

SUPREME COURT OF NORTH CAROLINA

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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 the

From Wake County  
No. 95-CVS-1158  
No. COA22-86

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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**CONDITIONAL PETITION FOR WRIT OF CERTIORARI**  
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TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Intervenor Defendants-Appellants, 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 (together, the “Legislative-Intervenors”), conditionally petition the Court to issue a writ of *certiorari* pursuant to Rule 21 of the North Carolina Rules of Appellate Procedure to review the 10 November 2021 Order entered by the Honorable David W. Lee, as amended by the 26 Order Following Remand entered by the Honorable Michael L. Robinson (Judge Lee’s Order hereinafter referred to as the “Original Order” and Judge Robinson’s amended Order hereinafter referred to as the “Amended Order”), including all findings, conclusions, directives, and prior related orders incorporated into the both the Original Oder and Amended Order. (R pp 1824, 2168).

On 18 March 2022, this Court granted the State’s Petition for Discretionary Review Prior to a Determination by the Court of Appeals. In that same Order, this Court remanded the case to the trial court to determine the effect, if any, the adoption of the 2021 Current Operations and Appropriations Act, 2021 2021 N.C. Sess. L. 180,

had on the “nature and extent” of the relief granted in the Original Order. Pursuant to that direction, Judge Robinson entered his Amended Order on 26 April 2022 and immediately certified it to this Court. The State and Legislative-Intervenors have both filed notices of appeal from the Original Order, and all of the parties have noted further appeals from the Amended Order. In addition, Plaintiffs and Plaintiff-Intervenors have filed purported appeals as of right, as well as petitions for discretionary review and *certiorari* from a 30 November 2022 Order issuing a Writ of Prohibition restraining portions of the Original Order that would have required State officials to transfer money out of the State Treasury without any legislative appropriation. On 31 May 2022, this Court entered an Order allowing all of the appeals and granting all pending petitions.

Accordingly, the Supreme Court properly has before it all issues arising out of the Original Order and Amended Order, including all findings and conclusions encompassed therein. Still, out of an abundance of caution, the Legislative-Intervenors submit this Conditional Petition, to the extent the Court determines any issue related to those Orders is not already before it on appeal.

In support of this Petition, the Legislative-Intervenors show the following:

### **FACTS AND PROCEDURAL HISTORY**

The Legislative-Intervenors incorporate the statement of facts and procedural history included in its opening brief, filed contemporaneously with this Petition.

### **REASONS THE WRIT SHOULD ISSUE**

The Legislative-Intervenors submit that, should jurisdiction not lie to address all conclusions and findings set forth in the Original Order and Amended Order,

including all prior findings and conclusions from intermediate orders expressly incorporated therein, this Court should issue its writ of *certiorari* to reach those issues for the following reasons.

First, the Orders functionally operate as a final determination on the constitutionality of the Budget Act's efforts to provide educational opportunities for the children of this State as required by the North Carolina State Constitution and this Court's decisions in *Leandro v. State*, 346 N.C. 336, 488 S.E.2d 249 (1997) ("*Leandro I*"); *Hoke Cnty. Bd. of Educ. v. State*, 358 N.C. 605, 599 S.E.2d 365 (2004) ("*Leandro II*"), despite no direct challenge, leaving nothing to be decided between the parties on that issue. They also impose a judgment in an unprecedented sum against the State, totaling more than \$785 million.

In addition, the Orders affect the interests of children and families across North Carolina. The Orders improperly restrain constitutionally-mandated legislative functions of the General Assembly and violate core principles protecting the separation of powers. *See, e.g., Cablevision of Winston-Salem, Inc. v. City of Winston-Salem*, 3 N.C. App. 252, 257, 164 S.E.2d 737, 740 (1968) (restraining exercise of legislative function "in dealing with a matter of large public interest" affects a substantial right).

In particular, the Comprehensive Remedial Plan imposed by the Original Order (and assumed to be valid in the Amended Order) imposes eight years of statewide obligations that dictate virtually the entirety of the State's educational program. Importantly, they do so outside the legislative process, despite a duly-

enacted, presumptively-constitutional Budget having been passed in the interim. In other words, the trial court has commanded statewide legislative compliance with a judicially imposed plan to govern the State's entire educational program, in the absence of a statewide violation, following the passage of the Budget and despite no direct challenge to the Budget's constitutionality. The constitutional—and practical—implications of such a dictate are legion.

Finally, a writ of *certiorari* supports the interests of judicial economy. Many of these issues were ripe for review in the underlying appeal prior to remand. Following remand, the Amended Order further implicates, and creates additional independent bases for, these same issues—all of which involve matters of immediate concern. Piecemeal litigation of any issues arising from the Original Order or the Amended Order will unnecessarily delay answers on questions of the utmost public concern. Thus, the interests of justice, efficiency, and judicial economy are best served by immediate review.

### **CONCLUSION**

For each of the reasons set forth above, the Legislative-Intervenors respectfully request that, should the Court determine that it does not already have jurisdiction over this appeal or that an appeal as of right is otherwise not available as to any issue related to the Original Order or Amended Order, the Court grant the Legislative-Intervenors' Petition and issue a writ of *certiorari* to review such issue along with those already on appeal.

Respectfully submitted, this 1st day of July, 2022.

/s/ Matthew F. Tilley

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

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**CERTIFICATE OF SERVICE**

The undersigned certifies that on 1 July 2022, he caused a true and correct copy of the foregoing document to be served via Email upon the following:

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