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 No. COA22-86 No. 95-CVS-1158

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BRIEF OF PLAINTIFFS-APPELLEES

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BRIEF OF PLAINTIFFS-APPELLEES

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ISSUES PRESENTED

I. After the State failed to implement a *Leandro* remedy, despite being afforded seventeen (17) years of deference to do so, was the trial court correct to order relevant state actors to take measures to ensure compliance with the Constitution?

II. Whether the judiciary has the express and inherent authority to order the transfer of funds required to implement the State's sole chosen remedy for established constitutional violations that have persisted for over seventeen (17) years when the General Assembly is able, but refuses, to do so?

III. Whether the "right to the privilege of education" and the "duty of the State to guard and maintain that right" set forth in Article I, § 15 of the North Carolina Constitution, which is the express will of the people, is an appropriation made by law?

IV. Whether the State's obligations under the North Carolina Constitution to provide for a sound basic education are unenforceable and therefore meaningless when the General Assembly refuses to appropriate the funds necessary to do so?

V. Whether the State's court-ordered obligation to implement its sole chosen *Leandro* remedy can be cast aside and ignored simply because the General Assembly passes budgets?

VI. After representing to the trial court for seventeen (17) years that its chosen remedial plan will—and must—be implemented statewide, can the State now restrict that remedy to only those children in Hoke County, leaving all other children deprived of a fundamental constitutional right?

INTRODUCTION

This case is—and has always been—about the fundamental constitutional right of every child in North Carolina to the opportunity to receive a sound basic education in the public schools. This case is now also about the General Assembly's disregard of its affirmative constitutional duty to "guard and protect" that fundamental right for over two decades. In light of the State's admitted and continuing constitutional violations, and after seventeen (17) years of deference to the other two branches of government, the trial court was correct to order certain state actors to transfer the funds necessary to implement the only constitutional remedy before it.

Just as they have disregarded their own constitutional obligations, the Intervenor Defendants also ignore almost everything that transpired in this case between the trial court's "Liability Judgment" (4 April 2002) and the 10 November 2021 Order. In doing so, they attempt to exalt the legislative branch over the other branches of the co-equal tripartite system our Founders created. But this Court cannot ignore the record before it. Nor can this Court ignore its own duty to defend and protect the ultimate law of the land: the Constitution. The findings and conclusions in the 10 November 2021 Order are supported by the record in this landmark case and should be affirmed.

STATEMENT OF THE CASE AND FACTS

More than twenty-seven years ago, on 25 May 1994, students, parents, guardians, and the boards of education from the low-wealth counties of Hoke, Halifax, Robeson, Cumberland, 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). Plaintiffs 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). They 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, relatively-wealthy school districts (along with students and parents in those districts) intervened as plaintiff-intervenors (the "Urban Intervenors").[1] (R p 159). The Urban Intervenors similarly alleged that the

[1] 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 162-64).

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).

Over the course of nearly three decades, numerous appeals were taken, countless hearings were held by the trial court, and numerous orders were entered. While not an exhaustive summary of every order and proceeding, the following summarizes the material background necessary for the consideration of the issues relevant to this appeal.

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

On 2 November 1994, the State moved to dismiss the lawsuit, arguing that the Constitution did 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 pp 187-88). 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.

In 1997, this Court issued its unanimous decision now known as "*Leandro I*." *Leandro v. State*, 346 N.C. 336, 488 S.E.2d 249 (1997). 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* at 348, 488 S.E.2d at 256 ("[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 also rejected the State's "political question" argument, holding that "it is the duty of the 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 contention, 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.* (quoting *Maready v. City of Winston-Salem*, 342 N.C. 708, 716, 467 S.Ed.2d 615, 620 (1996) (internal quotation marks omitted)).

This Court remanded the case for trial to determine whether the children of North Carolina had been denied this fundamental constitutional right by the State. *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 duties 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. (internal citations omitted).

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 (urban, "wealthy" districts). (R p 245); *Hoke Cty Bd. of Educ. v. State*, 358 N.C. 605, 613, 599 S.E.2d 365, 375 (2004) ("*Leandro II*"). A trial commenced on the former in 1999.

That trial spanned more than a year, involved more than forty testifying witnesses, 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."[2] (R p 568-69).

Those evidentiary hearings took place in the Wake County Superior Court from 15 September 2001 to 5 October 2001, and 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

[2] Citing to Memorandum of Decision III, the Intervenor Defendants 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* Int. Defs. 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 Intervenor Defendants 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.

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, <u>even if it</u>

requires the State to spend additional monies to do so." (R p 677) (emphasis added). The Liability Judgment was appealed.[3]

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. Justice Orr, writing on behalf of this unanimous Court, 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*]." 358 N.C. 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 an *Leandro*-comporting educational opportunity." *Id.; see also id.* at 648-49, 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 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,

[3] Intervenor Defendants state that Plaintiffs filed a cross appeal arguing that the trial court erred when considering educational services provided by federal funds. *See* Int. Defs. Br. at 15. While irrelevant to this appeal, Plaintiffs note—to ensure this Court has the correct procedural background before it—that this is incorrect. The Urban Intervenors, not Plaintiffs, cross appealed that narrow issue. *Leandro II*, 358 N.C. at 645, 599 S.E.2d at 395.

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 II*-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.

IV. THE TRIAL COURT FINDS SYSTEMIC AND CONTINUING STATEWIDE CONSTITUTIONAL VIOLATIONS AND AFFORDS THE STATE MORE THAN A DECADE OF DEFERENCE TO ADDRESS THEM – THE STATE FAILS TO DO SO (2004-2018).

The Intervenor Defendants give short shrift to what happened in this case during the years between the Liability Judgment and 2018. *See* Int. Defs. Br. at 19-20. In doing so, they omit several important developments.

First, the State represented to the trial court that its chosen remedy for these violations will—and must—be implemented on a statewide basis. Indeed, evidence presented by the State during this period focused almost exclusively on statewide initiatives and compliance. *Second*, based on extensive statewide evidence submitted by the State, and introduced in more than twenty trial proceedings, the trial court found and concluded that children across the State were being denied a constitutionally-conforming education. *Third*, notwithstanding more than a decade of unfettered deference granted to the executive and legislative branches, the State failed to present, implement or sustain any remedial effort to address and correct its constitutional failings to North Carolina's children.

A. The State represents to the trial court 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 781 (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 the *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 p 800-01).[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 800-01).

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 800).

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

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[5] By this time, 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.

> 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 2671-73).[6] Accordingly, as explained below, during all the subsequent hearings before the trial court regarding the State's proposed remedial initiatives and *Leandro* compliance, the State presented only statewide evidence and statewide remedial initiatives.

B. The trial court held extensive evidentiary proceedings and found that the State had violated, and was continuing to violate, the constitutional rights of children across North Carolina.

In *Leandro II,* this Court held that the consideration of evidence on both educational "outputs" and "inputs" is appropriate in determining whether children are being afforded the opportunity to obtain a sound basic education. 358 N.C. at 630-38, 599 S.E.2d at 386-390. Because the State was proceeding with a statewide remedy, the trial court held extensive evidentiary hearings on the educational "outputs" and "inputs" in the low-wealth, rural districts and the relatively wealthy, urban districts across the State.

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[6] R pp 2671 - 3623 constitute Plaintiffs' supplement to the Record pursuant to N.C. R. App. P. 9(b)(5). This supplemental material responds to Intervenor Defendants' surprising contentions that only students in Hoke County are entitled to a constitutional remedy and that further post-remand trial proceedings were not held on matters beyond Hoke County. These materials are not intended to be an exhaustive summary of all such proceedings and evidence, but to serve as examples of the type of evidence considered by the trial court.

For example, the trial court heard evidence on both the composite test scores ("outputs") and the per pupil expenditures ("inputs") at high schools across North Carolina. *See, e.g.,* R pp 2674-79. Over the next year, the trial court heard and admitted additional evidence on this issue and witnesses testified from Plaintiff districts as well as other districts across North Carolina, including from, *inter alia,* Craven, Durham, Forsyth, Guilford, Mecklenburg, and Onslow Counties. *See, e.g.*, R pp 3320-78 ("The High School Problem") (trial court finding that the "State of North Carolina cannot standby and fail to act to stop the educational genocide that is occurring … throughout the State of North Carolina in too many of its high schools"); *see also, e.g.,* R pp 982-986 (evidentiary hearing on the educational opportunity being provided in high schools across North Carolina); R pp 2680-99, 2700-73, 2774-88, 2789-91, 2792-97, 2798-2823, 2824-43 (notices of filing and examples of evidence submitted during evidentiary proceedings); R pp 2844-3083, 3084-3133, 3134-3319 (same); R pp 987-990 (notice of additional evidentiary proceeding); R pp 3379-3406, 3407-13, 3414-3568 (additional evidence submitted during evidentiary proceedings).

The trial court held similar evidentiary proceedings regarding middle and elementary schools across North Carolina, both in rural districts and urban districts. *See, e.g.,* R p 1043. Indeed, the evidence received in the course of these proceedings as to Halifax County demonstrated that the State's constitutional failings were so

dire, it resulted in a 6 May 2009 Consent Order requiring State intervention in Halifax County. R pp 3569 ("majority of students in the Halifax County public school are not receiving an equal opportunity to obtain and sound basic education . . .").

Based on the extensive record compiled over a decade, the trial court found and concluded that there were children across North Carolina—in both the low-wealth, rural districts and the urban districts—who were being deprived of their fundamental constitutional rights on a daily basis. *See, e.g.,* R p 1089:

> . . . in a host of elementary, middle and high schools throughout North Carolina . . . the children in those schools who are blessed with the right to the equal opportunity to obtain a sound basic education as guaranteed by the Constitution and as set forth in *Leandro,* are being deprived of their constitutional right to that opportunity on a daily basis.

See also R p 1062 (finding "a *prima facie* denial of their opportunity to receive a sound basic education"). In 2011, the trial court summarized the evidentiary proceedings to date and its findings as follows:

> For the past several years, beginning in 2005 with the issue of poor performing high schools, the Court has held hearings and has carefully reviewed the academic performance of every school in this State as evidenced by each school's performance composite. Beginning in 2006, the Court has reviewed the individual schools' academic performance of its students by EOC scores in reading and math and the EOG performance in each high school by course.
>
> Following its review, the Court has reported on various aspects of poor academic performance in elementary, middle and high schools statewide to the Chairman of the State Board of Education and the Governor. Also, from time to time, the Court has reported on poor academic performance in the public

> schools to the leadership in the General Assembly and prior to 2011, was invited to discuss the issues relating to poor academic performance and solutions to the issues and problem[], including assessments with the leadership of the Senate and members of the educational subcommittee in the House of Representatives.
>
> There is no need to rehash these efforts here. Suffice it to say that poor academic performance remains a serious problems in a host of elementary, middle and high schools throughout North Carolina and as a result, the children in those schools who are not performing at Level III on the EOC and EOG tests are being deprived of their individual constitutional right to have the opportunity to obtain a sound basic education on a daily basis.

(R p 1140 (emphasis added)).

In 2015, the trial court once again reviewed the academic performance of students in every public school in North Carolina, as well as applicable teacher and principal data and programmatic resources available to at-risk students at those schools. Then, eleven years after *Leandro II*, the trial court similarly found and concluded that "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* decision." (R p 1257).

Unfortunately, the situation was the same in 2018. At that time, after Judge Manning's retirement, Defendant State Board of Education moved to be released from the case, which Plaintiffs opposed. (R p 1300). In connection with the denial of that motion, the trial court (the Honorable W. David Lee) once again examined

the record and found 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." *See* R p 1304; *see also* R p 1305 ("There is an ongoing constitutional violation of every child's right to receive the opportunity for a sound basic education.").

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 court found that in 2020, sixteen years after *Leandro II*, the "State faces greater challenges than ever" in satisfying its constitutional obligations. *Id.* The "historic and current data before the Court show that considerable, systemic work is necessary to deliver fully the *Leandro* right to all children in the State." (R p 1633).

The fact of the State's continuing violation of the Constitution is now uncontroverted. The State concedes that in "more than 17 years" after the *Leandro II* decision, it has still "fail[ed] to meet its obligation" to the children. *See* State Br. at 2. The State similarly admitted—repeatedly and unequivocally—to the trial court that hundreds of thousands of children across North Carolina 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.* (State admitting that "North Carolina's PreK-12 education system leaves too many students behind, especially students of color and economically disadvantaged students.").

No party appealed any of the orders, findings of fact, or conclusions of law—which date as far back as 2004—discussed above.

C. For more than a decade, the trial court afforded the State deference and discretion to address the established constitutional violations.

On remand, the trial court, as instructed by this Court, afforded the State—acting through it executive and legislative branches—nearly unfettered deference to use its initiative, discretion, and expertise to develop and implement an effective *Leandro* remedy. It failed to do so.

Regular compliance hearings were held for the express purpose of allowing the State to come forward and demonstrate that effective steps would be taken to address and correct its constitutional failings to North Carolina children. *See, e.g.*, R pp 922, 923, 946, 970, 1039, 1041, 1051, 1068, 1092, 1137, 1235, 1244, 1268, 1270 (notices of hearings and related orders). During this time, the State proposed various

statewide remedial initiatives that it "committed" to implement. (R pp 934-45, 991-1006). While the trial court found many of these initiatives to be meritorious, most of them never came to fruition. And those that were implemented were subsequently abandoned or significantly curtailed by the State shortly after their implementation. (R pp 1173-1194) (summarizing various remedial commitments and their subsequent elimination).

For example, in 2005, the State told the trial court it would implement a statewide "Principal's Executive Program" for the training and development of principals across North Carolina (R p 1000), which the trial court found to be a meritorious initiative (R pp 1044-45). That program, however, was eliminated in 2009. (R p 1187). The State also told the trial court in 2004 and 2005 that it would create specific *Leandro*-focused teacher development and training programs across North Carolina (R pp 936-45, 998-1000). But the State disbanded these programs in 2011. (R p 1186).

By way of further example, the State represented that it would ensure that "every at-risk four-year-old" in North Carolina had "access to a quality prekindergarten program." (R pp 935, 941). Not only did the State fail to live up to this commitment, it subsequently barred most of these 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 Cty. Bd. of Educ. 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.

During the decade after *Leandro II*, Plaintiffs objected—repeatedly—to the State's reversals on its "commitments" to the trial court as well as its failure to demonstrate any coordinated or meaningful progress towards the development of a workable remedial plan. *See, e.g.,* R p 979 (Plaintiffs' motion to show cause against State seeking court to order the State to show "what they propose to do, and when"); R p 1191 (Plaintiffs' motion in the cause against State seeking to require the "State, through its executive and legislative branches, to present a specific written plan, with timetables, for their compliance with the previous orders of this Court … and the orders of the North Carolina Supreme Court in *Leandro I* and *Leandro II*"); R pp 1265-66 (Plaintiffs' motion to compel State to present a remedial compliance plan).

The trial court found that the State's piecemeal, often-disbanded remedial initiatives and strategies were insufficient and concluded that a "definite plan of action" is now "necessary to meet the requirements and duties of the State of North Carolina with regard to its children having the equal opportunity to obtain a sound basic education." (R p 1246). *See also* R p 1826 ("[T]he decade after *Leandro II* made plain that the State's actions … not only failed to address its *Leandro* obligations, but exacerbated the constitutional harms experienced by another generation of students

across North Carolina, who moved from kindergarten to 12th grade since the Supreme Court's 2004 decision.").

V. THE TRIAL COURT AFFORDS THE STATE ANOTHER THREE YEARS OF DEFERENCE AND DISCRETION TO DEVELOP AN EFFECTIVE *LEANDRO* REMEDY (2018-2021).

In 2018, the trial court concluded, yet again, that the State had failed to present the court with a "remedial plan of action that addresses the liability … established by the law of this case." (R p 1306). As the trial court explained, the State, through its political branches of government, had now "had more than a decade since the Supreme Court remand in *Leandro II* to chart a course that would adequately address this continuing constitutional violation" and had not done so. *Id.* at fn. 1.

But, even then, the trial court did not enter a specific remedial order. Instead, it granted the State more deference and time. *See, e.g.,* R p 1306 ("This trial court has held status conference after status conference and continues to exercise tremendous judicial restraint."). The trial court did so because it was "encouraged" by the State's acknowledgment that a new approach was required to fulfill the promise of *Leandro* to all children. (R p 1634). The State committed to working with the parties to the case and relevant state actors to take "decisive and concrete action," in a coordinated approach (with definitive timelines), to develop and implement a remedy. (R p 1634) ("The Court is encouraged that the parties to this case … are in agreement that the time has come … to bring North Carolina into

constitutional compliance so that all students have access to the opportunity to … obtain a sound basic education."). The trial court, however, warned that its patience was running out. (R p 1306). The trial court stated its "sincere desire" that "the legislative and executive branches heed the call," but warned that continuing failure to do so will trigger "the duty of the court" to enter a specific order to correct the constitutional wrongs. (R p 1305-06).

In January 2018, the State moved the trial court for the appointment of an independent, non-party expert to assess the current status of *Leandro* compliance and to identify specific challenges or barriers to its achieving sustained compliance with *Leandro*. (R p 1293). Plaintiffs consented to and joined in that motion. *Id.*

Thereafter, on 13 March 2018, the trial court appointed WestEd to serve in this capacity. (R p 1298). WestEd is "a non-profit, non-partisan, educational research, development and service organization" that provides states and state education agencies with data-driven research and recommendations to "improve public education systems, student achievement, educator effectiveness, and educational leadership." (R p 1641). In this role, WestEd worked with the Friday Institute for Educational Innovation at North Carolina State University (the "Friday Institute") and the Learning Policy Institute ("LPI"), an education research organization with extensive experience in North Carolina. (R p 1642). All parties to the case agreed that WestEd was qualified to serve the trial court. (R p 1641).

In October 2019, after more than a year of work, WestEd submitted its final report to the trial court (the "WestEd Report").[7] (R pp 1331-1631). The scope of work performed by WestEd, the Friday Institute, and LPI was extensive and included, *inter alia*, an analysis of education data from both the North Carolina Education Research Center Data Center at Duke University and the Education Policy Initiative at the University of North Carolina; analysis of data collected from North Carolina principals and teachers; in-person site visits to schools and districts across North Carolina; statewide interviews and focus groups with teachers, principals, superintendents, school board members and other district and state educational professionals; analysis of the independent operational assessment commissioned by the General Assembly; a review of the State's multi-year data regarding district allotments, expenditures, student demographics, and school characteristics; and thirteen additional research studies to identify, define, and understand key issues and challenges related to North Carolina's public education system.[8] (R pp 1641-43).

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[7] In an apparent attempt to manufacture a sense of suspicion about the timing, the Intervenor Defendants state that the report "initially" "remain[ed] under seal" before public release. The purpose of the initial confidentiality was to ensure that no confidential student data (or personally-identifying information of children) was contained therein prior to public dissemination. (R pp 3617-22) (18 June 2019 order instructing parties to review to ensure that no "inadvertent and unlawful disclosures … about individual student matters protected as confidential under G.S. 115C-402 and 20 U.S.C. 1232g and/or individual personnel matters protected as confidential under G.S. 115C-319" would be implicated by public dissemination).

[8] The thirteen studies are as follows: (1) *Best Practices to Recruit and Retain Well-Prepared Teachers in All Classrooms* (Darling-Hammon et al., 2019); (2) *Developing and Supporting North Carolina's Teachers* (Minnici, Beatson, Berg-Jacobson, & Ennis, 2019); (3) *Educator*

The WestEd Report underscored what the trial court had already found – namely, that thousands of children across North Carolina were not receiving the opportunity to a sound basic education. (R p 1371, 1375, 1646). WestEd found that the State was now "further away" from providing all students with the opportunity for a sound basic education than in 2004. (R p 1375). It found systemic deficiencies in terms of North Carolina's teacher quality and supply, especially in Plaintiffs' low-wealth districts, (R pp 1397-1406, 1649-52), and similar deficiencies in principal quality and supply (R pp 1416-1427, 1652-53). It also found that the State was failing to provide adequate programmatic and funding resources, especially those necessary to target at-risk children. (R pp 1379-95, 1653-56). Indeed, while North

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Supply, Demand, and Quality in North Carolina: Current Status and Recommendations (Darling-Hammond et al., 2019); (4) *How Teaching and Learning Conditions Affect Teacher Retention and School Performance in North Carolina* (Berry, Bastian, Darling-Hammond, & Kini, 2019); (5) *Retaining and Extending the Reach of Excellent Educators: Current Practices, Educator Perceptions, and Future Directions* (Smith & Hassel, 2019); (6) *Attracting, Preparing, Supporting, and Retaining Education Leaders in North Carolina* (Koehler, Peterson & Agnew, 2019); (7) *A Study of Cost Adequacy, Distribution, and Alignment of Funding for North Carolina's K-12 Public Education System* (Willis et al., 2019); (8) *Addressing Leandro: Supporting Student Learning by Mitigating Student Hunger* (Bowden & Davis, 2019); (9) *High-Quality Early Childhood Education in North Carolina: A Fundamental Step to Ensure a Sound Basic Education* (Agnew, Brooks, Browning, & Westervelt, 2019); (10) *Leandro Action Plan: Ensuring a Sound Basic Education for All North Carolina Students Success Factors Study* (Townsend, Mullennix, Tyrone, & Samberg, 2019); (11) *Providing an Equal Opportunity for a Sound Basic Education in North Carolina's High-Poverty Schools: Assessing Needs and Opportunities* (Oakes et al., 2019); (12) *North Carolina's Statewide Accountability System: How to Effectively Measure Progress Toward Meeting the Leandro Tenets* (Cardichon, Darling-Hammond, Espinoza, & Kostyo, 2019); and (13) *North Carolina's Statewide Assessment System: How Does the Statewide Assessment System Support Progress Toward Meeting the Leandro Tenets?* (Brunetti, Hemberg, Brandt, & McNeilly, 2019). (R p 1642).

Carolina has an above-average proportion of at-risk students, its per-pupil spending on education is among the lowest in the nation. (R pp 1379, 1654). The WestEd Report made detailed recommendations to the trial court (and the parties) as to specific remedial actions. (*See, e.g.,* R pp 1394-95, 1406-1413, 1427-1430, 1435-38).

WestEd did not recommend a wholesale revamping of the State's public education system. To the contrary, WestEd found that the State either has in place or, at one point, had in place many effective educational initiatives and programs. (R pp 1357-60). WestEd also found that the State had developed "promising" ideas for statewide, regional, district and school improvement efforts. The critical problem, according to WestEd, was that these "promising" initiatives "have neither been sustained nor been brought to scale" to "adequately address the *Leandro* requirements." (R p 1361).

On 21 January 2020, the trial court entered an order adopting many of the findings set out in the WestEd Report. (R pp 1632- 65). No party appealed that order. The trial court also ordered, once again, that "the time" had indeed "come for the State Defendants to work expeditiously and without delay," (R p 1664), to present a "comprehensive remedial plan" that identifies the specific long-term actions that must be taken by the State, the timeline for implementation of each identified action, and the resources, if any, necessary to complete those actions (R p 1665).

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 1686-1771) (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 1840) (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. The Plan, designed to be implemented in a specific manner over an eight-year period, is multi-faceted.[9] It sets out (1) the specific actions identified by the State it its discretion that must be implemented to remedy the continuing constitutional violations, (2) the respective actors and agencies, as determined by the State, charged with each action's implementation, (3) the timeline developed by the State required for successful

[9] These are eight school years (which parallel fiscal years): Year 1 (2020-2021), Year 2 (2021-2022), Year 3 (2022-2023), Year 4 (2023-2024), Year 5 (2024-2025), Year 6 (2025-2026), Year 7 (2026-2027), and Year 8 (2027-2028). Year 1 of the Plan was addressed by a separate order of 11 September 2020. (R pp 1666-77). In light of the impact of COVID-19, the State failed to implement many—if not most—of the components for Year 1. Accordingly, when the Plan was submitted, the Year 1 components were rolled up into Years 2-8. (R p 1682).

implementation, and (4) the necessary resources and funding, again as determined by the State, that will be provided for implementation.

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 1689) (emphasis added). The State assured the trial court of its "commit[ment] to meeting these actions under the timeframes set forth therein." (R p 1688).

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 1678-85); *see also* R p 1684 (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.").

Recognizing the passage of time since *Leandro II*, the trial court stressed that "[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."). Accordingly, the trial court ordered the State to submit compliance

reports to advise the court of its "progress toward fulfilling the terms and conditions of this Order." (R p 1684). The trial court further warned the State, quoting *Leandro II,* that if it "fails to implement the actions described in the Comprehensive Remedial Plan … 'it will be the duty of this Court to enter judgment granting declaratory relief and such other relief as needed to correct the wrong.'" (R p 1683).

That order was entered on 11 June 2021. (R p 1678). It was not appealed.

VII. IN DEFIANCE OF THE TRIAL COURT'S ORDER, THE STATE FAILS TO IMPLEMENT THE COMPREHENSIVE REMEDIAL PLAN.

Yet again, the State failed to comply with the orders of the trial court. In a compliance hearing held on 8 September 2021, the State told the trial court that it had not secured the resources required to implement Years 2 and 3 of its Plan. The court provided the State additional time, but warned that "should all necessary steps to fully fund the Comprehensive Remedial Plan not be taken by the State—that is, our legislative and executive branches—as of October 18, 2021, this Court is prepared to implement the judicial remedies at its disposal to ensure that our State's children are finally guaranteed their constitutionally-mandated opportunity to obtain a sound basic education." (R p 1817).

During the 18 October 2021 hearing, the State told the trial court that it had still failed to secure the resources needed to implement Years 2 and 3 of its Plan, despite the fact that it had more than enough undesignated cash surplus to do so. The trial court directed Plaintiffs to submit "proposed orders for the Court's

consideration" and "legal memoranda" on the remedial powers available to the trial court in light of the State's defiance. (R pp 1819-21).

VIII. THE TRIAL COURT DIRECTS STATE ACTORS TO TRANSFER THE RESOURCES NECESSARY TO IMPLEMENT YEAR 2 AND YEAR 3 OF THE PLAN.

After receiving those submissions, the trial court entered an order in open court on 10 November 2021 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 1823-41) (the "10 November 2021 Order").

The State's Plan identified each applicable state agency charged with the implementation of each action item and for each year, as well the specific funding needed to do so for each year. Accordingly, the trial court directed the funds to be transferred in strict accordance with the State's Plan, which was as follows: (a) $189,800,000 to the Department of Health and Human Services, (b) $1,522,053,000 to the Department of Public Instruction, and (c) $41,300,000 to the University of North Carolina System. (R p 1841).

In entering such an order, the trial court recognized that the judiciary must do so only after it has taken steps to minimize encroachment on the authority of the

political branches. (R p 1840). With regard to its deference to those branches and its efforts to minimize such encroachment through the least intrusive means, the trial court summarized the evidence as follows:

> a. The Court has given the State seventeen years to arrive at a proper remedy and numerous opportunities proposed by the State have failed to live up to their promise. Seventeen classes of students have since gone through schooling without a sound basic education;
>
> b. The Court deferred to State Defendants and other parties to recommend to the Court an independent, outside consultant to provide comprehensive, specific recommendations to remedy the existing constitutional violations;
>
> c. The Court deferred to State Defendants and other parties to recommend a remedial plan and the proposed duration of the plan, including recommendations from the Governor's Commission on Access to Sound Basic Education;
>
> d. The Court deferred to State Defendants to propose an action plan and remedy for the first year and then allowed the State Defendants additional latitude in implementing its actions in light of the pandemic's effect on education;
>
> e. The Court deferred to State Defendants to propose the long-term comprehensive remedial plan, and to determine the resources necessary for full implementation;
>
> f. The Court also gave the State discretion to seek and secure the resources identified [by the State] to fully implement the Comprehensive Remedial Plan;
>
> g. The Court has further allowed for extended deliberations between executive and legislative branches over several

> months to give the State an additional opportunity to implement the Comprehensive Remedial Plan;
>
> h. The status conferences … have provided the State with additional notice and opportunities to implement the Comprehensive Remedial Plan, to no avail. The Court has further put [the] State on notice of forthcoming consequences if it continued to violate students' fundamental rights to a sound basic education.

(R pp 1840-41) (internal cites omitted).

The trial court, yet again, granted deference to the State. It stayed the operation of the 10 November 2021 Order for thirty days to "permit the other branches of government to take further action consistent with the findings of fact and conclusions of this Order." (R p 1842).

Approximately one week later, on 18 November 2021, the State enacted the 2021 Appropriations Act (the "Budget"). Recognizing that the Budget may have appropriated funds to implement certain Year 2 and Year 3 components, the trial court issued an order on 30 November 2021 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).

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." *Id.* Before that hearing could take place, however, the Court of Appeals issued a *writ* of prohibition, despite the fact that the 10 November 2021 Order had been stayed.[10] (R pp 1842, 1845). Judge Lee therefore did not have the opportunity to address the impact of the Budget on the funding amounts set forth in the 10 November 2021 Order.

IX. THE STATE AND INTERVENOR DEFENDANTS APPEAL THE 10 NOVEMBER 2021 ORDER.

On 7 December 2021, the State appealed the 10 November 2021 Order. (R pp 1847-50). The next day, on 8 December 2021, the Intervenor Defendants intervened in this case—almost three decades after its inception—and separately appealed that Order. (R pp 1851-54).

On 14 February 2022, the State filed a *Petition for Discretionary Review Prior to Determination by the Court of Appeals* (the "State's PDR Submission"). Pursuant to Rule 15(c) of the Rules of Appellate Procedure, the State identified specific issues concerning the 10 November 2021 Order for which it sought review. On 24 February

[10] 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 issued on 21 March 2022, and confirmed by Order of this Court issued on 1 June 2022.

2022, Plaintiffs responded to the State's Petition and, pursuant to Rule 15(d), identified and requested this Court's review of certain additional issues (the "Plaintiffs' PDR Submission"). On 28 February 2022, the Intervenor Defendants responded to the State's Petition. They did not request review of any additional issues pursuant to Rule 15(d).

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, accordingly, certified for review the specific constitutional questions identified in the State's and Plaintiffs' respective PDR Submissions.

In that 21 March 2022 Order, this Court 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* 21 March 2022 Order at 2. This was the issue that the trial court previously wanted to address but could not do so after the appellate process had been initiated.

This case was then re-assigned, by order of the Chief Justice, to The Honorable Michael L. Robinson. (R p 1873). On 26 April 2022, Judge Robinson certified an order to this Court on the remanded issue. (R p 2618) (the "26 April 2022 Order").

That order first answered the directive on remand finding that, even 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 2630-2641, ¶¶ 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 2641). Plaintiffs did not appeal this aspect of the 26 April 2022 Order.

Judge Robinson's 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—(R p 2628) (the trial court "shall not consider the legal issue of the trial court's authority to order State officers to transfer funds")—it nonetheless struck that portion from the 10 November 2021 Order entered by Judge Lee based on the Court of Appeals' *writ* of prohibition (which Plaintiffs had already appealed). Plaintiffs timely filed their Notice of Appeal on 26 May 2022 as to that portion of the 26 April 2022 Order. (R p 2651). Plaintiffs submitted their Appellate Brief on 1 July 2022.

STANDARD OF REVIEW

A trial court's conclusions of law are reviewed *de novo*. *Farm Bureau v. Cully's Motorcross Park*, 633 N.C. 505, 512, 742 S.E.2d 781, 786 (2013). It is "well settled that *de novo* review is ordinarily appropriate in cases where constitutional rights are implicated." *Piedmont Triad Reg'l Water Auth. v. Sumner Hills Inc.*, 353 N.C. 343,

348, 543 S.E.2d 844, 848 (2001). A trial court's findings of fact, however, are conclusive on appeal if supported by competent evidence in the record. *Matter of Skinner*, 370 N.C. 126, 139, 804 S.E.2d 448, 457 (2017).

ARGUMENT

Leandro I established that the State is constitutionally obligated to ensure that every child in North Carolina is provided the opportunity to receive a sound basic education, regardless of age, race, gender, socio-economic status, or the district in which he or she lives. There is no question that the State is denying this fundamental right to North Carolina children. The State admits it. There is also no question as to what *must* be done to remedy the State's ongoing and established constitutional violations. The State *itself* answered that question when it presented the trial court with *its* Comprehensive Remedial Plan—the only such plan presented to the trial court. (R pp 1686-1772). The State, in defiance of the trial court's prior orders and the State's own representations to the trial court, failed to implement its chosen remedy.

In entering the 10 November 2021 Order, the trial court concluded that it could "no longer ignore the State's constitutional violation" because to do so "would render both the North Carolina State Constitution and the rulings of the Supreme Court meaningless." (R p 1838, ¶ 10). According to the trial court, "[b]ecause the State has failed for more than seventeen years to remedy the constitutional violation as the Supreme Court ordered, this Court must provide a remedy through the

exercise of its constitutional role." (R p 1835, ¶ 11). Not doing so, it concluded, would result in "nullifying the Constitution's language without the people's consent, making the right to a sound basic education merely aspirational and not enforceable," a continual disregard of this Court's unanimous decisions, and a failure of the judiciary to perform its core constitutional duty. (R p 1836, ¶ 11). The trial court was correct.

I. THE TRIAL COURT WAS CORRECT TO ORDER STATE ACTORS TO TRANSFER THE FUNDS NECESSARY TO IMPLEMENT THE STATE'S CHOSEN REMEDY TO CORRECT AN ESTABLISHED CONSTITUTIONAL VIOLATION.

A. Under *Leandro I* and *II*, after seventeen years of deference, and in light of a continuing constitutional violation, the trial court was correct to order the transfer of funds to implement Years 2 & 3 of the State's Comprehensive Remedial Plan.

The right of each North Carolinian to "the privilege of education" is not in dispute. N.C. Const. art. I, § 15. In *Leandro I,* this Court defined that fundamental right as the opportunity to obtain a sound basic education. 346 N.C. at 347, 488 S.E.2d at 255. Nor is there any dispute that the State has an affirmative duty to "guard and maintain" that right for every citizen. 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."). It is similarly established that the State cannot shirk its "ultimate responsibility" by delegating or abdicating that responsibility to local school districts. *Leandro II*, 358 N.C. at 635, 599 S.E.2d at 388. Indeed, this Court

has described the State's obligation to ensure the right to the "privilege" of a sound basic education as both "paramount" (*id.* at 649, 599 S.E.2d at 377) and "sacred." *Mebane Graded Sch. Dist. v. Alamance Cty.*, 211 N.C. 213, 189 S.E. 873, 880 (1937).

Plaintiffs recognize this Court's previous holding "that the legislative process provides a better forum than the courts for discussing and determining what educational programs and resources are most likely to ensure that each child of the state receives a sound basic education" because the "members of the General Assembly are popularly elected to represent the public for the purpose of making just such decisions." *Leandro I*, 346 N.C. at 354-55, 488 S.E.2d at 259. And this Court instructed the trial court, on remand, to "grant every reasonable deference to the legislative and executive branches when considering whether they have established and are administering a system that provides the children of the various school districts of the state a sound basic education." *Id.* at 356, 488 S.E2d at 261.

This Court, however, also recognized that if the trial court found that the legislative and executive branches were unable—or unwilling—to meet their obligations, then, "like the other branches of government, the judicial branch has its duty under the North Carolina Constitution," namely to "enter a judgment granting declaratory relief and <u>such other relief as needed</u> to correct the wrong while minimizing the encroachment upon the other branches of government." *Id.* at 357, 488 S.E.2d at 261 (emphasis added) (quoting *Corum v. University of N.C.*, 330 N.C.

761, 784, 413 S.E.2d 276, 291, *cert. denied*, 506 U.S. 985, 113 S.Ct. 493 (1992)). Thus, while recognizing the creation and administration of a system that supports a sound basic education as the "province … of the legislative and executive branches," *id.* at 357, 488 S.E.2d at 261, this Court held that if the legislative and executive branches fail to fulfill their duties, the trial court must act.

In *Leandro II*, this Court affirmed the trial court's finding that Plaintiffs made a "clear showing" of the State's violation of a fundamental constitutional right. 358 N.C. at 647, 599 S.E.2d at 396. The Court, once again, confirmed the trial court's authority—and duty—to ensure that constitutional deprivations are addressed and corrected should the State fail to do so. *Id.* at 642, 599 S.E.2d at 393 ("Certainly, when the State fails to live up to its constitutional duties, a court is empowered to order the deficiency remedied, and … a court is empowered to provide relief by imposing a specific remedy and instructing the recalcitrant state actors to implement it.").

The Court instructed the trial court to afford due discretion to the State—"initially at least"—to fashion a remedy of its choosing. *Id.* at 623, 599 S.E.2d at 381. But this Court made plain that its unanimous decision was not advisory, and 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, 599 S.E.2d at 396 (emphasis added).

The Intervenor Defendants' recitation of the proceedings ends here. But ignoring nearly everything that happened in this case since *Leandro II* does not change the fact that what this Court foretold in 1997, and again in 2004, came to pass: the State failed to fulfill its constitutional duties. As explained at length above (*supra* at 13-20), the trial court, on remand, conducted numerous multi-day evidentiary hearings regarding the status of constitutional compliance in districts across the State and concluded "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 decision." (R p 1257). *See also* R p 1140 ("children in those schools . . .are being deprived of their individual constitutional right to have the opportunity to obtain a sound basic education on a daily basis"); R p 1305 ("There is an ongoing constitutional violation of every child's right to receive the opportunity for a sound basic education"). The State itself concedes—as it must on this evidentiary record—that it is continuing, *to this day*, to violate the fundamental constitutional rights of children across North Carolina. *See supra* at 19-20.

Notwithstanding its conclusion that the constitutional violations affirmed by this Court were ongoing, the trial court continued to afford the State every opportunity, discretion, and deference to present a *Leandro*-compliant remedial plan of its own choosing. *See supra* at 20-28. Prior to issuing the 10 November 2021

Order, the trial court warned the State repeatedly that its patience in affording deference to the executive and legislative branches was coming to an end. (R p 1306 at fn. 1) ("time is drawing nigh … when due deference to both the legislative and executive branches of government must yield to this court's duty to adequately safeguard and actively enforce the constitutional mandate on which this case is premised.") The trial court held multiple status conferences leading up to the 10 November 2021 Order to permit the State additional time to come into constitutional compliance. *See e.g.*, R pp 1772, 1819. And, after issuing the 10 November 2021 Order, the trial court continued to defer to the State by staying that order's operation.

In these extraordinary circumstances, and after affording the State with seventeen years of nearly unfettered deference, the trial court appropriately followed the directives of this Court to "provide relief by imposing a specific remedy and instructing the recalcitrant state actors to implement it." *Leandro II,* 358 N.C. at 642, 599 S.E.2d at 393. Those directives flow from the duty of the judiciary, as one of the three branches of the "State," to "interpret[] the law, and through its power of judicial review, determine[] whether they comply with the constitution." *State v. Berger*, 368 N.C. 633, 635, 781 S.E.2d 248, 250 (2016) (citing *Bayard v. Singleton*, 1 N.C. 5, 6–7 (1787)). As the Court recently observed, it is the judiciary's "responsibility to protect the state constitutional rights of the citizens; this obligation to protect the

fundamental rights of individuals is as old as the State." *Harper v. Hall*, 2022-NCSC-17, ¶ 1, 380 N.C. 302, 365, 867 S.E.2d 554, 535 (2022), *cert. granted sub nom. Moore v. Harper*, No. 21-1271, 2022 WL 2347621 (U.S. 30 June 2022).

The trial court correctly concluded that being unable to address the State recalcitrance would itself violate separation of powers "by preventing the judiciary from performing its core duty of interpreting our Constitution." (R p 1836, ¶ 11) (citing *State v. Berger*, 368 N.C. 633, 638 (2016) ("This Court construes and applies the provisions of the Constitution of North Carolina with finality.")).

The trial court's 10 November 2021 Order is consistent with, and flows from, this Court's prior orders and the judiciary's own constitutional duty to protect and enforce every child's fundamental constitutional right to the opportunity to a sound basic education.

B. The trial court had the express and inherent authority to direct state actors to transfer the funds necessary to implement the State's sole chosen remedy.

Not only is the 10 November 2021 Order consistent with the judiciary's own constitutional duties and the prior unanimous decisions of this Court, it is properly within the scope of the express and inherent authority of the judiciary to act in the face of ongoing and established constitutional violations.

The trial court's authority to fashion a remedy is rooted in the Constitution itself. The Declaration of Rights expresses that "every person for an injury done

him in his lands, goods, person, or reputation shall have remedy by due course of law, and right and justice shall be administered without favor, denial or delay." N.C. Const. art. I, § 18 (emphasis added). *See also Lynch v. N.C. Dept. of Justice*, 93 N.C. App. 57, 61, 376 S.E.2d 247, 250 (1989) (art. I, § 18 "guarantees a remedy for legally cognizable claims"); *Craig ex rel. Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 342, 678 S.E.2d 351, 357 (2009) (noting this Court's "long-standing emphasis on ensuring redress for every constitutional injury").

In order to provide the necessary redress to every injury, this Court has held that "the courts have power to fashion an appropriate remedy 'depending upon the right violated and the facts of the particular case.'" *Simon v. Hardin*, 339 N.C. 358, 373, 451 S.E.2d 858, 869 (1994) (quoting *Corum,* 330 N.C. at 783-4, 413 S.E.2d at 291). "Generally speaking, the scope of a court's inherent power is its 'authority to do all things that are reasonably necessary for the proper administration of justice.'" *In the Matter of Alamance Cty. Court Facilities*, 329 N.C. 84, 94, 405 S.E.2d 125, 129 (1991) (holding that the judiciary had inherent authority to order government officials to supply facilities in accord with their statutory obligation). *See also State v. Buckner*, 351 N.C. 401, 411, 527 S.E.2d 307, 313 (2000) (judiciary has the "authority to do all things that are reasonably necessary for the proper administration of justice").

With regard to the respective roles of the political and judicial branches, this Court has observed that "[o]bedience to the Constitution on the part of the Legislature is no more necessary to orderly government than the exercise of the power of the Court in requiring it when the Legislature inadvertently exceeds its limitations." *State v. Harris*, 216 N.C. 746, 746, 6 S.E.2d 854, 866 (1940). Indeed, the Constitution expressly restricts legislative intrusion into judicial powers. *See* N.C. Const. art. IV, § 1. ("The 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 government . . . ."); *see also Beard v. N.C. State Bar*, 320 N.C. 126, 129, 357 S.E.2d 694, 695 ("The inherent power of the Court has not been limited by our constitution; to the contrary, the constitution protects such power."); *Matter of Alamance Cty. Court Facilities*, 329 N.C. at 95, 405 S.E.2d at 130 (powers granted to the political branches do "not curtail the inherent power of the judiciary, plenary within its branch, but serve to delineate the boundary between the branches, beyond which each is powerless to act.") (emphasis added).

In *Matter of Alamance Cty. Court Facilities*, this Court further evaluated the respective roles of the legislative and judicial branches and recognized that "[t]he scope of the inherent power of a court does not, in reality, always stop neatly short of explicit, exclusive powers granted to the legislature," and must occasionally "be exercised in the area of overlap between branches." 329 N.C. at 96, 405 S.E.2d at

130-31. This "overlap" in authority is not only possible, but it "constitutes a check and preserves the tripartite balance," and is a "functional component of pragmatic necessity . . . whereby one branch exercises some activities usually belonging to one of the other two branches in order to fully and properly discharge its duties." *Id*. at 96-7, 405 S.E.2d at 131. Appropriations is one such area of "overlap" because "one branch is exclusively responsible for raising the funds that sustain the other and preserve its autonomy." *Id*. at 97, 405 S.E.2d at 131. *See also Wilson v. Jenkins*, 72 N.C. 5, 5 (1875) ("the Courts have now not power to compel, by *Mandamus*, the Public Treasurer to pay a debt, which the General Assembly has directed him not to pay, nor the Auditor to give a warrant upon the Treasurer, which the General Assembly has directed him not to give, unless the act of the General Assembly be void, as violating the Constitution of the United States, or of this State"); *Richmond Cty. Bd. of Educ. v. Cowell*, 254 N.C. App. 422, 427, 803 S.E.2d 27, 31, fn. 1 (2017) (noting an "exception to this rule [that a court cannot transfer state funds] is when the legislative branch refuses to fund the judicial branch to such an extreme extent that the judiciary cannot perform its own constitutional duties").

Here, a constitutional violation had persisted for seventeen years because of State inaction and recalcitrance. The "overlap" of the legislature's duty to "guard and maintain" the right to the privilege of education and the trial court's inherent authority to enforce the Constitution is stark and, indeed, compelling. The trial

court's exercise of its inherent authority to order state actors to remedy a constitutional violation by transferring funds was correct and should be affirmed.

C. Having shown unfettered deference to the State for seventeen years, and in the face of government recalcitrance, the 10 November 2021 Order was no more forceful or invasive than the exigency of the circumstances.

Because the power of the judiciary is plenary, including its authority "to preserve the efficient and expeditious administration of Justice and protect it from being impaired or destroyed," this Court has recognized that the judiciary must exercise such power "with as much concern for its potential to usurp the powers of another branch as for the usurpation it is intended to correct." *Matter of Alamance Cty. Court Facilities,* 329 N.C. at 100–01, 405 S.E.2d at 133 (internal quotations omitted). Instead of delineating specific actions a court can or cannot take to remedy a violation of a constitutional right, this Court has defined the "critical limitations" that arise when a court is "called upon to exercise its inherent constitutional power to fashion a common law remedy." *Corum*, 330 N.C. at 784, 413 S.E. 2d at 291. In this light, when exercising its inherent powers, a court "must minimize the encroachment upon other branches of government … by seeking the least intrusive remedy available and necessary to right the wrong." *Id.* at 784-85, 413 S.E. 2d at 290 (citing *Sale v. State Highway & Pub. Works Comm'n*, 242 N.C. 612, 618, 89 S.E.2d 290, 296 (1955)).

Here, the trial court strictly adhered to this critical limitation before issuing the 10 November 2021 Order. First, from 2002 to 2015, the trial court gave the State complete discretion to present, through regular progress reports and the presentation of additional evidence, a *Leandro*-compliant remedy. After more than a decade of fits and starts, the trial court ordered the State in 2015 to develop and present a "definite plan of action" to correct ongoing constitutional deficiencies. Six years later, in its 20 June 2021 Order, the trial court ordered the implementation of the Comprehensive Remedial Plan that the State represented was "necessary and appropriate" to achieve constitutional compliance. Lastly, the trial court confirmed, over a period of additional months, through additional hearings, that there was no other remedy "on the table," and that the State had ample funds to implement the first two years of its own Plan. The trial court exhausted *all* existing alternatives over a period of seventeen years before ordering the funding of the State's Plan with existing State resources.

1. ***The trial court afforded the State countless opportunities to present evidence of Leandro compliance and programs to achieve constitutional compliance for over a decade before directing any specific action.***

As previously explained, *supra* at 13-22, beginning in 2002, and continuing through 2015, the trial court requested and received regular reports from the State on the status of its *Leandro* compliance. As directed by this Court, the trial court

held multiple evidentiary hearings to assess the extent to which children were being denied their constitutional right to the opportunity to obtain a sound basic education and what programs and remedies the State was implementing to address the deficiencies identified at trial and affirmed by this Court. *See, e.g.*, R pp 922, 923, 946, 947, 970, 982, 987, 1039, 1041, 1051, 1053, 1065, 1068, 1084, 1086, 1092, 1101, 1137, 1235, 1244 (notices of hearings and related orders). Notwithstanding Plaintiffs' frustration over the lack of meaningful progress, s*ee, e.g.,* R p 972 (Plaintiffs' motion to show cause against State); R p 1173 (Plaintiffs' motion in the cause against State); R p 1258 (Plaintiffs' motion to compel State to present a "definite plan of action"), the trial court continued to defer to the State to come forward with its own solution to achieve constitutional compliance.

The State presented numerous statewide initiatives that it contended evidenced its "plans" to remedy the ongoing constitutional violations. *See, e.g.*, R pp 923-933 (hearing on statewide Disadvantaged Student Supplemental Fund and other statewide issues); R pp 1101-1105 (hearing on State's Race-to-the-Top statewide initiatives); R pp 1144-1172 (hearing on statewide pre-kindergarten program). After more than a decade, however, the trial court concluded that the State's initiatives had either not been implemented or, if they had, were not sustained long enough to satisfy this Court's mandate 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." *Leandro II*, 358 N.C. at 647-48, 599 S.E.2d at 396 (emphasis added); *see generally*, *supra* at 20-26.

2. The trial court directs the State to develop and present a "definite plan of action."

In 2015, the trial court, having heard testimony and reviewed additional evidence, concluded that a "definite plan of action" was "necessary to meet the requirements and duties of the State of North Carolina with regard to its children having the equal opportunity to obtain a sound basic education." (R p 1246). Judge Manning held several days of hearings before his retirement to determine the sufficiency of the evidence the State presented. (R pp 1244- 1274).

Upon his appointment in 2018, Judge Lee separately reviewed the evidentiary record and concluded that "the decade after *Leandro II* made plain that the State's actions . . . not only failed to address its Leandro obligations, but exacerbated the constitutional harms experienced by another generation of students across North Carolina." (R p 1826).

Then and only then did the trial court seek the expertise of an "independent, non-party consultant" to assist the parties and the trial court in identifying the specific actions required to give each child the opportunity to obtain a sound basic education. (R p 1293-1297, 1323) ("Only in the continuing absence of a comprehensive plan shall this Court, as required by law, intervene in that process."). The trial court contemplated that after the parties reviewed the consultants' findings

for an agreed-upon period of time, "the Court shall order such further proceedings and/or discovery as shall then appear appropriate and shall thereafter conduct a hearing wherein the parties may present such evidence and call such witnesses, including but not limited to WestEd, to testify as each party deems appropriate." (R p 1325, ¶ 6) The trial court also ordered that "[t]estifying witnesses shall be subject to such rights, privileges and cross-examination as by law allowed with respect to any witness testifying in court." *Id*.

3. The State presents its Comprehensive Remedial Plan setting out the specific "necessary and appropriate" action items and timelines that "must be implemented to address the continuing constitutional violations."

Six years after Judge Manning directed the State to develop a "detailed plan of action," and nearly three more years after Judge Lee appointed WestEd as the trial court's consultant, the State presented its Comprehensive Remedial Plan. (R pp 1689- 1771). The Plan sets forth specific actions that the State represented to the trial court "must be implemented to address the continuing constitutional violations." *See* R p 1682; *see also* State Br. at 10 ("The Comprehensive Remedial Plan identified 'discrete, individual action steps to be taken to achieve the overarching constitutional obligation to provide all children the opportunity to obtain a sound basic education in a public school.'"). Intervenor Defendants' attempts to characterize the State's Plan as Plaintiffs' "veritable wish list of appropriations" (Int.

Def. Br. at 46) or the trial court's plan to "judicially dictate educational policy for the entire State over an eight-year period" (*id.* at 36) summarily fail upon even the most cursory examination of the actual evidence of record.

In *Leandro II*, this Court affirmed the trial court's finding that the opportunity to obtain a sound basic education requires, at least, "a competent, certified, well-trained teacher" in every classroom; a "well-trained competent principal" leading every school; and "the resources necessary" to meet the educational needs and constitutional rights of all children, especially at-risk children. 358 N.C. at 636, 599 S.E.2d at 389. The Court affirmed that at-risk children require more resources, time and focused attention in order to receive a sound basic education. *Id.* at 641, 599 S.E.2d 392-93. The Court also affirmed that the State's failure to provide adequate resources to at-risk prospective enrollees contributes towards their "subsequent failure to avail themselves of the opportunity to obtain a sound basic education." *Id.* at 641, 599 S.E.2d 392-93. Consistent with this Court's rulings, the State's Plan is focused on training, recruiting and retaining competent teachers and principals; early childhood programs; programs and resources targeted to at-risk students, particularly those attending high-poverty and/or failing schools; and an accountability system to measure the impact of the specific remedial steps. *See generally* R pp 1686-1771. The Plan sets out 146 definitive action items designed to specifically target the very constitutional deficiencies found by the trial court and

affirmed by this Court. It does not, as the Intervenor Defendants suggest, represent a wholesale takeover of public education.

Nor does the Plan replace or supplant other existing educational programs and funding priorities. To the contrary, the trial court found that the State has taken "significant steps" to improve students' access to a sound basic education. (R p 1633). "Many of these efforts have made a positive impact on the lives of public school students and improved public schooling in the State." *Id.*; *see also* R pp 1357-1361. The State's Plan does not eliminate or "defund" these or any other existing educational programs.

The Comprehensive Remedial Plan is the *only* targeted constitutional remedy presented to the trial court by the State in the seventeen years following *Leandro II*. While Plaintiffs consented to the 11 June 2021 Order directing the State to implement the State's Plan, it is certainly not their "veritable wish list." (App. 2 at 26:20-24). The State's Plan is, however, the least invasive—indeed the only—remedy presented to the court.

4. *The trial court found that the State has the ability—just not the will—to comply with the Constitution.*

It is unquestionably the role of the legislature to raise state funds. N.C. Const. art. I, § 8 & art. II, § 23. The 10 November 2021 Order does not require the State to raise funds. When entering the 10 November 2021 Order, Judge Lee heard arguments from the State and found that, although "more than sufficient funds are

available to execute the current needs of the [Plan]," the "State has not provided the necessary funding to execute the [Plan]." (R p 1831, ¶22). In fact, at that period in time, the State was "already behind the contemplated timeline, and the State has failed yet another class of students." (R p 1831, ¶26). On remand, Judge Robinson examined the impact of the subsequently passed budget and again found "the funds transferred on a discretionary basis to the State's Savings Reserve and the State's Capital and Infrastructure Reserve during the two-year budget cycle is substantially in excess of the amount necessary to fully fund the [Plan] during years 2 and 3 of the [Plan]." (R pp 2636-37, ¶¶43-46).[11]

The State has conceded, and the trial court found, that there are already more-than-sufficient funds available to comply with the 10 November 2021 Order. The Intervenor Defendants' contention that these funds are not "available" because they are distributed through various "reserves" (*see* Int. Def. Br. at 68-70) misses the point.

This Court held in *Leandro I* that, upon a finding of a constitutional violation, the State must prove that its "actions [in] denying this fundamental right are

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[11] To the extent the Intervenor Defendants rely on the Court of Appeals' decision in *Richmond Cty. Board of Educ. v. Cowell*, the State itself acknowledges that it is inapposite. State Br. at 47. Unlike *Richmond County*, this case deals with a fundamental affirmative constitutional right guaranteed to each child. Moreover, in *Richmond County*, the county sought "*new* money from the treasury" to remedy past harm caused by the State's misappropriation of funds. 254 N.C. App. at 428, 803 S.E.2d at 32. This case, unlike *Richmond County*, involves prospective relief to remedy the violation of a fundamental constitutional right.

'necessary to promote a compelling government interest.'" 346 N.C. at 357, 488 S.E.2d at 261; *see also*, *Leandro II*, 358 N.C. at 609-10, 599 S.E.2d at 373 (affirming that State had failed to prove a "compelling government interest" for its failure to provide a sound basic education). The point is that the Intervenor Defendants failed to present *any* evidence to the trial court that the withholding of any "reserve" funds is necessary to promote a compelling government interest. Thus, the trial court correctly found that such funds are in fact available to implement the State's Comprehensive Remedial Plan.

* * * * *

The trial court unquestionably gave remarkable deference to the political branches before ordering the transfer of existing and available State funds. (R pp 1840-1841, ¶ 26). It found that "[s]ince 2004, this Court has given the State countless opportunities, and unfettered discretion, to develop, present, and implement a *Leandro*-compliant remedial plan." (R p 1825, ¶ 2). The deference included "discretion to develop its chosen *Leandro* remedial plan," (R p 1832, ¶ 28), and "opportunity to use their informed judgment as to the "nuts and bolts" of the remedy, including the… resources necessary for the implementation, and the manner in which to obtain those resources." *Id.* Despite that deference, "the State demonstrated its inability, and repeated failure," to "remedy the constitutional deficiencies." *Id.* After seventeen years, the trial court was correct to order the State

to implement the State's own plan to achieve constitutional compliance. There was "nothing else of the table" for the court's consideration. (R p 1840). The legislature, however, refused to fund the implementation of the State's Plan, notwithstanding the State's representations that it remained "committed" to implementing its strategy. (R p 1688). Under these unprecedented circumstances, directing state actors to transfer existing available funds is an appropriate and narrowly-tailored remedy that should be affirmed.

II. THE CONSTITUTION—THE ULTIMATE LAW OF THE STATE—MAKES AN APPROPRIATION NECESSARY TO ENSURE THAT EACH CHILD HAS THE OPPORTUNITY TO A SOUND BASIC EDUCATION.

On 6 August 2021, the State told the trial court that, despite having more-than-enough funds on hand, the State could not implement its sole chosen remedy because the General Assembly failed to provide the needed funding. *See, e.g.,* R pp 1772-1796 (State's submission to trial court); R p 1796 (Action Item VII B. ii. 1, "Further action dependent on new recurring money"; Action Item VII C. iii. 1, "Dependent on new funding"). Even then, the trial court continued to defer to the State with more time to implement its Plan without judicial intervention. Only when the trial court was convinced that the State's compliance would never be forthcoming, did it order state actors to transfer the specific funds necessary to implement Years 2 and 3.

The Intervenor Defendants argue that the trial court had no power to order the transfer of funds. According to them, the Comprehensive Remedial Plan cannot be implemented, and thus the constitutional rights of children cannot be vindicated, unless and until *they*—and they alone—decide the children can access the State's sole remedy for them. In their view, any order requiring the transfer of funds violates the Appropriations Clause, N.C. Const. art. V, § 7, and this Court's prior orders. They are wrong.

The legislature's power over the purse is not greater than the will of the people as expressed in our Constitution. As the State itself concedes, the Constitution requires an appropriation necessary to afford North Carolina's children the opportunity to obtain a sound basic education. State Br. at 43. To conclude otherwise would exalt the "budget" above the Constitution as the ultimate law of North Carolina and completely excuse the State from its constitutional obligations. Legislative recalcitrance, of course, cannot make a fundamental constitutional right meaningless and unenforceable. Moreover, recognizing Article I, § 15 as an appropriation "by law" is necessary to read the provisions of our Constitution in harmony, especially when faced with legislative inaction.

"'We, the people,'" created the Constitution and the government of our State." *Corum*, 330 N.C. at 788, 413 S.E.2d at 293. The Constitution itself "expresses the will of the people in this State and, is therefore the supreme law of the land." *In re*

Martin, 295 N.C. 291, 299, 245 S.E.2d 766, 771 (1978). In enacting the Constitution, the people enshrined into the ultimate law of this land that all children have "a right to the privilege of education" and, specifically, an educational system that affords each child the "opportunity to obtain a sound basic education."

For that right to be realized, the trial court recognized that an appropriation of funding is required. (R p 1838, ¶ 21). Indeed, it is one of a very few fundamental constitutional rights that requires an appropriation to be realized. Because of this, the "solemn injunction" to provide the right to a sound basic education must be read as an "appropriation by law" to give full force and effect to the words of Article I, Section 15. *See, e.g.*, *Wake v. Raleigh*, 88 N.C. 120, 122 (1883) (this Court recognizing the constitutional mandate to provide a system of public education as a "constitutional appropriation"); *see also University R. Co. v. Holden*, 63 N.C. 410, 435–36 (1869) (Settle, J., concurring) (discussing art. IX, § 2 of the Constitution of 1868 as a "solemn injunction" on the General Assembly to provide for a general and universal system of public schools).

Otherwise, the legislature could appropriate a mere $100 to provide a "general and uniform system of free public education," and the people of North Carolina would have no judicial recourse. According to the Intervenor Defendants, in that instance, thousands of students would have to wait at least two years to allow "the ballot box" to remedy that clear constitutional violation. That is not the law of North

Carolina. *See, e.g.*, *Matter of Alamance Cty. Court Facilities*, 329 N.C. at 101-02, 405 S.E.2d at 134 (expressly rejecting the "ballot box" theory of solving legislative recalcitrance as "nonremedial" and overturning previous cases that held otherwise); *Harper*, 2022-NCSC-17, ¶ 6, 380 N.C. at 323, 868 S.E.2d at 510 ("the task of redistricting is primarily delegated to the legislature," yet "it must be performed 'in conformity with the State Constitution'"). And that is not the law of this case. *See Leandro II*, 358 N.C. at 616, 599 S.E.2d at 377 ("We cannot … imperil even one more class unnecessarily.").

The Intervenor Defendants want to view the Appropriations Clause in isolation and above all else. "The established rules of [constitutional] construction," however, "require us to look to the whole instrument; by doing so, in this instance, all the parts may be reconciled, and each perform its proper functions." *Univ. R. Co. v. Holden*, 63 N.C. at 435–36 (Settle, J., concurring) (reasoning that the "equation of taxation" applied only to the ordinary expenses of the State government and not to the public debt because interpreting it otherwise would create conflict within the Declaration of Rights set out in the North Carolina Constitution of 1868). *See also Town of Warrenton v. Warren County*, 215 N.C. 342, 342, 2 S.E. 2d 463, 465 (1939) (observing courts "see the Constitution steadily and see it whole" giving effect to the intent of the framers) (Stacy, J., concurring).

This Court has carefully avoided construing provisions of the Constitution in such a way where "[i]t is apparent that [such] construction would effectually destroy the most cherished objects of the Constitution. . . notwithstanding the Declaration of Rights." *Univ. R. Co. v. Holden*, 63 N.C. at 435–36 (Settle, J., concurring). In *Univ. R. Co. v. Holden,* for example, this Court examined the claim that the "equation of taxation" established by the Constitution of 1868 art. V, § 1 restricted the power of State taxation to meet the interest of the public debt as required by the Constitution of 1868, Art. I, § 6 ("to maintain the honor and good faith of the State untarnished" in regard to the public debt). Four of the five justices agreed that there were either exceptions to the equation of taxation, or that it did not apply in its entirety when it came to paying the public debt (Reade, J., Dick, J., Settle, J, and Rodman, J.). Finding otherwise, as Justice Settle wrote, "would effectually destroy the most cherished objects of the Constitution" which include paying "public debt," and providing "for a general and universal system of public schools" (then, art. IX, § 2). *Id.* at 435.

Here, the State has violated the established, affirmative right to "the privilege of education" for decades due to government recalcitrance and, specifically, the failure of the legislature to perform its "solemn" Constitutional duty to "provide by taxation and otherwise, for a general and universal system of public schools." Article I, § 15 and Article V, § 7 must be read together, in this extraordinary

circumstance, as an appropriation "made by law" that authorizes the transfer of funds. Otherwise, the "paramount" right of the children of North Carolina to the opportunity to obtain a sound basic education will "become a dead letter, ignorance and vice [will] take the places of intelligence and virtue, and this promise made to the ear but intended to be broken in the heart, [will] stand as a perpetual reproach." *Univ. R. Co. v. Holden*, 63 N.C. at 435–36. Indeed, this and other "beneficent provisions of the Constitution" would all "go down, in order to preserve" an interpretation of the Appropriation Clause that is not required. *See id.* at 435-36.

The Intervenor Defendants' reliance on *Cooper v. Berger,* 376 N.C. 22, 852 S.E.2d 46 (2020) is misplaced. That case, unlike here, did not involve the violations of fundamental constitutional rights guaranteed to children. Rather, that case was a dispute between "the Governor of the State of North Carolina, as compared to the North Carolina General Assembly," to determine which "has the authority to determine the manner in which monies derived from three specific federal block grant programs should be distributed to specific programs." *Id*. at 23, 852 S.E.2d at 50. This case, however, is not between the Governor "as compared to" the General Assembly.

This case, as it stands before this Court now, is between the Constitution, which grants to the people "the privilege of education," and the General Assembly, which has refused to carry out its duty to "guard and maintain" that right. As to that

battle, there can be no question as to which one prevails—it is the Constitution. And, specifically, the fundamental right to a sound basic education that the Constitution grants to every child. When the General Assembly pits itself against the Constitution and its recalcitrance threatens to withhold resources needed to remedy a violation of a fundamental right, the Constitution itself steps in to ensure the will of the people remains supreme.

III. THE INTERVENOR DEFENDANTS' BELATED ARGUMENTS ARE FACTUALLY AND LEGALLY UNFOUNDED.

Seventeen years after *Leandro II*, the Intervenor Defendants come before this Court and lodge a series of belated arguments in an attempt to deny children access to the only constitutional remedy selected by the State to help them. Despite classifying themselves as "agents of the State," they sever themselves from the State completely in this appeal and, indeed, from nearly every legal and factual position taken by the State in this case since *Leandro II*. Therefore, not surprisingly, their arguments disregard or misconstrue the procedural and factual history of the case, as well as its established law, and, if accepted, would lead to absurd—and further unconstitutional—results.

A. The Intervenor Defendants' attempt to raise new issues now is improper.

The Intervenor Defendants' arguments are not properly before this Court. Nearly all of their arguments challenge the trial court's order dated 11 June 2021 (R

pp. 1678-85), which directed the State to implement the Comprehensive Remedial Plan. But that order was *not* appealed. Because of this, the State has acknowledged to this Court, as it must, that it is obligated under that court order to "take each action described in the Comprehensive Remedial Plan" and under the timeframes set forth therein. *See* State's Br. at 11. The Intervenor Defendants, as the "agents of the State," are likewise bound by that order (which they also did not appeal).

Moreover, this Court considered what issues are before it in this appeal. In its 21 March 2022 Order, this Court granted the State's and Plaintiffs' respective requests for discretionary review and certified for review the constitutional questions identified in the State's and Plaintiffs' respective PDR Submissions. On 1 June 2022, the Court authorized briefing on one additional matter—certain issues arising from the Judge Robinson's 26 April 2022 Order. There are no other issues certified for review.

If the Intervenor Defendants had wished to have additional issues certified for review, they were required to have identified them and requested their review more than four months ago—in their response to the State's 14 February 2022 Petition for Discretionary Review. *See* N.C. R. App. P. 15(d) ("If, in the event that the Supreme Court certifies this case for review, the respondent would seek to present issues in addition to those presented by the petitioner, those additional issues shall

be stated in the response.") (emphasis added). They identified none. Consequently, they should not be permitted to belatedly interject them now.

Still further, concessions made in their recent appellate brief now confirm that their intervention was improper in the first instance. The Intervenor Defendants purported to intervene under N.C. Gen. Stat. § 1-72.2(b), which limits such intervention to only those cases challenging the constitutionality of a State statute or constitutional provision. Intervenor Defendants purported to intervene based on an argument that the 10 November 2021 Order was somehow a constitutional "challenge" to the subsequently-enacted Budget. They now, however, concede what was true all along—namely, that "no party has ever sought to challenge the Budget" in this case. Int. Def. Br. at 36. In doing so, they acknowledge that their basis for intervention was in fact nonexistent.

B. The Intervenor Defendants misconstrue the State's Comprehensive Remedial Plan and merely echo arguments already rejected by this Court.

The Intervenor Defendants argue that the trial court erred when it ordered the State to implement the State's own Comprehensive Remedial Plan. *See* Int. Def. Br. at 41-47. According to them, the State's Plan imposed an impermissible "judicial[] dictate" regarding "educational policy for the entire State over an eight-year period" and crossed into "inherently political" realm beyond the judiciary's reach. *Id.* at 38-40, 58-65. They also argue that the Plan resulted from a so-called

"friendly" lawsuit and therefore cannot be ordered. These arguments are legally and factually unfounded. *Id.* at 48-54.

First, as explained above, the trial court's order directing the State to implement the Comprehensive Remedial Plan was *not* appealed. Accordingly, the Intervenor Defendants cannot raise this challenge now.

Second, the Intervenor Defendants' contention that the Plan is a judicially-created "dictate" setting out the "educational policy for the entire State" is divorced from factual reality. As explained above, *supra* at 28-30, the Plan was developed by the *State*. Not a single component of it was "judicially" developed or crafted by the trial court. Moreover, the State's Plan does not, as the Intervenor Defendants would have this Court believe, dictate "every dollar of education spending and every detail of education policy for at least the next eight years." Int. Def. Br. at 40. Nor does it "supplant" the State's education funding priorities in *any* part of the State for *any* period of time. Rather, the Plan contains a discrete set of 146 action items specifically targeted to address *Leandro* compliance. Other than these actions to comply with *Leandro,* the Plan leaves all "educational funding priorities" intact and untouched.

Third, the Intervenor Defendants' "political question" argument was already rejected by this Court. Their argument merely echoes the one the State made and lost 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 p 1300 (denying Defendant State Board's motion to be released from case on similar grounds).

To be sure, this Court also held that due deference must be afforded to the political branches of the State—"initially at least"—to allow them the opportunity and discretion to develop an effective *Leandro*-conforming remedy. *Leandro II*, 358 N.C. at 623, 599 S.E.2d at 381. That is exactly what the trial court did here. Acting with remarkable judicial restraint, the trial court 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 each "nut and bolt" of that remedy.

Indeed, Plaintiffs respectfully submit that the trial court exercised far too much judicial restraint. In the intervening seventeen years since *Leandro II*, an entirely new generation of 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 prolonged

failure to act: "the children of North Carolina are our state'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.

Fourth, the Intervenor Defendants' "friendly lawsuit" contention is absurd. There is nothing "friendly" about Plaintiffs' 28-year-long battle to vindicate the fundamental—and still, to this day, denied—constitutional rights of children. As Judge Manning stated, "[i]t should never be forgotten that the State of North Carolina, represented by its Attorney General, while acknowledging the State's constitutional responsibility has 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)

Even after liability was established, Plaintiffs continued to fight against the State "tooth and nail" for a remedy. In the decade following *Leandro II*, the State's court-ordered obligation to present a remedy was marked by consistent recalcitrance and inaction. Plaintiffs filed repeated motions in the cause against the State objecting to its failure to demonstrate any coordinated or meaningful progress

towards the development, let alone actual implementation, of a sustained effort to comply with court's orders. *See, e.g.,* R pp 979, 1191-92, 1265.

The State did not present its Plan because it was "friendly" with Plaintiffs. The State did so because it was faced with a mountain of evidence, which it could not dispute, establishing continuing and severe constitutional deprivations to the children of this State (*see supra* at 15-20) and, more critically, because it was *ordered* by the court to do so.[12]

In 2015, Judge Manning found that the State's piecemeal, often disbanded remedial efforts had failed and ordered that a "definite plan of action" was "necessary." (R p 1246). The State, over Plaintiffs' objection, still failed to do so. In 2018, Judge Lee found again that the State had failed to present the trial court with a "remedial plan of action that addresses the liability … established by the law of this case" and warned the State this his patience had run out. (R p 1306) ("time is drawing nigh … when due deference to both the legislative and executive branches of government must yield to this court's duty to adequately safeguard and actively enforce the constitutional mandate").

[12] Again, in an attempt to manufacture a sense of suspicion, the Intervenor Defendants state that the order directing the State to implement the Plan "may" have been drafted by Plaintiffs. Int. Def. Br. at 52. They forget, perhaps, that superior court judges do not have law clerks. It is the established practice of our trial courts to have parties submit proposed orders for consideration. If, as the Intervenor Defendants contend, that renders an order "friendly" or otherwise invalid, then nearly every order entered every day in our court system is fatally flawed.

While the State was to be afforded discretion in developing its chosen remedy, the State had no discretion in whether or not a remedy was to be provided. It has been under court order (indeed, several court orders) to do just that since the Liability Judgment in 2002 and this Court's decision in *Leandro II*. Complying with a judicial order is what the State must do. That does not make a lawsuit impermissibly "friendly."[13]

C. The Intervenor Defendants' attempt to restrict a constitutional right to only those children in Hoke County, while leaving all other children to fend for themselves, is unfounded and would itself yield absurd and unconstitutional results.

The Intervenor Defendants also argue that the trial court lacked a proper basis to order the State to implement the State's Comprehensive Remedial Plan. *See* Int. Def. Br. at 42-47. According to them, a statewide constitutional violation was never determined by the trial court and thus, they argue, any remedy ordered must be restricted to only "students in Hoke County." *Id.* at 45. Once again, the Intervenor Defendants ignore nearly everything that has happened in this case since the Liability Judgment was entered. Moreover, the surprising new position they seek to advance now, "as agents of the State," directly contradicts the legal position

[13] The cases cited by Intervenor Defendants are inapposite. *See* Int. Def. Br. at 48-54. 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 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 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.

the State steadfastly maintained in this case and would, itself, lead to absurd and unconstitutional results.

1. *The Intervenor Defendants cannot re-invent what actually happened in this case.*

The Intervenor Defendants are wrong. The existence of a statewide constitutional violation *was* established in this case. On remand after *Leandro II*, the trial court held evidentiary proceedings to assess whether the State was in fact providing the opportunity to obtain a sound basic education in the districts beyond Hoke County (both other low-wealth, rural districts and the urban, relatively-wealthy districts). Witnesses from schools and districts across North Carolina testified and evidence was admitted regarding the educational "outputs" and "inputs" for students in every single high school, middle school, and elementary school in North Carolina. *See supra* at 15-20. Evidence on the performance of students in every North Carolina public school was admitted. So too was evidence on teacher and principal supply, qualifications, and effectiveness in every school across the State, as well as evidence on the programmatic resources available to at-risk students in every North Carolina school district. *See, e.g.,* R pp 1244-57.

After receiving and considering the voluminous witness testimony and evidence, the trial court found and concluded, repeatedly, that schoolchildren across North Carolina were "being deprived of their individual constitutional right to have the opportunity to obtain a sound basic education on a daily basis." (R p

1140); *see also, e.g.,* R p 1257 (similar findings and conclusions), R p 1305 (same); R p 1646 (same). Indeed, faced with the evidence of record in the case, the State admitted to the trial court—repeatedly and unequivocally—that hundreds of thousands of children across North Carolina were denied, and are *today* being denied, a *Leandro*-compliant educational opportunity. *See supra* at 19-20.

To be sure, the trial court did not conduct separate "trials" (*i.e.,* in terms of the magnitude of the trial conducted in 1999-2001) for every other low-wealth Plaintiff district or urban district. Intervenor Defendants conspicuously neglect to mention, however, that those separate trials did not happen because of the legal position the State first took in 2002 and has steadfastly maintained.

After entry of the Liability Judgment against the State, Plaintiffs demanded a remedy tailored specifically to Hoke County, and the trial court ordered the State to present one. (R p 781-82). Plaintiffs, and other intervenor parties, were prepared to move forward on any additional liability trial necessary to ensure that students in other districts across North Carolina obtained the necessary relief and could be part of the State's remedial efforts.

The State, however, did not want more trials. It represented to the trial court and to the parties that their "concerns" could be put to "rest." (R p 800). To avoid additional trials and the requirement to tailor a remedy only to Hoke County (which State argued it could not do because of its obligation to administer a "general and

uniform system of free public schools"), the State took a definitive legal position—namely, 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 800) (emphasis added). The State 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 801).

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.

Now, the Intervenor Defendants, seventeen years later, take the exact opposite position, arguing, purportedly on behalf of the State, 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 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 (the relatively wealthy, urban districts) agreed that, in light

of the State's position, further liability trials were unnecessary and they dismissed their claims. (R p 1037). Likewise, additional liability trials were unnecessary as to the other Plaintiff districts (beyond Hoke County).

The Intervenor Defendants' argument, if accepted now, would cause the State to impermissibly "blow hot and cold in the same breath," *Kannan v. Assad,* 182 N.C. 77, 78, 108 S.E. 383, 384 (1921), by, on the one hand, promising the trial court and the parties that it would implement a statewide remedy to avoid further trials and then, on the other hand, telling this Court that further trials are required before its chosen statewide Comprehensive Remedial Plan can be ordered.

This litigation is not, and cannot be, about legal gamesmanship. As the Court held in *Leandro II*, the legal gamesmanship must yield to the constitutional rights of children and the State must:

> step forward, boldly and decisively, to see that all children, without regard to their socio-economic circumstances, have an educational opportunity and experience that not only meet the constitutional mandates set forth in *Leandro*, but fulfill the dreams and aspirations of the founders of our state and nation.

Leandro II, 358 N.C. at 649, 599 S.E.2d at 397 (emphasis added).

2. *The Intervenor Defendants' logic, if accepted, would result in over 100 unnecessary trials.*

As explained above, after entry of the Liability Judgment, the State—to avoid additional trials and its obligation to tailor a remedy only to Hoke County (which, it argued, was constitutionally impermissible)—committed to statewide remedial

efforts. And, after being afforded seventeen years of deference, the State came forward with its chosen statewide action plan, the Comprehensive Remedial Plan.

The Intervenor Defendants now argue, however, that separate trials are in fact required in the 114 other schools districts for the State to be bound by its own selected **statewide** compliance plan. The Intervenor Defendants are erroneously attempting to shift the burden to the at-risk children across North Carolina by requiring them to justify, in more than 100 additional trials, the remedial plan the *State* created.

Over a hundred additional trials would be an overwhelming drain on both the taxpayers and the court system. This Court has recognized the staggering costs already incurred by the taxpayers arising from the State's continual efforts to fight its obligations to North Carolina's children. This Court in *Leandro II* stated:

> The time and financial resources devoted to litigating these issues over the past ten years undoubtedly have cost the taxpayers of this state an incalculable sum of money. While obtaining judicial interpretation of our Constitution in this matter and applying it to the context of the facts in this case is a critical process, one can only wonder how many additional teachers, books, classrooms, and programs could have been provided by that money in furtherance of the requirement to provide the school children of North Carolina with the opportunity for a sound basic education.

Leandro II, 358 N.C. at 610, 488 S.E.2d at 373.

Over a hundred additional trials would also be a wholly unnecessary exercise. Indeed, there would be nothing for the finder of fact to determine. The State already

admits to its continuing constitutional violations across North Carolina, and the trial court findings and conclusions in this case finding systemic and continuing violations in every district in North Carolina were never appealed. The State also admits that its Comprehensive Remedial Plan is "necessary and appropriate" and "must" be implemented to correct its constitutional failings. The trial court's order directing the State to implement that statewide Plan was also not appealed.

In 2004, this Court recognized "[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 316-17 (citing *Seattle Sch. Dist. v. State*, 90 Wash.2d 476, 490-95, 585 P.2d 71, 80-83 (1978)). Consequently, this Court held, "the unique procedural posture and substantive importance of the instant case compel us to adopt and apply the broadened parameters of a declaratory judgment action that is premised on issues of great public interest." *Id*. In that light, the Court further held:

> The children of North Carolina are our state's most valuable renewable resource. If inordinate numbers of them are wrongfully being denied their constitutional right to the opportunity for a sound basic education, our state courts cannot

> risk further and continued damage because the perfect civil action has proved elusive.

Leandro II, 358 N.C. at 616, 599 S.E.2d at 377. The same holds true today.

3. *The Intervenor Defendants' new position is itself unconstitutional.*

The Intervenor Defendants' surprising position—that 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* R p 801. The State's position was well founded.

First, this 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. "Whether it be the infant Zoe, the toddler Riley, the preschooler Nathaniel, the 'at-risk' middle-schooler Jerome, or the not 'at-risk' seventh-grader Louise, the constitutional right articulated in *Leandro* is vested in all of them," regardless of the district in which he or she may live. *Id*. 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 3602-3606).

Second, 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 58. *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 [E]qual [P]rotection [C]lause . . . 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 Township*, 247 U.S. 350, 352-53, 38 S.Ct. 495, 495 (1918)).

Undoubtedly, further constitutional challenges would be raised if the Intervenor Defendants' position were accepted, and the State provided the constitutional right to a sound basic education to the children of Hoke County, while leaving all the other children across the State to fend for themselves.

D. "Budgets" are not constitutional remedial plans and their passage does not create a revolving door of new "burdens of proof."

After affording the State seventeen years of unfettered deference, the State presented the trial court with one—and only one—remedial plan. No alternative to

the Comprehensive Remedial Plan was presented to the trial court. Yet, the Intervenor Defendants contend that the sole remedial plan of record in this case must be cast aside and ignored simply because the legislature passed a budget. According to them, when any new budget is passed the trial court must "presume" that it, and it alone, will deliver a sufficient *Leandro*-conforming remedy "unless or until the Plaintiffs prove otherwise." Int. Def. Br. at 36 (emphasis added). This is incorrect.

First, a "budget" is not a *Leandro* constitutional remedial plan and certainly nothing that would come close to satisfying a "definite plan of action," which is what the trial court ordered the State to submit. Indeed, as this Court held in *Leandro I*, funding for education alone, which is all a "budget" shows, is not determinative on whether school children are receiving the opportunity for a sound basic education. 346 N.C. at 347, 488 S.E.2d at 255. Rather, that determination is appropriately made in consideration of both the educational "inputs" (*e.g.*, State programmatic resources and the manner and nature of the delivery of educational services to children) and "outputs" (*e.g.,* the manner and nature to assess student performance). *Id.* at 355, 488 S.E.2d at 260. And, for *Leandro* compliance, a plan must analyze and examine the actions needed to ensure, assess and monitor that each classroom has a competent, certified, and effective teacher and that each school is led by an effective, well-trained principal, as well as address how specific

and differentiated educational services will be delivered to students in different circumstances (*i.e.,* whether they attend a high-poverty school or not, whether they attend a failing school or not, whether they are an "at-risk prospective enrollee" or not, etc.). A "budget" certainly does not do this. The Comprehensive Remedial Plan, however, does.[14]

Second, putting aside the additional practical problems with their new position (*e.g.,* it would force Plaintiffs to be before this Court at every turn of the budget cycle with a constitutional challenge), the Intervenor Defendants have the law exactly backwards. Once a violation of a fundamental constitutional right has been established, such as here, the burden rests firmly on the *State* to prove the effectiveness of any remedy, not the other way around.

This was precisely what the federal courts faced after over a decade of minimal integration progress required by *Brown v. Topeka Bd. of Educ.,* 347 U.S. 483 (1954), where for years recalcitrant segregationists refused to take real, meaningful action to implement remedial integration plans. The federal courts held that once a fundamental constitutional violation had been established, the burden shifts to the defendant government actors to prove the effectiveness and implementation of any remedy. *See, e.g., Everett v. Pitt County Bd. of Educ.*, 678 F.3d 281, 289 (4th Cir. 2012)

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[14] All of the evidence of record before the trial court, and now this Court, supports the remedial actions set out in the State's Comprehensive Remedial Plan. That evidence is voluminous. *See, e.g.,* R pp 1331-1771. There is no evidence in the record supporting the proposition that a budget alone is—or even could be—a constitutional remedial plan.

(once a constitutional violation is established, the burden is on government actors to prove that the effectiveness of any remedy); *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 13 (1971) (After plaintiffs prove a constitutional violation, the burden shifts to government defendants to provide "a plan that promises realistically to work now" and to maintain that plan until defendants prove that the constitutional violation "has been completely removed."); *Green v. Cty. Sch. Bd. of New Kent Cty.*, 391 U.S. 430, 439 (1968) (after constitutional violation is proven, the burden shifts to the government actor to come forward with a "plan that promises realistically to work, and promises realistically to work now").

Here, consistent with this federal precedent, the trial court similarly concluded in 2018 that the burden rested firmly on the State to prove that it was successfully implementing remedial actions specifically targeted to address the *Leandro* mandates. (R p 1306). It was not Plaintiffs' burden to prove the opposite. As the State Board previously conceded to this Court in *Leandro III*, it is the "State's burden to come forward with a remedial plan and demonstrate to the court that it would adequately address the previously determined constitutional violation."[15] It is this burden on the State that cannot be dodged by the mere passage of a "budget."

[15] *See Brief of Defendant-Appellee State Board of Education* dated 24 July 2013 (North Carolina Supreme Court; No. 5PA12-2) at p. 33.

E. The trial court's findings as to amounts required to implement Years 2 & 3 of the State's Plan are both correct and supported by undisputed competent evidence.

The trial court found that, even after the passage of the Budget, Years 2 and 3 of the State's Comprehensive Plan were unfunded by almost half. (R pp 2630-2641, ¶¶ 33-34, 46, 50-54, 56). It found that the following amounts were still necessary to implement the specific components of 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 2641). No party challenges these factual findings. Nor could they. The evidence submitted by both the State and the Intervenor Defendants confirm their accuracy. *See* R pp 2011-2013, 2028-2035, 2578-2582 (State's evidence), R pp 2389-2393 (Intervenor Defendants' evidence).

The Intervenor Defendants, however, argue now—without a single evidentiary record cite—that school districts have received (or may receive) "COVID-relief" funds from the federal government. According to them, pandemic relief should somehow (they do not say how) be "credited" towards the State's Plan. This argument fails for several reasons.

First, COVID pandemic assistance does not, and was not designed to, address the historical and unmet *Leandro* needs of children established in this case seventeen years ago (long before the COVID pandemic). The State conceded this to

the trial court. *See, e.g.,* R p 1688 (State representing that COVID "funds were not intended to remedy the historical and unmet needs of children who are being denied the opportunity for a sound basic education but were intended to help mitigate the unavoidable loss of educational opportunities caused by the pandemic"). The trial court also considered this issue, in June of 2021, an issued an order finding that because COVID-19 relief funds do not address the unmet *Leandro* needs of children, they "cannot be relied upon by the State to sustain ongoing programs that are necessary to fulfill the State's constitutional obligation to provide a sound basic education" to children. (R pp 1681-82). That order was not appealed.

Second, there is not a shred of evidence in the record that any COVID pandemic funding was—or even could be—used to fund the components of the Comprehensive Remedial Plan. The Intervenor Defendants did not identify a single action item in the Plan that was in fact funded with COVID relief funding, and they certainly presented no evidence of that. Nor do they cite to any such evidence of record in their brief to this Court.

Third, the Intervenor Defendants once again have the burden of proof exactly backwards. Even if there were evidence that pandemic relief funds in fact funded a component of the Comprehensive Remedial Plan (and there is not), it was the State's (which in this case includes the Intervenor Defendants) burden to present that evidence. As explained above, once the violation of a fundamental constitutional

right has been established, the burden rests firmly on the government to prove the actual implementation of an effective remedy. The burden does not rest on Plaintiffs to prove the opposite.

CONCLUSION

The 10 November 2021 Order should be affirmed, with the amount of funds to be transferred amended according to the 26 April 2022 Order.

Respectfully submitted, this the 1st day of August 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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CONTENTS OF APPENDIX

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

* *

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

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

RAFAEL PENN, et al,
Plaintiff-Intervenors,
v.

STATE OF NORTH CAROLINA and
the STATE BOARD OF EDUCATION,
Defendants,
and

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION,
Realigned Defendants,
and

PHILIP E. BERGER, in his official
capacity as President Pro Tempore
of the North Carolina Senate, and
TIMOTHY K. MOORE, in his official
capacity as Speaker of the North
Carolina House of Representatives,
Intervernor-Defendants.

* *

TRANSCRIPT
Wednesday, April 13, 2022

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

Denise St. Clair, RPR, CRR, CRC
Official Court Reporter
N.C. Administrative Office of the Courts
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the present date is that underperformance and the denial of the equal educational opportunities, especially to at-risk students. Those would include students with disabilities, students who are trying to learn the English language, students who come from low-income families, students that are at risk of being pushed out of the very educational systems that are intended to help educate them so they can achieve that American dream that we have of our public education system.

But there's zero funding in the Defendant-Intervenors' budget for at-risk students -- increased funding for those. Zero increased funding for low-wealth districts to provide eligible counties supplemental funding equal to 107 percent as laid out in the Comprehensive Remedial Plan. Zero funding for increased funding for English learners by lifting an arbitrary cap. Something that's been studied already and found to have been arbitrary to simplify the formula and increase the wait for those students so that they can have more programs and resources, providing resources to support community schools in high-poverty schools.

This isn't just some wish list. Believe me, if this was a wish list for the best education that you could have, it would be much longer and deeper, but this meets those minimal requirements for a sound basic education, as the courts have repeatedly defined in this case, and that the