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.

****

LEGISLATIVE-INTERVENOR APPELLANTS' BRIEF

****

INDEX

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

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.

****

LEGISLATIVE-INTERVENOR APPELLANTS' BRIEF

****

ISSUES PRESENTED

1. Did the trial court lack subject matter jurisdiction to issue orders, including those requiring the Comprehensive Remedial Plan, that purported to dictate educational policy on a statewide basis when Plaintiffs' claims were limited to the conditions in their individual school districts?

2. Did Plaintiffs lack standing to assert claims for, and to obtain orders directing the operations of, school districts where they do not reside and that were never made part of their claims?

3. Did the trial court exceed its subject matter jurisdiction by issuing an impermissible advisory opinion dictating the programs and funding that must be implemented for North Carolina's statewide educational system, over an eight-year period, in the absence of any claim or judgment that the State system as a whole was insufficient to provide children the opportunity for a sound basic education?

4. Did the trial court exceed its subject matter jurisdiction by issuing remedies, purporting to dictate educational programs and funding, through the issuance of consent orders in a "friendly suit" where there was no true adversity between the parties?

5. Did the trial court lack subject matter jurisdiction under the political question doctrine to order the State to implement, and fund, each element of the Comprehensive Remedial Plan?

INTRODUCTION

In its first two decisions in this case, this Court repeatedly warned the trial court to stay within the well-established boundaries that govern the exercise of judicial power. Those warnings have proved prescient.

In *Leandro*, Justice Mitchell, writing for a unanimous court, explained that "administration of the public schools of the state is best left to the legislative and executive branches of government." *Leandro v. State*, 346 N.C. 336, 357, 488 S.E.2d 249, 261 (1997) ("*Leandro*"). For this reason, he held that "courts of this state must grant every reasonable deference to the legislative and executive branches" and that only a "clear showing to the contrary" will be sufficient "to justify a judicial intrusion into an area so clearly the province, initially at least, of the legislative and executive branches as the determination of what course of action will lead to a sound basic education." *Id.*

In *Hoke County I,* the Court once again reiterated these holdings and then went further. It stressed that, because Plaintiffs' claims turn on the alleged conditions in their individual school districts, they only have standing to represent, at most, the students who live in those districts—not those that 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").* As a result, the Court unambiguously held that, "because the Court's examination" in the only trial ever conducted in this matter "was premised on evidence as it pertains to Hoke County in particular, our holding mandates cannot be construed to extend to the other four rural districts named in the complaint." *Id.* 358

N.C. at 614, 599 S.E.2d at 376, n. 5. Accordingly, the Court directed that further proceedings would be necessary to establish Plaintiffs' claims with respect to any other district. *Id.*

The Court grounded those warnings and limitations not only in judicial restraint, but also the fundamental notion that Plaintiffs must first prove their claims and establish the violation of a constitutional right before they can invoke the courts' remedial powers.

Yet, Plaintiffs—who have now found allies in the executive branch—have refused to live within the boundaries set by this Court. In the years since *Hoke County I*, they have persistently tried to recast that decision as one that establishes the existence of a statewide violation in order to push the court to grant "relief" that exceeds the scope of the judgment they actually obtained.

When the case was assigned to Judge W. David Lee in 2018, Plaintiffs redoubled their efforts to lead the trial court to error. Since that time, they have worked hand-in-hand with the Attorney General's office and the executive branch defendants to secure consent orders that purport to require the State to develop and implement a sweeping "Comprehensive Remedial Plan" ("CRP") that would dictate educational policy and spending for the whole of North Carolina over a period of eight years. The breadth of the CRP cannot be overstated. It includes 146 action items that would dictate virtually every aspect of the State's education program over an eight-year period—from teacher development, recruitment, and pay; to school finance; standards for measuring academic performance; university programs for

teacher training; to universal visits by social workers to new mothers and pre-kindergarten programs. It would also require billions in funding. By the executive branch's own estimate, the CRP will require at least $5.4 billion each year in recurring appropriations, with another $3.6 billion in non-recurring appropriations over the course of the eight-year plan—figures that do not include the numerous items for which funding is marked "TBD."

The implications of imposing the CRP through judicial fiat likewise cannot be overstated. Our State Constitution explicitly recognizes that decisions regarding education policy and spending are left to the people, through their representatives in the General Assembly. *See*, *e.g.*, N.C. Const. Art. IX, §§ 2, 5; *see also Rhyne v. K-Mart*, 358 N.C. 160, 169, 594 S.E.2d 1, 8 (2004) (holding that the General Assembly is the "policy making agency of our government"); *State ex rel. Ewart v. Jones*, 116 N.C. 570, 570, 21 S.E. 787, 787 (1895) (explaining that the General Assembly serves as the policy making branch of government because "[a]ll political power is vested and derived from the people.") The CRP, however, removes decision-making over education from the political process and thus prevents the people from deciding how best to administer and provide for the State's educational system—even if they live in areas where no constitutional violation has ever been alleged.

Judge Ammons's order below,[1] represents what is now only the latest in a series of orders that seek to enforce the CRP—all of which flow from the trial court's original orders requiring "the State" to implement and fund the CRP. Those orders

---

1 *See* Order, dated 17 April 2023 (R p 1311).

culminated in last years' decision in *Hoke County III*,[2] in which a majority of this Court voted to break with more than 200 years of precedent and allow the court to order money out of the State treasury without a legislative appropriation as required by the Appropriations Clause of the State Constitution.[3] In March, this Court implicitly recognized that ordering such a transfer would exceed the court's remedial powers and reinstated a writ of prohibition issued by the Court of Appeals prohibiting it.[4] Still the Court has yet to determine whether the trial court had jurisdiction to require the CRP in the first place. This appeal presents that issue.

---

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

[3] The Appropriations Clause of Article V, Section 7 of the State Constitution provides: "No money shall be drawn from the State treasury but in consequence of appropriations made by law . . . ." N.C. Const. art V, § 7.

[4] As the writ of prohibition makes clear, it rests on the conclusion that the trial court acted in a matter without jurisdiction and in a manner contrary to law. (App. 1-2 (citing *State v. Allen*, 24 N.C. 183, 189 (1841)). The Court of Appeals reached that conclusion based on both the text of the Appropriations Clause[4] and an unbroken line of Supreme Court decisions that have consistently held "appropriating money from the State treasury is a power vested exclusively in the legislative branch" and thus the judicial branch "lack[s] the authority to 'order State officials to draw money from the State treasury.'" *Cooper v. Berger*, 376 N.C. 22, 47, 852 S.E.2d 46, 64 (2020) (quoting *Richmond Cnty. Bd. of Educ. v. Cowell*, 254 N.C. App. 422, 423, 803 S.E.2d 27, 29 (2017)); *see also Richmond Cnty. Bd. of Educ.*, 254 N.C. App. at 426, 803 S.E.2d at 31 ("The Separation of Powers clause prevents the judicial branch from reaching into the public purse on its own" even if to remedy the violation of another constitutional provision directing how those funds must be used); *In re Alamance Cnty. Court Facilities*, 329 N.C. 84, 94, 405 S.E.2d 125, 129 (1991) (holding that the Separation of Powers Clause "prohibits the judiciary from taking public monies without statutory authorization"); *State v. Davis*, 270 N.C. 1, 14, 153 S.E.2d 749, 758 (1967) ("[T]he appropriations clause "states in language no man can misunderstand that the legislative power is supreme over the public purse").

As set forth below, the trial court lacked subject matter jurisdiction to impose the CRP—much less require the transfer of money to fund it—for at least four principal reasons:

First, by issuing statewide injunctions, the trial court purported to decide the rights of parties who were not before it. Because Plaintiffs' claims are limited to the alleged conditions in their individual school districts, they do not have standing to represent students who live elsewhere. The trial court, however, disregarded this and purported to issue orders that dictated educational measures to be taken in districts for where no claim has ever been alleged.

Second, the trial court erred by issuing a "remedy" without first requiring proof of a violation. This Court made clear in *Hoke County I*, that, because the only trial in this matter related to Hoke County, its mandates could not extend beyond that district, and that further adversarial proceedings would be necessary to establish Plaintiffs claims regarding the remaining counties. Those proceedings never occurred, and Plaintiffs have never proven the existence of a violation outside of Hoke or Halifax County by clear and convincing evidence. The trial court's efforts to dictate the measures necessary to provide for the State's education system as a whole thus amounts to a mere "advisory opinion."

Third, the Court erred by issuing injunctive relief in an otherwise "friendly suit" where there was no actual adversity between the parties, and, in doing so, permitting Plaintiffs and the executive branch to make an "end-run" around the legislative process.

Fourth, the Court's imposition of the CRP improperly seeks to answer political questions by not just determining *whether* a violation occurred, but prescribing *how* the State's educational system should be administered and the manner in which it should be funded.

For each of these reasons, the trial court's orders imposing and requiring implementation of the CRP—including Judge Ammons's most recent order purporting to calculate the amounts necessary to fund Years 2 and 3 of that plan—exceed the bounds of the court's subject matter jurisdiction and should accordingly be overturned.

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

On 18 October 2023, this Court granted Legislative Intervenors' petition for discretionary review prior to a determination by the Court of Appeals and certified this case for review "on the question of whether the trial court lacked subject matter jurisdiction to enter its order of 17 April 2023." This Court therefore has jurisdiction to hear this appeal pursuant to N.C. Gen. Stat. 7A-31(b) and Rule 15 of the North Carolina Rules of Appellate Procedure.

STATEMENT OF THE CASE AND THE FACTS

This litigation, which is commonly known as "*Leandro*," now spans 29 years. As a result, the case's procedural history is winding and complex. Although there has

only ever been one trial, the case has now produced four decisions from this Court, including the decision last year in *Hoke County III*.[5]

Judge Ammons's order itself does not stand alone, but instead, pursuant to this Court's instructions in *Hoke County III*, amended prior orders issued by Judge W. David Lee on 10 November 2021, and Judge Michael L. Robinson on 26 April 2022, which required the State to fund Years 2 and 3 of the CRP. Those orders, in turn, reflected a multi-year effort by the Attorney General's and Plaintiffs to secure consent orders requiring the State to develop, implement, and fund the CRP.[6]

Determining whether the trial court had jurisdiction to enter those orders requires attention to the precise procedural history of this litigation, and in particular, the limits imposed by this Court's prior decisions as well as what was, and what was not, established by the one-and-only trial in this matter.

A. <u>The Parties and Plaintiffs' Initial Claims</u>

The case commenced in May 1994 when local school boards from five rural, "relatively poor school systems" in Cumberland, Halifax, Hoke, Robeson, and Vance Counties, along with students and parents from those districts, sued the State and State Board of Education, alleging that the conditions in their respective districts fell

---

[5] Those decisions are *Leandro v. State*, 346 N.C. 336, 488 S.E.2d 249 (1997) ("*Leandro*"); *Hoke Cnty. Bd. of Educ. v. State,* 358 N.C. 605, 599 S.E.2d 365 (2004) ("*Hoke County I*"); *Hoke Cnty. Bd. of Educ. v. North Carolina*, 367 N.C. 156, 749 S.E.2d 451 (2013) ("*Hoke County II*"); and *See Hoke Cnty. Bd. of Educ. v. State*, 382 N.C. 386, 879 S.E.2d 193 (2022) ("*Hoke County III*").

[6] To this end, Judge Lee's 10 November 2021 Order further incorporated the trial court's prior 21 January 2020 Consent Order; 11 September 2020 Consent Order; 7 June 2021 Order; 22 September 2021 Order; and 22 October 2021 Order.

below the threshold necessary to provide them an opportunity for a sound basic education as guaranteed by the North Carolina Constitution. *Leandro*, 346 N.C. at 342, 488 S.E.2d at 252. The original plaintiffs were joined by intervening plaintiffs from five wealthy school districts who alleged the opposite—that by focusing resources on rural school districts, the State had ignored the needs of urban districts. Four of those intervening plaintiffs later dismissed their claims. *Id*. 346 N.C. at 342, 488 S.E.2d at 252. Only one, the Charlotte-Mecklenburg Board of Education, remains—although now in the capacity of a "realigned defendant."

As this Court explained in *Leandro*, the claims asserted by these two sets of Plaintiffs were not the same. Plaintiffs from the "poor" school districts alleged their students were being "denied an equal education because there is a great disparity between the educational opportunities available [in their districts] and those offered in more wealthy districts of our state." *Id.* According to Plaintiffs, the State's system of financing education resulted in poor conditions in their individual districts, including substandard school facilities and insufficient educational resources, producing an inadequate substantive education, as evidenced by standardized test scores lower than the statewide averages. *Id.*

As mentioned, Plaintiffs from the wealthy school districts essentially alleged the opposite. They argued that by "singling out certain rural districts to receive supplemental state funds" the State had "failed to recognize comparable if not greater needs in urban school districts," which must serve large populations of students with special needs.

In 2005—after the Court issued its decision in *Hoke County I*—another set of plaintiffs, known as the "Penn-Intervenors," joined the case.[7] Their claims differ from the other Plaintiffs and rest primarily on allegations that Charlotte-Mecklenburg Schools' reassignment plan violated their rights under the Equal Protection Clause as well as the Educational Provisions of the North Carolina Constitution. (R p 682). The Penn-Intervenors later amended their complaint to remove the claims focused on the student assignment plan and instead asserted a litany of alleged failures to provide a sound basic education limited to high poverty and low-performing high schools in the Charlotte-Mecklenburg school district. (R pp 1032-34).

B. *Leandro*

In 1997 this Court issued its decision in *Leandro*.

In an opinion by Chief Justice Mitchell, the Court held that "Article I, Section 15, and Article IX, Section 2 of the North Carolina Constitution combine to guarantee every child of the state an opportunity to receive a sound basic education" that meets certain, minimum "qualitative" standards. *Leandro,* 346 N.C. at 347, 488 S.E.2d at 255. The Court then defined what constitutes a "sound basic education," not in terms of money or funding, but in terms of "substance," explaining as follows:

> For purposes of our Constitution, a "sound basic education" is one that will provide the student with at least: (1) sufficient ability to read, write, and speak the English language and a sufficient knowledge of fundamental mathematics and physical science to enable the student to function in a complex and rapidly changing society; (2) sufficient fundamental knowledge of geography, history, and basic economic and political systems to enable

[7] Justice Earls represented the Penn-Intervenors in this case and signed the original and amended complaints on their behalf.

> the student to make informed choices with regard to issues that affect the student personally or affect the student's community, state, and nation; (3) sufficient academic and vocational skills to enable the student to successfully engage in post-secondary education or vocational training; and (4) sufficient academic and vocational skills to enable the student to compete on an equal basis with others in further formal education or gainful employment in contemporary society.

Id. Based on this, the Court concluded "that some of the allegations in the complaints . . . state claims upon which relief may be granted if they are supported by substantial evidence." *Id.* at 355, 488 S.E.2d at 259.

At the same time, the Court held that, because State Constitution expressly authorizes local governments to "add to or supplement" the funding provided public schools, Plaintiffs' claims based on differences in funding levels were nonjusticiable and therefore should be dismissed. *Id.* at 355-57, 488 S.E.2d at 259.

In remanding the case, this Court stressed that decisions over how to administer the State's educational program should be left to the democratic process. It agreed with the United States Supreme Court's observation that "[t]he very complexity of the problems of financing and managing a statewide public school system suggests that there will be ***more than one constitutionally permissible method of solving them***." *Id.* at 356, 488 S.E.2d at 260 (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez,* 411 U.S. 1, 42–43 (1973) (emphasis added)). Therefore, "within the limits of rationality, the legislature's efforts to tackle the problems should be entitled to respect." *Id.* (quoting *San Antonio Indep. Sch. Dist.,* 411 U.S. at 42–43).

The Court also addressed the burden Plaintiffs would have to meet to establish their claims at trial. It admonished that the courts "must grant every reasonable deference to the legislative and executive branches when considering whether they have established and are administering a system that provides the children of the various school districts of the state a sound basic education[,]" and, accordingly, "***a clear showing to the contrary*** must be made before the courts may conclude that they have not." *Id.*, 358 N.C. at 357, 488 S.E.2d at 261 (emphasis added). "Only such a clear showing," the Court explained, would "justify a judicial intrusion into an area so clearly the province, initially at least, of the legislative and executive branches as the determination of what course of action will lead to a sound basic education." *Id.*

With this guidance, the case was remanded to the trial court and then subsequently assigned to the Honorable Howard E. Manning, Jr. under Rule 2.1 of the General Rules of Practice.

C. Trial and Judgment Regarding Conditions in Hoke County Schools

After remand, Judge Manning, with agreement of the parties, bifurcated the case and conducted a trial limited to the conditions in Hoke County. *Hoke County I*, 348 N.C. at 613, 599 S.E.2d at 375. The trial was conducted periodically over fourteen months. Following conclusion of the trial, the parties submitted post-trial briefing and Judge Manning issued his judgment, set out in a four-part "Memorandum of

Decision" that spanned more than 400-pages, the last installment of which was entered on April 4, 2002.[8]

In his decision, Judge Manning concluded the State's (i) curriculum (as reflected in the State's Standard Course of Study); (ii) system for licensing, certifying, and employing teachers; (iii) standards for academic accountability; as well as its (iv) "educational funding delivery system" were all sufficient to provide children with an opportunity to obtain a sound basic education. (R p 563 Importantly, Judge Manning also rejected Plaintiffs' arguments that differences in educational opportunities in Hoke County were attributable to a lack of funding. (R p 567 ("[P]laintiffs and plaintiff-intervenors have yet to convince this Court, by clear and convincing evidence, that the State of North Carolina is not presently providing sufficient funding to its LEAs to meet the Constitutional mandate that each child have an equal opportunity to receive a sound basic education."); *see also* R p 474 ("Instead, the Court believes that the funds presently appropriated and otherwise available are not being effectively applied . . . .")).[9] Judge Manning, however, did conclude that Plaintiffs had shown that at-risk students in Hoke County were "not receiving an equal opportunity to receive a sound basic education." (R p 573).

---

[8] *See* Memorandum of Decision – Section One (filed 12 October 2002) (R p 234); Memorandum of Decision – Section Two (filed 26 October 2000) (R p 428); Memorandum of Decision – Section Three (filed 26 March 2001) (R p 472); Order Amended Memorandum of Decision Dated 26 March 2001 (R p 560); and Memorandum of Decision – Section Four (filed 4 April 2002) (R p 570).

[9] *See also Hoke County I*, 358 N.C. at 634, 599 S.E.2d at 388 ("We note that the trial court went to great lengths in its efforts to convey its view that the evidence offered no definitive showing that the State's overall funding, resources, and program scheme lacked the essentials necessary to provide a sound basic education.")

Accordingly, he ordered the State to develop a plan to address the deficiencies in the educational services provided to students in Hoke County, and to keep the Court apprised of its remedial actions through written reports filed every ninety-days. *See Hoke County I*, 358 N.C. at 608-09, 599 S.E.2d at 372-73. At the same time, Judge Manning expressly stated the "nuts and bolts of how this task should be accomplished is not for the Court to do." (R p 558). Instead, "[c]consistent with the direction of *Leandro*," he concluded "this task belongs to the Executive and Legislative Branches of Government." (*Id.*) The court also ordered that the State expand pre-kindergarten educational programs so that they reach all qualifying "at-risk" students. *Id.*

D. *Hoke County I*

Plaintiffs and the State cross appealed Judge Manning's ruling, which resulted in this Court's 2004 decision in *Hoke County I*.[10]

The Court began with the observation that, "[w]ith the [*Leandro*] *decision* . . . the thrust of this litigation turned from a funding issue to one requiring the analysis of the qualitative educational services provided to the respective plaintiffs and plaintiff-intervenors." *Hoke County I*, 358 N.C. at 609; 599 S.E.2d at 373. The Court also explained that, because the trial had been limited to the conditions in Hoke County, "***our consideration of this case is properly limited to the issues relating in Hoke County as raised at trial***." *Id.* at 613, 599 S.E.2d at 375

---

[10] The original lead plaintiffs, Robert Leandro and his mother Kathleen, withdrew from the case once he reached the age of majority. In recognition of this, as well as the case's focus on only the conditions in *Hoke County*, this brief refers to the subsequent decisions captioned *Hoke County Board of Education v. State* as *Hoke County I*, *Hoke County II*, *etc.*, rather than "*Leandro II," etc. See Hoke County III*, 382 N.C. 386, 480, 879 S.E.2d 193, 252 (Berger J., dissenting).

(emphasis added). For this reason, the Court held that its mandates did not extend beyond Hoke County, and "further proceedings" would be necessary on Plaintiffs' claims regarding the other counties:

> The Court recognizes that plaintiffs from the four other original rural districts—those representing Cumberland, Halifax, Robeson, and Vance Counties—were not eliminated as parties as a result of the trial court's decision to confine evidence to its effect on Hoke County schools. ***However, because this Court's examination of the case is premised on evidence as it pertains to Hoke County in particular, our holding mandates cannot be construed to extend to the other four rural districts***, the case is remanded to the trial court for further proceedings that include, but are not necessarily limited to, presentation of relevant evidence by the parties, and findings of and conclusions of law by the trial court.
>
> Moreover, the Court emphasizes that its holding in the instant case is not to be construed in any fashion that would suggest that named plaintiffs from the other four rural districts are precluded from pursuing their claims as presented in the complaint.

Id. (emphasis added).

As to Hoke County in particular, the Court upheld Judge Manning's conclusion that the State had failed to provide a significant number of Hoke County students an opportunity to receive a sound basic education. *Id.* at 609, 599 S.E.2d 373. In doing so, the Court held Judge Manning properly considered evidence regarding both "outputs" (*i.e.*, evidence regarding student performance, including results of standardized testing) as well as "inputs" (evidence regarding the resources made available to districts and students) in finding the existence of a violation. At the same time, the Court noted that, given the "free-wheeling nature" of the trial court's

judgment, it could not tell "pro or con" whether the trial court's findings were limited to only "at-risk" students. *Id.* at 622, 634, 599 S.E.2d at 380, 388. Accordingly, the Court explained: "We cannot and do not offer any opinion as to whether non 'at-risk' students in Hoke County are either obtaining a sound basic education or being afforded their rightful opportunity by the State to obtain such an education." *Id.* at 634, 599 S.E.2d at 388.

The Court in *Hoke County I* also rejected Plaintiffs' argument that it should ignore federal funding when determining whether the State has met its obligations. As the Court explained, "[w]hile the State has a duty to provide the means for such [constitutionally sufficient] educational opportunity, no statutory or constitutional provisions require that it is concomitantly obliged to be the exclusive source of the opportunity's funding." *Id.* at 646, 599 S.E.2d at 395.

Finally, the Court addressed the remedies Judge Manning sought to impose. First, the Court held that the trial court "demonstrated admirable restraint by refusing to dictate how existing problems should be approached and resolved," instead "defer[ing] to the expertise of the executive and legislative branches of government in matters concerning the mechanics of the public education process." *Id.* at 638, 599 S.E.2d at 390-91. Accordingly, the Court upheld "those portions of the trial court's order . . . that require the State to assess its education-related allocations to the county's schools [*i.e.*, the schools in Hoke County] so as to correct any deficiencies that presently prevent the county from offering its students the opportunity to obtain a *Leandro*-conforming education." *Id.* at 638, 599 S.E.2d at 391.

But the Court reversed the portion of the Judge Manning's order that purported to require specific remedies by directing the State to extend pre-kindergarten services to all at-risk students, reasoning as follows:

> In our view, while the trial court's findings and conclusions concerning the problem of "at-risk" prospective enrollees are well supported by the evidence, a similar foundational support cannot be ascertained for the trial court's order requiring the State to provide pre-kindergarten classes for either all of the State's "at-risk" prospective enrollees or all of Hoke County's "at-risk" prospective enrollees. Certainly, when the State fails to live up to its constitutional duties, a court is empowered to order the deficiency remedied, and if the offending branch of government or its agents either fail to do so or have consistently shown an inability to do so, a court is empowered to provide relief by imposing a specific remedy and instructing the recalcitrant state actors to implement it . . . . **However, such specific court-imposed remedies are rare, and strike this Court as inappropriate at this juncture of the instant case for two related reasons: (1) The subject matter of the instant case—public school education—is clearly designated in our state Constitution as the shared province of the legislative and executive branches; and (2) The evidence and findings of the trial court, while supporting a conclusion that "at-risk" children require additional assistance and that the State is obligated to provide such assistance, do not support the imposition of a narrow remedy that would effectively undermine the authority and autonomy of the government's other branches . . . .**
>
> The state's legislative and executive branches have been endowed by their creators, the people of North Carolina, with the authority to establish and maintain a public school system that ensures all the state's children will be given their chance to get a proper, that is, a *Leandro*-conforming, education. As a consequence of such empowerment, those two branches have developed a shared history and expertise in the field that dwarfs that of this and any other Court. While we remain the ultimate

> arbiters of our state's Constitution, and vigorously attend to our duty of protecting the citizenry from abridgments and infringements of its provisions, **we simultaneously recognize our limitations in providing specific remedies for violations committed by other government branches in service to a subject matter, such as public school education, that is within their primary domain**. Thus, we conclude that the trial court erred when it imposed at this juncture of the litigation and on this record the requirement that the State must provide pre-kindergarten classes for all "at-risk" prospective enrollees in Hoke County. In our view, based on the evidence presented at trial, such a remedy is premature, and **its strict enforcement could undermine the State's ability to meet its educational obligations for "at-risk" prospective enrollees by alternative means.**

Id. at 643-45, 599 S.E.2d at 394 (emphasis added).

Thus, the Court left the remedy for at-risk students in Hoke County to the legislative and executive branches, and otherwise remanded the case to the trial court to conduct further proceedings as to the other districts who had asserted claims, but not on a statewide basis.

E. Remedial Phase

Although the Court in *Hoke County I* remanded the case with the expectation that the parties would conduct trials concerning Plaintiffs' claims regarding the other named school districts, no such trials (or any other proceedings leading to a judgment entered in accordance with the Rules of Civil Procedure) ever occurred. Instead, the trial court and the parties pushed forward with post-judgment enforcement proceedings, which they have since referred to as the "remedial phase" of this litigation.

During this time, Judge Manning summoned the parties to appear at a series of status conferences and required Defendants to provide periodic reports and updates regarding their progress fixing the deficiencies identified in the course of the trial.[11] The only substantive change during this period occurred on 6 May 2009, when the parties entered into a Consent Order that required Halifax County Schools to cooperate with the State Board of Education to fix deficiencies in its delivery of educational services. (R S pp 2671).

At some point, the scope of those conferences, as well as the reports the State submitted, inexplicably expanded beyond Hoke County to include progress on statewide initiatives and standardized test results across all 115 local school districts.

F. Plaintiffs and the Attorney General Cooperate to Obtain Consent Orders Requiring the CRP

Following Judge Manning's retirement in 2016, the case was reassigned to Judge Lee. From that point on, the Attorney General joined sides with the Plaintiffs to secure a series of consent orders purporting to "require" the State to take actions and fund various initiatives that would otherwise require legislative approval.

---

[11] The parties dispute whether the procedural orders Judge Manning issued in calling these hearings—most of which were entitled "Notice of Hearing and Order Re: Hearing" also established the existence of a Statewide violation, as opposed to one in just Hoke County. Although the majority in *Hoke County III*, concluded these orders amounted to a judgment establishing a violation, it remains undisputed that no other trials were ever conducted. *Hoke County III*, 307, 382 N.C. 386, 499, 879 S.E.2d 193, 263. ("The record demonstrates that, contrary to this Court's express direction, no trials were conducted for any other school districts or counties, and the parties have failed to point this Court to anything in the record indicating that any such trials ever occurred. Moreover, at oral argument in this case, the parties were unable to direct this Court to any order finding a statewide violation.")

In 2018, the Attorney General, together with the Plaintiffs, asked the court to appoint WestEd, a San-Francisco-based consultant, to work with the Governor's newly appointed Commission on Access to a Sound Basic Education to develop proposals to correct deficiencies in the State's educational system. (13 March 2018 Order at n. 1 (R S p 2935); *see also* 10 November 2021 Order at p 5 (R S p 3473)). Through a joint motion, the Attorney General and the Plaintiffs asked the court to charge the consultant with an expanded scope, and thus to develop recommendations, not just for Hoke County, but "every public school in North Carolina" to:

> a. To provide a competent, well-trained teacher in every classroom ***in every public school in North Carolina***;
>
> b. To provide well-trained, competent principal for ***every public school in North Carolina***; and
>
> c. To identify resources necessary to ensure ***that all children in public school***, including those at-risk, have an equal opportunity to obtain a sound basic education, as defined in *Leandro I*.

(Order on Joint Motion for Case Management and Scheduling Order, dated 1 February 2018 (R S pp 2928-29) (emphasis added)). The parties also asked that the Court direct that WestEd be given access to, and be allowed to participate in, all meetings of the Governor's Commission.[12] (R S p 2930). The Attorney General and Plaintiffs, however, did not ask Judge Lee to direct WestEd to work with the General

---

[12] The WestEd report was funded, in part, by two executive branch agencies controlled by the Governor, DHHS ($600,000) and the Department of Administration ($200,000). *See* "Pivotal Report in NC School Funding Lawsuit Costs $2 Million, WRAL.com (3 Nov. 2021), *available at*, https://tinyurl.com/39cfzevy (last visited 9 Nov. 2023).

Assembly, and the West Ed report makes clear the authors did not consult any members of the General Assembly in developing their recommendations, despite purportedly "engaging" more than 1,310 "stakeholders" including superintendents, teachers, central office staff, members of the board of education, and members of the Governor's Commission. (R S p 2995).

WestEd's Report was submitted to Judge Lee in June 2019, but the court directed that it initially remain under seal. In January 2020, after WestEd's report was finally released to the public, the trial court signed a jointly-prepared consent order directing the executive branch to create a plan to implement WestEd's recommendations. The consent order expanded the scope of the court's mandates even further by directing that the plan include the following *statewide* components:

> 1. 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;
>
> 2. 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;
>
> 3. 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;
>
> 4. 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;

> 5. An assistance and turnaround function that provides necessary support to low-performing schools and districts;
>
> 6. 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
>
> 7. 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.

(R S pp 3278).

On 15 March 2021, the executive branch defendants submitted a "Comprehensive Remedial Plan" ("CRP") to the trial court, which largely mirrored items the Governor and State Board of Education had requested in the Governor's proposed budget.[13] (R p 745). Although the 2002 judgment that resulted from the only trial in this matter was limited to at-risk children attending schools in Hoke County, *see Hoke County I,* 358 N.C. at 613, 599 S.E.2d at 375, n.5, the CRP included proposals to rework virtually every element of the State's education program over an eight year period. In its submission, DOJ represented that each of the 146 proposed actions items in the Plan were "necessary and appropriate actions that must be implemented to address continuing constitutional violations." (*See* 10 November 2021 Order (R p 3477) (quoting State's March 20 Submission at 3, 4 (emphasis added by court))).

---

[13] *See* Governor Cooper Proposes Budget, dated 24 March 2021, *available at* https://tinyurl.com/ycxf5tcw (last visited 9 Nov. 2023).

Plaintiffs consented to the Plan, and in June 2021, the Court issued an order—again drafted by the parties—approving the CRP and requiring the State to implement it. (R p 736). The Executive-branch agencies that prepared the CRP acknowledged in numerous places that their proposals would require approval of the North Carolina General Assembly—either to amend existing statutes or appropriate money for the proposals. (*See, e.g.,* R pp 751-99 (listing "General Assembly" among the "Responsible Parties"). Indeed, while the funding necessary to accomplish many of the tasks was marked "TBD," the Appendix attached to the Plan estimated that, by FY 2028, it will require at least $5.4 billion each year in recurring appropriations, with another $3.6 billion in non-recurring appropriations over the course of the eight-year plan. (R pp 801-29).

Even though they acknowledged their proposals would require legislative approval, Plaintiffs and the Attorney General never sought to consult the General Assembly, either in the course of developing the CRP or after they secured an order directing the State to implement it. *Hoke County III*, 382 N.C. at 513, 879 S.E.2d at 271 (Berger J., dissenting) ("This was all done to the exclusion of the one entity that controlled what the parties wanted to accomplish—the General Assembly. Put another way, executive branch bureaucrats and government actors, sanctioned by the court, agreed to a process that called for the expenditure of taxpayer money without consultation from the branch of government to which that duty is constitutionally committed.") Yet, in status conferences the Attorney General repeatedly complained

that the relevant executive agencies could not implement the plan because, at the time, no budget had been adopted for the FY 2021-22 and 22-23 biennium.

G. Trial Court's 10 November 2021 Order

In November 2021, Plaintiffs and the Attorney General submitted briefs and a proposed order to the trial court that purported to, in the absence of an appropriation made by the General Assembly, require the State Controller and Treasurer to transfer more than $1.7 billion out of the State treasury to fund Years 2 and 3 of the CRP. The trial court acknowledged the Appropriations Clause prohibits drawing money from the treasury unless "in consequence of appropriations made by law." N.C. Const. Art. V, § 7. It also acknowledged that this Court's cases hold that the General Assembly has the exclusive power over appropriations (R S p 3482 (citing *Cooper v.* Berger, 376 N.C. 22, 852 S.E.2d 46 (2020) and *Richmond Cnty. Bd. of Educ. v. Cowell*, 254 N.C. App. 422, 803 S.E.2d 27 (2017))). Nevertheless, the trial court adopted Plaintiffs and the Attorney General's briefing, including their reasoning that it could order the requested appropriation based on a made-up theory that "Article I, Section 15 of the North Carolina Constitution represents an ongoing constitutional appropriation of funds," and thus grant the courts "inherent power" to order the appropriations from the treasury. (R S p 3484).

The trial court directed that the Office of State Budget and Management ("OSBM"), Treasurer, and Controller transfer $1,754,153,000 to the Department of Public Instruction, Department of Health and Human Services, and the University of North Carolina System to pay for the items listed in Years 2 and 3 of the CRP and

to "treat the foregoing funds as an appropriation from the General Fund." (R p 3487-88). At the conclusion of the Order, the trial court stayed its implementation for 30 days to "preserve the *status quo*." (*Id.*)

On 18 November 2021, while the trial court's order was stayed, the General Assembly enacted the Current Operations and Appropriations Act of 2021, N.C. Sess. Law. 2021-180 (the "2021 Appropriations Act" or "2021 Budget"), which the Governor signed into law the same day. Although the budget appropriated $21.5 billion in net General Funds over the FY 2021-23 biennium for K-12 public education—approximately 41% of the total biennial budget—it did not contain allocations identical to the executive branch's CRP.

H. Writ of Prohibition

On 24 November 2021, Dr. Linda Combs, then the Controller for the State of North Carolina and a non-party, petitioned the North Carolina Court of Appeals for a writ of prohibition restraining implementation of the November 10 Order, noting that the Budget and the Order created conflicting directives with which it would be impossible to comply. In her petition, the Controller raised four primary arguments: (1) the trial court lacked jurisdiction to issue the transfer order; (2) the transfer order is contrary to the express language of the General Statutes; (3) the order is contrary to the express language of the State Constitution; and (4) the order conflicts with controlling decisions from the appellate courts.

On 30 November 2021, the Court of Appeals issued a Writ of Prohibition "restrain[ing] the trial court from enforcing the portion of its order requiring petitioner to treat the $1.7 billion in unappropriated funding . . . 'as an appropriation

from the General Fund . . . .]" (*See* App.. 2). In issuing the writ, the Court of Appeals held that the trial court erred in several respects:

- First, the court reasoned that treating Article I, section 15 as a "constitutional appropriation" would contravene decisions, such as those in *Cooper v. Berger,* 376 N.C. 22, 37, 852 S.E.2d 46 (2020) and *Richmond Cnty. Bd. of Educ. v. Cowell*, 254 N.C. App. 422, 803 S.E.2d 27 (2017), which have consistently held that "appropriating money from the State treasury is a power vested exclusively in the legislative branch" under the Appropriations Clause. (App. 1-2).
- Second, the court concluded such an interpretation would "render another provision of our Constitution meaningless." (*Id.*). As the court recounted, Article IX, which deals with education, includes numerous sections which "provid[e] specific means of raising funds for public education . . . including the proceeds of all penalties, forfeitures, as well as fines imposed by the State, various grants, gifts, and devises." N.C. Const. art IX, § 6, 7. It also authorizes the General Assembly to supplement these sources of funding by "so much of the revenue of the State as may be set apart for that purpose." N.C. Const. art. IX, § 6. The Constitution requires that all such funds "shall be faithfully appropriated and used exclusively for establishing and maintaining a uniform system of free public schools." *Id.* If Article I, Section 15 were treated as an "ongoing appropriation," the court reasoned "there [would

be] no need for the General Assembly to 'faithfully appropriate' the funds" and "it would render these provisions . . . unnecessary and meaningless." (App. 1-2).

- Finally, the Court of Appeals held the transfer order "would result in a host of ongoing 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." (App. 2).

Judge Arrowood filed a dissent, contending that the majority should not have accelerated the deadlines to respond to the Controller's petition and instead should have issued only a temporary stay rather than a writ of prohibition. (App. 2-3). Judge Arrowood did not dissent from the merits of the writ.

On 15 December 2021, Plaintiffs filed a "Notice of Appeal, Petition for Discretionary Review and, Alternatively, Petition for Writ of *Certiorari*" seeking review of the Court of Appeals' 30 November 2021 order granting the writ of prohibition. Plaintiffs-Intervenors likewise filed a "Notice of Appeal and Petition for Discretionary Review" the same day. In their petitions, Plaintiffs and Plaintiff-Intervenors argued that the Writ of Prohibition effectively operated as a "decision on the merits" of their appeals. Accordingly, they asked the Court to grant *certiorari* on broad questions that would allow it to reach the merits of both the 10 November 2021

transfer order and the writ of prohibition. Those petitions and appeals are still pending before this Court as case no. 425A21-1.

I. Appeals from Transfer Order and Limited Remand

On 7 December 2021, the Attorney General appealed the trial court's 10 November 2021 transfer order. The next day, the General Assembly, by and through the Legislative Intervenors, intervened as of right in the trial court pursuant to N.C. Gen. Stat. § 1-72.2 and filed a notice of appeal as well. The Attorney General then filed a petition asking the Supreme Court to bypass the Court of Appeals and take up the parties' appeals from the 10 November 2021 order immediately. Those appeals, which led to the Court's decision in *Hoke County III*, proceeded before this Court as case no. 425A21-2.

On 21 March 2022, the Supreme Court granted the Attorney General's bypass petition, but simultaneously remanded the case for 30 days "for the purpose of allowing the trial court to determine what effect, if any, the enactment of the State Budget has upon the nature and extent of the relief that the trial court granted" in the November Order. (21 March 2022 Order Remanding Case, at 2 (No. 425A21-2)). At the same time, the Court issued an Order directing that Plaintiffs' petitions and appeals from the Court of Appeals' Writ of Prohibition be "held in abeyance, with no other action, including the filing of briefs, to be taken until further order of the Court." (21 March 2022 Order at 2 (No. 425A21-1)). The next day, the case was reassigned to Judge Michael L. Robinson of the North Carolina Business Court.

Pursuant to the Court's instructions, Judge Robinson issued an order on 26 April 2022 amending Judge Lee's 10 November 2021 transfer order. In doing so,

Judge Robinson concluded that the amounts the order declared to be due the various executive agencies should be reduced to reflect amounts appropriated from State and federal sources in the State Budget. Judge Robinson also concluded he was bound by the Court of Appeals' Writ of Prohibition, which "ha[d] not been overruled or modified" and therefore was "binding on the trial court." Accordingly, he amended the 10 November 2021 order "to remove [the] directive that State officers or employees transfer funds from the State treasury to fully fund the CRP."[14]

Plaintiffs, Plaintiff-Intervenors, the Attorney General, and Legislative Intervenors each appealed the amended order.

On 1 June 2022, the Court ordered the parties to submit briefing on their appeals from the amended transfer order in case no. 425A21-2. At the same time, the Court noted that the petitions and appeals from the Writ of Prohibition in case no. 425A21-1 would continue to be "held in abeyance." (1 June 2022 Order (425A21-2)).

J. *Hoke County III*

On 4 November 2022, the Court issued its decision in the appeal from Judge Lee's and Judge Robinson's orders (case no. 425A21-2), which this brief refers to as "*Hoke County III*." The majority held that in "exceedingly rare and extraordinary circumstances," the judiciary could use its "inherent power" to "direct the transfer of

---

[14] During the hearings leading to his remand order, Judge Robinson repeatedly questioned lawyers from the DOJ why the Attorney General appealed Judge Lee's order if it agreed with the outcome. Lawyers for the DOJ failed to identify any error with the order, instead stating that the executive branch defendants "did not disagree" with Judge Lee's order, or the imposition of the CRP, but instead appealed merely to confirm "that this is what the Supreme Court intended in *Leandro II*." (App. 4-8).

adequate available state funds." *See Hoke County III*, 382 N.C. at 464, 879 S.E.2d at 242. The majority thus reinstated the transfer provisions in Judge Lee's 10 November 2021 order and remanded the case to the trial court to "recalculate" the amounts necessary to fund years 2 and 3 of the CRP in light of the State Budget, which was amended while the case was on appeal. "To enable the trial court to do so," the majority announced that it would issue a special order staying the Writ of Prohibition "on its own motion." *Id.* at 467, 879 S.E.2d at 199 n. 2.

On the same day as its decision *Hoke County III*, the Court issued an Order in the appeal from the Writ of Prohibition (case no. 425A21-1), in which it (i) consolidated the two appeals "to the extent necessary" to address issues concerning the Writ of Prohibition that were also addressed in the opinion, and (ii) stayed (but did not vacate) the Writ of Prohibition pending any filings on additional issues. In that regard, the order directed as follows:

> Now on our own motion, the Court hereby treats the Writ of Prohibition filed 30 November 2021 by the Court of Appeals in 425A21-1 as consolidated with 425A21-2 to the extent necessary for the Court to address the arguments pertaining to the Writ made by the parties here; further ***we hereby stay the Writ of Prohibition pending any further filings in 425A21-1 pertaining to issues not already addressed in the opinion*** filed on this day in 425A21-2.

(4 November 2021 Order (425A21-1) (emphasis added)).[15]

[15] The Court also dismissed the Attorney General's motion to consolidate "as moot." (*Id.*)

K. Reinstatement of the Writ of Prohibition

On 3 March 2023, following motions filed on 8 February 2023 by the State Controller and Legislative Intervenors, the Court issued a Special Order whereby it reinstated the Writ of Prohibition until it addresses the issues remaining in this case.[16] The Court has not ordered briefing in case no. 425A21-1 or called the case for hearing. Likewise, the Court has not acted on Plaintiffs' and Plaintiff-Intervenors' petitions for discretionary review or *certiorari* in that case, which remain pending.

L. Current Proceedings on Remand

After this case was remanded following *Hoke County III*, it was reassigned to Judge Ammons, who now presides over the case.

The Court in *Hoke County III* directed the trial court to do three things on remand: (1) "to recalculate appropriate distributions" to fund Years 2 and 3 of the CRP in light of the 2022 Budget Act; (2) "to reinstate the November 2021 Order['s] transfer directive instructing State actors to transfer those recalculated amounts"; and (3) "to retain jurisdiction over the case in order to monitor compliance with its order and with future years of the CRP." 382 N.C. at 476, 879 S.E.2d at 249.

Judge Ammons concluded that this Court's order reinstating the Writ of Prohibition and Plaintiffs' pending appeals from the Writ rendered him without

---

[16] In the same order, the Court directed that Legislative Intervenors' notice of intervention as of right in the trial court did not relieve them of the need to formally notice an intervention in the proceedings flowing from the Writ of Prohibition (case no. 425A21-1). Legislative Intervenors accordingly filed a notice of intervention as of right that same day in Case No. 425A21-1, pursuant to N.C. Gen. Stat. 1-72.2, which grants them authority to intervene in the trial or appellate court "regardless of the stage of the proceeding."

jurisdiction to order a transfer from the treasury. Accordingly, he limited the proceedings on remand to only a recalculation of the amounts supposedly required to fund Years 2 and 3 of the CRP following passage of the 2022 Budget Act. (R pp 1315-16).

The executive branch defendants submitted an affidavit from OSBM, which works under the direction of the Governor, purporting to show the remaining amounts necessary to fully fund the items called for in the CRP. (R p 1316). In response, Legislative Intervenors offered calculations prepared under the supervision of Mark Trogdon, who formerly served as the director and currently served as a Senior Analysist with the General Assembly's nonpartisan Fiscal Research Division ("FRD"). (*Id.*) The Court then held an evidentiary hearing on 17 March 2023, in which it heard testimony from both OSBM's witness and Brian Matteson, the current direct of FRD. (*Id.*)

Although their calculations largely agreed, FRD's calculations showed that OSBM had failed to include money used to pay for several items called for in Years 2 and 3 of the CRP, as follows:

- *New Teacher Support Program* (CRP Item I.G.ii.1) – an additional $2 million which the Governor directed be used for this item from funds made available to him through the federal Governors' Emergency Educational Relief ("GEER") program.

- *Educator Compensation Study* (CRP Item I.A.ii.2) – an additional $109,000 that OSBM used to pay for this item in Year 3 using fund available to it through the North Carolina Evaluation Fund Grant.
- *Disadvantaged Student Supplemental Funding / At Risk Allocation* (CRP Item I.B.ii.2) – an additional $26,068,720 that the General Assembly appropriated and was distributed to school districts as part of the Disadvantaged Student Supplemental Funding ("DSSF") allotment.
- *Principal and Assistant Salaries* (CRP Item III.E.ii.3) – an additional $6.2 million that the General Assembly appropriated to pay for masters of school administration interns, who serve as assistant principals in schools.
- *District and Regional Support* (CRP Item. V.A.iii.1) – an additional $14 million appropriated by the General Assembly to pay for reading intervention and early learning specialists who serve as part of DPI's system of "District and Regional Support."

(R pp 1317-20).

In addition, Legislative Intervenors argued that the Court should not include recurring appropriations called for in Year 2 when calculating the "appropriate distribution amounts" for Year 3. Recurring appropriations are used to pay for ongoing expenses, such as salaries, for which appropriations are made each year. (*Id.*) Thus, Legislative Intervenors argued that there was no need to require the

General Assembly to pay for recurring appropriations called for in Year 2, because the CRP anticipated that those appropriations would be made again in Year 3. To do otherwise would result in double counting. (R p 1320).

Although Plaintiffs and the executive branch argued against Legislative Intervenor's position, they did not dispute that the amounts shown on the FRD chart were used to pay for the items listed. They also did not offer any evidence showing why recurring appropriations called for in Year 2 were somehow still needed to fund items in Year 3. (R pp 1317-20).

Judge Ammons entered an order on 17 April 2023 in which he ruled for the Plaintiffs and the executive branch on each of the issues outlined above. In the order, Judge Ammons acknowledged that the amounts OSBM left out of its chart were used to pay for items in the CRP, however, he found that he could not "credit" these amounts because they did not come from appropriations in the 2022 Budget and therefore fell outside of what he understood to be his limited task on remand. (*Id.*) The court similarly did not subtract out recurring appropriations from Year 2, even though there was no dispute that the CRP called for those appropriations to be made again in Year 3 because it did not believe it was empowered to disturb Judge Robinson's prior calculations. (*Id.*)

As a result, Judge Ammons entered a judgment against the State, finding that "the underfunding of the action items called for in Years 2 and 3 of the CRP on a per-entity basis are as follows:

a. Programs for which DHHS is responsible: $133,900,000.00;

b. Programs for which DPI is responsible: $509,701,707.00; and

c. Programs for which the UNC System is responsible: $34,200,000.00."

(R p 1321).

Legislative Intervenors appealed Judge Ammons's order on 5 May 2023. The record was filed with the Court of Appeals on 25 August 2023, and the appeal was docketed in the Court of Appeals as case no. 23-788 on 12 September 2023. On 18 October 2023, this Court granted Legislative Defendants' bypass petition in order to determine whether the trial court lacked subject matter jurisdiction to enter its orders require the State to implement and fund the CRP.

STANDARD OF REVIEW

"Whether a trial court has subject-matter jurisdiction is a question of law, reviewed *de novo* on appeal." *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010); *see also In re A.L.L.*, 376 N.C. 99, 101, 852 S.E.2d 1 (2020) (same).

"The question of subject matter jurisdiction may be raised at any time, even in the Supreme Court." *Lemmerman v. A.T. Williams Oil Co.*, 318 N.C. 577, 580, 350 S.E.2d 83, 85 (1986). "It is a universal rule of law that parties cannot, by consent, give a court, as such, jurisdiction over subject matter of which it would otherwise not have jurisdiction. Jurisdiction in this sense cannot be obtained by consent of the parties, waiver, or estoppel.'" *Pulley v. Pulley*, 255 N.C. 423, 429, 121 S.E.2d 876, 880 (1961) (quoting *Hart v. Thomasville Motors, Inc.*, 244 N.C. 84, 88, 92 S.E.2d 673, 676 (1956)),

appeal dismissed and *cert. denied*, 371 U.S. 22 (1962); *see also In re Peoples*, 296 N.C. 109, 144, 250 S.E.2d 890, 910 (1978) (same).

This means the Court can review whether Plaintiffs have standing to assert a statewide claim on behalf of nonparties, whether there was requisite adverseness to render a non-advisory opinion, and whether the Court had subject-matter jurisdiction to Order the transfer of funds to fund the CRP.

ARGUMENT

I. THE TRIAL COURT LACKED SUBJECT MATTER JURISDICTION TO GRANT STATEWIDE INJUNCTIONS REQUIRING THE COMPREHENSIVE REMEDIAL PLAN.

Judge Ammons's most recent order seeks to enforce—and thus depends on the validity of—the trial court's prior orders requiring "the State" to develop, implement, and fund each of the 146 action items in the CRP. Determining whether Judge Ammons's order was properly entered therefore requires the Court to determine whether the trial court had subject matter jurisdiction to enter those prior orders imposing the CRP in the first place.

As explained below, the trial court lacked subject matter jurisdiction to enter orders requiring the CRP for four principal reasons, any of which standing alone is sufficient to deprive the trial court of subject matter jurisdiction to order the CRP.

First, Plaintiffs have not asserted a statewide claim and, in any event, lack standing to do so. Because Plaintiffs' claims were limited to their individual school districts and they lack standing to assert claims on behalf of 109 unrepresented school

districts, the Court lacked subject matter jurisdiction to consider whether there was a statewide violation.

Second, the trial court erred by issuing a "remedy" for which no violation had ever been established. This Court made clear in *Hoke County I*, that, because the only trial in this matter related to Hoke County, its mandates could not extend beyond that district, and that further adversarial proceedings were necessary to establish Plaintiffs claims regarding the remaining counties. Despite Plaintiffs' creative efforts to recharacterize the record and claim otherwise, those trials never occurred and no court has ever entered judgment finding a violation anywhere other than Hoke and Halifax County. This renders the trial court's effort to dictate the means of providing for the State's educational system a mere advisory opinion.

Third, the trial court erred by granting Plaintiffs' and the Attorney General's requests to grant statewide injunctions, through the entry consent orders requiring the CRP, in an otherwise "friendly suit" where there was no true adversity between the parties at that time.

Finally, by purporting to dictate *how* the State must go about providing children with the opportunity to obtain a sound basic education, the court sought to answer an otherwise nonjusticiable political question that our Constitution places squarely in the political branches.

Because subject matter jurisdiction may be raised at any time, even on appeal, each of these issues is properly before this Court. Though the Legislative-Intervenors raised it, the first question—whether Plaintiffs lacked standing to assert claims

beyond their individual school districts—was not addressed by the majority in *Hoke County III* and, on its own, requires the Court to overturn the trial court's orders imposing the CRP. But the lack of standing only reveals deeper jurisdictional problems that should be addressed. The Court should not hesitate to reevaluate the majority's decision in *Hoke County III* to the extent necessary to clarify the proper scope of the trial court's jurisdiction in any further proceedings and to restore the holdings of this Court's prior decisions in *Leandro* and *Hoke County I*.

A. Plaintiffs Do Not Have Standing to Assert Statewide Claims or Obtain Injunctions Granting Statewide "Relief".

Plaintiffs lack standing to obtain relief outside their individual school districts. The trial court thus exceeded its jurisdiction by requiring CRP because, in doing so, it purported to grant relief on a supposed "statewide" claim that no party has ever asserted, much less has standing to bring.

From the very first paragraph of this case nearly 30 years ago, Plaintiffs distinguished themselves from—rather than sought to represent—the students and Boards of Education of more affluent school districts across the state. That is why Plaintiffs complained that the result of the State's funding system was an "inadequate and inferior education for the schoolchildren ***of plaintiff districts***"—not all districts. (R p 18, ¶ 58 (emphasis added)). Plaintiffs' claims have always rested on allegations regarding the specific conditions in their *individual school districts*. Since those claims necessarily must proceed on a district-by-district basis, they cannot support the imposition of a statewide injunctions by dictating educational

policy for the State as a whole. Plaintiffs accordingly do not have standing to assert claims on behalf of students in the 109 of the State's 115 school districts that are not a part of this litigation, and the trial court lacked subject matter jurisdiction to issue orders deciding the rights of students who were not before it.

"Standing is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction." *United Daughters of the Confederacy v. City of Winston-Salem by & through Joines*, 383 N.C. 612, 652, 881 S.E.2d 32, 61 (2022) (Newby, C.J., concurring) (internal citation omitted). A plaintiff must establish standing to assert a claim for relief. *Willowmere Cmty. Ass'n, Inc. v. City of Charlotte*, 370 N.C. 553, 561, 809 S.E.2d 558 (2018). "As a general matter, the North Carolina Constitution confers standing on those who suffer harm." *Mangum*, 362 N.C. at 642, 669 S.E.2d 279 (citing N.C. Const. art. I, § 18 (providing that "[a]ll courts shall be open" and "every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law[.]")). "In essence, [Plaintiffs] appear[] to believe that by simply filing a declaratory action . . . , [they have] made a sufficient showing to establish standing. However, . . . the mere filing of a declaratory judgment is not sufficient, on its own, to grant a plaintiff standing." *United Daughters of the Confederacy*, 383 N.C. at 629, 881 S.E.2d at 46 (internal citations and quotation marks omitted).

"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.'" *Stanley v.*

Dep't of Conservation and Dev., 284 N.C. 15, 28, 199 S.E.2d 641 (1973) (emphasis added) (quoting *Flast v. Cohen* 392 U.S. 83, 99 (1968) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962))). This requires that a plaintiff show that he or she, personally, 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*)).

Determining whether a plaintiff has standing requires the court to review the allegations of the complaint and the nature of the claims before it. *Davis v. Rigsby*, 261 N.C. 684, 686, 136 S.E.2d 33 (1964) ("A party is bound by his pleadings and, unless withdrawn, amended, or otherwise altered, the allegations contained in all pleadings ordinarily are conclusive against the pleader.").

Doing so here reveals Plaintiffs *never* alleged—much less proved—the existence of a statewide violation that would grant standing to obtain statewide injunctions. In their original complaint filed in 1994, the five rural school districts (Hoke, Halifax, Robeson, Cumberland, and Vance County Schools) asserted that, "the quality of the educational opportunities varies substantially according to where a child happens to live," and thus, "the educational opportunities offered to ***plaintiff schoolchildren*** are substantially inferior to those offered to children in wealthy school districts." (R p 27 at ¶¶ 91-92 (emphasis added); *see also* R p 4, ¶ 1;, R p 9 at ¶ 40 (claiming that funding system "does not take sufficient account of the substantial

disparities in wealth among school districts"), R. 13 at ¶ 46 (comparing per pupil tax base for Plaintiffs as a "stark contrast to the tax base per pupil of wealthier counties"), R p 16 at ¶ 55 (referring to "large gap between poor and wealthy districts"). To demonstrate the validity of their claims, Plaintiffs pointed to *disparities* in the academic performance of students in their districts versus those elsewhere in the State. (R p 28 (emphasizing "wide disparities in educational opportunities available to the schoolchildren in plaintiff districts and those available to the schoolchildren in wealthy districts"),R pp 23-25, ¶¶ 75-80). The core of these allegations did not change in Plaintiff's Amended Complaint filed in September 1994 or their Second Amendment filed on 15 October 1998.

Thus, Plaintiffs never alleged that the State failed to provide the opportunity to obtain a sound basic education on a statewide basis. Instead, relying on the disparities between their school districts and wealthier school districts, Plaintiffs alleged that the State had failed to provide the opportunity to a sound basic education in their specific districts.[17]

---

[17] Likewise, the urban school districts who intervened in October 1994 claimed that they were different from other school districts and, as a result, needed more resources. (R p 161 ¶¶ 3-4, R pp 169-70 ¶¶ 35-41, R p 172 ¶ 50, R p 174 ¶ 62 ("The cost of educating students in the urban school districts is disproportionately high."), R pp 178-79 ¶ 81 ("The State's supplemental funding scheme irrationally discriminates against school districts not defined as 'low wealth' or 'small.'"). They, too, filed the complaint "individually and on behalf of ***their*** children" and "the students and communities ***they serve***," as opposed to other school districts who did not face similar issues. (R p 161 ¶ 7 (emphasis added); *see also id.* at pp 177 ¶¶ 73-75 ("Defendants have failed to fulfill their duty to . . . all students in the ***urban school districts***. Defendants have failed to provide the ***urban school boards*** with the resources necessary to provide all of ***their students*** with an adequate education. . . . [T]he ***individual intervenors*** have been . . . injured. . . . [T]he ***urban school boards***

Leandro narrowed the Plaintiffs' claims even further when it rejected their arguments that the Constitution requires "substantially equal funding" and "equal educational opportunities" in all school districts. 346 N.C. at 349-51, 488 S.E.2d at 256-57 ("[E]ven 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"). [18] Accordingly, as this Court observed in *Hoke County I* that "the thrust of this litigation turned from a funding issue to one requiring the analysis of the qualitative educational services *provided to the respective plaintiffs and plaintiff-intervenors*." 358 N.C. at 609, 599 S.E.2d at 373 (emphasis added). In other words, Plaintiffs had asserted claims that—by their very nature—turned on an assessment of the conditions in their individual school districts.

The Penn-Intervenors' claims (which have never been tried) similarly turn on allegations specific to Charlotte-Mecklenburg Schools. In their complaint, the Penn-Intervenors alleged CMS and the State had not done enough to address the needs of the district's high-poverty high schools, which faced different challenges than the rural school districts. (R pp 704-708, 729-30). Thus, the Penn-Intervenors do not even purport to represent the interests of students across the State, but only those in

---

also have been injured.") (emphasis added), ¶¶ 83-84, ¶¶ 93-94, ¶¶ 98-100, ¶¶ 108-109)). They, too, did not claim that the State had failed to provide students with a sound basic education on a statewide basis, instead claiming that it depended on "where the student lives." (R p 178 ¶ 79).

[18] Despite the Court's prescient concern about protracted litigation over equal opportunities, the "remedial phase" of this litigation devolved into just that, with the trial court reviewing annual standardized test results and expressing concerns about why some schools performed lower than other schools.

the CMS school district. (R p 706 ¶ 2 ("Plaintiffs intervene in this lawsuit to enforce the constitutional rights of ***CMS high school students*** to a sound basic education . . . ." (emphasis added))).[19]

The nature of their claims thus means that Plaintiffs do not—and cannot—have standing to obtain statewide relief. But, as with so much of this case, even that conclusion is not new. This Court clarified the limited nature of Plaintiffs' standing two decades ago. In *Hoke County I*, the Court questioned whether Plaintiffs even had standing to represent the students within their respective districts, or instead should be limited to individual relief. Though the Court determined that the "unique procedural posture and substantive importance" of this case warranted "broaden[ing] both standing and evidentiary parameters," it expressly limited this expansion to the "zone of interests" in which the individual plaintiffs resided—the Hoke County school district. *See Hoke County I*, 358 N.C. at 376-77, 599 S.E.2d at 615-16. Thus, the Court in *Hoke County I* held that the Court's subject matter jurisdiction was limited to consideration of "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.* at 377, 599 S.E.2d at 616; *Id.* at 613, 599 S.E.2d at 376

---

[19] If a statewide violation had been alleged or the interests of all school districts represented, the Penn-Intervenors intervention on behalf of students in Charlotte-Mecklenburg schools would have been unnecessary. *See Hoke Cnty. Bd. of Educ. v. State*, 2023 WL 6940235, at *1 (N.C. Oct. 18, 2023) (Berger, J. concurring) ("Core to their rationale for intervention was that every public school district faces its own unique educational challenges and groups of students or school districts in one area of our state are ill-suited to address the educational deficiencies in others.").

(explaining that its "consideration of the case is properly limited to the issues relating solely to Hoke County as raised at trial.").

This Court's discussion of standing in *Hoke County I* establishes two things: (1) the applicable zone of interests for Plaintiffs is their respective school districts—not the entire state; and (2) the applicable remedy is that to redress the harm to the applicable zone of interests—not the entire state. If, as Plaintiffs have argued, they have standing to bring a claim on behalf of the entire state, this Court's entire discussion of standing and the "zone of interests" in *Hoke County I* would be rendered superfluous. In other words, the Court would have to overrule *Hoke County I* to hold that the trial court had subject matter jurisdiction to order the CRP. But the Court should not do so because Plaintiffs' standing mattered then, and it still matters today.

Given that Plaintiffs' claims turn on the conditions in their individual school districts, they do not have standing to assert claims on behalf of every school district in the State, nor are their claims representative of those that might be brought by students in the other 109 school districts in North Carolina. The trial court accordingly lacked subject matter jurisdiction to issue the orders granting statewide relief—since the only claims before it related to Plaintiffs' individual school districts. *See Chadwick v. Salter*, 254 N.C. 389, 395, 119 S.E.2d 158, 162 (1961) ("[A]n action is maintainable under the Declaratory Judgment Act . . . only in so far as it affects the civil rights, status and other relations' in the present actual controversy between *parties*.") (emphasis added) (internal quotation marks and citation omitted); *see also*

N.C. Gen. Stat. § 1-260 ("[N]o declaration shall prejudice the rights of persons not parties to the proceedings.").[20]

Despite nearly 30 years of litigation, multiple interventions, and multiple amended complaints, at most 11 out of 115 (less than 10%) school districts have had their interests represented at some point during this case. (Only six districts are currently involved in the case.) And yet no statewide violation has ever been asserted. For this reason, everything that has flowed from the court's order imposing the CRP—including the Judge Lee's 10 November 2021 Order attempting to transfer money out of the treasury to fund the CRP, as well as Judge Robinson's and Judge Ammons's amendments declaring the amounts supposedly owed under that order—has exceeded the court's subject matter jurisdiction. Accordingly, the entire series of orders from the 2018 consent orders appointing WestEd to the 2020 orders requiring the CRP through to Judge Ammons's order of 17 April 2023, should be vacated for lack of subject matter jurisdiction based on the absence of standing.

B. <u>The Trial Court Lacked Subject Matter Jurisdiction to Grant Statewide "Relief" in the Absence of a Judgment Establishing a Statewide Violation</u>.

The absence of any party with standing to assert a statewide claim—or to obtain injunctions that govern the delivery of education outside the plaintiff school

---

[20] The dissent in *Hoke County III* recognized this and questioned whether allowing Plaintiffs to secure orders dictating educational policy on statewide basis violated the rights of unrepresented parties—including those in school districts where no violation was even alleged to exist. 382 N.C. at 517, 879 S.E.2d at 273, n.17; *id.* at 530, 879 S.E.2d at 281, n.23. The majority's opinion in *Hoke County III*, however, did nothing to address it.

districts—is enough, standing alone, to resolve this appeal. The Court need go no further to conclude that the trial court lacked subject matter jurisdiction to impose the CRP or require that it be funded.

Nevertheless, the Court should take this opportunity to correct *Hoke County III*'*s* erroneous conclusion that the trial court record somehow reflects a judgment that establishes the existence of a statewide violation.[21]

The majority in *Hoke County III* held its decision was justified only because of what it claimed were the "exceedingly rare and extraordinary circumstances" of the case. *See Hoke County III*¸ 382 N.C. at 464, 879 S.E.2d at 242. Central to that reasoning was the Court's assumption that the trial court had—sometime, somewhere—entered a judgment establishing a statewide violation of the right to a sound basic education which had gone unaddressed for years.

---

[21] This Court has long held that the "doctrine of stare decisis should never be applied to perpetuate palpable error." *State v. Mobley*, 240 N.C. at 487, 83 S.E.2d at 108 (internal citation omitted); *see, e.g., Bulova Watch Co. v. Brand Distributors of N. Wilkesboro, Inc.*, 285 N.C. 467, 473, 206 S.E.2d 141, 145 (1974); *Rabon v. Rowan Mem'l Hosp., Inc.*, 269 N.C. 1, 15, 152 S.E.2d 485, 495 (1967); *Harper v. Hall*, 384 N.C. 292, 372–74, 886 S.E.2d 393, 445–46 (2023) (collecting cases); *Sidney Spitzer & Co. v. Comm'rs of Franklin Cnty.*, 188 N.C. 30, 32, 123 S.E. 636, 638 (1924) ("There should be no blind adherence to a precedent which, if it is wrong, should be corrected at the first practical moment." (internal citations omitted)); *Wiles v. Welparnel Constr. Co.*, 295 N.C. 81, 85, 243 S.E.2d 756, 758 (1978) ("[*S*]*tare decisis* will not be applied when it results in perpetuation of error or grievous wrong, since the compulsion of the doctrine is ... moral and intellectual, rather than arbitrary and inflexible." (internal citation omitted)). Thus, the Court can overrule and correct the errors which led to *Hoke County III*. Indeed, *Hoke County III* "does not call the rule of stare decisis in its true sense into play" because there is no line of cases that follow its holding and it thus represents "a single case . . . [which] is much weakened as an authoritative precedent by a dissenting opinion of 'acknowledged power and force of reason.'" *State v. Ballance*, 229 N.C. 764, 767, 51 S.E.2d 731, 733 (1949) (citations omitted).

But the majority's assumption was false. This Court unanimously held in *Hoke County I* that, because the only trial ever conducted in this matter was limited to Hoke County, the trial court's judgment could not extend to the other plaintiff school districts—much less the whole State. 358 N.C. at 614, 599 S.E.2d at 376, n. 5 ("B]ecause the only trial was "premised on evidence as it pertains to Hoke County[,] . . . our holding mandates cannot be construed to extend to the other four rural school districts named in the complaint.")[22] Thus, Judge Manning's trial judgment cannot serve as the basis for statewide violation. The majority in *Hoke County III* did not dispute this. *See* 382 N.C. at 461, 879 S.E.2d at 240 (acknowledging that the Court in *Hoke County I* limited its holdings to just Hoke County).

Hoke County I remanded the case to the trial court for further adversarial proceedings that must include at least presentation of evidence, findings of fact, and conclusions of law limited to determining whether there was a violation in Plaintiffs' school districts. That never happened. Yet the majority concluded that sometime in the intervening 12 years, Judge Manning entered a judgment finding a statewide violation. *Id.* The Court's opinion, however, did not point to any specific document in which that judgment was supposedly entered. Instead, it cited four filings

---

[22] To the extent that there was any statewide finding during the only trial here, the trial court found that the statewide education system complied with, rather than violated, the Constitution: "the State's general curriculum, teacher certifying standards, funding allocation systems, and education accountability standards met the basic requirements for providing students with an opportunity to receive a sound basic education" and, as a result, "the bulk of the core" of the State's "Educational Delivery System . . . is sound, valid and meets the constitutional standards enumerated by *Leandro*." *Id.* at 632, 599 S.E.2d at 387.

scattered across a period of at least 11 years—three entitled "Notices of Hearing and Order Re: Hearing" and another entitled "Report from the Court Re: The Reading Problem"—as "illustrative" examples of the conclusions entered by the trial court. *Id.* 382 N.C. at 405, 879 S.E.2d at 207.

Leandro and *Hoke County I* require that the Plaintiffs must establish the existence of a violation by clear and convincing evidence before they can invoke the court's remedial powers. *Hoke County I*, 358 N.C. at 622-23, 599 S.E.2d at 381; (quoting *Leandro*, 346 N.C. at 357, 488 S.E.2d at 261). Such a showing requires a trial, or at least a judgment entered in accordance with the Rules of Civil Procedure. *Hoke County III*, 382 N.C. at 518, 879 S.E.2d at 274 (Berger J., dissenting) ("A trial is required for appellate review of this extremely fact-intensive issue because an appellate court requires a record from which it may meaningfully review the trial court's findings and conclusions." (emphasis in original)).

Yet, the fact remains that no such trial ever occurred; no such judgment was ever entered; and neither the majority in *Hoke County III,* nor the parties, have ever identified *the order* where a judgment finding the existence of a statewide violation was supposedly entered. *See id.* 382 N.C. at 499, 879 S.E.2d at 263-64 (noting that "at oral argument, the parties were unable to direct the Court to any order finding a statewide violation"). Instead, the only thing that has changed in the roughly 20 years since *Hoke County I* is that the parties entered a consent order as to Halifax County. (R S p 2671). But the fact the parties felt the need to enter such a consent order to

extend the court's remedial jurisdiction to another county merely raises the question why no judgment exists for any other school district.

So, in essence, the majority in *Hoke County III* failed to follow the law of the case in *Leandro* and *Hoke County I* and this is the Court's opportunity to correct that error. The lack of a judgment establishing the existence of a violation anywhere other than Hoke and Halifax Counties means the Court lacked jurisdiction to order the CRP. Indeed, in issuing a purported "remedy" without any judgment establishing the existence of a violation, the court entered what amounts to a mere "advisory" order by purporting to dictate necessary measures to provide for the State's education system in the absence of any claim or judgment rendering such an order necessary.

i. <u>The Trial Court Has Never Entered an Order Finding a Statewide Violation.</u>

The majority's opinion in *Hoke County III* cited four filings which it contended where "illustrative" of the statewide findings it believed Judge Manning issued over the course of the 12 years between this Court's decision in *Hoke County I* and the case's reassignment to Judge Lee. None of those filings, however, resulted in a judgment finding a violation outside of Hoke and Halifax Counties.

First, the majority pointed to a filing dated 9 September 2004, which was one of many documents Judge Manning entered under the title: "Notice of Hearing and Order re: Hearing." *Hoke County III*, 382 N.C. 386, 405, 879 S.E.2d 193, 207. Rather than embody *Hoke County I*'s directive that the trial court further proceedings, this filing did the opposite. In fact, the trial court's later confusion over the nature and

scope of the "remedial phase" can be traced back to this filing, the first following *Hoke County I*'s decision.

Again, this Court in *Hoke County I* held,

> ***With regard to the claims of named plaintiffs from the other four rural districts, the case is remanded to the trial court for further proceedings that include, but are not necessarily limited to, presentation of relevant evidence by the parties, and findings and conclusions of law by the trial court***.

358 N.C. at 613, 599 S.E.2d at 375, n.5. In other words, this Court *mandated* that the trial court conduct further adversarial proceedings that, *at a minimum*, include presentation of evidence by the parties and findings of fact and conclusions of law for the other four rural districts.

The trial court, however, misinterpreted this mandate. In its 9 September 2004, filing on which the majority in *Hoke County III* relied, the trial court stated, "[T]his case has been remanded to this court for further proceedings, ***if necessary***." (R S pp 1665) (emphasis added). But that is not what this Court said. The words "if necessary" were not included passage above—Judge Manning simply read that phrase into this Court's decision in *Hoke County I*, and, in doing so, erroneously suggested that further adversarial proceedings might not be "necessary" to prove the claims of the other Plaintiffs' school districts.

By misinterpreting this Court's directive to the trial court as discretionary rather than mandatory, the trial court began down a path of hearings and informal memoranda that failed to conduct the requisite further adversarial proceedings with findings of fact and conclusions of law necessary to find a violation and fashion a

remedy outside of a Hoke County. To the extent that the trial court's use of "Notices of Hearing and Order re: Hearing" entered outside the adversarial process was intended to expand the scope of the trial judgment, these orders during the "remedial phase" conflict with *Hoke County I*'s mandate and are thus "unauthorized and void." *Lea Co. v. N. Carolina Bd. of Transp.,* 323 N.C. 697, 699, 374 S.E.2d 866, 868 (1989) ("'We have held judgments of Superior [C]ourt which were inconsistent and at variance with, contrary to, and modified, corrected, altered or reversed prior mandates of the Supreme Court . . . to be unauthorized and void.'") (quoting *Collins v. Simms*, 257 N.C. 1, 8, 125 S.E.2d 298, 303 (1962)).

As for the filing itself, the trial court's discussion in its September 9, 2004, notice of hearing and order focused on Hoke County and the other rural Plaintiff school districts. (R S pp 1662-63). The trial court also referred to a "serious problem in hiring, training and retaining certified teachers in North Carolina, especially in the low wealth plaintiff LEAs, and other low wealth LEAs." (R S p 1664). At most, the trial court discussed a "demonstrated need" in "16" out of 115 school districts. (R S pp 1664-65). The trial court seemingly explored this issue because Hoke County was one of those school districts. (R S pp 1665).

The trial court also expressed its own (personal) frustration at the decision not to include funding for the State's Disadvantaged Student Supplemental Funding ("DSSF") pilot program and directed that "counsel for the State . . . be prepared [at the next hearing] to report to the [c]ourt" what actions had been taken "to address [the] failure to fund" the pilot. (*Id.*)

The Trial Court also noted, "[t]o its credit, [the State] [has] expanded assistance teams to [school districts] other than [Hoke County] ***on their own initiative*** and because there is a demonstrated need for their help and assistance." (*Id.* at 10) (emphasis added). Thus, even the trial court seemingly recognized that the State's efforts outside of Hoke County were voluntary rather than required, given that the only judgment was limited to Hoke County.[23]

Regardless of the characterization of the trial court's 9 September 2004 filing, it happened before any further adversarial proceedings required under *Hoke County I* (which was issued only 40 days earlier) and did not purport to establish any statewide violation.

The remaining filings the majority relied on to find the existence of a statewide violation in *Hoke County III* fare no better.

The second filing was yet another "Notice of Hearing and Order re: Hearing" dated 15 March 2009. *Hoke County III*, 382 N.C. at 406, 879 S.E.2d at 207. In this filing, the Court noticed another "non-adversarial hearing" and noted, unsurprisingly, that test scores had dropped in schools after the rigor of standardized

---

[23] Though the majority in *Hoke County III* and Plaintiffs make much of a letter by the State Superintendent and Chair of the North Carolina State Board of Education on 29 July 2022—before *Hoke County I* and this Court's limitation of the judgment and its holdings to Hoke County—that letter merely acknowledged the State's obligation to provide the opportunity to a sound basic education statewide, as established in *Leandro*. (R S p 1491). Of course, it is the State's objective to comply with the Constitution and *Leandro* to provide the opportunity to a sound basic education to every child in the state. But that letter did not somehow amend Plaintiffs' complaints to assert a statewide claim or give them standing to do so, let alone establish a statewide violation or the need for a statewide remedy. Nor could it bind Legislative-Intervenors.

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." (R S p 2659). The trial court found that the State "must take action to remedy this deprivation of constitutional rights" in Halifax County. (R S p 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." (R S p 2671). In other words, a remedy was narrowly tailored to address the injury alleged by one of the Plaintiffs. This, of course, would have been unnecessary had the trial court already found a statewide violation.

The majority in *Hoke County III* seized on the trial court's commentary that "poor academic performance remains a problem in *a host* of elementary, middle and high schools throughout North Carolina and as a result, the children of *those schools* . . . are being deprived of their constitutional right to [the opportunity to obtain a sound basic education] on a daily basis." *Hoke County III*, 382 N.C. at 407, 879 S.E.2d at 208 (emphasis added). But the trial court limited its commentary to "a host" of schools and children in "those schools" rather than all schools across the state. Whatever "a host" means, it is less than all. That the trial court copied and pasted the format of this filing, including this statement, into subsequent filings gives it no more force.

The third filing was a 5 May 2014 document, which Judge Manning apparently entered *sua sponte*, entitled "Report from the Court Re: The Reading Problem." *Hoke*

County III, 382 N.C. at 407, 879 S.E.2d at 208 (R S p 2830). Once again, however, the report did not reflect the outcome of an adversarial proceeding—much less a judgment entered in accordance with the Rules of Civil Procedure. (R S p 2834).

After recounting—four years after the fact—hearings from 2009 and 2010 about K-2 assessments, low reading performance in Halifax County, Durham County, Guilford County, and Winston-Salem/Forsyth County, and his review of standardized scores since then, Judge Manning opined that, based on his review of standardized test scores, "[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." (R S p 2867); *but see 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."). Not only does this statement fail to reflect a statewide violation (with nearly 1.5 million students, "thousands" is a far cry from a statewide violation), the trial court once more referred to the wrong standard. *Leandro* held that every child is entitled to the "opportunity to receive a sound basic education." Thus, the trial court's consideration is limited to whether the State has provided the "opportunity," not whether each student has, in fact, received a sound basic education.

As with the prior filings, this "Report" was not the product of adversarial hearings, with findings of fact and conclusions of law. And despite its 40 pages, the "Report" did not identify a statewide violation.

The final filing relied on by the majority was another "Notice of Hearing and Order re: Hearing" dated 17 March 2015. *Hoke County III*, 382 N.C. at 407, 879 S.E.2d at 208. The majority referred to the "trial court's concern that,"

> [n]o matter how many times the [c]ourt has issued Notices of Hearings and Orders regarding unacceptable academic performance, and even after the North Carolina Supreme Court plainly stated that the mandates of *Leandro* remain "in full force and effect[,]" many adults involved in education ... still seem unable to understand that **the constitutional right to have an equal opportunity to obtain a sound basic education is a right vested in <u>each and every child</u> in North Carolina regardless of their respective age or educational needs**.

Id. at 407–08, 879 S.E.2d at 208 (emphasis in original). This is a simple rule statement. To be clear, no one disputes that the North Carolina Constitution applies statewide and that every child in the state of North Carolina is entitled to the opportunity to receive a sound basic education, as this Court held in *Leandro*. But this appeal is about whether the trial court lacked subject matter jurisdiction to order the CRP and other statewide injunctive relief based on its mere recitation of a rule statement rather than an adversarial proceeding or judgment finding a violation of same.

As the dissent in *Hoke County III* explained in summarizing the filings entered both Judge Manning and Judge Lee entered during the "remedial phase" of this litgiation, "the record in this case is not the record of an adversarial trial." 382 N.C. 386, 517, 879 S.E.2d 193, 273 (Berger, J. dissenting). Instead, it is "the record of trial court judges accepting studies and statistics, taking them at face value without any real inquiry into their veracity, and then opinion about the condition of the State's

education system." *Id.* The jarring juxtaposition between the 14-month trial and 400+ page order required to establish a violation in *just Hoke County* and the trial court's scattered notices of hearing and reports during the remedial phase is telling. Contrary to the Court's express direction in *Hoke County I*, "no trials were conducted for any other school district or counties" and Plaintiffs, when pressed were, "unable to direct [the] Court to any order finding a statewide violation." *Id.*

All told, other than Hoke and Halifax County, this Court will not find anywhere in the record further adversarial proceedings, including findings of fact and conclusions of law, or a judgment that reflects a clear showing of a violation, as required in *Hoke County I*.[24] And it certainly will not find a statewide judgment that would support the sweeping, and unprecedented remedy reflected in the CRP. [25]

ii. <u>Without a Judgment Establishing a Statewide Violation, the Trial Court's Orders Imposing the CRP are Impermissible Advisory Opinions</u>.

The lack of a judgment establishing a statewide violation renders the Court's orders requiring the State to develop and implement the CRP mere advisory opinions.

---

[24] Legislative-Intervenors were not parties to this dispute and, as a result, their interests were not represented until after Judge Lee's 10 November 2021 Order. *Cf. Berger v. N. Carolina State Conf. of the NAACP*, 597 U.S. ---, 142 S. Ct. 2191, 2203, (2022) ("[W]here a State chooses to divide its sovereign authority among different officials and authorize their participation in a suit challenging state law, a full consideration of the State's practical interests may require the involvement of different voices with different perspectives. To hold otherwise would risk allowing a private plaintiff to pick its preferred defendants and potentially silence those whom the State deems essential to a fair understanding of its interests.")

[25] Indeed, throughout the "remedial phase," the trial court compared low performing school districts to high performing—and necessarily *Leandro* compliant—school districts.

Those orders purport to answer a question that was never before the court: How can the Court remedy a statewide failure to provide students with the opportunity to a sound basic education? Absent a judgment holding that the State's political branches had failed their constitutional duty to do so, the Court had no jurisdiction to answer that question.

As this Court has explained:

> 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.

Little v. Wachovia Bank & Tr. Co., 252 N.C. 229, 243, 113 S.E.2d 689, 700 (1960). Similarly, in *Wise v. Harrington Grove Cmty. Ass'n, Inc.*, this Court held that deciding an issue not "drawn into focus" by the court proceedings would "render an unnecessary advisory opinion." 357 N.C. 396, 408, 584 S.E.2d 731, 740 (2003).

The trial court's imposition of the CRP violates this well-established prohibition against advisory opinions. The CRP is not a "remedy" designed to address any of the claims asserted in the pleadings in this case, all of which focus on the specific and varying conditions in certain, named county school districts. Nor can it possibly be justified as an effort to enforce the one-and-only judgment entered in this matter, which the law of the case limits to Hoke County.

Instead, the CRP purports to answer an abstract policy question—*i.e.*, what statewide measures should be undertaken to improve the whole of North Carolina's educational system—that is divorced from any of the claims actually asserted or

decided in this case. In doing so, the CRP goes far beyond the trial court's subject matter jurisdiction. This Court has repeatedly stressed that, in order to invoke the court's remedial powers, plaintiffs must first prove the existence of a constitutional violation by clear and convincing evidence. *Hoke County I*, 358 N.C. at 623, 599 S.E.2d at 381. This is because courts "must grant every reasonable deference to the legislative and executive branches when considering whether they have established and are administering a system that provides the children of the various school districts of the state a sound basic education." *Leandro*, 346 N.C. at 357, 488 S.E.2d at 261. As a result, "'[o]nly such a clear showing" will "justify a judicial intrusion into an area so clearly the province, initially at least, of the legislative and executive branches as the determination of what course of action will lead to a sound basic education.'" *Id.* (quoting *Leandro*, 346 N.C. at 357, 488 S.E.2d at 261)

Yet, despite this, the trial court required the State to implement a plan, in the form of the CRP, that purports to dictate educational policy (and spending)[26] on a statewide basis, over an 8-year period, prescribing measures that address everything from teacher recruitment and training, educational performance measures, curriculum content, staffing models, teacher compensation, revision of the State's educational finance system and funding formulas, expansion of pre-K programs, to

---

[26] Even the trial court noted in its 10 November 2004, filing 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" because it ranked 4th in local spending per pupil (ADM). (R S p 1684). Thus, the trial court reiterated "[a]s stated many times previously, there is no 'blank check' nor is there going to be a 'spending spree.'" (R S p 1685) (explaining that school districts must examine and reallocate existing resources).

early college courses. (R pp 745-800). It even purports to dictate funding for programs and entities that have no connection to *Leandro* and *Hoke County I*, including the University of North Carolina System Office, the North Carolina State Education Assistance Authority, the North Carolina Teaching Fellows Commission, East Carolina University, the North Carolina Department of Health and Human Services, and the North Carolina Partnership for Children (and its 75 local partnerships)—a veritable wish list of appropriations the Plaintiffs and Executive Branch would make if they alone controlled the Legislature. Moreover, the "TBD" components of the CRP are fast approaching, which means that the advisory remedy is incomplete rather than self-executing, and will require further intrusion to update the "TBD" placeholders.

None of this can be justified as a legitimate exercise of judicial power, much less an effort to "remedy" a statewide violation, given that such a violation was never alleged or proven. Instead, the court's orders mandating the CRP exceed the role of the judiciary by purporting to answer what measures should be implemented—in the abstract—to improve the State's education system. That is a legislative question—and it is one the Court lacks subject matter jurisdiction to answer in the absence of a (properly entered) court order establishing the existence of a constitutional violation.

C. The Trial Court Lacked Subject Matter Jurisdiction to Make a Constitutional Determination in a "Friendly Suit."

The proceedings before Judge Ammons highlight yet another reason the Court lacked jurisdiction to enter orders requiring the CRP: Those orders did not purport to answer or resolve any genuine controversy, but instead were the product of a

"friendly suit" in which the executive branch and Plaintiffs cooperated to secure judicial orders as a means to circumvent the legislative process.

If there were any doubt about the collusive nature of the proceedings that led to the CRP before now, the proceedings before Judge Ammons should end it. Rather than seek to defend the State, the Attorney General has taken the extraordinary step of cooperating with the Plaintiffs to not only secure orders requiring the CRP, but to increase the amounts the State must pay to fund it. To that end, during the proceedings before Judge Ammons, the Attorney General offered testimony from OSBM (an executive branch agency under control of the Governor) to argue that the General Assembly should still have to appropriate money for items in the CRP, such as the New Teacher Support Program (CRP Item I.G.ii.1) and an Educator Compensation Study (CRP Item I.A.ii.2), even though it was undisputed the Governor and OSBM had already paid for those items through other, discretionary sources, such as federal and state grants. (Tr pp 84-85 (stating that the Attorney General "agrees" with the Plaintiffs' and Plaintiff-Intervenors' positions)); Tr pp 61-70 (testimony of Anca Grozav)). The Attorney General also sided with the Plaintiffs in arguing that Judge Ammons should include recurring appropriations for Year 2 of the CRP as part of his judgment—even though that year had already ended and the CRP called the same appropriations to be made again in Year 3. (*Id.*; *see also* R pp 1316-21).

Put simply, the proceedings before Judge Ammons reflect a cooperative effort by Plaintiffs and the executive branch to secure additional funding without legislative approval through the enforcement of "consent" injunctions requiring the CRP.

This Court has repeatedly warned trial courts not to countenance such abuses of the judicial process. To that end, it has consistently held that courts lack jurisdiction to enter orders in so-called "friendly suits," where "all parties seek the same result." *City of Greensboro v. Wall*, 247 N.C. at 520, 101 S.E.2d at 416 (1958) (noting the existence of "genuine controversy" between "parties have conflicting interests" is "a jurisdictional necessity."); *State ex rel. Edmisten v. Tucker*, 312 N.C. 326, 338, 323 S.E.2d 294, 303 (1984) (same); *Town of Tryon v. Duke Power Co.*, 222 N.C. 200, 22 S.E.2d 450, 452 ("[T]he court will not entertain an *ex parte* [declaratory judgment] proceeding which, while adversary in form, yet lacks the essentials of genuine controversy."); *Griffin v. Fraser*, 39 N.C. App. 582, 587, 251 S.E.2d 650, 654 (1979) ("It is a 'jurisdictional necessity' that a genuine controversy between parties having conflicting interests exist."); *cf. Lide v. Mears*, 231 N.C. at 118, 56 S.E.2d at 409 (noting that if a party fails to plead "an actual controversy," the other party "cannot confer jurisdiction on the court to enter a declaratory judgment by failing to demur to the insufficient pleading").

The trial court thus had no subject matter jurisdiction to enter the CRP in the first place—which effectively represented the entry of a statewide injunction cooperatively sought by the executive branch and Plaintiffs—much less to determine how much the General Assembly should have to appropriate to fund it. And because

subject-matter jurisdiction was lacking at the time the CRP was entered, the court could not assume that jurisdiction later or create it any time thereafter. *See Clements v. Clements ex rel. Craige*, 219 N.C. App. 581, 586, 725 S.E.2d 373, 377 (2012) ("[S]ubject matter jurisdiction cannot be conferred by consent or waiver and a court cannot create it where it does not already exist.") That is especially true here where the question before the lower court was a constitutional one and the lower court explicitly retained jurisdiction "to ensure the implementation of this order and *to monitor continued constitutional compliance*." (R p 1322 (emphasis added)).

There can be no real question that when the orders requiring the CRP—which was the entire basis for the ruling below—were entered, there was no genuine controversy between the parties. *See Hoke County III*, 382 N.C. at 512-13, 879 S.E.2d at 270 (Berger, J. dissenting) (noting "[a]n examination of the record in this case leaves no doubt that, although the parties' interests may have once been adverse, any such adversity [between Plaintiffs and the executive branch] dissipated years ago.") Indeed, Judge Lee's orders expressly recite that the Attorney General and Plaintiffs worked together to seek the appointment of WestEd. (R S 2928-29 (Feb. 1, 2018, Case Management and Scheduling Order)). The CRP thus did not reflect an effort to resolve any genuine controversy between the parties, but instead a cooperative effort between the executive branch defendants and Plaintiffs, in which all parties "were in agreement." As Judge Lee recounted in his order imposing the CRP:

> [T]he parties to this case—Defendants State of North Carolina ("State") and the State Board of Education ("State Board") (collectively the "State Defendants"), as well as the Plaintiffs and Plaintiff-Intervenors (collectively

> "Plaintiffs")—***are in agreement*** that the time has come to take decisive and concrete action (*i.e.*, immediate, short term actions and the implementation of a mid-term and long-term remedial action plan) to bring North Carolina into constitutional compliance so that all students have access to the opportunity to obtain a sound basic education.

(R S pp 3280 (emphasis added). Judge Lee's orders also noted that, while the General Assembly was not a party (since Judge Manning had denied its previous attempt to intervene in 2013), the items in the CRP would require its approval:

> The Court is also encouraged by Governor Cooper's creation of the governor's Commission on Access to Sound Basic Education and the Commission's work thus far and **is hopeful that the parties, with the help of the Governor, can obtain the support necessary from the General Assembly** and other public institutions to implement and sustain the necessary changes to the State's educational system and deliver the constitutional guarantee of *Leandro* to every child in the State.

(*Id.*) (emphasis added).[27]

If this were not enough, the Attorney General made his position clear when he purported to "appeal" Judge Lee's 10 November 2021 order, even though his office had sought to have that order entered and assigned no error to it. When the case was remanded to Judge Robinson, he questioned the Attorney General's office about its reasons for appealing that order. The response was telling:

> The Court: Mr. Majmundar. The State. Excuse me. The Government Defendant appealed Judge Lee's Order on December seven. Is that correct?

---

[27] Though the trial court noted that the original order on the Comprehensive Remedial Plan was "received from the State of North Carolina and the State Board of Education," (R p 737), the order bears a document stamp from Parker Poe Adams and Bernstein, the law firm that represents Plaintiffs. (*Id.*) ("PPAB 6336941v.1.docx").

> Mr. Majmundar: Correct.
>
> The Court: To the Court of Appeals?
>
> Mr. Majmundar: Correct.
>
> The Court: Why?
>
> Mr. Majmundar: Because of the complicated constitutional issues embedded within Judge Lee's Order.
>
> The Court: Well, you supported the entry of the June order. Right, you told me that's what the State wanted. Your client wanted.
>
> Mr. Majmundar: I think that the State participated in the crafting of the comprehensive remedial plan, believed that the crafting believed that the comprehensive remedial plan was the way to achieve minimal constitutional compliance and that the June order adopted that plan. And **I don't think the State disagreed with the adoption of that plan.**

(App. 4-8 (emphasis added)). In other words, the Attorney General conceded that he agreed with—and indeed sought—the adoption of the CRP.

This exchange led Judge Robinson to conclude in his Order Following Remand 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)). Indeed, the last time this case was before this Court, counsel for the executive branch defendants admitted as much, and conceded at oral argument that the Legislature had no

"insight" into the crafting of the remedy ordered by the court because "the General Assembly was not a party." Oral Argument at 58:24, *Hoke Cnty. Bd. of Educ. v. State of North Carolina*, No. 425A21-2, https://www.youtube.com/watch?v=NOuFCf2rYdY.

Because *Hoke County I* required further adversarial proceedings on the claims that had actually been presented, Plaintiffs and DOJ could not consent to a statewide violation in the absence of statewide claims. Nor could Plaintiffs and DOJ confer subject matter jurisdiction on the Court by virtue of consent. Indeed, the "friendly suit" doctrine is intended to prevent just that. Thus, because the trial court's orders requiring the CRP arose from (a) a friendly suit without a genuine controversy (b) on a constitutional question, the trial court lacked subject matter jurisdiction to enter those orders, and, as a result, Judge Ammons lacked jurisdiction to enforce them.

D. The Trial Court Lacked Subject Matter Jurisdiction to Address Nonjusticiable Political Questions.

In addition to the reasons set forth above, the trial court lacked subject matter jurisdiction to impose the CRP because doing so required it to answer non-justiciable political questions. Although the Court addressed this issue in *Hoke County III*, the majority's decision failed to recognize the critical distinction between determining *whether* the State has failed to meet its constitutional obligation to provide children with the opportunity to obtain a sound basic education (which presents a justiciable question) and deciding *how* the State must do so by issuing orders prescribing the educational policies the State must adopt (which is a political question). In so doing, the majority in *Hoke County III* ignored the law of the case established in *Leandro* and *Hoke County I*.

"[T]he political question doctrine operates to check the judiciary and prevent its encroaching on the other branches' authority. Under this doctrine, courts must refuse to review political questions, that is, issues that are better suited for the political branches. Such issues are considered nonjusticiable." *Harper v. Hall*, 384 N.C. 292, 325, 886 S.E.2d 393, 415 (2023) (citation omitted); *see also Bacon v. Lee*, 353 N.C. 696, 717, 549 S.E.2d 840 (2001); *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 169, 594 S.E.3d 1, 8 (2004) ("[T]he legislative branch of government is without question 'the policy making agency of our government'" and, as such, "it is a far more appropriate forum than the courts for implementing policy-based changes to our laws."); *Hart v. N. Carolina*, 368 N.C. 122, 126, 774 S.E.2d 281, 285 (2015) ("But the role of judges is distinguishable, as we neither participate in this dialogue nor assess the wisdom of legislation. Just as the legislative and executive branches of government are expected to operate within their constitutionally defined spheres, so must the courts.").

The political question doctrine often applies when there is,

> a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government . . ..

Harper, 384 N.C. at 325, 886 S.E.2d at 415 (quoting *Baker*, 369 U.S. at 217).

While this Court in *Leandro* held the judiciary has the power to determine *what* the Constitution means and *whether* it has been violated, it did not hold that

courts could dictate *how* the State must satisfy its Constitutional obligation to provide for the State's educational system. The Supreme Court of Minnesota has described this balance as follows:

> In essence, appellants' claims ask the judiciary to answer a yes or no question—whether the Legislature has violated its constitutional duty to provide "a general and uniform system of public schools" that is "thorough and efficient," Minn. Const. art. XIII, § 1, and ensures a regular method throughout the state, whereby all may be enabled to acquire an education which will fit them to discharge intelligently their duties as citizens of the republic. To resolve this question, the judiciary is not required to devise particular educational policies to remedy constitutional violations, and we do not read appellants' complaint as a request that the judiciary do so. Rather, the judiciary is asked to determine whether the Legislature has violated its constitutional duty under the Education Clause. We conclude that the courts are the appropriate domain for such determinations and that appellants' Education Clause claims are therefore justiciable.

Cruz-Guzman v. State, 916 N.W.2d 1, 9 (Minn. 2018).[28]

---

[28] Many other states have reached similar conclusions in determining that the political question doctrine bars courts from dictating education policy. *See, e.g.*, *Nebraska Coal. for Educ. Equity & Adequacy (Coal.) v. Heineman*, 273 Neb. 531, 557, 731 N.W.2d 164, 183 (2007) ("We conclude that the relationship between school funding and educational quality requires a policy determination that is clearly for the legislative branch. . . . This court is simply not the proper forum for resolving broad and complicated policy decisions or balancing competing political interests."); *Citizens for Strong Sch., Inc. v. Fla. State Bd. of Educ.*, 262 So. 3d 127, 142–43 (Fla. 2019) ("Petitioners invite this Court to not only intrude into the Legislature's appropriations power, but to inject itself into education policy making and oversight. We decline the invitation for the courts to overstep their bounds"); *Ex parte James*, 836 So. 2d 813, 817 (Ala. 2002) ("[T]he pronouncement of a specific remedy 'from the bench' would necessarily represent an exercise of the power of that branch of government charged by the people of the State of Alabama with the sole duty to administer state funds to public schools: the Alabama Legislature. . . . [A]ny specific remedy that the judiciary could impose would, in order to be effective, necessarily involve a usurpation of that power entrusted exclusively to the Legislature.");

Striking that balance, *Hoke County I* reversed trial court orders that sought to (1) require that the State expand prekindergarten services to at-risk students in Hoke County; and (2) decide issues related to the appropriate age for compulsory education, precisely because they constituted "nonjusticiable" questions." 358 N.C. at 643, 599 S.E.2d at 393. In doing so, the Court relied not only on "the applicable statutory and constitutional provisions," which required the General Assembly to provide public schools for every child of an appropriate age, but also the lack of "satisfactory or manageable judicial criteria that could justify mandating changes with regard to the proper age for school children." *Id.* (citing *Baker*, 369 U.S. at 210).

As a result, *Hoke County I* rejected a "court order compelling the legislative and executive branches to address [the need to provide a sound basic education] in a singular fashion" because "imposition of a narrow remedy . . . would effectively undermine the authority and autonomy of the government's other branches." 358

Oklahoma Educ. Ass'n v. State ex rel. Oklahoma Legislature, 158 P.3d 1058, 1066 (OK 2007) ("The plaintiffs are attempting to circumvent the legislative process by having this Court interfere with and control the Legislature's domain of making fiscal-policy decisions and of setting educational policy by imposing mandates on the Legislature and by continuing to monitor and oversee the Legislature. To do as the plaintiffs ask would require this Court to invade the Legislature's power to determine policy. This we are constitutionally prohibited from doing."); *Shea v. State*, 510 P.3d 148, 154–55 (Nev. 2022); *Campaign for Quality Educ. v. State of California*, 246 Cal. App. 4th 896, 915, 209 Cal. Rptr. 3d 888, 903 (2016) (holding that courts could not "dictate to the Legislature, a coequal branch of government, how to best exercise its constitutional powers to encourage education and provide for and support a system of common schools throughout the state."); *see also Lobato v. State*, 304 P.3d 1132, 1140 (CO 2013) ("While . . . the current public school financing system might not be ideal policy, this Court's task is not to determine whether a better financing system could be devised, but rather to determine whether the system passes constitutional muster.").

N.C. at 643, 599 S.E.2d at 393. *Hoke County I* further reiterated *Leandro*'s guidance that (1) there is more than one way to provide a sound basic education, and (2) the General Assembly is entitled to deference when it comes to education:

> The state's legislative and executive branches have been endowed by their creators, the people of North Carolina, with the authority to establish and maintain a public school system that ensures all the state's children will be given their chance to get a proper, that is, a *Leandro*-conforming, education. As a consequence of such empowerment, those two branches have developed a shared history and expertise in the field that dwarfs that of this and any other Court. While we remain the ultimate arbiters of our state's Constitution, and vigorously attend to our duty of protecting the citizenry from abridgments and infringements of its provisions, we simultaneously recognize our limitations in providing specific remedies for violations committed by other government branches in service to a subject matter, such as public school education, that is within their primary domain.

358 N.C. at 644, 599 S.E.2d at 394–95. *Leandro* emphasized the shortcomings of the judiciary in comparison to the Legislative and Executive Branches in identifying *how* to provide a sound basic education:

> We have announced [the definition of a sound basic education] with some trepidation. We recognize that judges are not experts in education and are not particularly able to identify in detail those curricula best designed to ensure that a child receives a sound basic education. . . . We acknowledge that the legislative process provides a better forum than the courts for discussing and determining what educational programs and resources are most likely to ensure that each child of the state receives a sound basic education. The members of the General Assembly are popularly elected to represent the public for the purpose of making just such decisions. The legislature, unlike the courts, is not limited to addressing only cases and controversies brought before it by litigants. The legislature can properly conduct public hearings and committee

> meetings at which it can hear and consider the views of the general public as well as educational experts and permit the full expression of all points of view as to what curricula will best ensure that every child of the state has the opportunity to receive a sound basic education. . . .
>
> [W]e reemphasize our recognition of the fact that the administration of the public schools of the state is best left to the legislative and executive branches of government.

346 N.C. at 355, 357, 488 S.E.2d at 260-61 (agreeing with the Supreme Court of the United States' recognition that "[*o*]*n even the most basic questions in this area the scholars and educational experts are divided*." (quoting *San Antonio Indep. Sch. Dist.*, 411 U.S. at 42–43 (emphasis in original))).

Thus, while *Leandro* and *Hoke County I* establish the standard to determine *whether* the State has complied with its obligation to provide the opportunity to a sound basic education, they reject the judiciary's ability to upend the role of the legislative and executive branches by answering the political question of *how* to provide the opportunity to a sound basic education by imposing a specific remedy impacting education policy, appropriations, and budget allocation.[29] The CRP, however, does just that. It purports to dictate virtually every aspect of educational policy (and spending), over a long period—prescribing measures that address everything from teacher recruitment and training, to educational performance measures, curriculum content, staffing models, teacher compensation, revision of the State's educational finance system and funding formulas, expansion of pre-

---

[29] That the trial court outsourced development of the CRP to a third-party consultant underscores that the trial court itself did not have satisfactory and manageable criteria or standards for devising a specific remedy.

kindergarten programs, and early college courses. Whether to implement these measures, however, constitutes a nonjusticiable political question.

The Court should accordingly reject the trial court's imposition of the CRP because the North Carolina Constitution commits decisions over how to provide for the State's education system to the people, acting through the General Assembly. As this Court recognized in *Leandro* there is no "one way" to provide children with a sound basic education system—there is no "silver bullet." Instead, there are myriad of constitutionally permissible options, and the power to select among them, rests with the people and the General Assembly, not the Courts.

CONCLUSION

For each of the reasons set forth above, 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.

Respectfully submitted, this the 9th day of November, 2023.

/s/ *Matthew F. Tilley*
Matthew F. Tilley (NC No. 40125)
matthew.tilley@wbd-us.com
WOMBLE BOND DICKINSON (US) LLP
One Wells Fargo Center, Suite 3500

301 S. College Street
Charlotte, North Carolina 28202-6037
Phone: 704-350-6361

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.

Russ Ferguson (N.C. Bar No. 39671)
russ.ferguson@wbd-us.com

W. Clark Goodman (N.C. Bar No. 19927)
clark.goodman@wbd-us.com

Michael A. Ingersoll (N.C. Bar No. 52217)
Mike.ingersoll@wbd-us.com

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

CERTIFICATE OF SERVICE

The undersigned certifies that on the 9th day of November 2023, he caused a true and correct copy of the foregoing document to be served via U.S. Mail upon the following:

Joshua H. Stein, ATTORNEY GENERAL
Amar Majmundar,
Senior Deputy Attorney General
N.C. Department of Justice
P.O. Box 629
Raleigh, NC 27602
Attorney for State of North Carolina

Matthew Tulchin
Tiffany Lucas
N.C. DEPARTMENT OF JUSTICE
114 W. Edenton Street
Raleigh, North Carolina 27603

Neal Ramee
David Nolan
THARRINGTON SMITH, LLP
P. O. Box 1151
Raleigh, NC 27602
Counsel for Charlotte-Mecklenburg Schools

Thomas J. Ziko
STATE BOARD OF EDUCATION
6302 Mail Service Center
Raleigh, NC 27699-6302
Counsel for State Board of Education

H. Lawrence Armstrong
ARMSTRONG LAW, PLLC
P. O. Box 187
Enfield, NC 27823
Counsel for Plaintiffs

Melanie Black Dubis
Scott E. Bayzle
Catherine G. Clodfelter
PARKER POE ADAMS & BERNSTEIN LLP
P. O. Box 389
Raleigh, NC 27602-0389
Counsel for Plaintiffs

David Hinojosa
LAWYERS COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1500 K Street NW, Suite 900
Washington, DC 20005
Attorneys for Penn-Intervenors

Christopher A. Brook
PATTERSON HARKAVY LLP
100 Europa Drive, Suite 420
Chapel Hill, NC 27517
Attorneys for Penn-Intervenors

/s/ Matthew F. Tilley
Matthew F. Tilley

APPENDIX

North Carolina Court of Appeals
EUGENE H. SOAR, Clerk
Fax: (919) 831-3615
Web: https://www.nccourts.gov
Court of Appeals Building
One West Morgan Street
Raleigh, NC 27601
(919) 831-3600
Mailing Address:
P. O. Box 2779
Raleigh, NC 27602

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

IN THE NORTH CAROLINA GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION.
WAKE COUNTY

* *

HOKE COUNTY BOARD OF EDUCATION, et al, 95 CVS 1158
Plaintiffs,

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 Defendants,
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,
Intervernor-Defendants.

* *

TRANSCRIPT
Wednesday, April 13, 2022

Transcript of proceedings in the General Court of Justice, Superior Court Division, Wake County, 316 Fayetteville Street, 3rd Floor, Raleigh, North Carolina, before the Honorable Michael L. Robinson, Judge Presiding.

Denise St. Clair, RPR, CRR, CRC
Official Court Reporter
N.C. Administrative Office of the Courts
denise.stclair@nccourts.org

APPEARANCES:

Melanie Black Dubis
Chad Felder
Parker Poe Adams & Bernstein, LLP
301 Fayetteville Street, Suite 1400
Raleigh, NC 27601
On Behalf of the Plaintiffs

Lawrence H. Armstrong
Armstrong Law, PLLC
PO Box 187
Enfield, NC 27823
On Behalf of the Plaintiffs-Halifax County Board of Education

David Nolan
Tharrington Smith, LLP
PO Box 1151
Raleigh, NC 27602
On behalf of Realigned Defendants-Charlotte-Mechlenburg Schools

Amar Majmundar
Tiffany Lucas
Matthew Tulchin
Deputy Attorneys General
North Carolina Department of Justice
114 West Edenton Street
Raleigh, NC 27603
On Behalf of the Defendants-State of North Carolina Executive Branch

Robert Neal Hunter, Jr.
Higgins Benjamin, PLLC
301 North Elm Street, Suite 800
Greensboro, NC 27401
On Behalf of Petitioner-Linda Combs

David G. Hinojosa
Lawyers' Committee for Civil Rights Under Law
1500 K Street, NW, Suite 900
Washington, DC 20005
On Behalf of Plaintiff-Penn-Intervenors

APPEARANCES CONTINUED:

Christopher Brooks
Patterson Harkavy, LLP
100 Europa Drive, Suite 420,
Chapel Hill, NC, 27517
On Behalf of Plaintiff-Penn-Intervenors

Matthew F. Tilley
Russ Ferguson
Michael A. Ingersoll
W. Clark Goodman
Womble Bond Dickinson
One Wells Fargo Center
301 South College Street, Suite 3500
Charlotte, NC 28282
On Behalf of Legislative Intevernor-Defendants

* * *

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 for the General Funds as contemplated within N.C. Gen. Stat. 143C-6-4(b)(2)a, and to carry out all actions necessary to effectuate those transfers.

So they entered the writ of prohibition restraining the trial court of enforcing that portion of the order, yes, sir.

THE COURT: Thank you.

Mr. Majmundar, the Government-Defendant appealed Judge Lee's order on December 7th, is that correct?

MR. MAJMUNDAR: Correct.

THE COURT: To the Court of Appeals?

MR. MAJMUNDAR: Correct.

THE COURT: Why?

MR. MAJMUNDAR: Because of the complicated constitutional issues embedded within Judge Lee's order.

THE COURT: Well, you supported the entry of the June order, right? You told me that that's what the State wanted, your client wanted.

MR. MAJMUNDAR: I think that the State participated in the crafting of the Comprehensive Remedial Plan. I believe that the Comprehensive Remedial Plan was the way to achieve minimal constitutional compliance and that the June order

adopted that plan, and I don't think that the State disagreed with the adoption of that plan, Your Honor.

THE COURT: And then in November with the November 10 Order, Judge Lee attempted to enforce that plan by directing the State to pay for it, to fund it; correct?

MR. MAJMUNDAR: Yes, sir.

THE COURT: What was wrong with Judge Lee's order?

MR. MAJMUNDAR: Judge Lee's order implicates a novel issue, and that issue -- I say novel, but at least in the context of this case had not been raised before.

THE COURT: How do you contend Judge Lee erred in the November 10th Order?

MR. MAJMUNDAR: I think the appeal, Your Honor, is seeking, given Leandro II and the Court's admonition, that the State must comply with its constitutional obligations and that this order reflects an enforcement of that compliance. We had to be sure, Judge, that this is what the Supreme Court intended with Leandro II.

THE COURT: I believe Mr. Tilley on behalf of the Legislative-Intervenors pointed out that the governor signed the Budget Act.

MR. MAJMUNDAR: Yes, sir.

THE COURT: Am I correct that the executive branch is one of your clients?

MR. MAJMUNDAR: Yes, sir.