No. 425A21-3 TENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

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HOKE COUNTY BOARD OF EDUCATION, *et al.*, Plaintiffs, and CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, Plaintiff Intervenor, and RAFAEL PENN, *et al.*, Plaintiff Intervenors, v. STATE OF NORTH CAROLINA, Defendant, and STATE BOARD OF EDUCATION, Defendant, and CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, Realigned Defendant, and PHILIP E. BERGER, in his official capacity as President *Pro Tempore* of the North Carolina Senate, and TIMOTHY K. MOORE, in his official capacity as Speaker of the North Carolina House of Representatives, Defendant-Intervenors.	)	From Wake County

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BRIEF OF PLAINTIFFS-APPELLEES

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INDEX

TABLE OF CASES AND AUTHORITIES

Cases

Statutes

Rules

Other Authorities

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BRIEF OF PLAINTIFFS-APPELLEES

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Plaintiffs-Appellees Cumberland County Board of Education, Halifax County Board of Education, Hoke County Board of Education, Robeson County Board of Education, and Vance County Board of Education (collectively, "Plaintiffs-Appellees") submit this brief in opposition to the Appellant Brief filed by Philip E. Berger in his capacity as President Pro Tempore of the North Carolina Senate ("Mr. Berger") and Timothy K. Moore in his capacity as Speaker of the North Carolina House of Representatives ("Mr. Moore" and together with Mr. Berger, the "Defendant-Intervenors").

INTRODUCTION

"[T]he Court hereby allows the petition ***solely*** on the question of whether the trial court lacked subject matter jurisdiction to enter its order of 17 April 2023." *See* 20 October 2023 Order. That is the one—and the only—issue before the Court. Yet, Defendant-Intervenors ***never*** address this issue in their brief.

Instead, Defendant-Intervenors seek review of "orders" other than the 17 April 2023 order—orders that were never appealed and are therefore the law of this case. By asserting exactly the same arguments they asserted in the last appeal (using precisely the same words in most instances), Defendant-Intervenors continue to

demonstrate their "fundamental misunderstanding of the history of this case." *Hoke Cty. Bd. of Educ. v. State*, 382 N.C. 386, 471, 2022-NCSC-108, ¶ 223 ("*Leandro IV*").[1]

Since 1997, this Court has held, expressly and implicitly, that the trial court has the authority to deal with the subject matter of Plaintiffs' claims ("subject matter jurisdiction"). *Leandro v. State*, 346 N.C. 336, 345, 488 S.E.2d 249, 254 (1997) ("*Leandro I*"). Since 1997, this Court has held that the trial court has the authority *and duty* to exercise its authority over that subject matter and provide a remedy to Plaintiffs if the State failed to do so. *Id.* at 357, 488 S.E.2d at 261.

By order dated 4 April 2002, the trial court recognized the State had committed "serious and continuing constitutional violations" against the children of North Carolina, finding "the clear and convincing evidence . . . shows that there are thousands of children scattered throughout the State in low-wealth counties . . . and 'wealthy' counties . . . who are not being provided with the minimum educational resources necessary for them to have the equal opportunity to receive a sound basic education." (R pp 570-681; 674).

Plaintiffs have repeatedly requested, but been denied, a "Hoke County only" remedy for the Constitutional violations that they established. (*See e.g.*, R pp 1655-1656).

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[1] In *Leandro IV*, this Court referred to its three previous decisions in this case as *Leandro I*, *Leandro II*, and *Leandro III*. Accordingly, this brief will follow this Court's naming convention and refer to the 4 November 2022 decision as "*Leandro IV*."

Since 2002, Defendants have repeatedly represented to Plaintiffs and the trial court that the State could not provide a remedy for violations in "Hoke County only." *See infra* pp. 21-24. And Defendants have repeatedly represented to Plaintiffs and the trial court that no further trials would be needed in order to create a statewide remedy. (*See e.g.*, R pp 1491-1492).

Since 2004, this Court has confirmed that Plaintiffs have standing to bring claims that the State is violating the rights of children across the State to the opportunity for a sound basic education. *Hoke Cty. Bd. of Educ. v. State*, 358 N.C. 605, 615–16, 599 S.E.2d 365, 376–77 (2004) ("*Leandro II*"). And this Court confirmed that Plaintiffs had proven that the rights of children in this State have been violated. *Id.* at 623, 599 S.E.2d 381 ("this Court concludes that the trial court was correct as to this issue and thus we affirm, albeit with modifications").

After almost three decades of sitting on the sidelines, Defendant-Intervenors decided to intervene in this case and now inform Plaintiffs and the Court that they do not want to provide a remedy for the established constitutional violations, and they do not think that the court should be able to order them to do so.

In 2022, this Court squarely rejected those arguments and found that the trial court did—under the extraordinary facts of this case—have authority to order the State to carry out a statewide remedy for the on-going violations of Plaintiffs' constitutional rights. *Leandro IV*, 382 N.C. at 391, 2022-NCSC-108, ¶ 6.¶

This Court then remanded the case back to the trial court and instructed the court to determine a single, narrow factual issue—namely, to "recalculat[e] the additional amounts required to fund the action items called for in Years 2 and 3 of the CRP...." (R p 1315-1316 at ¶ 1). The Chief Justice then appointed Judge Ammons to consider that issue.

The question now before this Court, "did Judge Ammons have subject matter jurisdiction" to determine the narrow issue that this Court instructed him to determine—is easy. The answer is, of course, "yes." This is because this very Court acknowledged that he did. And Judge Ammons stayed within the very narrow parameters of this Court's remand. He did not order the transfer of funds. He did not order any party to take (or refrain from taking) any action. He performed a mathematical calculation based on evidence (largely undisputed) presented by the parties and reported back to this Court. Just as this Court instructed him to do.

The order that Judge Ammons entered in April 2023 plainly deals with subject matter over which the trial court has jurisdiction in this case. Indeed, this Court has determined—in at least four opinions—that the trial court has subject matter jurisdiction to order a remedy where there is an established constitutional violation, which is the case here.

Defendant-Intervenors do not directly argue otherwise. Rather, they appear to argue that, though this Court decided that the trial court had subject matter

jurisdiction to hear ***whether*** Plaintiffs rights were being violated, the trial court did not have jurisdiction to determine ***how*** to remedy the violations. That argument is nonsensical, and especially so when viewed in light of the numerous other opinions from this Court ***in this case***.

As an initial matter, Judge Ammons's 17 April 2023 order ***does not*** order any remedy. Indeed, the order itself expressly states otherwise:

> In order to allow this Court to perform the second directive, to "order the applicable State officials to transfer these funds as an appropriation under law," the Supreme Court stayed the Court of Appeals' November 30, 2021 Writ of Prohibition that "restrain[ed] the trial court from enforcing the portion of its order" requiring the transfer of funds as an appropriation under law. On March 3, 2023, however, the Supreme Court lifted the stay imposed. ***Accordingly, this Court will not consider that directive at this time***.

(R p 1315) (emphasis added).

Even so, this Court has consistently stated that it would be within the trial court's authority, and indeed its duty, to order a remedy if defendants were unable to provide one. In *Leandro I*, in 1997, this Court held:

> [L]ike the other branches of government, the judicial branch has its duty under the North Carolina Constitution. If on remand of this case to the trial court, that court makes findings and conclusions from competent evidence to the effect that defendants in this case are denying children of the state a sound basic education, a denial of a fundamental right will have been established. It will then become incumbent upon defendants to establish that their actions in denying this fundamental right are 'necessary to promote a compelling government interest.' … If defendants are unable to do so, it will then be the duty of the

> court to enter judgment granting declaratory relief ***and such other relief as needed to correct the wrong*** while minimizing encroachment upon the other branches of government.

Id. at 357, 488 S.E.2d at 261 (emphasis added) (internal citations omitted).

Again, in 2004 (*Leandro II*), the Court held if the State failed to live up to its constitutional duties to provide relief to Plaintiffs as ordered, the trial court was empowered to impose a specific remedy and instruct state actors to implement it:

> 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***.

358 N.C. at 642, 599 S.E.2d at 393 (emphasis added).

Defendant-Intervenors' arguments are not really about subject matter jurisdiction at all, even though they sprinkle that phrase liberally throughout their brief. In truth, Defendant-Intervenors ask this Court to rehear and overturn *Leandro IV*. But the Court did not grant Defendant-Intervenors a rehearing of *Leandro IV*, and that is no longer a procedural possibility; Defendant-Intervenors failed to seek a rehearing as required by Rule 31 of the North Carolina Rules of Appellate Procedure. And that deadline, which has long passed, ***cannot*** be extended. *See* N.C. R. App. P. 27(c) ("Courts may not extend the time . . . for rehearing or the responses thereto prescribed by these rules or by law.").

This Court should not entertain Defendant-Intervenors' not-so-subtle attempt to flout the Appellate Rules and undermine the bedrock principle of judicial finality. **Thirty classes of students** "as of the time of this [brief] will have already passed through our state's school system without benefit of relief," *Leandro II*, 358 N.C. at 616, 599 S.E.2d at 377, notwithstanding the undeniable fact that art. I, § 18 of the North Carolina Constitution "guarantees a remedy for legally cognizable claims," *Lynch v. N.C. Dep't of Justice*, 93 N.C. App. 57, 61, 376 S.E.2d 247, 250 (1989). *See also Craig ex rel. Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 339–40, 678 S.E.2d 351, 355 (2009).

The children of North Carolina deserve better. The North Carolina State Constitution requires more.

PROCEDURAL BACKGROUND

On 4 November 2022, the Court issued its nearly 100-page opinion in *Leandro IV*, which affirmed the trial court's 10 November 2021 Order. (4 November 2022 Order, 425A21-1.) In addition to affirming the 10 November 2021 Order, *Leandro IV* ordered that the case be remanded to the trial court on a narrow question: whether any amounts required to fund the action items called for in Years 2 and 3 of the CRP needed be recalculated.

On 28 November 2022, the mandate for the *Leandro IV* decision was issued from this Court to the trial court. According to Rule 31 of the North Carolina Rules of Appellate Procedure, any party had fifteen days from 28 November 2022 to

request this Court to rehear the issues decided by *Leandro IV* before the trial court was to proceed as directed by the Court. Neither Mr. Berger, Mr. Moore, nor any other party or intervenor petitioned this Court for a rehearing under Rule 31.

On 29 December 2022, the Chief Justice appointed the Honorable James F. Ammons, Jr., to hear the remand and all proceedings that would follow.

After an evidentiary hearing, Judge Ammons entered the 17 April 2023 Order answering the question this Court instructed him to consider. (R pp 1311-1322). Defendant-Intervenors appealed the 17 April 2023 Order and filed a bypass petition, requesting that this Court hear and determine issues prior to a determination by the Court of Appeals.

This Court granted Defendant-Intervenors' petition for discretionary review prior to a determination by the Court of Appeals "solely on the question of whether the trial court lacked subject matter jurisdiction to enter its order of 17 April 2023." 20 October 2023 Order.

BACKGROUND

This case began on 25 May 1994, when students, parents, guardians, and the boards of education of Cumberland, Halifax, Hoke, Robeson, and Vance filed this lawsuit against Defendant State of North Carolina and Defendant State Board of Education. (R p 3).

Plaintiffs alleged that the North Carolina Constitution guaranteed certain fundamental educational rights that were being denied to North Carolina's children by the State (R pp 34-158) and sought a declaration that the State had failed, and was failing, to provide constitutionally-conforming educational opportunities to children across North Carolina. (R pp 61-62). Plaintiffs further sought a "declaration that the educational system of North Carolina must be reformed so as to assure that ***all North Carolina schoolchildren, no matter where they may live in the State, receive adequate educational opportunities***," and that the State be ordered to provide the resources necessary to ensure that all children receive an opportunity to a constitutionally-sufficient education. (R p 62).

In October of 1994, six urban school districts (along with students and parents in those districts) intervened as plaintiff-intervenors (the "Urban Intervenors").[2] (R p 159). The Urban Intervenors similarly alleged that the State had violated, and was continuing to violate, its constitutional obligations to provide adequate, constitutionally-conforming educational opportunities to their students. (R pp 159-186). *See also Leandro IV*, 382 N.C. at 392-95, 2022-NCSC-108, ¶¶ 10-16.

[2] These included students, parents, and the boards of education for the school systems of the City of Asheville and Buncombe, Wake, Forsyth, Mecklenburg, and Durham Counties. (R pp 162-164).

This Court has now heard and determined issues in this case in four separate appeals over twenty-eight years. Following each appeal, the Court has remanded the case to the trial court for further proceedings.

I. *LEANDRO I*: RECOGNITION OF A FUNDAMENTAL CONSTITUTIONAL RIGHT (1997).

On 2 November 1994, the State moved to dismiss the lawsuit and raised the same issue that is before the Court on this appeal. The State Defendants argued that the trial court lacked ***subject matter jurisdiction*** and personal jurisdiction to hear Plaintiffs' claims. Specifically, the State moved on the grounds that:

> 1. The Court lacks jurisdiction over the subject matter . . . in that the issues are not justiciable, there is no existing controversy and plaintiffs and plaintiff-intervenors lack standing to assert the claims presented;
>
> 2. The Court lacks jurisdiction over the person of the defendants, or over the subject matter, or both . . . ; and
>
> 3. The plaintiffs . . . have failed to state a claim upon which relief can be granted.

(R pp 187-188).

The trial court (Honorable E. Maurice Braswell) denied the State's motion. The State took an interlocutory appeal; the Court of Appeals reversed and directed that the lawsuit be dismissed. *See Leandro v. State,* 122 N.C. App. 1, 14, 468 S.E.2d 543, 552 (1996). Plaintiffs then appealed to this Court.

On appeal, the State argued that the Constitution does not embrace any "qualitative" component for the educational opportunity it is required to provide and that, even if it did, determinations as to whether children are receiving an adequate education are "nonjusticiable ***political questions***." (R p 239).

In 1997, this Court issued its unanimous decision now known as "*Leandro I*." *Id.* at 336, 488 S.E.2d at 249.

This Court unanimously rejected the State's argument that subject matter jurisdiction was lacking or that this case presented a nonjusticiable political question. This Court held "it is the duty of this Court to address plaintiff-parties' constitutional challenge to the state's public education system." *Id.* at 345, 488 S.E.2d at 254. Contrary to the State's contentions then—and Defendant Intervenors' contentions now—this Court affirmed that it has a "duty" to "ascertain and declare the intent of the framers of the Constitution and reject any act in conflict therewith." *Id.* at 345, 488 S.E.2d at 253–54 (quoting *Maready v. City of Winston-Salem*, 342 N.C. 708, 716, 467 S.Ed.2d 615, 620 (1996)).

Rejecting the State's argument that the Constitution embraces no "qualitive" standard, Chief Justice Mitchell, writing on behalf of this Court, held that "Article I, Section 15 and Article IX, Section 2 of the North Carolina Constitution combine to guarantee every child of this state an opportunity to receive a sound basic education in our public schools." *Id.* at 347, 488 S.E.2d at 255; *see also* N.C. Const. art. I, § 15

("The people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right."); *id.* art. IX, § 2(1) ("The General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools ...."). The Constitution requires the State to ensure that each and every child, regardless of age, race, gender, socio-economic status, or the district in which he or she lives, is provided with this "fundamental" right. *Leandro I*, 346 N.C. at 348, 488 S.E.2d at 255–56 ("[T]he intent of the framers was that every child have a fundamental right to a sound basic education" and, thus, the Constitution "ensured that all the children of this state would enjoy this right.").

This Court affirmed in part, reversed in part, and remanded the case for further proceedings in Wake County Superior Court. *Id.* at 358, 488 S.E.2d at 261.

When considering whether the State is "administering a system that provides the children of the various school districts of the state a sound basic education," the trial court was to grant deference to the political branches. *Id.* at 357, 488 S.E.2d at 261. In the event a constitutional violation was found, however, this Court reminded the trial court of its duty to ensure that relief is provided to "correct the wrong." *Id.* This Court held:

> [L]ike the other branches of government, the judicial branch has its duty under the North Carolina Constitution. If on remand of this case to the trial court, that court makes findings and conclusions from competent evidence to the effect that defendants in this case are denying children of the state a sound basic education, a denial of a fundamental right will have been

> established. It will then become incumbent upon defendants to establish that their actions in denying this fundamental right are 'necessary to promote a compelling government interest.' ... If defendants are unable to do so, it will then be the duty of the court to enter judgment granting declaratory relief *and such other relief* as needed to correct the wrong while minimizing encroachment upon the other branches of government.

Id. (emphasis added) (internal citations omitted). *See also Leandro IV*, 382 N.C. at 394-97, 2022-NCSC-108, ¶¶ 17-25.

II. THE STATE IS FOUND LIABLE FOR VIOLATING THE FUNDAMENTAL CONSTITUTIONAL RIGHTS OF CHILDREN (2002).

Upon remand, the case was assigned to The Honorable Howard E. Manning, Jr. for trial proceedings. (R p 245).

The case was to be bifurcated initially into two separate actions for liability determinations, one to address the claims of Plaintiffs (rural, low-wealth districts) and one to address the claims of the Urban Intervenors. (R p 245); *Leandro II*, 358 N.C. at 613, 599 S.E.2d at 375. A trial commenced on the former in 1999.

That trial spanned more than a year and included hundreds of documentary exhibits. *Leandro II*, 358 N.C. at 610, 599 S.E.2d at 373. While the trial focused on Hoke County as a representative low-wealth county, it also involved extensive evidence on the public schools, educational resources, and student performance in districts across North Carolina. (R pp 234-681) (summarizing evidence). The trial

court issued four memoranda of decision collectively totaling over 400 pages of findings of fact and conclusions of law. *Id.*

In its Memorandum of Decision III (issued prior to entry of the liability judgment), the trial court ordered "the State of North Carolina, the plaintiffs, and the plaintiff-intervenors" to analyze their allocation of educational resources and "produce a rational, comprehensive plan . . . towards meeting the needs of all children, including at-risk children[,] to obtain a sound basic education...." (R p 558). The State filed an interlocutory appeal. (R p 562). The trial court subsequently amended that decision, vacated the directive to the parties to produce a plan at that time, and proceeded to "conduct additional evidentiary hearings . . . to seek an answer to the question of whether the failure is lack of funding or lack of proper allocation of resources . . . or a lack of cost effective implementation of successful strategies . . . or a combination of two or more of these factors."[3] (R p 568-69).

[3] Citing to Memorandum of Decision III, the Defendant-Intervenors state—as a purported fact—that Judge Manning "rejected" the proposition that lack of funding was contributing to the State's failure to provide a constitutionally-conforming education. *See* Def.-Int. Br. at 14. This is incorrect. Memorandum of Decision III states that Plaintiffs "have *yet* to convince this Court" of this proposition. (R p 557). The Defendant-Intervenors neglect to tell this Court that the memorandum was subsequently amended and further trial proceedings were held on this issue. The subsequent evidence ***did*** convince the trial court that additional assistance, intervention, and ***financial resources*** were in fact necessary for the State to provide a *Leandro*-conforming education to students, especially to students at-risk of academic failure. *See, e.g.*, R pp 623, 677.

Those evidentiary hearings took place in the Wake County Superior Court from 15 September 2001 to 5 October 2001, and the trial court heard evidence from State witnesses, Plaintiffs' expert, and witnesses from school districts across North Carolina, including Wilson County, Nash County-Rocky Mount, Northampton County, Hoke County, Wake County, Burke County and Clay County. (R p 593).

After hearing the additional evidence, the trial court entered a liability judgment against the State on 4 April 2002 finding serious and continuing constitutional violations. (R pp 570-681) (the "Liability Judgment"). The trial court found and concluded that Plaintiffs had proven the violation of a fundamental constitutional right by clear and convincing evidence. Plaintiffs established that the State had denied, and was continuing to deny, children in Hoke County and across North Carolina their constitutionally-guaranteed opportunity to obtain a sound basic education. *See* R p 673 ("[T]he clear and convincing evidence also shows that there are ***thousands of children scattered throughout the State*** in low-wealth counties, such as Hoke, Northampton, and Halifax, and 'wealthy' counties, such as Guilford, Charlotte-Mecklenburg and Forsyth, who are not being provided with the minimum educational resources necessary for them to have the equal opportunity to receive a sound basic education."); R p 674 ("It is these children whose constitutional rights are being violated . . . that must be the focus of the State's

efforts and methods to locate and remedy the constitutionally deficient educational opportunities being provided to them.").

The trial court ordered the State to remedy its constitutional failings and to provide the requisite resources necessary to ensure that all children, including those at-risk of academic failure, have an opportunity to a sound basic education. (R p 680) (The "State of North Carolina is ORDERED to remedy the Constitutional deficiency for these children who are not being provided the basic educational services" required under the Constitution, "whether they are in Hoke County, ***or another county within the State***."). The trial court also concluded that the State "cannot shirk . . . its ultimate responsibility to provide each and every child in the State with the equal opportunity to obtain a sound basic education, ***even if it requires the State to spend additional monies to do so***." (R p 677) (emphasis added). *See also Leandro IV*, 382 N.C. at 398-401, 2022-NCSC-108, ¶¶ 27-32.

The Liability Judgment was appealed.

III. *LEANDRO II:* THE STATE'S VIOLATION OF FUNDAMENTAL CONSTITUTIONAL RIGHTS IS UNANIMOUSLY AFFIRMED (2004).

That appeal—*Leandro II*—came before this Court in 2004. As an initial matter, this Court in *Leandro II* recognized that it had already, in *Leandro I*, heard and determined arguments regarding the trial court's subject matter jurisdiction to hear the claims before the Court. *Leandro II*, 358 N.C. at 611, 599 S.E.2d at 374.

The Court then addressed Defendants' argument that the trial court had erred by allowing the Plaintiff local school boards to continue as parties. Specifically, the Court held:

> [i]n declaratory actions involving issues of significant public interest, such as those addressing alleged violations of education rights under a state constitution, courts have often broadened both standing and evidentiary parameters to the extent that plaintiffs are permitted to proceed ***so long as the interest sought to be protected by the complainant is arguably within the "zone of interest" to be protected by the constitutional guaranty in question.***

Leandro II, 358 N.C. at 615, 599 S.E.2d at 376. In other words, Plaintiff school boards are proper plaintiffs because their interests—whether they receive from the State the resources necessary to ensure that their students are provided the opportunity for a sound basic education—are clearly within the "zone of interest" that is sought to be protected by the constitutional right.

The Court further observed that, while declaratory actions require "that there be a genuine controversy to be decided, ***they do not require that the participating parties be strictly designated as having adverse interests in relation to each other***." *Id.* at 617, 599 S.E.2d at 378 (internal citation omitted).

The Court further affirmed the trial court's finding that the violation of a fundamental constitutional right had been established and, specifically, that the State had "failed in its constitutional duty to provide certain students with the

opportunity to attain a sound basic education, as defined by this Court's holding in [*Leandro I*]." *Id.* at 608, 599 S.E.2d at 372.

In light of that holding, this Court held that "the State must act to correct those deficiencies that were deemed by the trial court as contributing to the State's failure of providing a *Leandro*-comporting educational opportunity." *Id.* at 647–48, 599 S.E.2d at 396; *see also id.* at 649, 599 S.E.2d at 397 ("The State must step forward, boldly and decisively, to see that all children, without regard to their socio-economic circumstances [are provided a *Leandro*-conforming education]."). This Court remanded this case to the trial court to oversee the State's implementation of a remedy. *Id.* at 649, 599 S.E.2d at 397 ("Assuring that our children are afforded the chance to become contributing, constructive members of society is paramount. ***Whether the State meets this challenge remains to be determined***.") (emphasis added)).

As to the development of that remedy, this Court held that, "initially at least," the trial court must afford discretion to the State to develop an effective, *Leandro*-conforming remedy. *Id.* at 638, 599 S.E.2d at 391. Any specific remedy ordered by the trial court at the time of the Liability Judgment, in 2002, was "premature" because it could "undermine the State's ability" to achieve constitutional compliance by alternative means. *Id.* at 645, 599 S.E.2d at 395.

While the State was initially to be afforded discretion in devising an effective means to achieve constitutional compliance, this Court held that the State had ***no*** discretion in whether or not a remedy was to be provided. If the State failed to live up to its constitutional duties as ordered, the trial court was empowered to impose a specific remedy and instruct state actors to implement it:

> 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.

Id. at 642, 599 S.E.2d 393.

This Court also held that additional trial proceedings involving other rural, low-wealth school districts and urban school districts should proceed "as necessary," consistent with the *Leandro II* holdings. *Id.* at 648, 599 S.E.2d 397. Specifically, the Court remanded the case 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." *Id.* at 613 n.5, 599 S.E.2d 375, n.5. *See also Leandro IV*, 382 N.C. at 401-405 , 2022-NCSC-108, ¶¶ 33-41.

IV. THE STATE REPRESENTS THAT ITS *LEANDRO* REMEDY WILL—AND MUST—BE IMPLEMENTED ON A STATEWIDE BASIS.

Both before and after this Court's decision in *Leandro II,* the State told the trial court that its remedial efforts will be, and must be, directed on a statewide basis, and not limited specifically to Hoke County or any other Plaintiff district.

In its 2002 Liability Judgment, the trial court ordered the State to submit compliance reports outlining remedial actions under consideration to correct the established constitutional violations.[4] (R p 680). After reviewing the initial reports, the trial court found that the State had set forth general statewide initiatives but had failed to specify any proposed actions targeted specifically to Hoke County or the other Plaintiff districts. (*See* R p 1472) (trial court finding "there has been no evidence of any efforts by the State . . . to directly assist HCSS [Hoke County school system], or for that matter any other plaintiff or plaintiff-intervenor" district).

In response, the State represented to the trial court and the parties that its *Leandro* remedial efforts must be implemented statewide, stating that they were constitutionally obligated to administrate "a general and uniform system of free public schools" and that their chosen remedial plan would be directed on a

[4] The case was not stayed pending the *Leandro II* appeal.

statewide basis and not just to "students in plaintiff-party" districts. (R pp 1491-1492).[5] The State further represented to the trial court:

> [It] always understood that this case was about whether the State was fulfilling its constitutional obligation to provide a 'general and uniform system of free public schools' in which every student has the opportunity to obtain a sound basic education. ... ***The State has never understood the Supreme Court or this Court to have ordered the defendants to provide students in Hoke County or any other plaintiff or plaintiff-intervenor schools districts special treatment, services or resources which were not available to at-risk students in other LEAs [local education agencies] across the State***.

(R pp 1491-1492).

The State also represented that the "concerns" raised by the trial court and Plaintiffs over the lack of a remedy targeted to Hoke County could be put to "rest" because any statewide remedy would, by its very nature, provide "concrete actions to improve the educational opportunities for at-risk students in the plaintiff-party LEAs [districts] along with their similarly disadvantaged peers across the State." (R p 1491).

After *Leandro II*, the State held steadfast to its decision to direct all remedial efforts on a statewide basis. In 2005, the trial court approved the State's decision to

[5] This Court had already held in *Leandro I* that a system that treats districts in an "arbitrary and capricious manner" would be constitutionally-impermissible and "could result in a denial of equal protection or due process." 346 N.C. at 353, 488 S.E.2d at 258.

focus on statewide remedial efforts and, in response to Plaintiffs' concerns, stated as follows:

> No matter what happens, Mr. [Robert] Spearman, this case is going forward on the remedy stage without a blip. Nothing is going to change the course of where we have to go, whether it's big city school or not. ... Because this case needs to move on. ... [T]here are bad things happening all over the state. The focus has got to be on taking care of wherever the problem is, not just one ... particular district."

(R pp 1654-1656).

Because of the State's position, the trial court rejected Plaintiffs' request for the immediate creation and implementation of a remedy targeted specifically to Hoke County students. *See, e.g.*, R pp 1655-1656. And, the State's legal position—which it has maintained since the Liability Judgment and *Leandro II*—is the precise reason why additional county-specific trials did not occur after remand. In May of 2006, the Urban Intervenors, relying on the State's position, agreed that further liability trials would be unnecessary ***and dismissed their claims***. *See* R p 734. In light of the State's position, the trial court did not hold separate trials focused on the other Plaintiff districts.

Because the State took the position that its remedial compliance efforts must be directed statewide, it presented the trial court with statewide evidence regarding the status of its *Leandro* compliance. A series of extensive evidentiary hearings were

held between 2005 to 2020. The State Board of Education's 1 August 2022 Appellee Brief in appeal No. 425A21-2 details much of this evidence.

Based on the voluminous evidence of record, the trial court ***repeatedly*** found that children across the State continued to be deprived of their fundamental constitutional rights on a daily basis. *See, e.g.*, R pp 2649, 2702, 2753, 2892, 2939. *See also Leandro IV*, 382 N.C. at 405-08 , 2022-NCSC-108, ¶¶ 42-47.

Consistent with its legal position, the State—in the 17 years after *Leandro II*—submitted only ***statewide*** evidence of its efforts to comply with *Leandro* and ***statewide*** remedial initiatives. Not once has the State presented a remedial plan targeted only to Hoke County.

V. THE SUPREME COURT CONFIRMS ITS MANDATES IN *LEANDRO I* AND *LEANDRO II* REMAIN IN FULL FORCE AND EFFECT.

One such statewide remedial effort involved quality prekindergarten programming. The State represented to the trial court—repeatedly—that it would ensure that "every at-risk four-year-old" across North Carolina had "access to a quality prekindergarten program," as one of its *Leandro* remedial actions. (R pp 1669, 1675).

Not only did the State fail to live up to this commitment, it subsequently barred most at-risk children from access to the program and, instead, gave their slots to children who were ***not*** at-risk.

This brought the case back to this Court in *Hoke County Board of Education v. State*, 367 N.C. 156, 749 S.E.2d 451 (2013) ("*Leandro III*"). Before this Court ruled, the State repealed the offending legislation which mooted the appeal. This Court, however, held that its mandates in *Leandro I* and *II* "remain in full force and effect." *Id.* at 160, 749 S.E.2d at 455.

VI. THE STATE PRESENTS ITS COMPREHENSIVE REMEDIAL PLAN AND TRIAL COURT ORDERS THE STATE TO IMPLEMENT IT.

On 21 March 2021, seventeen years after *Leandro II* (and nineteen years after the Liability Judgment ordered it to do so), the State presented its Comprehensive Remedial Plan for constitutional compliance. (R pp 744-800) (also, the "Plan"). The Plan is the only comprehensive remedy presented to the trial court in the entirety of this litigation. No alternative plan was submitted. (R p 3486) (trial court finding that other than the Comprehensive Remedial Plan, "there is nothing else on the table" for the court's consideration).

The Plan sets out the "nuts and bolts" for how the State will remedy its continuing constitutional failings to North Carolina's children. In presenting its sole remedial plan, the State represented to the trial court that all of the components outlined are the "necessary and appropriate actions that ***must*** be implemented to address the continuing constitutional violations." (R p 747) (emphasis added). The State assured the trial court of its "commit[ment] to meeting these actions under the timeframes set forth therein." (R p 746).

Based on the State's representations, the ongoing and established constitutional violations, its own substantial review of the Plan, and with the consent of the State and the other parties to the case, the trial court ordered the State to implement the Plan. (R p 736-743); *see also* R p 742 (trial court finding and concluding that "the actions, programs, policies, and resources propounded by and agreed to by State Defendants, and described in the Comprehensive Remedial Plan, are necessary to remedy continuing constitutional violations and to provide the opportunity for a sound basic education to all public school children in North Carolina."). Defendant-Intervenors did not seek to intervene or challenge the trial court's order.

VII. THE STATE FAILS TO IMPLEMENT THE COMPREHENSIVE REMEDIAL PLAN AND THE TRIAL COURT DIRECTS STATE ACTORS TO TRANSFER RESOURCES NECESSARY TO IMPLEMENT THE PLAN.

The State informed the Court in two compliance hearings, one held on 8 September 2021 and the other on 18 October 2021 hearing, that it had failed to secure the resources needed to implement the Plan, despite the fact that it had more than enough undesignated cash surplus to do so.

On 10 November 2021 the trial court entered an order directing the State Budget Director, the State Controller and the State Treasurer "take the necessary actions to transfer the total amount of the funds necessary to effectuate years 2 & 3 of the Comprehensive Remedial Plan, from the unappropriated balance within the General Fund to the state agents and state actor with the fiscal responsibility for

implementing the Comprehensive Remedial Plan." (R pp 3469-3488) (the "10 November 2021 Order").

Approximately one week later, on 18 November 2021, the State enacted the 2021 Appropriations Act (the "Budget").

The trial court noticed a hearing for 13 December 2021 to afford the State an opportunity to inform it "of the specific components of the Comprehensive Remedial Plan for years 2 & 3 that are funded by the Appropriations Act and those that are not." (R pp 3489-3491). Before that hearing could take place, however, the Court of Appeals issued a *writ* of prohibition (the "Writ").[6] (R pp 1187-1188). The Writ said that the trial court lacked authority to enter the order that was entered but stated "[o]ur 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." Writ at p. 2.

On 7 December 2021, the State appealed the 10 November 2021 Order. (R pp 3493-3496). The next day, on 8 December 2021, the Defendant-Intervenors intervened in this case—almost three decades after its inception—and separately appealed that Order. (R pp 3497-3500).

[6] Defendant-Intervenors claim "Judge Arrowood did not dissent from the merits of the writ." Def.-Int. Br. at 28. That is a wildly inappropriate misrepresentation of a judge's dissenting opinion. Judge Arrowood dissented precisely because he believed the merits were not properly before the Court of Appeals at that time. Writ at 3.

By order signed 18 March 2022 and issued 21 March 2022 (the "21 March 2022 Order"), this Court granted the State's and Plaintiffs' respective requests for discretionary review and also issued a limited remand (of "no more than thirty days") for the trial court to address a specific issue: "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 its [10] November 2021 order." *See* R p 3502.

This case was then re-assigned, by order of the Chief Justice, to The Honorable Michael L. Robinson. (R pp 1241-1242). On 26 April 2022, Judge Robinson certified an order to this Court (R pp 1184-1209) (the "26 April 2022 Order"), which found, among other things, that after the passage of the Budget, Years 2 and 3 of the Plan were unfunded by almost half notwithstanding the fact that the State still had sufficient unappropriated funds to do so. (R pp 1196-1207, ¶¶ 33-34, 46, 50-54, 56). Specifically, the trial found that the following amounts were still necessary implement Years 2 and 3 of the Plan: (a) $142,900,000 to the Department of Health and Human Services, (b) $608,006,248 to the Department of Public Instruction, and (c) $34,200,000 to the University of North Carolina System. (R p 1207). *See also Leandro IV*, 382 N.C. at 416-428, 2022-NCSC-108, ¶¶ 67-96.

VIII. *LEANDRO IV*: THIS COURT HOLDS THAT THE TRIAL COURT HAD THE AUTHORITY TO ENTER THE 10 NOVEMBER 2021 ORDER.

On 4 November 2022, this Court issued its *Leandro IV* Order.

This Court acknowledged that issues of subject matter jurisdiction had already been raised and determined in *Leandro I* and *Leandro II*. *Leandro IV*, 382 N.C. at 394–95, 2022-NCSC-108, ¶ 17-20.

The Court next considered, analyzed, and determined the following "procedural and substantive" arguments raised by Defendant-Intervenors as follows:[7]

First, this Court addressed Defendant-Intervenors' argument that the trial court "erred by exceeding its jurisdiction and authority by imposing a statewide remedy" because "this case really involves only Hoke County." *Id.* at 391, 2022-NCSC-108, ¶¶ 5-6. After reviewing of the history of the case, this Court determined that "[b]ased on an abundance of clear and convincing evidence, the trial court repeatedly concluded that the . . . violation was not limited to Hoke County but was pervasive statewide." *Id.* at 470, 2022-NCSC-108, ¶ 220. This Court explained, "***to contend that there has never been a finding or conclusion of a Leandro violation beyond Hoke County reflects, at best, a fundamental misunderstanding of the history of this case and the State's constitutional obligations***." *Id.* at 471, 2022-NCAC-108, ¶ 223 (emphasis added); *see also id.* at 461-62, 2022-NCAC-108, ¶ 191 ("this Court holds that the trial court, in alignment with

[7] The Court addressed numerous other contentions that have not been improperly re-raised in this appeal by Defendant-Intervenors, such as arguments that the passage of the 2021 Budget Act fulfills their constitutional duties under *Leandro*.

this Court's instructions in Leandro II, properly concluded based on an abundance of clear and convincing evidence that the State's *Leandro* violation was statewide"). The Court further explained that "the State itself has consistently proposed and advocated for a statewide remedy . . . because its constitutional obligation applies not just toward marginalized students in Hoke County, but to every student in every district in the state." *Id.* at 470-71, 2022-NCAC-108, ¶ 222. As a result, the Court "unequivocally rejected" this first argument. *Id.* at 471, 2022-NCAC-108, ¶ 223.

Second, this Court considered Defendant-Intervenors' argument that "because this case implicates education policies, it raises non-justiciable political questions." *Id.* at 391, 2022-NCSC-108, ¶¶ 5-6. Not only did this Court reject this argument, *see, e.g.*, *id.* at 394-95, 2022-NCSC-108, ¶¶17-20, it pointed out that this was not the first time the Court had been asked to consider the same issue. This Court explained that it previously addressed these same arguments in 1997 when State Defendants in *Leandro I*, "claimed that the trial court lacked jurisdiction over the complaint because the issues raised were non-justiciable, State Defendants were shielded by sovereign immunity, and Plaintiffs failed to state a claim upon which relief could be granted." *Id.* at 394-95, 2022-NCSC-108, ¶ 17. And, as this Court explained, it "squarely rejected this notion" already in the previous appeal. *Id.* at 395, 2022-NCSC-108, ¶ 20. This Court, in *Leandro IV*, further held that Defendant-Intervenors' contentions about subject matter jurisdiction in this case "reflects, at

best, a fundamental misunderstanding of the history of this case and the State's constitutional obligations." *Id.* at 471, 2022-NCSC-108, ¶ 223. As a result, their argument was "unequivocally rejected." *Id*.

Third, the Court turned to the argument that, prior to Defendant-Intervenors' intervention, "this case constituted a friendly suit with no actual controversy before the court." *Id.* at 391, 2022-NCSC-108, ¶¶5-6. This Court held that, yet again, this argument ignored decades of history in which the case was "hotly contested" and the State was the party repeatedly asserting that the Court did not have jurisdiction over the case. *Id.* at 474, 2022-NCSC-108, ¶ 234. Moreover, this Court held, a defendant's efforts to achieve compliance with the Constitution did not render the lawsuit "friendly." *Id.* at 474, 2022-NCSC-108, ¶ 235. Rather, after a violation had already been established in the courts, parties "are ***encouraged*** to create a collaborative solution." *Id.* Nothing rendered this suit "friendly" in the legal sense. *See id.*

Altogether, this Court determined Defendant-Intervenors' "claims unequivocally fail." *Id.* at 391, 2022-NCSC-108, ¶¶ 5-6.

This Court's analysis concluded, "[u]nder the extraordinary circumstances of this case," the trial court's November 2021 Order was affirmed. *Id.* at 428, 2022-NCSC-108, ¶ 97.

IX. THIS COURT REMANDS TO TRIAL COURT ON A NARROW FACTUAL ISSUE.

In *Leandro IV,* this Court held that the calculations in Judge Robinson's April 26 Order were "diligent and precise," but they had been "functionally mooted by the State's subsequent enactment of the 2022 Budget Act." *Id.* at 468, 2022-NCSC-108, ¶ 211. That is because while this case was on appeal, the State passed its short-session 2022-2023 budget. Thus, in *Leandro IV,* this Court "narrowly direct[ed] the trial court to recalculate the appropriate distributions in light of the State's 2022 Budget," as Judge Robinson had done previously. *Id.* at 476, 2022-NCSC-108, ¶ 240.

X. THIS COURT REINSTATES THE WRIT.

After the case had been remanded to Judge Ammons but before he had entered the 17 April 2023 Order, the State Controller moved to lift a stay of the Writ and a motion to confirm reinstatement of the Writ, among other motions. *Hoke Cty. Bd. of Educ. v. State*, 384 N.C. 8, 8-9, 883 S.E.2d 480, 480-481 (2023). This Court, finding the State Controller's Motion to be a "further filing" in 425A21-1, granted the motion and reinstated the Writ. *Id.* As of 3 March 2023, the trial court was prohibited from entering an order "enforcing" its order to State officials to disburse the funds. However, the "trial court's findings that these funds are necessary" remain. Writ at p. 2.

XI. JUDGE AMMONS ENTERS AN ORDER IN COMPLIANCE WITH THIS COURT'S REMAND INSTRUCTIONS.

On remand, Judge Ammons recognized the "narrow directive" before him and stated that the issue was "limited" to "recalculating the additional amounts required to fund the action items called for in Years 2 and 3 of the CRP . . . ." (R pp 1315-1316 at ¶ 1). In addition, he recognized the Writ of prohibition had been reinstated by this Court which prohibited him from enforcing a disbursement but holding that the funds were necessary. (R p 1315 at ¶ 20).

After an evidentiary hearing (including Judge Ammons' evaluation of testifying witnesses' "believability, credibility, reliability, and qualifications"), Judge Ammons entered the 17 April 2023 Order determining the recalculated amounts[8] as follows:

- ~~$142,900,000~~ $133,900,000 for CRP components administered through the Department of Health and Human Services ("DHHS");
- ~~$608,006,248~~ $509,701,707 for CRP components administered through the Department of Public Instruction ("DPI"); and
- $34,200,000 [no recalculation required] for CRP components administered through the University of North Carolina System ("UNC System").

(R p 1321 at 11).

[8] In making those calculations, the trial court also stated that it would employ the same calculation methodology that Judge Robinson had previously, which this Court had reviewed in *Leandro IV*, and held to be "diligent and precise." *Leandro IV*, 382 N.C. at 468, 2022-NCSC-108, ¶ 211.

Not addressed in the 17 April 2023 Order were this Court's legal holdings in *Leandro IV*. Indeed, that order, on its face, makes plain that it was limited to the mathematical calculation and was not addressing any legal issues about the transfer of funds. Defendant-Intervenors themselves conceded that any legal issue raised in *Leandro IV* ***could not*** be considered by the trial court.[9]

STANDARD OF REVIEW

As the party appealing, Defendant-Intervenors bear the burden to show the trial court was without subject matter jurisdiction to enter its 17 April 2023 Order. *See Jackson v. Bobbitt*, 253 N.C. 670, 673, 117 S.E.2d 806, 808 (1961).

There is a "prima facie presumption of rightful jurisdiction which arises from the fact that a court of general jurisdiction has acted in the matter," and when this presumption applies "every presumption not inconsistent with the record will be indulged in favor of jurisdiction" and "the burden is on the party asserting want of jurisdiction to show such want." *Id.*; *see also, e.g.*, *Matter of S.E.*, 373 N.C. 360, 364, 838 S.E.2d 328, 331 (2020) (same).

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[9] *Defendant-Intervenors' Brief Responding to the Executive Branches "Accounting"* dated 15 March 2023, at pp. 8-10.

ARGUMENTS

I. JUDGE AMMONS HAD SUBJECT MATTER JURISDICTION TO DECIDE THE SINGLE, NARROW, FACTUAL ISSUE THAT THIS COURT INSTRUCTED HIM TO DECIDE.

The sole issue before the Court is whether the trial court had subject matter jurisdiction, i.e., the power to deal with the kind of action in question, to enter its 17 April 2023 Order.[10] 20 October 2023 Order. The answer is, of course, "yes."

Judge Ammons had jurisdiction to perform the narrow task of recalculating numbers based on an updated State budget. Indeed, this Court—the Supreme Court of North Carolina—instructed him to do so. *See, e.g.*, *Kramer v. S. Ry. Co.*, 128 N.C. 269, 38 S.E. 872, 872 (1901) ("It was the duty of the judge below to follow our decision . . . We cannot adjudge that he was in error in obeying our mandate."); *Tennessee–Carolina Transp., Inc. v. Strick Corp.*, 286 N.C. 235, 239, 210 S.E.2d 181, 183 (1974) ("when an appellate court passes on questions and remands the case for further

[10] Subject matter jurisdiction is the power of a court to deal with the kind of action in question and is given to the court by Constitution and state statute. W. Shuford, N.C. Civil Practice and Procedure § 12-4 (6th ed.). Const. art. I, § 18 guarantees a remedy for legally cognizable claims, and N.C. Gen. Stat.§ 7A-240 vests "original general jurisdiction of all justiciable matters of a civil nature cognizable" in the General Court of Justice, superior court division, except where the Constitution or statute specifically gives jurisdiction over a matter elsewhere. *See Stewart v. Hodge*, 211 N.C. App. 605, 609, 711 S.E.2d 175, 177–78 (2011) (providing examples of limited claims over which a trial court does not have subject matter jurisdiction, including Workers' Compensation Act claims and where federal law has removed jurisdiction from the state courts).

proceedings to the trial court, the questions therein actually presented and necessarily involved in determining the case, and the decision on those questions become the law of the case" (quoting *Collins v. Simms,* 257 N.C. 1, 11, 125 S.E.2d 298, 305 (1962) (Parker, J., dissenting in part))).

Defendant-Intervenors' entire brief is grounded on a false premise. They contend in the very first sentence of their argument, "Judge Ammons's most recent order seeks to **enforce** . . . the trial court's prior orders requiring 'the State' to develop, implement, and fund each of the 146 action items in the CRP." Def.-Int. Br. at 37. Nothing could be further from the truth. On its face, Judge Ammons' 17 April 2023 Order repeatedly and expressly declines to "enforce" any prior order. (R p 1315 at ¶ 20) (trial court stating that it "will not consider that directive [to order State officials to transfer funds] at this time"); (R pp 1315-1316 at ¶ 1) (trial court stating that it is not addressing the "transfer provisions"); (R p 1321 at ¶ 1) ("this Court is 'narrowly' tasked with 'recalculating the amount of funds…").

Apart from that foundationally false argument, Defendant-Intervenors do not discuss the 17 April Order's findings of facts and conclusions of law. To the contrary, they admit that what they really seek is to vacate "the entire series of orders from . . . 2018 . . . through to Judge Ammons's order of 17 April 2023," (Def.-Int. Br. at 46), which were already before this Court in *Leandro IV*. And, they urge the Court to revisit and overturn *Leandro IV,* notwithstanding the fact that the time to petition

this Court to do so has long passed (and under established rules cannot be extended).

The sole issue on appeal is whether the trial court had subject matter jurisdiction to enter the 17 April 2023 Order. Because Defendant-Intervenors' arguments do not address this question, their appeal should be ***dismissed***. *See State v. Sturkie*, 325 N.C. 225, 226–27, 381 S.E.2d 462, 463 (1989) (finding the issues presented in appellate brief demonstrated discretionary review was improvidently allowed and the appeal should be dismissed); *see also State ex rel. Edmisten v. Tucker*, 312 N.C. 326, 359, 323 S.E.2d 294, 315 (1984) (holding only issues raised by trial court's ruling are the "subject matter of this appeal"); *see* N.C. Const. art. IV, § 12.

II. THIS COURT HAS ALREADY HELD ONCE, AND HAS CONFIRMED IN ITS SUBSEQUENT HOLDINGS, THAT THE TRIAL COURT HAS SUBJECT MATTER JURISDICTION OVER PLAINTIFFS' CLAIMS.

On no less than four occasions, this Court determined or confirmed that the trial court has subject matter jurisdiction over Plaintiffs' claims. Judge Ammons' 17 April 2023 Order answered a narrow question on remand (as this Court directed) that indisputably concerned Plaintiffs' original challenge to the State's system of public education. Therefore, fundamental principles of subject matter jurisdiction and the law of the case require this Court to reject Defendant-Intervenors' arguments and affirm Judge Ammons' 17 April 2023 Order.

A. In 1997, 2004, and 2022, this Court confirmed that the trial court had jurisdiction over the subject matter of this case.

Subject matter jurisdiction and standing are assessed at the time a case is initiated and a pleading requesting declaratory relief is filed. This has been the established jurisprudence of this Court for more than a hundred years. *See e.g.*, *Shankle v. Ingram*, 133 N.C. 254, 45 S.E. 578, 580 (1903) (holding that it is the allegations in a complaint that confer "the necessary jurisdiction to proceed in the case"); *Sharpe v. Park Newspapers of Lumberton, Inc.*, 317 N.C. 579, 584, 347 S.E.2d 25, 29 (1986) (holding subject matter jurisdiction for a declaratory judgment is based on the controversy existing between the parties "at the time the pleading requesting declaratory relief is filed").

Defendant-Intervenors do not dispute—because they cannot—that this Court has determined the trial court had subject matter jurisdiction over Plaintiffs claims: "whether the people's constitutional right to education has any qualitative content, that is, whether the state is required to provide children with an education that meets some minimum standard of quality." *Leandro I,* 346 N.C. at 345, 488 S.E. 2d at 254; Def.-Int. Br. at 11-12.

In 1997, when the case came before this Court for the first time, the State argued exactly what the Defendant-Intervenors argue in this appeal—that the trial court lacked subject matter jurisdiction because the case presented supposed nonjusticiable political issues. As this Court is well aware, it rejected that argument,

holding not only that the trial court in fact had jurisdiction, but that it had a "duty . . . to address plaintiff-parties' constitutional challenge to the state's public education system." *Leandro I*, 346 N.C. at 345, 488 S.E.2d at 254.

Seven years later, in response to further arguments by the State, this Court explained in *Leandro II*, the issue of the trial court's subject matter jurisdiction had been raised and determined in *Leandro I*. *See Leandro II*, 358 N.C. at 611, 599 S.E.2d at 374.

This case came before this Court in 2013 in *Leandro III*, and the Court confirmed that the mandates in *Leandro I* and *II* "remain[ed] in full force and effect." *Leandro III*, 367 N.C. at 160, 749 S.E.2d at 455.

Most recently, in *Leandro IV*, the Defendant-Intervenors argued that the trial court lacked subject matter jurisdiction to enter the 10 November 2021 Order. All parties briefed the issue,[11] and this Court, again, addressed subject matter jurisdiction. This Court observed that it had already heard and decided the matter of subject matter jurisdiction in this case. *Leandro IV*, 382 N.C. at 395, 2022-NCAC-108, ¶ 20. This Court further held that Defendant Intervenors' argument "reflects, at best, a fundamental misunderstanding of the history of this case and the State's

[11] *See, e.g.*, *Legislative-Intervenor Appellants Opening Br.*, 425A21-2, 1 July 2022, at pp. 33-54; *Petitioner Nels Roseland, Controller of the State of North Carolina Response Brief*, 425A21-2, 1 Aug. 2022, at pp. 25-27; *Brief of Defendant-Appellant State of North Carolina*, 425A21-2, 1 Aug. 2022, pp. 23-28; *Plaintiff-Intervenors' Appellee Brief*, 425A21-2, 1 Aug. 2022, pp. 84-99.

constitutional obligations." *Id.* at 471, 2022-NCAC-108, ¶ 223. Accordingly, this Court" unequivocally rejected" the argument that the trial court lacked subject matter jurisdiction over Plaintiffs' claims. *Id*.

To remove all doubt, this Court then went on to "instruct the trial court to retain jurisdiction over the parties to monitor State compliance with this order." *Id.* at 391, 2022-NCAC-108, ¶ 7. In other words, in *Leandro IV,* this Court already decided Judge Ammons had jurisdiction to recalculate the amount of funds to be transferred in light of the State's 2022 Budget when it remanded the case to him and told him that he did.

A contrary determination from the same Court now (and in the same case where the same Court has repeatedly confirmed—on at least four separate occasions—the trial court's subject matter jurisdiction) would irreparably undermine the judiciary and over a hundred years of established precedent. This "[c]ontrovers[y] would never be settled," *State v. Speaks*, 95 N.C. 689, 691 (1886), and an "unseemly conflict of decisions" would result, *Mabry v. Henry*, 83 N.C. 298, 302 (1880). *See also Davis v. Hilton Lumber Co.*, 190 N.C. 873, 130 S.E. 156, 156 (1925).

This is precisely why this Court respects its prior determinations concerning jurisdiction in the same case, "because the former decision . . . is the law of the case."

N. Carolina Pub. Serv. Co. v. S. Power Co., 181 N.C. 356, 107 S.E. 226, 227 (1921), (Walker and Allen, JJ., (concurring)). As this Court has explained:

> When an appellate court passes on questions and remands the case for further proceedings to the trial court, the questions therein actually presented and necessarily involved in determining the case and the decision on those questions become the law of the case, both in subsequent proceedings in the trial court and on a subsequent appeal, provided the same facts and the same questions, which were determined in the previous appeal, are involved in the second appeal.

Tennessee–Carolina Transp., 286 N.C. at 239, 210 S.E.2d at 183 (quoting *Collins,* 257 N.C. at 11, 125 S.E.2d at 305 (1962) (Parker, J., dissenting in part)).

Moreover, pursuant to the law of the case doctrine, a "decision of this court on [a] previous appeal," including decisions about the trial court's exercise of jurisdiction, is "conclusive on the points so adjudged." *Cheshire v. First Presbyterian Church of Raleigh*, 222 N.C. 280, 22 S.E.2d 566, 566 (1942) (refusing to revisit the issue of whether the superior court had power to enter its order in the exercise of equitable jurisdiction); *see also Richardson v. Ainsa*, 218 U.S. 289, 295 (1910) (refusing to revisit the "first error assigned[,] that the district court was without jurisdiction" because "[t]hat point already has been decided against the appellant in this very case . . . [and] so it is not open to him to urge it"); *see also N. Carolina Pub. Serv. Co.*, 181 N.C. at 107 S.E. at 227 (Walker and Allen, JJ., (concurring on issues of jurisdiction even though they "did not agree" because it is the law of the case)).

Indeed, the law of the case doctrine is a universally observed principle.[12] For example, the United States Supreme Court will not, absent an allegation of fraud, examine subject matter jurisdiction for a second time once it has been determined on appeal. *Richardson*, 218 U.S. at 295; *Tyler v. Magwire*, 84 U.S. 253, 283 (1872) ("Repeated decisions of this court have established the rule that a final judgment or decree of this court is conclusive upon the parties, and that it cannot be re-examined at a subsequent term, except in cases of fraud . . . .").

As another example, the Supreme Court of Virginia has similarly held,

> [While t]he question of jurisdiction of the circuit court was not expressly presented and decided on the former writ of error[, it] was necessarily involved, and when this court remanded the cause for a new trial it of necessity determined that the circuit court had jurisdiction of the case.

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[12] Defendant-Intervenors inappropriately invite this Court to "take this opportunity to correct" its jurisdiction holding because, according to them, the Court can simply ignore *stare decisis* when it chooses. Def.-Int. Br. at 47. Defendant-Intervenors miss the point. Irrespective of their desire to toss out the established doctrine of *stare decisis,* they ignore the law of the case doctrine. That is, *Leandro IV* is the ***law of this case***, decided approximately one year ago. No rehearing was requested, and no facts have changed since that time. Moreover, the cases they cite are inapposite. For example, in *State v. Mobley*, 240 N.C. 476, 487, 83 S.E.2d 100, 108 (1954), the Court considered and declined to follow an order ***entered in a separate case 70 years prior*** in which a statute directly applicable on the matter at issue had been overlooked and the matter had been generally discussed in the earlier case as *dicta*. In *Harper v. Hall*, 384 N.C. 292, 374, 886 S.E.2d 393, 446 (2023), unlike in this case, "Legislative Defendants filed a timely petition under Rule 31 of the Rules of Appellate Procedure," so that the case could be "properly reheard." No such petition was filed here.

Norfolk & W. Ry. Co. v. Duke & Rudacille, 107 Va. 764, 766, 60 S.E. 96, 97 (1908).

B. This Court's prior holdings extend to Judge Ammons' 17 April 2023 Order.

Once subject matter jurisdiction of a court attaches, it exists for all time until the cause is fully determined. *See Shankle*, 133 N.C. 254, 45 S.E. at 580 (this Court holding that it is the allegations in a complaint that confer "the necessary jurisdiction to proceed in the case; and this jurisdiction, once acquired, is not lost"). "[T]he general rule is that it will not be ousted by subsequent events." *In re Peoples*, 296 N.C. 109, 146, 250 S.E.2d 890, 911 (1978).

This established jurisprudence is recognized across jurisdictions. *See, e.g.*, *Silver Surprize, Inc. v. Sunshine Mining Co.*, 74 Wash.2d 519, 523, 445 P.2d 334, 336–37 (1968) (subject matter jurisdiction is not "a light bulb which can be turned off or on during the course of the trial"); *Collins v. Robbins*, 147 Me. 163, 167, 84 A.2d 536, 538 (1951) ("subsequent events will never defeat jurisdiction already acquired"); *Jones Drilling Co. v. Woodson*, 509 P.2d 116, 117 (Okla. 1973) ("The general rule is that when jurisdiction of subject matter and person is once acquired it will not be defeated or divested by subsequent events."); *J.H. France Refractories Co. v. Allstate Ins. Co.,* 521 Pa. 91, 96, 555 A.2d 797, 800 (1989) (same); 20 Am. Jur. 2d Courts § 96 ("Ordinarily, a court that has acquired jurisdiction of a case cannot be deprived of jurisdiction by subsequent events in the course of its proceedings, even if those

subsequent events would have prevented jurisdiction from attaching in the first place.").

Here, the only issue before Judge Ammons, and the only issue that Judge Ammons determined, was the impact of the 2022 State Budget on the remedy that had already been entered on 10 November 2021 and upheld in *Leandro IV*. Thus, Judge Ammons was doing nothing more than exactly what this Court determined he had the power and authority to do when it remanded that issue to him.

Furthermore, the remand to Judge Ammons was not the first time that the case had been remanded from the Supreme Court to the trial court for this exact type of determination. On 26 April 2022, the trial court (Honorable Michael Robinson) issued an order that recalculated the amount of funds required to implement Years 2 and 3 of the State's CRP (the "26 April Order") pursuant to this Court's remand. And the Court in *Leandro IV* held that the calculations in Judge Robinson's 26 April Order were "diligent and precise." 382 N.C. at 468, 2022-NCSC-108, ¶ 211. Thus, the remand before Judge Ammons, as before Judge Robinson, "narrowly direct[ed] the trial court to recalculate the appropriate distributions in light of the State's 2022 Budget." *Id.* at 476, 2022-NCSC-108, ¶ 240.

In sum, Judge Ammons had subject matter jurisdiction to enter the 17 April 2023 Order because this Court examined and determined multiple times that the

trial court had jurisdiction and then remanded the case to him for a narrow and specific purpose squarely within the scope of this decades-long litigation.

III. DEFENDANT-INTERVENORS' SOLE ARGUMENT RELATED TO THE 17 APRIL 2023 ORDER IS BASED ON AN INCORRECT LEGAL PREMISE.

To the extent Defendant-Intervenors argue that Judge Ammons did not have subject matter jurisdiction because the parties did not dispute each fact before him and thus created a "friendly lawsuit," that argument also fails, because it is based on an incorrect legal premise.

A determination of whether a suit is a "friendly suit" is made based on the facts existing at the time a case is initiated, even in the case of declaratory actions. *See Lide v. Mears*, 231 N.C. 111, 118, 56 S.E.2d 404, 409 (1949) ("[W]hen a litigant seeks relief under the declaratory judgment statute, he must set forth in his pleadings all facts necessary to disclose the existence of an actual controversy between the parties to the action with regard to their respective rights and duties . . . ."); *Sharpe v. Park Newspapers of Lumberton, Inc.*, 317 N.C. 579, 584, 347 S.E.2d 25, 29 (1986) ("[I]n order for a court to have subject matter jurisdiction to render a declaratory judgment, an actual controversy must exist between the parties ***at the time the pleading requesting declaratory relief is filed***.") (emphasis added)).

According to Legislative-Intervenor's interpretation, a defendant could momentarily agree with a plaintiff in order to destroy subject matter jurisdiction and dismiss the suit, then return to its unconstitutional conduct. This would be an

untenable result. It is for this precise reason that "[j]urisdiction is not a light bulb which can be turned off or on during the course of a trial. . . . If the converse of this were true, it would be within the power of the defendant to preserve or destroy jurisdiction of the court at his own whim." *In re Peoples*, 296 N.C. 109, 146, 250 S.E.2d 890, 911 (1978)(quoting *Silver Surprize, Inc. v. Sunshine Mining Co.*, 74 Wash.2d 519, 523, 445 P.2d 334, 336–37 (1968)).[13]

If the act of not arguing about each fact before the trial court amounts to "collusion," then, under Messrs. Berger and Moore's own rationale, they were colluding when providing their own testimony evidence to Judge Ammons. 14 April Order at 7 (finding the parties are "largely in agreement as to the amount of funding provided for the action items called for in Years 2 and 3 of the CRP").

IV. THE ISSUES RAISED BY DEFENDANT-INTERVENORS ARE NOTHING MORE THAN ANOTHER ATTEMPT TO REHEAR *LEANDRO IV*.

Instead of answering this Court's sole question on appeal, Defendant-Intervenors re-assert the same arguments that they made before this Court in *Leandro IV*. And, more critically, they assert the same arguments that this Court rejected in *Leandro IV*. That they cannot do.

[13] Moreover, as discussed below, this Court has already considered and rejected Defendant-Intervenors' argument that this is a "friendly" lawsuit.

Indeed, in an attempt to have an improper rehearing, which they failed to seek timely under Rule 31, Defendant-Intervenors misapply and misrepresent the fundamental rules of subject matter jurisdiction to shoehorn previously decided issues into this very narrow appeal. Their brief focuses on four arguments, each of which was addressed in a prior *Leandro* decision:

(1) Defendant-Intervenors argue that the Plaintiffs did not have standing, even though Plaintiffs' standing was determined in *Leandro II*.

(2) Defendant-Intervenors argue the Plaintiffs could not enforce the State's proposed remedy for the ongoing constitutional violation, even though *Leandro I*, *II*, and *IV,* all held that the trial court had authority to enter an order requiring the state to provide a remedy; and, regardless, and Judge Ammons made it clear that his order (the only subject of this appeal) did not address enforcement;.

(3) Defendant-Intervenors argue this is a "friendly lawsuit" because the State and Plaintiffs allegedly colluded before Judge Ammons to get more money, even though the State agreed with Defendant-Intervenors and not the Plaintiffs on proposed findings of fact and conclusions of law; and

(4) Defendant-Intervenors argue that Plaintiffs' claims involve a nonjusticiable political question even though *Leandro I*, *II*, and *IV* held otherwise; and regardless, Judge Ammons was simply performing a math calculation at the direction of this Court.

Each of those issues have already been decided by this Court, on the same facts, between the same parties.

A. This Court, the State, and the North Carolina Constitution have already determined Plaintiffs' remedy must be a "statewide" remedy, and the issues raised by Defendant-Intervenors do not implicate the trial court's subject matter jurisdiction.

The only remedy the State has ever presented in this case is a statewide remedy. That the Constitution requires the State to implement its remedy statewide does not divest the trial court of jurisdiction. Nor does it serve to deprive Hoke County of a remedy. Put differently, Hoke County's remedy is a statewide remedy. Defendant-Intervenors' arguments otherwise are legal nonsense.

1. *Leandro II* determined that Plaintiffs have standing to assert their claims; it did not hold that Plaintiffs were limited to a remedy for Hoke County only.

Leandro II definitively decided that the Plaintiffs have standing to bring their claims. Defendant-Intervenors do not challenge this holding. Instead, they argue that Plaintiffs do not have standing to receive a ***statewide*** remedy to redress their injury. This argument, however, places the cart before the [dead] horse and must be rejected.

Under Defendant-Intervenors forced argument, to determine whether a party has standing, one must start with the remedial order that the trial court entered. That is absurd. Our courts do not determine standing and subject matter jurisdiction by waiting until the end of the case and working its way backward.

Indeed, if their arguments were to be accepted, it would mean that every other decision this Court has decided on standing, subject matter jurisdiction, and constitutional remedies is wrong. North Carolina's jurisprudence would be upended.

As set out above, subject matter jurisdiction is determined as of the time a case is initiated and a pleading requesting declaratory relief is filed. *See Shankle*, 133 N.C. at 254, 45 S.E. at 580 (holding it is the allegations in a complaint that confer "the necessary jurisdiction to proceed in the case"); *Sharpe*, 317 N.C. at 584, 347 S.E.2d at 29 (holding subject matter jurisdiction for a declaratory judgment is based on the controversy existing between the parties "at the time the pleading requesting declaratory relief is filed").

One cannot determine the proper remedy for a constitutional violation, however, based only on the complaint. Common law provides a remedy for violations of a constitutionally protected right, and "[w]hat that remedy will require, if plaintiff is successful at trial, will depend upon the facts of the case developed at trial." *Corum v. Univ. of N. Carolina*, 330 N.C. 761, 784, 413 S.E.2d 276, 290 (1992). The trial judge must "craft the necessary relief." *Id. see also* N.C. Const. Art. 1, § 18 ("every person for an injury done to him in his lands, goods, person, or reputation shall have a remedy by due course of law").

In *Leandro II*, the State argued the Plaintiffs did not have standing to assert the claim that the State failed to provide children with the right to an opportunity for a sound basic education. Before addressing the State's arguments that Plaintiffs were not the appropriate party, the Court recognized:

> [T]he evidence presented in this case reaches a broader constituency than the two designated plaintiff-school children in the case's caption. In fact, a far greater proportion of the evidence pertains to the circumstances of Hoke County's student population in general than it does to the named plaintiffs in particular. Thus, as a threshold question, we address whether the evidence presented concerning the plight of Hoke County's student population is relevant to the question of whether the named plaintiffs have been denied their right to an opportunity to obtain a sound basic education.

Leandro II, 358 N.C. at 615, 599 S.E.2d at 376. The Court determined that "the nature of a declaratory judgment action and the mandate of *Leandro* combine to afford the trial court and the participating parties greater evidentiary leeway than in a conventional civil action." *Id.* The Court then determined plaintiffs would be permitted to proceed "***so long as the interest sought to be protected*** by the complainant is arguably within the ***'zone of interest' to be protected by the constitutional guaranty in question***." *Id.* In other words, the Court in *Leandro II* determined Plaintiffs ***did*** have standing because they were within the "zone of interest."

The Court ***did not*** hold that Plaintiffs "only have standing to represent, at most, the students who live in those districts," as Defendant-Intervenors contend. Def.-Int. Br. at 3. The "zone of interest" is not some type of geographical boundary

limiting the area within which relief may be granted. Instead, it is a zone of interest that surrounds the constitutional right in question and that gives parties within that "zone" standing to bring a claim concerning the violation of that constitutional right. *See Seattle Sch. Dist. v. State,* 90 Wash.2d 476, 490–95, 585 P.2d 71, 80–83 (1978). Contrary to Defendant-Intervenors' arguments, the "zone of interest" does not limit the remedy that may be afforded to this claimants.

Moreover, this Court, in *Leandro I*, already held that the State owes to every child, in every County, a sound basic education. Every child in North Carolina has that right. The Court did not limit the "zone of interest" to Hoke County in *Leandro II*.[14] Instead, the Court confirmed that Plaintiffs were within the zone of interest to be able to bring the claims.

Arguments about a "statewide" violation are a distraction from the facts, law, and the State's own legal position in this case. Since 2001, the State has represented to the trial court and to Plaintiffs that any remedy in this case would only be "statewide." Moreover, Defendant-Intervenors' surprising current position—that

[14] Certainly other districts have standing to bring a declaratory judgment action claiming a constitutional violation of their rights to a sound basic education. But this Court has never found that other districts are a necessary party for an action to determine whether a *Leandro* violation exists in this case. Even if the other districts were necessary parties—which they are not—"a failure to join a necessary party does not result in a lack of jurisdiction over the subject matter of the proceeding." *Stancil v. Bruce Stancil Refrigeration, Inc.*, 81 N.C. App. 567, 573, 344 S.E.2d 789, 793 (1986).

the State only has to provide remedial aid to students in Hoke County—would itself violate the Constitution.

That is precisely why the State represented to the trial court that it was constitutionally obligated to administer a "general and uniform system of free public schools" and, as a result, any plan must be implemented statewide and not just to students in Hoke County. (*See, e.g.*, R p 1492). The State took this position because the Court's *Leandro* mandates apply to all students in North Carolina. They are, of course, not limited to only those students living within the provincial boundaries of Hoke County. As *Leandro II* made plain, "our state Constitution . . . accord[s] the right at issue to all children in North Carolina." 358 N.C. at 379, 599 S.E.2d at 620. As former Justice Robert Orr, author of the *Leandro II* opinion, argued to this Court in *Leandro III,* "it would be disingenuous and inaccurate to argue . . . that the ruling [in *Leandro II*] was limited to Hoke County." (R pp 2793-2797).

As *Leandro I* made plain, a State system that treats districts in an "arbitrary and capricious manner" would itself be constitutionally-impermissible and "could result in a denial of equal protection or due process." 346 N.C. at 353, 488 S.E.2d at 258; *see also Edward Valves, Inc. v. Wake County*, 343 N.C. 426, 433, 471 S.E.2d 342, 346 (1996) ("No state shall 'deny any person within its jurisdiction the equal protection of the laws'" and the "'purpose of the Equal Protection Clause . . . is to secure every person within the state's jurisdiction against intentional and arbitrary

discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.'" (quoting *Sunday Lake Iron Co. v. Wakefield Twp.*, 247 U.S. 350, 352-53 (1918))).

Defendant-Intervenors are trying to blame the ***Plaintiffs*** for a reality that the State of North Carolina created and that Defendant-Intervenors, as agents of the State, did not dispute for more than seventeen years. Plaintiffs certainly have not "refused to live within the boundaries set by this Court," Def.-Int. Br. at 4, they have been told by the State of North Carolina and the trial court for two decades that they cannot have a "Hoke County only" remedy. And, by a "statewide" remedy, they will get their long-overdue relief.

The State took a definitive legal position that its *Leandro* remedial efforts would be implemented on a statewide basis. The State further represented that its efforts would provide "concrete actions to improve the educational opportunities for at-risk students in the plaintiff-party [districts] along with their similarly disadvantaged peers across the State." (R p 1491) (emphasis added). The State of North Carolina conceded that it had accepted its constitutional duty to provide "all students" across North Carolina an opportunity to obtain a sound basic education and, thus, its remedial efforts would be directed "State-wide" as necessary to correct constitutional deficiencies in the other Plaintiff districts, the intervenor districts, as well as the other districts "across the State." (R p 1492).

Over the course of the seventeen years since *Leandro II*, the State—consistent with its legal position—submitted only ***statewide*** evidence to the trial court concerning its efforts to comply with *Leandro* and ***statewide*** remedial initiatives. *See supra* at 13-23. Not once has the State presented a remedial plan directed only to Hoke County, even though Hoke County requested one. Indeed, the State of North Carolina relied on findings about violations outside of Hoke County to intervene in Halifax County through court order in this case. (R pp 2671-2677).

Now, the Defendant-Intervenors take the exact opposite position, arguing, purportedly on behalf of the State of North Carolina, that a statewide remedy cannot be ordered because there were no further liability trials. Apparently, they fault the trial court and Plaintiffs for taking the State of North Carolina at its word.

Our judiciary, however, does not permit such trickery and flip-flopping by litigants. This Court confirmed, in *Whitacre Partnership v. Biosignia, Inc.*, the "shared and longstanding judicial reluctance to permit the assertion of inconsistent positions before a judicial or administrative tribunal." 358 N.C. 1, 14, 591 S.E.2d 870, 879 (2004). "'Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position . . . .'" *Id*. at 22, 591 S.E.2d at 884 (quoting *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001)). "[T]his state has long recognized the importance of protecting the integrity of judicial proceedings" and,

because of this, a litigant is estopped from asserting "inconsistent positions before a tribunal." *Id*. at 26, 591 S.E.2d at 887. The "inherently flexible" doctrine of judicial estoppel "prevents a party from acting in a way that is inconsistent with its earlier position before the court." *Powell v. City of Newton*, 364 N.C. 562, 569, 703 S.E.2d 723, 728 (2010).

The State took the legal position that additional trials were unnecessary. It also took the legal position that a remedy targeted only to Hoke County was not feasible. The State represented that it would implement a statewide remedy which would, by its very nature, correct the State's constitutional failings to children in Hoke County, the other Plaintiff and intervenor districts, and every other district across the State. Based on the State's position, additional full trials did not occur.

The Urban Intervenors agreed that, in light of the State's position, further liability trials were unnecessary and they dismissed their claims. (R p 734). Likewise, additional liability trials were unnecessary as to the other Plaintiff districts (beyond Hoke County).

For that reason, this argument is as confounding as it is disingenuous. No State party, especially not Defendant-Intervenors, has ever proposed a way to remedy Hoke County's violations "only." And it is undisputed that—to this very day—there is ***no*** remedy to the ongoing constitutional violations in Hoke County.

2. This Court has already affirmed the trial court's finding that a statewide *Leandro* violation exists.

Defendant-Intervenors also argue this Court should revisit Statewide issues because they did not like the way this Court decided them previously in *Leandro IV*. As evidenced by the *Leandro IV* opinion itself, this Court directly and thoroughly addressed each point the Defendant-Intervenors raise in this appeal.

This Court in *Leandro IV* recounted—over approximately nineteen paragraphs spanning thirteen pages—the trial court's findings that there had been a statewide *Leandro* violation. The trial court made those findings following the directive on remand from *Leandro II* to conduct "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." *Leandro II*, 358 N.C. at 613 n.5, 599 S.E.2d at 375 n.5.

This Court then concluded and confirmed that the trial court had indeed found a statewide violation, acknowledging that, "[w]hile the trial court focused primarily on Hoke County as a representative district, it expressly and repeatedly made findings of fact and conclusions of law regarding a statewide violation that was not isolated to Hoke County." *Leandro IV*, 382 N.C. at 461, 2022-NCSC-108, ¶ 188.

This Court even addressed and approved of the nature in which those findings were made. *Id.* at 461, 2022-NCSC-108 ,¶ 191 ("it is well within this Court's ability

and authority to properly identify factual findings and legal conclusions as such, regardless of how they are labeled by a trial court") (citing *In re J.O.D.*, 374 N.C. 797, 807, 844 S.E.2d 570 (2020) (identifying findings of fact and conclusions of law as such despite trial court labels)).

Following those findings, this Court considered the identical arguments made by Defendant-Intervenors in their brief now. *Id.* at 469, 2022-NCAC-108, ¶¶ 218 ("First, and most enthusiastically, Legislative Defendants assert this case is properly 'limited to just at-risk students in Hoke County.'").

In many cases, the dissent discusses and acknowledges that the Court made these findings. *See, e.g.*, *id.* at 518, 2022-NCAC-108, ¶ 350 (Berger, J., dissenting) ("The majority simply declares that the trial court 'properly concluded based on an abundance of clear and convincing evidence that the State's *Leandro* violation was statewide.'"); *id.* at 477, 2022-NCAC-108, ¶ 245 ("The majority affirms the trial court order which strips the General Assembly of its constitutional power to make education policy and provide for its funding.").

The *Leandro IV* holdings are not broad declarations. This Court demonstrably considered the Defendant-Intervenors' arguments and decided them with thorough analysis based on binding precedent. While Plaintiffs understand this Court is willing to review questions that were not addressed, this is not one of them. Indeed,

the issues that Defendant-Intervenors raise are almost identical to their issues before the Court in *Leandro IV*.

A simple comparison of the briefing makes this plain:

Leg. Int. 1 July 2022 Brief p.3, Issue 2:

> 2. Did the trial court issue an impermissible advisory opinion by 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 somehow insufficient to provide children the opportunity for a sound basic education?

Appellant Brief p.2, Issue 3:

> 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?

This issue was squarely addressed in *Leandro IV*.

B. Defendant-Intervenors misapply or misunderstand "friendly lawsuits" and the history of this litigation, and their arguments do not concern the trial court's subject matter jurisdiction to enter the 17 April 2023 Order.

Defendant-Intervenors' arguments that this is a "friendly lawsuit" due to the State and Plaintiffs' actions between 2018 and 2022 to consent to a remedy for an established, ongoing constitutional violation have also been considered and rejected by this Court. This is the exact argument Defendant-Intervenors tried before this

Court in *Leandro IV*. Indeed, they rely on the same case law, the same quotes, and the same arguments that they have already made before the Court:

Compare Leg. Int. Brief 1 July 2022, pp. 48, 52-53

> Nevertheless, since 2018 both sides—meaning Plaintiffs and DOJ—have asked the trial court to enter a series of consent orders that purport to require the "State" to comply with the CRP and take other measures that they readily admit would require approval by the General Assembly.

with Appellant Brief pp. 20, 64-65.

> 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.

Because it apparently is necessary, Plaintiffs remind Defendant-Intervenors that Judge Manning found the State had:

> consistently fought 'tooth and nail' to prevent any finding that (1) the State of North Carolina is not providing the equal opportunity for each child to obtain a sound basic education through its educational programs, systems and offerings and (2) that the State of North Carolina is not providing sufficient funding to its school districts to provide each and every child with the equal opportunity to obtain a sound basic education within its funding delivery system.

(R p 572). Furthermore, this Court has already determined Defendant-Intervenors ignored decades of history to raise this "friendly lawsuit" argument, and that the State's "commitment—at long last—to honor its constitutional duty to guard and maintain the right of North Carolina schoolchildren to a sound basic education," "did not render this suit friendly." *Leandro IV*, 382 N.C. at 474, 2022-NCSC-108, ¶

235. Defendant-Intervenors cannot have a rehearing on this issue; they ignored the proper procedural mechanism to request one.

Fundamentally, these allegations (both the old and the new) could never form the basis of finding that the lawsuit was a "friendly" suit, as that phrase is used in the case law that Defendant-Intervenors cite. Those cases use the term "friendly lawsuit" to mean one in which government action is challenged, but no party is directly and adversely affected by it. In fear of again stating the obvious, the denial of a fundamental constitution right to children directly and adversely affects Plaintiffs. And, not a single one of the cases cited by Defendant-Intervenors even remotely involves the situation present here—where the State must comply with an existing court order to remedy an established violation of a fundamental constitutional right.

C. This Court already determined in *Leandro I, II*, and *IV* that requiring a remedy for the State's constitutional violations is <u>not</u> a "nonjusticiable political question," and a finding otherwise would be a misapplication of subject matter jurisdiction principles.

Defendant-Intervenors' "political question" argument has also been rejected by this Court not once, but twice. Their argument merely echoes the one the State made and lost in *Leandro I* and they made and lost again in *Leandro IV*. In addition, it is contradicted by the Court's conclusions in *Leandro II*.

In *Leandro I*, the State argued that determinations involving whether children were receiving a constitutionally-conforming education were "nonjusticiable

political questions" and, thus, outside the reach of the judiciary. This Court, however, rejected that contention, holding instead that it is indeed the "duty" of the Court to address such constitutional matters and to guard fundamental constitutional rights from encroachment. *See also* R pp 2935-2941 (denying Defendant State Board's motion to be released from case on similar grounds).

Leandro IV directly addressed this issue when recounting and confirming the findings in *Leandro I* and *Leandro II*, that a court not only has authority, but also has a duty to order a constitutional remedy if the legislative and executive branches failed to act. Leandro *IV*, 382 N.C. at 395 & 403, ¶¶ 20, 37-39.

In arguing Judge Ammons' recalculation answered nonjusticiable political questions, Defendant-Intervenors do not raise new issues concerning an issue Judge Ammons actually decided.[15] Instead, they again copy the arguments that previously came before this Court.

Compare Leg. Int. 1 July 2022 Brief pp. 42-43:

> [T]he CRP would purport to dictate virtually every aspect of educational policy (and spending), over an eight-year 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

[15] Undoubtedly, calculating the amount needed to implement the State's remedy for its Constitutional violation is well within the trial court's jurisdiction. *See Sale v. State Highway & Pub. Works Comm'n*, 242 N.C. 612, 618, 89 S.E.2d 290, 296 (1955) (a court determines just compensation for violations of property rights). Indeed, it was this Court that instructed Judge Ammons to perform the recalculation on remand.

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

with Appellant Brief concerning Judge Ammons' order pp. 71-72:

> It [Judge Ammons' Order] 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-kindergarten programs, and early college courses. . . . Whether to implement these measures, however, constitutes a nonjusticiable political question.

And compare Leg. Int. 1 July 2022 Brief pp. 45:

> Thus, while *Leandro I* and *Leandro II* establish the standard to determine *whether* the State has complied with its obligation to provide 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 a sound basic education by imposing a specific remedy impacting education policy, appropriations, and budget allocation.

with Appellant Brief concerning Judge Ammons' order pp. 71:

> 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.[16]

[16] Even the footnotes are the same. *Compare* Leg. Int. 1 July 2022 Brief pp. 45 fn. 12 *with* Appellant Brief concerning Judge Ammons' order pp. 71 fn. 29.

Leandro IV rejected these arguments, and Judge Ammons' 17 April 2023 Order presents no new issues for this Court to decide.

This Court, ***in this case***, has consistently anticipated there may come a point in time when the trial court had to order a remedy that the State was unwilling to provide. *Leandro I* stated that if plaintiffs prevailed on their claim, it would "be the duty of the court to enter a judgment granting declaratory relief ***and such other relief as needed to correct the wrong*** while minimizing the encroachment upon the other branches of government." 346 N.C. at 357, 488 S.E.2d at 261 (emphasis added). [17]

This Court already has decided that the 10 November 2023 Order provided the "relief [] needed to correct the wrong." *See id.*

CONCLUSION

Judge Ammons had subject matter jurisdiction to enter the 17 April 2023 Order. Indeed, because this Court determined that he did and then remanded the case to him to enter it. The Court should confirm the same and dismiss this appeal.

[17] Indeed, for every Constitutional violation there must be a remedy. *Corum v. University of North Carolina*, 330 N.C. 761, 782- 83, 413 S.E.2d 276, 289-90, cert. denied, 506 U.S. 985, 113 S.Ct. 493, 121 L.Ed.2d 431 (1992).

Respectfully submitted, this the 10th day of January, 2024.

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N.C. R. App. P. 33(b) Certification: I certify that all the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

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