No. 425A21-2 TENTH 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, Intervenor Defendants.	)	From Wake County

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PLAINTIFFS-APPELLANTS' BRIEF

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PLAINTIFFS-APPELLANTS' BRIEF

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QUESTION PRESENTED

I. Whether the trial court acted outside the limited scope of this Court's remand, and therefore exceeded its jurisdiction, when it struck the portion of The Honorable W. David Lee's 10 November 2021 Order directing the transfer of funds needed to implement Years 2 and 3 of the Comprehensive Remedial Plan?

STATEMENT OF THE CASE AND APPLICABLE FACTS

In the course of this 28-year-long litigation, many constitutional questions have been conclusively answered and much law established. There are, however, important constitutional questions remaining, and the children of North Carolina desperately need them answered by this Court.

Both Defendant State of North Carolina and Plaintiffs Hoke County Board of Education *et al.* (collectively, "Plaintiffs"), among other parties and intervenors, have issues on appeal before this Court. For nearly all of these issues, Plaintiffs are appellees. For one issue, however, Plaintiffs are appellants. In light of the various cross appeals and issues before the Court, Plaintiffs take this opportunity to briefly summarize (A) the established law of the case, (B) the issues for which Plaintiffs are appellees, and (C) the limited issue for which Plaintiffs are appellants.

A. The Established Law of the Case.

There is no longer a question that the State is constitutionally obligated to ensure that every child in North Carolina, regardless of age, race, gender, socio-economic status, or the district in which he or she lives, is provided the opportunity to receive a sound basic education. Chief Justice Mitchell, writing on behalf of this unanimous Court, answered that critical question in 1997. This Court held that Article I, Section 15 and Article IX, Section 2 of the North Carolina Constitution combine to guarantee every child this inalienable, fundamental right. *Leandro v. State,* 346 N.C. 336, 347, 488 S.E.2d 249, 255 (1997) ("*Leandro I*").

There is also no longer a question in this case that the State has violated—and continues to violate—the Constitution by denying children across North Carolina this fundamental right. In 2004, Justice Orr, again on behalf of this unanimous Court, answered that question and affirmed the trial court's finding that the State is failing to provide students with the opportunity to obtain a sound basic education, particularly to those children at-risk of academic failure. *Hoke Cty. Bd. of Educ. v. State,* 358 N.C. 605, 647-48, 599 S.E.2d 365, 396-97 (2004) ("*Leandro II*").

The trial court (then The Honorable Howard E. Manning, Jr.) annually reviewed the academic performance of every school in North Carolina from 2004-2015, as well as teacher and principal data and programmatic resources available to at-risk students, and issued an order in 2015 finding and concluding, "in way too many school districts across the state [ ] thousands of children in the public schools have failed to obtain and are not now obtaining a sound basic education as defined by and required by the *Leandro* decisions." (R p 1257). That order was not appealed. It is the law of the case.

After Judge Manning's retirement, the trial court (then the Honorable W. David Lee) examined the record in 2018 and found again that "the evidence before this court … is wholly inadequate to demonstrate … substantial compliance with the constitutional mandate of *Leandro* measured by the applicable educational standards." (R p 1304). That order was also not appealed. It is the law of the case.

The trial court, yet again, examined the record in 2020 and found that "children across North Carolina are still not receiving the constitutionally-required opportunity for a sound basic education, and systemic changes and investments are required for the State Defendants to deliver each of the *Leandro* tenets." (R p 1646). Notably, the trial court found that in 2020, sixteen years after this Court's unanimous *Leandro II* decision, the "State faces greater challenges than ever" in satisfying its constitutional obligations. *Id.* That order was also not appealed. It is the law of the case.

Indeed, the State has admitted—repeatedly and unequivocally—that hundreds of thousands of children are still not now receiving a *Leandro*-compliant educational opportunity. *See, e.g.*, R p 1646 (State acknowledging in a consent order that it has failed to meet its "constitutional duty to provide all North Carolina students with the opportunity to obtain a sound basic education."); R p 1648 (State conceding that it has "yet to achieve the promise of our Constitution and provide all with the opportunity for a sound basic education"); R p 1687 (State admitting that "this constitutional right has been and continues to be denied to many North Carolina children"); *id.* ("North Carolina's PreK-12 education system leaves too many students behind, especially students of color and economically disadvantaged students.").

There is also no longer a question as to what *must* be done to remedy the ongoing and established constitutional violations. That question was answered by the Defendant State *itself* in this case when it presented the trial court with *its* Comprehensive Remedial Plan for constitutional compliance, the only such comprehensive remedial plan presented by the State in the eighteen years since this Court's unanimous *Leandro II* decision. (R pp 1686-1771).

The trial court—acting with remarkable judicial restraint—afforded the State nearly unfettered discretion for almost two *decades* to develop its chosen *Leandro* remedial plan. The trial court went to extraordinary lengths in granting the political branches of government time, deference, and opportunity to use their informed judgment as to the "nuts and bolts" of the remedy.

In the intervening eighteen years, an entirely new *generation* of North Carolina school children, especially those at-risk and socio-economically disadvantaged, were denied a fundamental constitutional right. This Court foresaw and cautioned against the consequences of the State's failure to act: "the children are North Carolina's "most valuable renewable resource" and "[w]e cannot … imperil even one more class unnecessarily." *Leandro II,* 358 N.C. at 616, 599 S.E.2d at 377.

On 21 March 2021, the State finally presented the trial court with its Comprehensive Remedial Plan for constitutional compliance (the "Plan"). (R pp 1686-1771). In presenting its sole remedial plan, the State represented—again,

without equivocation—that all actions outlined in the Plan are the "necessary and appropriate actions that *must* be implemented to address the continuing constitutional violations." (R p 1689 (emphasis added)). The State assured the trial court that it was "committed" to the full implementation of its Plan and within the time frames set forth therein. *Id.* Based on the State's representations, the ongoing and established violations of fundamental constitutional rights, its own substantial review of the Plan and the record of the case, and with the consent of the State, the trial court ordered the State to implement the Plan such that the constitutional rights of North Carolina's children would finally be vindicated. (R p 1684). Also, recognizing the passage of time since the *Leandro II* decision, the trial court stressed to the State, "[t]ime is of the essence." (R pp 1682-83) ("The urgency of implementing the Comprehensive Remedial Plan on the timeline set forth by State Defendants cannot be overstated."). That order was entered on 7 June 2021. (R p 1684). It was not appealed. It is the law of the case.

The trial court subsequently reminded the Defendant State of this Court's unanimous holding in *Leandro II*:

> when the State fails to live up to is 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.

R p 1817 (quoting *Leandro II*, 358 N.C. at 642, 599 S.E.2d 393).

B. The State's Appeal: Significant Constitutional Questions Needing Final Determination By This Court.

The State, however, failed to implement Years 2 and 3 of the Plan, as it had been ordered to do. The trial court held a hearing on 18 October 2021, at which time, the State conceded its failure to comply with the trial court's prior orders. Importantly, the State had more than enough resources (and, specifically, undesignated cash surpluses) to fully fund and implement every single component of Year 2 and Year 3 of the Remedial Plan as ordered. (R p 1816).

The trial court (Judge Lee) directed the parties to submit proposed orders and/or legal memoranda addressing the State's non-compliance. (R p 1820). After receiving those submissions, Judge Lee entered an order in open court on 10 November 2021 directing the necessary state actors to transfer from the undesignated cash surplus the funds required to implement Years 2 and 3 of the Plan. (R pp 1823-42) (the "10 November 2021 Order")).

The State appealed the 10 November 2021 Order. (R pp 1848-50). Subsequently, Philip E. Berger, as President *Pro Tempore* of the North Carolina Senate, and Timothy K. Moore, as Speaker of the North Carolina House of Representatives, twenty-eight years after the filing of this case, intervened and separately appealed the 10 November 2021 Order. (R pp 1851-54).

On 14 February 2022, Defendant-Appellant State filed a *Petition for Discretionary Review Prior to Determination by the Court of Appeal*s associated with

its appeal ("State's PDR Submission"). On 24 February 2022, Plaintiffs (as Appellees) responded to the State's Petition, agreeing that by-pass review by this Court was appropriate and necessary, and identifying additional issues, pursuant to Rule 15(d) of the Rules of Appellate Procedure, that they intend to address as Appellees ("Plaintiffs' PDR Submission").

By an order signed 18 March 2022 and issued 21 March 2022, this Court granted Defendant-Appellant State's and Plaintiffs-Appellees' respective requests for discretionary review (the "21 March 2022 Order"). These involve critical constitutional questions concerning, *inter alia*, (1) the role of the judiciary in vindicating the fundamental constitutional rights of North Carolina children, the continuing violations of which have long been established under the unique circumstances presented in this 28-year-long litigation; (2) the remedial powers available to the judiciary when faced with a recalcitrant General Assembly that refuses to provide the funding necessary to implement the only comprehensive remedial plan presented by the State since this Court's 2004 *Leandro II* decision; and (3) whether the trial court had the authority (and duty), under the circumstances of this constitutional case, to order the transfer of funds to implement Years 2 and 3 of the Plan. *See* State's PDR Submission at 28; Plaintiffs' PDR Submission at 7. The answers to these critical questions of first impression will determine whether this Court's unanimous decisions in *Leandro I* and *Leandro II*, and indeed the

fundamental educational rights granted to the children under the Constitution, have any real meaning.

As to these critical issues, Plaintiffs are appellees. Pursuant to this Court's Order signed 31 May 2022 and issued 1 June 2022 (the "1 June 2022 Order"), Plaintiffs will file their appellee brief on 1 August 2022.

C. Plaintiffs' Partial Appeal of the 26 April 2022 Order.

Plaintiffs' appeal here concerns a portion of an order entered on remand by The Honorable Michael L. Robinson on 26 April 2022 (the "26 April 2022 Order"), which struck a certain remedial portion of the 10 November 2021 Order. Judge Robinson filed the 26 April 2022 Order directly with this Court in this appeal. Additional background on the 26 April 2022 Order is instructive.

1. This Court's Limited Remand.

The 10 November 2021 Order (which is the subject of the State's appeal) concerned, *inter alia*, the funding required to implement Years 2 and 3 of the Plan. At the time Judge Lee entered that order, however, a budget had yet to be enacted pertaining to the fiscal years relevant to Year 2 (2021-2022) and Year 3 (2022-2023). (R p 1833). Recognizing this, Judge Lee stayed operation of the 10 November 2021 Order for thirty days in the event that a budget was belatedly passed that may impact the funding amounts set forth in that order. (R p 1842).

Approximately one week later, on 18 November 2021, the State enacted the 2021 Appropriations Act (the "Budget"). Accordingly, on 30 November 2021, Judge Lee issued an order extending the stay of the 10 November 2021 Order and stating:

> [O]n November 18, 2021, the State enacted the [Budget]. The Appropriations Act appears to provide for some—but not all—the resources and funds required to implement years 2 & 3 of the Comprehensive Remedial Plan, which may necessitate a modification of the November 10 Order.

(R p 1845). Judge Lee noticed a hearing for 13 December 2021 to allow the State "to inform the Court 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." *Id.*

Before that hearing could take place, however, the Court of Appeals issued a *writ* of prohibition against Judge Lee, despite the fact that the 10 November 2021 Order was already stayed.[1] (R pp 1842, 1845). The trial court therefore did not have the opportunity to address the impact of the Budget on the funding amounts set forth in its 10 November 2021 Order—*i.e.*, which funding amounts required for Years 2 and 3 of the Plan were satisfied by the Budget and which were not—before the appeal.

[1] Plaintiffs separately appealed from, and petitioned for discretionary review—and, alternatively, for a *writ* of certiorari—of the Court of Appeals' *writ* of prohibition (*see* P21-511, 425A21). Those matters are held in abeyance by Order of this Court signed on 18 March 2022 and issued on 21 March 2022.

Accordingly, in its 21 March 2022 Order granting the State's and Plaintiffs' requests for discretionary review, this Court also issued a limited remand (of "no more than thirty days") for the trial court to address one 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* 21 March 2022 Order at 2.

2. The 26 April 2022 Order

On 26 April 2022, Judge Robinson certified an order to this Court on the remanded issue. That order first answered the directive on remand, finding that the State Budget continued to underfund Years 2 and 3 of the Plan by almost half notwithstanding the fact that the State still had sufficient unappropriated funds to do so. *See* 26 April 2022 Order, ¶¶ 33-34, 46, 50-54, 56. Plaintiffs do not appeal that aspect of the 26 April 2022 Order.

The 26 April 2022 Order, however, went further. While the trial court stated it would not consider its authority to direct State actors to transfer funds necessary to implement Years 2 and 3 of the Plan—*id.* at ¶ 26 (the trial court "cannot and shall not consider the legal issue of the trial court's authority to order State officers to transfer funds from the State treasury to fund the CRP")—it nonetheless struck that portion from the 10 November 2021 Order entered by Judge Lee. The trial court did so for one reason – the Court of Appeals' *writ* of prohibition (which Plaintiffs had

already appealed). Accordingly, Plaintiffs timely filed their Notice of Appeal on 26 May 2022 as to that portion of the 26 April 2022 Order. In their Notice of Appeal (at p 3), Plaintiffs stated as follows:

> Plaintiffs note that they have already appealed the 30 November 2021 decision of the Court of Appeals (*see* P21-511, 425A21), and this Court, in this appeal, has already granted review of the legal and constitutional questions addressing the trial court's authority to direct the transfer of funds and to otherwise issue orders to ensure the State's compliance with its constitutional obligations. This notice of appeal is filed out of an abundance of caution to ensure that all such appellate rights are preserved and that these critical constitutional questions remain before this Court.

D. This Court's 1 June 2022 Order.

In its 1 June 2022 Order, this Court ordered that appellant briefs shall be filed by 1 July 2022 and appellee briefs by 1 August 2022. As explained above, Plaintiffs are appellees for nearly all issues on appeal. Accordingly, they will address those issues in their appellee brief. The only issue for which Plaintiffs are appellants is whether Judge Robinson exceeded the scope of the remand, and thus his jurisdiction, when he struck the remedial portion of Judge Lee's 10 November 2021 Order.[2]

[2] Pursuant to this Court's 1 June 2022 Order, Plaintiffs understand they are "appellees" of the 10 November Order but "appellants" of the one portion of the 26 April 2022 Order. To the extent this Court intended Plaintiffs to be appellants on all issues, Rule 2 of the North Carolina Rules of Appellate Procedure authorizes this Court to "suspend or vary the requirements or provisions" of the Rules of Appellate Procedure "[t]o prevent manifest injustice to a party, or to expedite decision in the public interest." Plaintiffs would respectfully request that this Court suspend Rule 15(i)(1) which defines "appellants" and

STATEMENT OF GROUNDS FOR APPELLATE REVIEW

This Court has jurisdiction under N.C. Gen. Stat. § 7A-31 because the Court has certified the cause for review before determination by the Court of Appeals. This Court's 21 March 2022 Order allowed the State's and Plaintiffs' requests for by-pass discretionary review.

Moreover, subsequent to this Court granting discretionary review, and after the limited remand to the trial court, Judge Robinson certified the 26 April 2022 Order directly to this Court. On 1 June 2022, this Court granted Plaintiffs', Plaintiff-Intervenors' (Rafael Penn *et al.*), and the State's requests to brief and argue issues relating to the 26 April 2022 Order.

ARGUMENT

Jurisdiction over all issues on appeal from the 10 November 2021 Order lies with this Court – and only this Court. Once an order is appealed to this Court, the trial court is divested of jurisdiction to further consider the issues on appeal, except in strict accordance with any remand instructions issued by the Court.

The appeal of Judge Lee's 10 November 2021 Order is before this Court. This Court issued a limited, 30-day remand for the trial court to determine a single issue: what effect, if any, the "enactment of the State Budget" had on the 10 November 2021

"appellees" in matters before the Court on appeal before determination by the Court of Appeals and consider Plaintiffs' arguments as briefed (whether as "appellants" or "appellees").

Order. This Court did not ask the trial court to consider the constitutional questions over which it had already accepted jurisdiction, and it did not ask the trial court to modify the 10 November 2021 based on the Court of Appeals' *writ* of prohibition (which was then already under separate appeal).

Here, however, in addition to answering the limited question on remand, the 26 April 2022 Order went beyond the scope of remand and struck the requirement in the 10 November 2022 Order that certain State actors transfer the funds needed to comply with Years 2 and 3 of the Plan. In this regard, the trial court exceeded the scope of the remand and therefore acted without jurisdiction. Consequently, the trial court committed legal error, and that portion of the 26 April 2022 Order is void.

I. THE TRIAL COURT ACTED OUTSIDE THIS COURT'S DIRECTIVE ON REMAND AND THEREFORE LACKED JURISDICTION TO STRIKE THE REMEDIAL PORTION OF THE 10 NOVEMBER 2022 ORDER.

The law in North Carolina is well-established: after the perfection of an appeal, the trial court is divested of jurisdiction. *See Wiggins v. Bunch*, 280 N.C. 106, 108, 184 S.E.2d 879, 880 (1971) ("an appeal takes the case out of the jurisdiction of the trial court"); *Hoke v. Atl. Greyhound Corp.*, 227 N.C. 374, 375, 42 S.E.2d 407, 408 (1947) (same); *see also Veazey v. City of Durham*, 231 N.C. 357, 363, 57 S.E.2d 377, 382 (1950) (collecting cases for the principle that "the appeal operates as a stay of all proceedings in the Superior Court relating to the issues included therein until the matters are determined in the Supreme Court").

In this case, Judge Robinson did not have jurisdiction to modify the 10 November 2021 Order except in accordance with this Court's specific instructions on remand. *See, generally*, *Lea Co. v. N.C. Bd. of Transp.*, 323 N.C. 697, 700, 374 S.E.2d 866, 868 (1989) (affirming trial court's determination that Supreme Court's "mandate did not include a remand for consideration of an award of compound interest" thus, the trial court was correct that it had "no authority to modify or change in any material respect the decree affirmed") (internal quotations omitted); *D & W, Inc. v. Charlotte*, 268 N.C. 720, 722, 152 S.E.2d 199, 202 (1966) ("Upon appeal [the Supreme Court's] mandate is binding upon [the trial court] and must be strictly followed without variation or departure."); *see also SED Holdings, LLC v. 3 Star Properties, LLC*, 14 CVS 5766, at * 3 (N.C. Super. Ct. Sept. 27, 2016) (unpublished) (the trial court issuing an order cancelling hearing and staying case because "the grant of Original Defendants' PDR by the North Carolina Supreme Court. . . divests the undersigned of authority to consider Plaintiff's Motion for Mandatory Preliminary Injunction . . . at least absent a directive from the Supreme Court directing this Court to proceed").

In its 26 April 2022 Order, the trial court stated that (1) it could "reconsider any interlocutory ruling, like the 10 November Order, at any time prior to entry of final judgment" and (2) "[b]ased on the Supreme Court's Remand Order, and the express directive contained there, this Court has authority to reconsider the trial

court's 10 November Order." 26 April 2022 Order, ¶ 48. The trial court is incorrect on both points.

The fact that the 10 November 2021 Order may be interlocutory does not provide the trial court with *carte blanche* authority to amend the order after an appeal has been filed. Indeed, the law is just the opposite. It is well-established that a trial court loses jurisdiction to amend an interlocutory order properly under appeal. *See Keith v. Silvia*, 236 N.C. 293, 294, 72 S.E.2d 686, 687 (1952) ("When an appeal is certified to this Court, the superior court loses jurisdiction of all matters involved in the appeal until action is taken here and the opinion of this Court is certified back to the superior court."); *Patrick v. Hurdle*, 7 N.C. App. 44, 45, 171 S.E.2d 58, 59 (1969)(collecting this Court's decisions holding that an "appeal from an appealable interlocutory order carries the interlocutory order and all questions incident to and necessarily involved therein to the appellate division"). The trial court has no authority to modify an order on appeal, even if interlocutory, beyond the scope of the specific remand instructions from the appellate court.

It is equally well-settled that, absent such a specific remand instruction, one superior court judge may not modify the ruling of another superior court judge. "[N]o appeal lies from one Superior Court judge to another[,]… one Superior Court judge may not correct another's errors of law[,] … and … one judge may not modify, overrule, or change the judgment of another Superior Court judge previously made

in the same action." *Calloway v. Motor Co.*, 281 N.C. 496, 501, 189 S.E.2d 484, 488 (1972); *see also Town of Sylva v. Gibson*, 51 N.C. App. 545, 548, 277 S.E.2d 115, 117 (1981) (vacating order of one trial judge that attempted or purported to modify previous trial judge's order so as to apply a different principle or rule of law) (citing *Young v. Insurance Co.*, 267 N.C. 339, 343, 148 S.E.2d 226, 229 (1966)).

Here, this Court remanded for the limited purpose of having the trial court determine what effect "the enactment of the State Budget" had upon the relief set out in the 10 November 2021 Order. *See* 21 March 2022 Order at 2. In discerning the intent of an appellate court's remand order, the plain language of the order controls. *See In re Parkdale Mills*, 240 N.C. App. 130, 135, 770 S.E.2d 152, 156, *review denied*, 368 N.C. 284, 284, 776 S.E.2d 200, 201 (2015). The plain language of this Court's remand order limited the trial court's consideration to the "State Budget"; this Court did not give the trial court unlimited authority to "reconsider" the 10 November 2021 Order in full. Instead, this Court retained jurisdiction over the significant constitutional questions set out in the State's and Plaintiffs' respective requests for discretionary review. *See supra* at 8.

Moreover, unlimited "reconsideration" of the 10 November 2021 Order in its entirety would have been impracticable in light of the short "no more than thirty days" period for the remand. *See* 21 March 2022 Order at 2. The trial court could not have meaningfully reviewed and considered the significant constitutional issues

underlying the 10 November 2022 Order within a such a rushed timeframe. Thirty days, however, was sufficient time for the trial court to address the limited question on remand: the impact of the State Budget. And, with the benefit of a short remand to resolve this factual issue, this Court is in a position to review, and answer, the contested constitutional questions upon a complete factual record.

This was after all the same factual issue that Judge Lee had intended to resolve after passage of the State Budget—namely, the extent to which the Budget funded, or did not fund, the components of Years 2 and 3 of the Plan (R p 1844)—but could not do so after the appellate process had been initiated. Indeed, Judge Lee had extended the stay of the 10 November 2021 order to resolve this factual issue prior to any appeal. *Id.*

Finally, in the 26 April 2022 Order, the trial court concluded that it was bound by the Court of Appeals' *writ* and thus was required to modify the 10 November 2022 Order. 26 April 2022 Order, ¶ 26. This is incorrect.

The 10 November 2021 Order was already under appeal. So too was the Court of Appeals' *writ*. In its express remand instructions, this Court did not instruct the trial court to consider the *writ*. Likewise, it did not ask the trial court to modify the 10 November 2021 Order based on the *writ*. The *writ* is (and was at the time of remand) already on appeal, and this Court had already accepted review—and thus

jurisdiction over—the significant constitutional questions underlying both the 10 November 2021 Order and the *writ*.

For this reason, Plaintiffs have appealed the trial court's striking of the remedial provision from the 10 November 2021 Order. The trial court cannot, with the stroke of a pen, displace this Court as the final arbiter of the significant constitutional questions over which it had already accepted review.

CONCLUSION

The trial court did not have jurisdiction on remand to strike the remedial portion of an order already on appeal to this Court. Regardless of whether the trial court acted properly to make new conclusions of law based on the *writ*, the issues underlying those conclusions are of significant constitutional concern and remain to be fully briefed, heard and ultimately determined by this Court.

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

Electronically Submitted
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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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CERTIFICATE OF SERVICE

I hereby certify that on 1 July 2022 the foregoing was served upon the following by electronic mail and US Mail addressed as follows:

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ADDENDUM

STATE OF NORTH CAROLINA DURHAM COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 14 CVS 5766
SED HOLDINGS, LLC, Plaintiff, v. 3 STAR PROPERTIES, LLC; JAMES JOHNSON; TMPS LLC; MARK HYLAND; HOME SERVICING, LLC; and CHARLES A. BROWN & ASSOCIATES, PLLC d/b/a DOCSOLUTION, INC., Defendants.	**ORDER CANCELLING HEARING AND STAYING CASE**

1. THIS MATTER is before the Court sua sponte following the North Carolina Supreme Court's grant of Defendants 3 Star Properties, LLC, James Johnson, TMPS LLC, Mark Hyland, and Home Servicing, LLC's ("Original Defendants") petition for discretionary review ("PDR"), docket number 211P16, on September 23, 2016.

2. Presently scheduled before the Court is a hearing in this action for September 29, 2016 at 2:00 p.m. (the "Injunction Hearing") to consider Plaintiff's Motion for Mandatory Preliminary Injunction against Defendant Charles A. Brown & Associates, PLLC d/b/a DocSolution, Inc. ("Charles A. Brown").

3. On August 23, 2016, the Court entered its Opinion and Order Regarding Stay Pending Appeal (the "August 23 Opinion and Order"). In the August 23 Opinion and Order, the Court analyzed the then-current procedural posture of the case and determined that it could proceed with the Injunction Hearing. The Court's

determination of its authority to proceed was based, in large part, on the fact that Original Defendants' Motion to Dismiss based on lack of subject matter jurisdiction and improper venue was not the subject of their second, pending appeal to the Court of Appeals, but was only the subject of their PDR, and Original Defendants had not sought a stay of the proceeding while their PDR was under consideration by the Supreme Court. In the August 23 Opinion and Order, the Court advised the parties that it would issue a separate order scheduling the Injunction Hearing. The Court also directed that any party who believed other matters needed determination by the Court should file, on before September 2, 2016, a Notice of Requested Hearing.

4. On August 30, 2016, the Court issued a Notice of Hearing, scheduling the Injunction Hearing for September 29, 2016. On the same day, the Court issued a Scheduling Order and Notice of Hearing directing the parties to comply with Rule 18.6 of the General Rules of Practice and Procedure for the North Carolina Business Court relating to discovery disputes and to consider whether the provisions of Rule 18.6 might aid in the resolution of any discovery disputes between the parties. Counsel for Plaintiff was directed to file with the Court a listing of any discovery matters remaining unresolved and needing Court attention at the Injunction Hearing on or before September 12, 2016.

5. No party filed a Notice of Requested Hearing or otherwise advised the Court that any discovery disputes remain outstanding. As a result, the Court understands that all prior discovery issues and disputes between the parties have been resolved to the parties' satisfaction.

6. On September 23, 2016, the North Carolina Supreme Court granted Original Defendants' PDR. The PDR deals with a venue issue arising from a choice of forum provision contained in the Non-Performing Note and Mortgage Loan Sale Agreement ("LSA") entered into between Plaintiff and Defendant 3 Star Properties, LLC. The PDR seeks review of the North Carolina Court of Appeals' decision affirming the trial court's decision denying Original Defendants' Motion to Dismiss based on lack of subject matter jurisdiction and improper venue.

7. The Court notes that Plaintiff's claims against Charles A. Brown arise from a contract between Plaintiff and Charles A. Brown that is separate from the LSA at issue in the PDR, and that, unlike the LSA, Plaintiff's contract with Charles A. Brown contains a North Carolina choice of forum provision. However, the Court also notes that the loan files at issue between Plaintiff and Charles A. Brown are the same loan files at issue between Plaintiff and Original Defendants.

8. Based on its research and consideration of the matter, the Court believes that the grant of Original Defendants' PDR by the North Carolina Supreme Court—making the Original Defendants' Motion to Dismiss based on alleged lack of subject matter jurisdiction and improper venue an issue on appeal, rather than an issue pending discretionary review—divests the undersigned of authority to consider Plaintiff's Motion for Mandatory Preliminary Injunction against Charles A. Brown, at least absent a directive from the Supreme Court directing this Court to proceed.

9. As a result, the Court cancels the Injunction Hearing presently scheduled for September 29, 2016.

10. The Court has reviewed the two Notices of Appeal to the North Carolina Supreme Court filed on September 23, 2016 by Defendants TMPS LLC, Mark Hyland, and Home Servicing, LLC (the "Appeals"). The Appeals are of the August 23 Opinion and Order, and the Court's Order Setting Deadlines to File and Serve Responses to Amended Complaint and Motion for Mandatory Preliminary Injunction, entered on August 24, 2016. The Court's determination that it is divested of jurisdiction to proceed with the Injunction Hearing rests entirely on the grant of the PDR and is not affected by the filing of these two interlocutory, and arguably defective, appeal notices.

11. THEREFORE, it is hereby ORDERED that the Injunction Hearing scheduled for September 29, 2016 is CANCELLED, and this matter is STAYED pending further order of this Court following the resolution of Original Defendants' appeal to the North Carolina Supreme Court.

SO ORDERED, this the 27th day of September, 2016.

/s/ Michael L. Robinson

Michael L. Robinson
Special Superior Court Judge
for Complex Business Cases