No. 425A21-2 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

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

and

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

and

RAFAEL PENN, *et al.*,
Plaintiff-Intervenors-Appellees,

v.

STATE OF NORTH CAROLINA,
Defendant-Appellant,

and

STATE BOARD OF EDUCATION
Defendant-Appellant.

and

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION,
Realigned Defendant-Appellee

and

PHILIP E. BERGER, in his official capacity as President *Pro Tempore* of the North Carolina Senate, and

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

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

****

BRIEF OF PROFESSORS AND LONG-TIME PRACTITIONERS
OF CONSTITUTIONAL AND EDUCATIONAL LAW
AS *AMICI CURIAE*

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BRIEF OF PROFESSORS AND LONG-TIME PRACTITIONERS
OF CONSTITUTIONAL AND EDUCATIONAL LAW
AS *AMICI CURIAE*[1]

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INTRODUCTION

This brief *amicus curiae* is submitted to the Court by constitutional law and education law scholars and by longtime education law practitioners to support an Order of the Superior Court of Wake County entered in this case on November 10, 2021 by the Honorable W. David Lee, as subsequently augmented by an Order Following Remand entered on April 26, 2022 by the Honorable Michael Robinson. Judge Lee's comprehensive Order acts to deliver a long-promised, long-awaited, but woefully long-delayed educational remedy.

The constitutionally based right at issue – the opportunity for a sound basic education – was first assured to every North Carolina schoolchild twenty-five years ago in the Court's unanimous decision in *Leandro v. State*, 346 N.C. 336 (1997). The widespread *violation* of the *Leandro* right was unanimously acknowledged by the Court seven years later, in *Hoke County Board of Education v. State*, 358 N.C. 605 (2004). In the ensuing eighteen years, the prospect of a full and adequate educational remedy has waxed, waned, and languished, but has never for a single day been delivered to North Carolina's children.

On this appeal, the Plaintiffs, the State, and the State Board of Education, the original parties to this action, have contested neither the *Leandro* right nor the

[1] No one beyond counsel and *amici curiae* contributed to the drafting and/or funding of this brief.

remedy necessary to fulfil it. Indeed, the remedial details were hammered out cooperatively by the State and the Plaintiffs, under judicial supervision, over many years' time – with wide notice and ample opportunity for participation by every interested party, including (had they chose), the leaders of the General Assembly.[2] The comprehensive remedy drew upon both the expertise of State educational leaders and expert educators nationwide who afforded the State an exceptionally careful diagnosis of North Carolina's ongoing *Leandro* deficiencies and charted a comprehensive remedial path forward.

Judge Robinson's Order Following Remand carefully compared the remedial funding directed by Judge Lee's order against the State budget passed last November and concluded that "the Budget Act fails to provide nearly one-half of those necessary funds . . ." (Robinson Order, at 13), a shortfall of "$785,106,248 in the aggregate."(*Id.* at 22). Judge Robinson also concluded that the State would have over $4.25 billion in its unappropriated (but not 'unreserved') balance at the conclusion of fiscal year 2022-23, an amply sufficiency if expended to meet the obligations directed by Judge Lee's order. (Robinson Order, 19-20, paras. 42-46; *id.*, 22-23, paras. 53-55).[3]

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[2] Although in 2011 a motion by the leaders of the General Assembly to intervene in *Leandro/Hoke County* was denied by the trial court, *see* Judge Robinson's Order Following Remand at 2-3 n.1, two years later, the General Assembly enacted a law empowering the Speaker of the House and the President Pro Tempore of the Senate to intervene in any state lawsuit challenging the validity of a North Carolina statute or state constitutional provision. N.C.G. S. § 1-72.2(b) (2013). The House and Senate leaders obviously believe, as their recent motion reflects, that this provision authorizes their intervention in this case.

[3] Judge Robinson's order reasoned that the November 30, 2021 order of the Court of Appeals, granting a writ of prohibition against Judge Lee's order to transfer State funds, controlled his own resolution of that question on remand. *See* Robinson Order, pp. 10-11, para. 26; p. 24, para. 58. Yet

Objection to Judge Lee's order now comes from two sources. First, and quite naturally, a question is posed by the State Comptroller, who finds herself directed to transfer funds pursuant to a novel (though, we will contend, a perfectly proper) judicial order. Second, far more unnaturally, objection comes from State legislative leaders who have for years largely ignored the ongoing *Leandro* litigation, declined to participate in its creation, and yet now – having seen how the Superior Court's order has managed to circumvent their willful non-cooperation – insist that the remedial order suffers, ironically, from the infirmities of "a joint effort" by parties whom it accuses of the wickedness of "cooperation" and the sin of "working together" to achieve a constitutionally-mandated end.

Our contrary submission is that the Superior Court's order was a rare but necessary judicial act entered, not simply to enforce the Court's prior decrees, but to reaffirm and vindicate this State's most indispensable legal principle: that North Carolina is and must always be governed by the rule of law. This 'rule' is crucially more than a verbal piety; it expresses the deep, mutual pledge that everyone – State citizens and every branch of their government – will abide by principles expressed in the State Constitution and by the judicial decrees rendered pursuant thereto.

As *Bayard v. Singleton* early held, 1 N.C. 5 (1787), to assure the rule of law the judicial branch must act occasionally, with understandable caution and reluctance, to enforce constitutional commands even against a defiant legislative branch. Though some have reasoned that the North Carolina legislature is itself the

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this Court's remand order neither invited nor required independent reconsideration of these legal issues. We respectfully suggest that this portion of the order is ultra vires and not controlling.

preeminent 'representative of the people' and therefore cannot be brought into compliance – except insofar as it chooses – this Court knows better. The deepest expression of 'the people's will' in North Carolina is the Constitution itself, to which every knee must bow.

Here, where two unanimous decisions of this Court have held that the North Carolina Constitution does not simply aspire to, but in fact guarantees, the opportunity of a sound basic education, then at least within the financial capacity of the State, we assert this legal obligation must at long last be afforded to all the State's children.

Despite these basic principles, the recent history of this State is that the State's General Assembly -- which at times has operated under Democratic leadership and more recently, under Republican leadership – has consistently treated *Leandro*'s constitutional commands as little more than a sideshow, at most a discretionary suggestion. Both in the past, presently, and looking toward the future, the General Assembly refuses to commit a single dollar more than legislators may choose, consulting neither constitutional duty nor the court's carefully weighed remedial findings but instead their own preferences. In short, the legislature implicitly claims exemption from compliance with judicial decrees, constitutional commands, and the rule of law itself. In so doing, these leaders exceed their powers and have lost their way.

Under these rare but crucially importance circumstances, we submit, it becomes the Court's duty to reaffirm the rule of law, embrace the Superior Court's

carefully wrought order, and at last redeem the long overdue pledge the Court has itself made not once, but twice, to the students of this great State.

ARGUMENT

The Structural Protections Afforded by the North Carolina Constitution Have Always Depended Both upon the Separation of Governmental Power into Three Branches *and* Upon the Presence (and Timely Exercise) of Checks and Balances Designed to Curb Abuse by Any One Branch.

Over the past forty years, the North Carolina judiciary has addressed a number of previously unresolved questions about the separation of state governmental powers and the limits upon the exercise of those powers. *See generally Cooper v. Berger*, 376 N.C. 22 (2020); *Cooper v. Berger*, 370 N.C. 392 (2018); *State ex rel. McCrory v. Berger*, 368 N.C. 633 (2016) ; *North Carolina Department of Transportation v. Davenport,* 334 N.C. 428 (1993); *Matter of Alamance County Court Facilities*, 329 N.C. 844 (1991); *Advisory Opinion in re Separation of Powers*, 305 N.C. 767 (1982); *State ex rel. Wallace v Bone*, 304 N.C. 591 (1982); *Smith v. State*, 289 N.C. 303 (1976); *see also Cooper v. Berger*, 256 NC. App. 190 (2017); *Richmond County Board of Education v. Cowell*, 254 N.C. App. 422 (2017); *State v. Bowles*, 159 N.C. App. 18 (2003).

Many of these cases have involved conflicts between the legislative and the executive branches, jockeying for power over the appointment of officials to state executive positions or over the allocation of federal block-grant dollars. Other cases have involved the power of the judicial branch to issue rulings implicating local legislative or executive authorities. Each new conflict has required the judicial

branch to reassess how best to accommodate an inflexible, literalist view of the separation of powers – that each branch should operate totally 'separately' from the other branches, unchecked in its powers – with the Framers' deeper recognition that committing total power to any one branch might, if not subject to constitutional check, undermine either the proper role of another branch or some right promised to the people, or both.

Initially, the people designed the North Carolina Constitution of 1776 to give extraordinary primacy to the legislative branch, granting it power to appoint the governor, all principal executive officials, and all judges. *See* N.C. Const. of 1776, art. XIII – XVI. Yet from the time of *Bayard v. Singleton*, 1 N.C. 5 (1787), this Court has declared that even under the 1776 Constitution, the legislative branch must be subject to constitutional command, since it is the Constitution that embodies and reflects people's very deepest and most lasting purposes.

In *Bayard*, a citizen claimed a constitutional right to a trial by a jury on the claim to ownership of her deceased Loyalist-father's property, which had been seized and sold via a state commission after the Revolutionary War. Although the post-war General Assembly had, by statute, instructed North Carolina courts to summarily dismiss all such lawsuits, this Court declined to follow that express legislative degree:

> [N]o act they [the legislators]could pass could by any means repeal or alter the constitution, because if they could do this, they would at the same instant of time, destroy their own existence as a Legislature, and dissolve the government thereby established. Consequently, the constitution (which the judicial power was bound to take notice of as much as of any other law whatever,) standing in full force as the fundamental law of the land,

> notwithstanding the act on which the present motion [to dismiss the lawsuit] was grounded, the same act must of course, in that instance, stand as abrogated and without any effect.

Bayard, 1 N.C. at 7. *See also Trustees of University of North Carolina v. Foy*, 5 N.C. 58 (1805) (in which the Supreme Court relied upon Section 41 of the North Carolina Constitution of 1776 -- providing that "schools shall be established by the legislature for the convenient instruction of youth . . . in one or more Universities " -- to invalidate an 1800 act by the General Assembly that attempted to remove financial support for the University by revoking earlier legislative choices that committed all future escheats and confiscated property to the trustees of the University to meet its ongoing educational needs).

Consistent with that spirit, and the more constrained legislative power in our current constitution, the Court has since invalidated certain statutes that have proposed to encroach upon the Governor's authority to appoint executive officers to various administrative commissions, *see Cooper v. Berger*, 370 N.C. 392 (2018); *State ex rel. McCrory v. Berger*, 368 N.C. 633 (2016), even though the Appointments Clause of the North Carolina Constitution itself, art. III, sec. 5(8), did not textually appear to constrain such encroachment.[4] Looking deeper, as it did in *Cooper v. Berger* in 2018, the Court observed that there were two kinds of separation of powers concerns, the first " 'when one branch exercises power that the constitution

[4] Invoking the "system of checks and balances that gives each branch some control over the others," 368 N.C. at 635, the Court in *McCrory* examined the impact of the statutes in light of the Governor's "core functions," and concluded that the legislation would "violate the separation of powers clause" by "prevent[ing] the Governor from performing his express constitutional duty to take care that the laws are faithfully executed." *Id.* at 636.

vests exclusively in another branch,' " citing *McCrory,* 368 at 645, and the second " 'when the actions of one branch prevent another branch from performing its constitutional duties.' " *Cooper v. Berger*, 370 N.C. at 414.

On this appeal, the narrow question is whether the Superior Court can direct a payment from the State Treasury to various State educational authorities to provide them the financial resources indispensable to carry out the first three years of the State's eight-year *Leandro* remedial plan, rather than accept General Assembly *inaction* that would otherwise prevent North Carolina educational authorities from performing *their* constitutional duties. The Comptroller and the legislative leaders have staked their objection on the arguably open-ended language of Article V, sec. 7 (1), providing that "[n]o money shall be drawn from the State treasury but in consequence of appropriations made by law. . . ." They point to implementing statutory language from the State Budget Act, adopted by the General Assembly itself, which interprets Section 7 (1) narrowly, providing that: "No State agency or non-State entity shall expend any State funds except in accordance with an act of appropriation," later confining "appropriations" in Sec.143C-1-1-1 (d) (1) to be transfers made "by the legislature." N.C.G.S. §143C-1-1 (b).

They draw further support for their reading from the Court's recent decision in *Cooper v. Berger*, 376 N.C. 22, (2020), a case examining the power of the General Assembly to appropriate federal block grant funds, after receipt by the State, at

variance with the priorities reflected in the Governor's original submission to Washington.

Turning to the Appropriations Clause, the Court in 2020 first examined an important scholarly work on the early history of the control over State funds.[5] That history underscored "the long struggle between the English Parliament and the Crown over the control of public finance" and the colonists' determination "to secure the power of the purse for their elected representatives." *Id*. Hence, it observed, the General Assembly was appropriately deemed to have the power to "ma[k]e the underlying policy decisions itself by appropriating the monies made available to the State through the relevant federal block grant programs," while the Governor's responsibility lay in faithfully executing those legislation policy choices.

Yet the 2020 *Cooper v. Berger* decision does not control the outcome in the present case. The Court has long emphasized that differently configured separation of powers conflicts might dictate different results; in order faithfully to guard the authority and limits of each branch, the Court "must examine the text of the constitution, our constitutional history, and this Court's separation of powers precedents."

No precedent comes closer to the present dispute than *Matter of Alamance County Court Facilities*, 329 N.C. 84 (1991). There, an appeal challenged the inherent power of the judicial branch to direct county commissioners in Alamance County to bring county jail and courtroom facilities up to minimum constitutional

[5] John V. Orth & Paul Martin Newby, *The North Carolina State Constitution* 154 (2d ed. 2013).

standards. After patiently awaiting the upgrade of woefully deficient facilities, the Superior Court eventually directed extensive testimony and "issued an order based upon copious findings of fact enumerating the inadequacies of the physical facilities provided by Alamance County to the court system." *Id*. at 89.

The judge noted that the requisite of adequate judicial and jail facilities had both state statutory and constitutional bases in the Constitution's Open Courts Clause, Art. I, Sec 18 and its Right to Jury Trial Clauses, Art. I, secs. 24 & 25. After finding expressly that the county "was financially able to provide adequate judicial facilities" and concluding that "it was the duty of the county acting through its commissioner to make these provisions," the Superior Court directed the county commissioners "immediately [to] take steps to provide adequate facilities," specifying the number and dimensions of the required new courtrooms and jury rooms.

On appeal, this Court first observed that, since the 1880s, the Court has repeatedly recognized certain inherent powers as "plenary within the judicial branch – neither limited by our constitution nor subject to abridgement by the legislature." 329 N.C. at 93. The Court noted that this inherent power of the judicial department is expressly protected by N.C. Const. Article IV, §1, which declares that "[t]he General Assembly shall have no power to deprive the judicial department of any power or jurisdiction that rightfully pertains to it as a co-ordinate department of the government." *Id*. It further observed that

> [i]nherent powers are critical to the court's autonomy and to its functional existence: 'If there courts could be deprived by the Legislature of these

> powers, which are essential in the direct administration of justice, they would be destroyed for all efficient and useful purposes.' *Ex Parte Schenck*, 65 N.C. 353, 355 (1871), quoted in *Ex Parte McCown*, 139 N.C. at 106, 51 S.E.at 961.

Id.

The Court reasoned that, in assessing whether inherent powers have been appropriately employed, it must "look freshly at the separation of powers provision in the North Carolina Constitution, with an eye to the actual constitutional, pragmatic, and philosophical limitations on the power granted therein" aware of the difficulties since "the inherent power of a court . . . occasionally must be exercised in the area of overlap between branches." *Id*. at 96.

The Court recited its hope that normally the judicial and legislative branches would cultivate "a working reciprocity and cooperativeness" in this crucial area of overlap, and it commended "self-restraint regarding the [judicial] reach into the public fisc." Yet the Court staked out a clear position ensuring the protection of the judicial role and constitutional liberties:

> We hold that *when inaction by those exercising legislative authority threatens fiscally to undermine the integrity of the judiciary*, a court may invoke its inherent power to do what is reasonably necessary for 'the orderly and efficient exercise of the administration of justice. *Beard v. N.C. State Bar*, 320 N.C. [126]at 129, 357 S.E.2d [694]at 696 [(1987].

Alamance County, 329 N.C. at 99 (emphasis added). So as not to be misunderstood, the Court reiterated the basis for this assertion of inherent power, coupled with appropriate cautionary language about its use:

> The very genius of our tripartite Government is based upon the proper exercise of their respective powers together with harmonious cooperation between the three independent Branches. However, if the cooperation breaks down, the Judiciary must exercise its inherent power to preserve the efficient

> and expeditious administration of Justice and protect it from being impaired or destroyed. . . . [I]t is a tool to be utilized only where other means to rectify the threat to the judicial branch are unavailable or ineffectual, and its wielding must be no more forceful or invasive than the exigency of the circumstances requires.

Id., 99-100.

In *Leandro*, the Superior Court has met that exacting test after exercising remarkable patience. It acted only after the General Assembly has declined to honor a constitutional right first recognized in 1997 and unanimously declared to have been violated in 2004. Numerous efforts to bring legislative leaders to the table to negotiate a remedy had failed even to find a negotiating partner.

Finally, the Superior Court began a good-faith, multi-year, multi-step process during which the Governor's Office, the State Board of Education, and numerous North Carolina and national educational experts met repeatedly to cooperate and craft a credible remedy. To minimize interbranch conflicts, its eventual order chose not to confront the legislative branch directly by enjoining Senate and House leaders to appropriate funds on pain of contempt. Such a remedy might have seemed a bridge too far. Instead, the Superior Court turned to members of the executive branch, whose oversight of the State fisc is essentially ministerial and fiduciary, not a matter of discretion or policy choice.

We acknowledge that the legislature ordinarily has very broad discretion to set public policies and decide how much or little of the public fisc it will commit to carry out those policies. Yet the circumstances here are far from ordinary; since 1997, the State has been under a constitutional command to provide, to every North

Carolina schoolchild, the opportunity for a sound basic education, a constitutional requirement the legislature has repeatedly ignored. After decades of delay, the General Assembly cannot now be heard to insist that it stands beyond the force of law, answerable only to the voters (ironically, since *Leandro*'s beneficiaries are children who cannot vote) or to its own independent sense of will and propriety. As the Court warned eighteen years ago in 2004:

> 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.

Hoke County Bd. of Educ. v. State, 358 N.C. at 642.

The Court's observation in *Hoke County* draws on the longstanding position that *no* branch of government, even the people's legislature, can place itself above the law. When in *Federalist* Nos. 48-50 James Madison surveyed the ways in which power could be aggrandized by the various branches, he identified potential dangers not only from an overbearing chief executive or from a rash judiciary, but also from claims of unlimited legislative power (citing Thomas Jefferson's *Notes on the State of Virginia*, p. 195):

> It will be no alleviation, that these [legislative] powers will be exercised by a plurality of hands, and not by a single one. One hundred and seventy-three despots would surely be as oppressive as one. . . . As little will it avail us, that they are chosen by ourselves. An *elective despotism* was not the government we fought for; but one which the powers of government should be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits, without being effectually checked and restrained by the others.

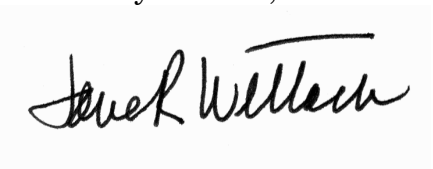
Federalist No. 48, at 311 (Henry Cabot Lodge ed., 1888).

CONCLUSION

The Superior Court has acted to ensure that the constitutional rights of all North Carolina schoolchildren will, at long last, be vindicated. Rather that create an interbranch standoff, it chose the most transparent and least confrontational means to meet the State's obligations to its children: it directed that State funds, available in the Treasury, be transferred directly to those educational officials who stand ready to make effective use of them.

This prudent use of judicial authority deserves to be, and should be, affirmed. North Carolina's constitutional promises to its children, under the rule of law, require no less.

Respectfully submitted this 24th day of June, 2022.



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This 24th day of June, 2022.

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