directly infringes upon the separation of powers and the General Assembly's province to set education policy for the State, a nonjusticiable political question. The express language of those prior decisions was not so broad. *See, e.g.*, *Hoke County I*, 358 N.C. at 613 n.5, 599 S.E.2d at 375 n.5. Thus, the context—and posture—of the present appeal is distinguishable.

The Attorney General and Penn-Intervenors take a slightly different approach, arguing that *Hoke County III* ruled on the Court's ability to impose Plaintiffs' and the executive branch's preferred, statewide remedy. (Penn-Intervenors' Br. at 22-23);

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[13] Even if they were correct—which they are not—the North Carolina Rules of Appellate Procedure also provide that the Court may suspend its procedural requirements, particularly "[t]o prevent manifest injustice to a party, or to expedite decision in the public interest[.]" N.C. R. App. P. 2. Thirty years of litigation show that this matter is one of public interest, and it would certainly be a manifest injustice not to decide whether the Plaintiffs even have standing to assert statewide claims and seek statewide relief, and whether the Court has subject matter jurisdiction to order the CRP, a statewide remedy.

(Atty. Gen. Br. at 38-41). Nevertheless, while they bootstrap it to the doctrines of *stare decisis* and "law of the case," their argument is, at bottom, the same as Plaintiffs—*i.e.*, a prior case ruled on jurisdiction, and thus it is settled. But, as discussed below, even *stare decisis* does not insulate errant decisions from subsequent review. This is also true for 2013's *Hoke County II*[14], which the Attorney General argues "confirmed the mandates in *Leandro I* and [*Hoke County I*] 'remain[ed] in full force and effect.'" (Atty. Gen. Br. at 39). Yet again, the relevant "mandates" from those cases were that the Court had subject matter jurisdiction to (i) hear the case in the first place, *Leandro*, 346 N.C. at 336, 488 S.E.2d at 249; (ii) affirm the conclusion of a violation as to at-risk students in Hoke County, only, *Hoke County I*, 358 N.C. at 605, 599 S.E.2d at 365; and (iii) remand for a new trial *in order to determine whether* further violations in the parties' school districts exist, *id.* They did not address the Court's subject matter jurisdiction for the specific question at issue: Plaintiffs' standing to assert statewide claims and seek statewide relief, and the Court's subject matter jurisdiction to grant same.

B. ***Stare Decisis* Does Not Preclude Review.**

Appellees argue that *Hoke County III* controls this case and is determinative and argue the Court should adhere to it. (Pls.' Br. at 27; Atty. Gen. Br. at 26; Penn-Intervenors' Br. at 27). They say, "*stare decisis*." So do Legislative-Intervenors.

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[14] *Hoke Cnty. Bd. of Educ. v. State*, 367 N.C. 156, 749 S.E.2d 451 (2013) ("*Hoke County II*").

Forsaking accuracy for rhetoric, Plaintiffs and their Executive Branch allies claim that "according to [Legislative Intervenors], the Court can simply ignore *stare decisis* when it chooses." (Pl. Br. at 42 n.12). And yet, that is precisely what Plaintiffs and the Executive Branch asked of the Court in *Hoke County III* and what they insist now. But that is not what the Legislative Intervenors request. Rather, Legislative Intervenors seek only to adhere to the "long series of precedents by this Court, over the course of nearly thirty years," (Atty. Gen. Br. at 29), beginning with the foundational decisions in *Leandro* and *Hoke County I*, which addressed the scope of the Court's authority, the requirement of a violation before a remedy, the need to tailor that remedy to only that which is necessary, the boundaries of Plaintiffs' standing, and, importantly, the recognition that their opinions were limited to at-risk students in Hoke County. *Hoke County III* rushes past these critical aspects of the Court's prior binding and law-of-the-case decisions, and, in fact, conflicts with them.[15]

In distinguishing the authorities relied on by the Legislative-Intervenors, the Attorney General makes much of the time that passed between an errant decision and the one reversing it, citing decisions overturning earlier cases from years before. (Atty. Gen. Br. at 29-30). In doing so he implies that *Hoke County III* should remain in place longer, as if its errors would improve with age. But as this Court cautioned a century ago, "[t]here should be no blind adherence to a precedent which, *if it is*

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[15] As Justice Berger observed, "in its rush to publish an opinion in the prior matter, the majority declined to address fundamental subject matter jurisdiction questions. To be sure, these issues were raised, but the majority chose to ignore the bedrock legal principle that courts must examine jurisdiction to act." *Hoke Cnty. Bd. of Educ.*, 385 N.C. at 382, 892 S.E.2d at 596 (Berger, J. concurring).

wrong, *should be corrected at the first practical moment*." *Sidney Spitzer & Co. v. Comm'rs of Franklin Cnty.*, 188 N.C. 30, 32, 123 S.E. 636, 638 (1924) (internal citations omitted) (emphasis added). This is that moment.

Nor is *Hoke County III* the exclusive "law of this case[.]" (Pls.' Br. at 42, n.12 (emphasis omitted)). Both *Leandro* and *Hoke County I* are law of the case, too, and required that any relief by the least intrusive possible to remedy a clear and convincing Constitutional violation, limited Plaintiffs' standing to their respective school districts, and ordered further trials so that further relief would match any violations.

Of course, this limited ruling comports with Plaintiffs' allegations from the outset of this litigation nearly thirty years ago, claiming that the conditions for which they sought relief were particular to "the children of plaintiff districts"—that is, 6 out of the State's 115 school districts. (R p 18, ¶ 58). It is only recently that Appellees claim that Plaintiffs also represent the interests of all remaining 109 districts, though this transformation's origin point remains unclear.

Even Justice Earls, who previously represented the Penn-Intervenors, acknowledged in her order concluding recusal was not warranted that the current "statewide litigation" is distinct from what this case was back in 2005, and apparently did not commence until 2018. (*See generally* 31 January 2024 Order). That the "statewide litigation" is distinct from what preceded it necessarily, if tacitly, admits

the nature of this case inexplicably transformed from Plaintiffs' respective school districts to engulfing the entire State.[16]

The evolution of this case reveals other departures by Plaintiffs from the precedent they so vehemently purport to protect. There is, of course, the imposition of a statewide remedy where this Court found only a local injury. But even the imposition of that remedy departs further from its precedent. For example, consistent with *Hoke County I*, the calculations Legislative Intervenors presented to Judge Ammons accounted for federal funds that were used to fulfill certain CRP action items. (R S pp 4160-4161). Plaintiffs, however—who purport here to champion strict *stare decisis*—"assert[ed] the same arguments that this Court rejected in" *Hoke County I*, (Pl. Br. at 46), and advocated for calculations that disregarded the use of federal funding. (*See* R S pp 4160-4161). Judge Ammons agreed with Plaintiffs to depart from *Hoke County I*, and despite "simply performing a math calculation," (Pl. Br. at 47), instead ordered that the General Assembly must appropriate additional funds to pay for those items, despite having been already funded by federal grant money.

Yet, in *Hoke County I*, Plaintiffs unsuccessfully advanced this same ignore-federal-funding approach. The Court "squarely rejected" this argument, (Pl. Br. at 4), holding that "no statutory or constitutional provisions require that [the State] is concomitantly obliged to be the exclusive source of the opportunity's funding." *Id.* at

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[16] Nor have Legislative-Intervenors located in the Record the "invitation" Justice Earls claims the Penn-Intervenors received from the trial court in 2018 to join the "statewide suit". (31 January 2024 Order Denying Mot. for Recusal at 3, 9).

646, 599 S.E.2d at 395. Thus, unlike Plaintiffs, the Penn-Intervenors, and the Attorney General, Legislative Intervenors do not seek to depart from precedent; rather, they seek adherence to it.

By design, *stare decisis*, as a doctrine, is stubborn. But it is not dogma.[17] Appellees now argue *stare decisis* for *stare decisis*'s sake. And yet, it is only now that they invoke it, for only the benefit of *Hoke County III*, years after having departed from its seminal decisions in *Leandro* and *Hoke County I* to justify the adoption of a statewide remedy for a nonexistent statewide violation.

Hoke County III expressly departs from *Leandro* and *Hoke County I*'s mandates by affirming a statewide remedy—the CRP—in the absence of a statewide violation that takes education policymaking authority from the People, through the Legislative Branch, and gives it to the parties who designed it—Plaintiffs and the Executive. It never had jurisdiction to do so. Legislative Intervenors seek only to return this process to the boundaries imposed by this Court in *Leandro* and *Hoke County I*, which dictate new proceedings to *properly* determine whether additional violations exist. They thus seek adherence to precedent, not abandonment of it—*stare decisis* for due process's sake.

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[17] The Attorney General's own secondary authority agrees. *See* Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 Tex. L. Rev. 1711, 1728 (2013) ("I tend to agree with those who say that a justice's duty is to the Constitution and that it is thus more legitimate for her to enforce her best understanding of the Constitution rather than a precedent she thinks clearly in conflict with it.").

CONCLUSION

For each of the reasons set forth above, as well as those set forth in Legislative Defendants' opening brief, the trial court lacked subject matter jurisdiction to enter orders requiring the State to develop, implement, and fund, the CRP, or to in any other way grant "relief" beyond the limits of Hoke County and Halifax County. Those orders should therefore be vacated with instructions that any further proceedings must be conducted in a manner consistent with the limits imposed by this Court's decision in *Hoke County I* and the scope of claims Plaintiffs have actually alleged.

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