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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REPLY BRIEF OF PLAINTIFFS-APPELLEES

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REPLY BRIEF OF PLAINTIFFS-APPELLEES

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INTRODUCTION

The central question before this Court is: when ongoing violations of fundamental constitutional rights have been established, does the judiciary have any authority—after 17 years—to order a remedy, or must it bow to legislative inaction and recalcitrance?

Intervenor Defendants try to obfuscate this question by ignoring and misstating 17-years-worth of findings of fact that were never appealed, and by mischaracterizing the legal posture of the case.[1] This is *not* a case about whether the legislative or executive branch has the "power of the purse." This case is about the role of the Court when the State is violating the fundamental constitutional rights of North Carolina's children. After seventeen years, the time has come for this Court to tell the children if their constitutional right to the opportunity to receive a sound basic education in a public school actually means something, or if it is just a promise "made to the ear but intended to be broken in the heart." *Univ. R. Co. v. Holden*, 63 N.C. 410, 435–36 (1869) (Settle, J., concurring).

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[1] Intervenor Defendants also argue issues that are not properly before the Court. *See* Plaintiffs' Appellee Br. at 62-64. Similarly, the appeal of the Court of Appeals' Writ of Prohibition (Case No. P21-511) has been held in abeyance and, thus, the Controller's Brief is improper. However, it merely echoes the arguments presented by the Intervenor Defendants. This Reply, therefore, is also submitted in response to those arguments.

I. INTERVENOR DEFENDANTS SEEK TO ENCROACH UPON THE ROLE THAT THE CONSTITUTION VESTS EXCLUSIVELY IN THE JUDICIARY.

Legislative power does not trump the Constitution. And it cannot be used to render the fundamental rights granted in its Declaration of Rights meaningless.

A. The Judiciary—Not the Legislature—Determines Whether the Constitutional Mandate to Provide a Sound Basic Education Has Been Met.

At the core of their arguments, the Intervenor Defendants believe that the General Assembly—not this Court—is the final arbiter of what constitutes a sound basic education. Interpreting and applying the language of the Constitution, however, falls squarely within this Court's exclusive authority as the "ultimate interpreter of our State Constitution." *Harper v. Hall*, 380 N.C. 317, 365, 868 S.E.2d 499, 535, 2022-NCSC-17, ¶ 120, *cert. granted sub nom. Moore v. Harper*, No. 21-1271, 2022 WL 2347621 (June 30, 2022).

Intervenor Defendants point out that the Constitution does not dictate an amount of funding the State must provide to the public school system, and that "there will be more than one constitutionally permissible method of solving" the problem of "financing and managing a statewide public school system." *Leandro v. State* ("*Leandro I*"), 346 N.C. 336, 356, 488 S.E.2d 249, 260 (1997); *see* Int. Def.'s Appellee Br. at 22. They state that this Court has instead interpreted the Constitution to require that the State provide access to a certain level of educational

"*substance.*" Int. Def.'s Appellee Br. at 41 (emphasis in original). As to these points, Plaintiffs agree.

For 17 years, the State Board of Education, acting on behalf of the State, presented multiple and varied educational programs which attempted to bring the educational system into constitutional compliance. *See, e.g.*, R pp 923-1270, 2680-2699, 2774-2788, 3320-3568, 3577-3594. The trial court found them lacking. The State Board recounts its "continued efforts to prove the reformed public school system was constitutional" and the "extensive actions that *both* the General Assembly and the State Board of Education had taken" over the course of 17 years in an attempt to provide all children with the opportunity to obtain a sound basic education. State Bd. of Ed. Appellee Br. at 5 & 6 (emphasis added). Through Democratic and Republican administrations, eighteen long and short legislative sessions, and fifteen "Current & Capital" budgets passed by the then-sitting General Assembly, the State Board of Education presented "volumes of evidence" regarding alternative ways the State was trying to meet its constitutional obligations. *Id.* at 5. That evidence was met with "the court's repeated rejection of those efforts on grounds that they were constitutionally insufficient to remedy the injuries inflicted on North Carolina students." *Id.* at 6.[2]

[2] The State admits that after the trial court's repeated findings of ongoing constitutional violations, it was "legally impossible" to do anything else but cooperate with the other parties to this case to fashion a comprehensive remedy. The Intervenor Defendants were well aware of this shift in defense strategy and openly criticized it. *See* State Bd. of Ed.

The only evidence before the trial court—and in the record before this Court—of what meets the "substantive" requirement of a sound basic education is the Comprehensive Remedial Plan (the "Plan"). The Intervenor Defendants do not point to any contradictory record evidence. The State presented its Plan and all of its components as "necessary and appropriate actions that must be implemented to address the continuing constitutional violations." (R p 1689). The trial court agreed. (R pp 1678-85).

Now the Intervenor Defendants want to second guess the trial court's determination of what is "necessary and appropriate" to provide a sound basic education, as that term has been defined by this Court. The interpretation of "sound basic education" and factual determination that the constitutional standard has, or has not, been met is the province of the judiciary—not the legislature. To hold otherwise is to violate the very separation of powers the Intervenor Defendants purport to protect.

When examining the power vested in the judiciary, the Court has held that "[t]his Court construes and applies the provisions of the Constitution of North Carolina *with finality*." *State v. Berger,* 368 N.C. 633, 638, 781 S.E.2d 248, 252 (2016) (emphasis added). Authorities cited by Intervenor Defendants are not to the contrary. Intervenor Defendants repeatedly cite the historic "struggle between the

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Appellee Br. at 7. Still, they did nothing to intervene or participate in the case at that time. Their late attempts to do so now are barred. *See infra* 11-15.

English Parliament and the Crown over the control of public finance…." Int Def. Appellee Brief at 28 & 56 (emphasis added). Similarly, *Cooper v. Berger* involved the role of the "the Governor of the State of North Carolina, as compared to the North Carolina General Assembly…." 376 N.C. 22, 23, 852 S.E.2d 46, 50 (2020). That is not the case here.

Where, as in this case, a fundamental constitutional right is at stake, this Court has held that the judiciary is vested with the authority—indeed, the duty—to step in to preserve and protect the Constitution. *See Leandro I*, 346 N.C. 336, 357, 488 S.E.2d 249, 261 (1997); *Hoke Cnty. Bd. of Educ. v. State*, 358 N.C. 605, 609-10, 599 S.E.2d 365, 373 (2004) ("*Leandro II*"); *see also Corum v. Univ. of N.C.*, 330 N.C. 761, 783, 413 S.E.2d 276 (1992); *Matter of Alamance Cnty. Ct. Facilities*, 329 N.C. 84, 99, 405 S.E.2d 125, 132 (1991). This Court has held that, when necessary, courts can take action within the "overlap [of authority] between branches." *Matter of Alamance Cnty. Ct. Facilities*, 329 N.C. at 96, 405 S.E.2d at 130; *see also Harper v. Hall*, 380 N.C. at 364, 868 S.E.2d at 534, 2022-NCSC at ¶ 115 ("the mere fact that responsibility for reapportionment is committed to the General Assembly does not mean that the General Assembly's decisions in carrying out its responsibility are fully immunized from any judicial review.").

Indeed, other courts, faced with similar circumstances, have taken far more "intrusive" action than the 10 November 2021 Order to protect the constitutional

rights of children. *See, e.g., Missouri v. Jenkins*, 495 U.S. 33, 51, 110 S. Ct. 1651, 1663 (1990) (holding the trial court had the authority to authorize or require a tax levied to fund desegregation remedial plans); *Aaron v. Cooper*, 156 F.Supp. 220, 226 (E.D. Ark. 1957) (enjoining the executive from exercising its constitutional right to call in the national guard to interfere with the constitutionally required desegregation of public schools).

Although the task of providing a general and uniform system of public education is primarily the function of the executive and legislative branches, that function must be performed "in conformity with the State Constitution." *Stephenson v. Bartlett*, 355 N.C. 354, 371, 562 S.E.2d 377, 390 (2002). The trial court, after 17 years of deference to the State's multiple initiatives and "volumes of evidence," determined that the educational substance required to discharge the State's function "in conformity with the State Constitution" is still lacking. The trial court was correct to order the implementation of the sole constitutionally-compliant remedy ever presented by the State and to order state actors to transfer funds necessary to do so. It is this Court's role to review the trial court's findings on the record before it and carry out "the most fundamental of [its] sacred duties: protecting the constitutional rights of the people of North Carolina…." *Harper v. Hall*, 380 N.C. at 323, 868 S.E.2d at 510, 2022-NCSC-at ¶ 7.

B. The Language of the Constitution and Its History Support The Trial Court's 10 November 2021 Order.

The trial court's reading of Article I, § 15 to provide an ongoing appropriation to fund the "right to the privilege of education" is correct.

Intervenor Defendants argue that the requirement in Article IX, §§ 6 and 7 that funds "shall be faithfully appropriated" to maintain free public schools renders the constitutional appropriation of Art. I, § 15 superfluous. Int. Def. Br. at 33-34. That is exactly backwards. What if the legislature fails to appropriate "such revenue" necessary to provide a general and uniform system of free public schools? According to Intervenor Defendants, there would be no judicial recourse. The legislature itself would decide whether its actions pass constitutional muster.

The absurdity of the Intervenor Defendants' position is clear in their contention that the Constitution requires the General Assembly to appropriate only those funds enumerated in Article IX §§ 6-7 to fund education. Int. Def. Br. at 33 ("Article IX permits, *but does not require*, the General Assembly to appropriate general revenue" to supplement educational funding). Such funds ("proceeds of … land," "sales of the swamp lands" and "penalties, forfeitures, and fines," among others) currently constitute approximately $235 million ($186 million of which is directed to the State Public School Fund) of the $2.1 billion K-12 education budget.[3] According to the Intervenor Defendants, that $235 million is the only funding the

[3] *See* Act of 1 July 2022, N.C. Sess. L. 2022- 74, § 4.3, 2022 Sess. Laws.

Constitution requires the General Assembly to appropriate for public education. Taken to its logical conclusion, the Intervenor Defendants argue that the legislature could eliminate over $1.8 billion of current State funding, and if that funding is insufficient to provide the opportunity to all students to receive a sound basic education, this Court is powerless to act.

This is exactly why Article I, § 15 provides an ongoing appropriation of funds necessary to "guard and maintain" the "privilege to the right of education." Without it, the legislature could render that right meaningless. Constitutional provisions, however, must be read in concert to give meaning to all provisions. *See Town of Warrenton v. Warren County*, 215 N.C. 342, 342, 2 S.E. 2d 463, 465 (1939). And as Justice Settle observed in *Univ. R. Co. v. Holden*, the Constitution cannot contradict itself. 63 N.C. at 435–36. The only way to read the grant of the right to obtain a sound basic education with the Appropriations Clause is to recognize Article I, §15 as an appropriation "by law."

The Intervenor Defendants' argument that "made by law" only refers to statutes passed by the General Assembly is unfounded. First, whether "by law" means only "by the General Assembly" is a matter of constitutional interpretation, which is the province of this Court. *See Harper v. Hall*, 380 N.C. at 364, 868 S.E.2d at 535, 2022-NCSC-at ¶ 117. Second, this Court has held that "law" as written in the Constitution contemplates more than just "statutory law" passed by the General

Assembly. *See, e.g., Sale v. State Highway & Pub. Works Comm'n*, 242 N.C. 612, 618, 89 S.E.2d 290, 296 (1955) ("The courts of the land to preserve the liberty and rights and property of the people, must adhere to the plain stipulations of the fundamental law, and it will be a tragic day in the history of our democratic constitutional form of government, if the courts should ignore the clear mandates of the organic law."); *Kitchin v. Wood*, 154 N.C. 565, 70 S.E. 995, 996 (1911) ("a constitution is but a higher form of statutory law, and it is entirely competent for the people, if they so desire, to incorporate into it self-executing enactments."). The definition of "law" itself encompasses but is not limited to legislation and is generally defined as "[t]he aggregate of legislation, judicial precedents, and accepted legal principles." LAW, BLACK'S LAW DICTIONARY (11th ed. 2019). Intervenor Defendants cite no case for the proposition that "by law" means solely "by the General Assembly."

Most importantly, Intervenor Defendants' argument misses the point. "Made by law" is not a grant of power to the General Assembly to ignore the Declaration of Rights. *See Baker v. Martin*, 330 N.C. 331, 337, 410 S.E.2d 887, 891 (1991) ("[I]t is firmly established that our State Constitution is not a grant of power.") (internal citations omitted); *McIntyre v. Clarkson*, 254 N.C. 510, 515, 119 S.E.2d 888, 891 (1961) (reciting the doctrine that all power which is not expressly limited by the people in our State Constitution remains with the people). As set forth above, the legislature can only

exercise its authority "in conformity with the State Constitution." *Stephenson*, 355 N.C. at 371, 562 S.E.2d at 390.

When the legislature violates the Constitution, its action—or failure to act—cannot be "law," even when the action falls within the its primary authority. *See, e.g., Harper v. Hall*, 380 N.C. 317, 868 S.E.2d 499, 2022-NCSC-17. The Constitution itself, as the "will of the people" is the "law" in that circumstance.

II. THE TRIAL COURT FOUND SYSTEMIC CONSTITUTIONAL VIOLATIONS ACROSS THE STATE AND THE INTERVENOR DEFENDANTS CANNOT RESTRICT THE STATE'S SOLE CONSTITUTIONAL REMEDY TO ONLY HOKE COUNTY.

The Intervenor Defendants completely ignore—or misstate—17 years of factual findings made by the trial court. Those findings are set forth at length in Plaintiffs' Appellee Brief, as well as the Appellee Brief of the State Board of Education. The record confirms that the State itself introduced the "volumes" of statewide evidence on which the trial court based its repeated findings of a statewide constitutional violation. And the State itself represented to the trial court for 17 years that only a statewide remedy would be forthcoming.

A. Since the Liability Judgment, the State represented to the trial court and the parties that its *Leandro* remedy will—and must—be implemented statewide.

Contrary to Intervenor Defendants' contention, Plaintiffs did in fact demand a remedy targeted specifically to Hoke County, and in 2002 the trial court ordered the State to present one. (R pp 781-82). But the State refused to implement a remedy

targeted specifically to Hoke County students (which the State said was not feasible because of its obligation to administer a "general and uniform system" to students across all districts). (R pp 800-01). Instead, the State represented to the trial court and the parties that its *Leandro* remedial efforts will—and must—be implemented statewide. *Id*. Because it had then accepted its constitutional duty to ensure that "all students" in North Carolina had a *Leandro*-conforming education, the State committed to implement a statewide remedy which would, by its nature, correct the constitutional deficiencies present in Hoke County, the other Plaintiff and intervenor districts, and every other district "across the State." (R p 801); *see also* State Bd. of Ed. Br. at 7.

The trial court and the parties relied on the State's legal position. Because of the State's position, the trial court rejected Plaintiffs' request for the immediate creation and implementation of a remedy targeted specifically to Hoke County students. *See, e.g.,* R pp 2672-73. And, the State's legal position—which it has maintained since the Liability Judgment and *Leandro II*—is the precise reason why additional county-specific trials did not occur after remand. The Urban Intervenors agreed, relying on the State's position, that further liability trials would be unnecessary and dismissed their claims. *See* R p 1037. In light of the State's position, the trial court did not hold separate trials focused on the other Plaintiff districts.

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

The Intervenor Defendants now come before this Court—nearly two decades later—and attempt to assert the exact opposite position on the State's behalf, seeking to fault the trial court and the parties for taking the State of North Carolina at its word. Apparently, it is their view that the State can, on the one hand, affirmatively represent to the court and the parties for years that it will implement a statewide remedy to avoid additional trials and the requirement to develop a specifically-targeted Hoke County remedy and, on the other hand, tell this Court that the State's Comprehensive Remedial Plan cannot be ordered because those additional trials did not occur and the Plan is not specifically-targeted at Hoke County. Their position, however, is rejected by the State and barred by law for several reasons.

First, the judiciary does not permit such legal maneuvering, and litigants are not allowed to "blow hot and cold in the same breadth." *Kannan v. Assad,* 182 N.C. 77, 78, 108 S.E. 383, 384 (1921). This Court has "long recognized the importance of protecting the integrity of judicial proceedings," and, because of this, a litigant is precluded from asserting "inconsistent positions before a tribunal," which is

precisely what the Intervenor Defendants are seeking to have the State do in this appeal. *Whitacre Partnership v. Biosignia, Inc.*, 358 N.C. 1, 26, 591 S.E.2d 870, 887 (2004).

Second, as the State itself concedes, such an argument is barred by the doctrine of laches. State Appellee Br. at 16-20 (citing *Builders Supplies Co. of Goldsboro, N.C., Inc. v. Gainey,* 282 N.C. 261, 271, 192 S.E.2d 449, 456 (1972) (the doctrine of laches bars a litigant from raising belated arguments, when that delay prejudices another party)). The prejudice and harm resulting from such delay here is beyond certain. Indeed, in the seventeen years since the *Leandro II* decision, a new <u>generation</u> of school children have been denied their constitutional right to the opportunity to attain a sound basic education. *See Leandro II,* 358 N.C. at 616, 599 S.E.2d at 377 ("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*….")(emphasis added). *See also* Pl.'s Appellee Br. at 71-74 (the Intervenor Defendants are estopped from making these arguments as well).

Third, the Intervenor Defendants' restrictive interpretation of the *Leandro* decisions makes little sense. The fundamental constitutional right to the opportunity to obtain a sound basic education in a public school applies to <u>all</u>

children in North Carolina. It is not limited to only those children living within the provincial boundaries of Hoke County. As this Court held in *Leandro II*, "our state Constitution … accord[s] the right at issue to all children of North Carolina." 358 N.C. at 379, 599 S.E.2d at 620 (emphasis added). Indeed, as former Justice Robert Orr, the author of *Leandro II*, 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 3603)(emphasis added).

In light of the critical importance of these constitutional rights, this Court held that the "unique procedural posture and substantive importance of the instant case compel us to adopt and apply broadened parameters of a declaratory judgment action that is premised on issues of great public interest." *Leandro II*, 358 N.C. at 616, 599 S.E.2d at 377. Accordingly, this Court held that, "our state courts cannot risk further and continued damage because the perfect civil action has proved elusive." *Id*. Any alleged "imperfection" in this action resulting from the State's legal position certainly cannot be used now by the Intervenor Defendants to deny North Carolina's children access to the only remedy presented to the trial court—the Comprehensive Remedial Plan.

Fourth, the Intervenor Defendants' position, if accepted, would itself be unconstitutional as it would provide a constitutional right to the children of Hoke

County, while leaving all other children across the State to fend for themselves. *See Leandro I*, 246 N.C. at 353, 488 S.E.2d at 58*; see also* Plaintiffs' Appellee Br. at 77-78.

B. The trial court found systemic and continuing statewide constitutional violations.

Because the State took the position that its remedial compliance efforts must be directed statewide, it presented the trial court with statewide evidence regarding the status of its *Leandro* compliance. A series of extensive evidentiary hearings were held between 2005 to 2020. The State Board of Education's Appellee Brief details much of this evidence. *See also supra* 3-7.

Based on the voluminous evidence of record, the trial court repeatedly found that children across the State where being deprived of their fundamental constitutional rights on a daily basis. *See, e.g.,* R pp 1062, 1089, 1140, 1257, 1304, 1626. *See also* Plaintiffs' Appellee Br. pp 15-20.

The Intervenor Defendants do not address these factual findings. Nor do they address the substantial evidence of record upon which each finding is based. Instead, in an apparent effort to excuse the fact that they never appealed these orders in the first instance, they argue only that the orders are "interlocutory" and may be now reviewed by this Court.[4] The Intervenor Defendants miss the point.

[4] The Intervenor Defendants highlight an order from 2018 (which denied the State Board's motion to be released from the case) and argue that the factual findings contained therein must be ignored. According to them, it was an order on a Rule 12 motion and, thus, any factual findings were improper. They are, however, wrong. That motion was also based on Rule 60 of the North Carolina Rules of Civil Procedure. For such a motion, the "trial judge

Whether an order is "interlocutory" or not, this Court's review of factual findings remains the same: a trial court's findings are conclusive on appeal if supported by competent evidence of record. *Matter of Skinner,* 370 N.C. 126, 139, 804 S.E.2d 448, 457 (2017). The trial court's findings were based on its consideration of the voluminous evidence presented by the State *itself* (over the course of more than a decade) on the educational "outputs" and "inputs" for every high school, middle school, and elementary school in the State of North Carolina, the effectiveness and qualifications of teachers and principals in each district, and the programmatic resources available children at-risk of academic failure in each district. *See, e.g.*, Plaintiffs' Appellee Br. at 15-20 (summarizing evidence and evidentiary proceedings).

There is no question that the findings are supported by competent evidence of record. The Intervenor Defendants certainly have not argued otherwise. Nor could they. When faced with the mountain of evidence establishing continuing, systemic and statewide violations, the State has already conceded that it is continuing to violate the Constitution by denying children across North Carolina with their fundamental, inalienable right to the opportunity to receive a sound basic education.

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has the duty to make findings of fact, which are deemed conclusive on appeal if there is any evidence on which to base such findings." *Briley v. Farabow*, 348 N.C. 537, 547, 501 S.E.2d 649, 655 (1998).

III. NO PARTY HAS CHALLENGED THE CONSTITUTIONALITY OF THE BUDGET BECAUSE THAT DETERMINATION IS UNNECESSARY AND IRRELEVANT.

Intervenor Defendants argue that the trial court erred when it did not consider whether the Appropriation Act of 2021 was constitutional before entering the 10 November 2021 Order. They contend that the trial court should have found the Plan unnecessary, because the Appropriation Act of 2021 is entitled to a presumption of constitutional validity. Int. Def. Response Br. at 45-46. These arguments are nonsensical and contrary to the law of the case.

The trial court has already found, after examining the record numerous times over the past two decades, a statewide violation of the right to a sound basic education (Pl.'s Appellee Br. at 17-19; 70-74), and the State has already presented to the court a plan to remedy that violation, which the trial court ordered on 11 June 2021. *Id.* at 28-30.[5] That order was not appealed. Once the trial court entered an order approving the Plan and ordering its implementation, which was also not appealed, the budget was relevant to the issues currently before this Court only to the extent it appropriated resources necessary to implement Years 2 and 3 of the State's Plan. It's "constitutionality" is not at issue.

[5] The trial court's numerous findings during this case that the State was not providing a sound basic education statewide were not findings that the budget was unconstitutional because funding was just one factor working in concert with a host of other, more indicative, statewide factors.

Furthermore, this Court has already determined that it is not necessary to consider the "constitutionality" of the Appropriations Act of 2021 when determining whether the State is providing a sound basic education. *In Leandro I*, this Court stated "[e]ducational goals and standards adopted by the legislature … may be considered on remand to the trial court," but "[t]hey will not be determinative on this issue." *Leandro I*, 346 N.C. at 355, 488 S.E.2d at 259 (1997) (emphasis added). Instead, "output" factors like test scores and other performance indicators "may be more reliable than measurements of 'input' such as per-pupil funding or general educational funding provided by the state." *Id.* at 354-355, 488 S.E.2d at 260.

Intervenor Defendants cite these same holdings from *Leandro I* for the proposition that one factor (funding) will not provide a sound basic education. Their argument, however, muddies the distinction here between the budget as a non-determinative factor for a trial court to consider when determining whether the State is providing a sound basic education (a determination that has already been made), and funding necessary to support a targeted, remedial plan that was already proposed by the State and adopted by the trial court. In short, proceedings in this case are not about the budget (which is why a challenge to the budget is nonsensical). Proceedings in this case are now about implementing the State's Plan to remedy a constitutional violation.

Intervenor Defendants' arguments only succeed in creating a problematic contradiction for them. On the one hand, Intervenor Defendants argue that the Appropriations Act of 2021 has not been challenged and that the such a challenge was required in order to determine whether the State is meeting its obligations to provide a sound basic education (which is, as shown above, incorrect); and on the other hand, Intervenor Defendants argue that the current proceedings must be a challenge to the budget as it is the only basis on which they have a right to intervene.

CONCLUSION

When the arguments before this Court are distilled, and issues not properly before the Court are set aside, this matter condenses into a fundamental question suited for this Court and this Court alone to determine. It is a question that the Court itself posed twenty years ago: "Assuring that our children are afforded the chance to become contributing, constructive members of society is paramount. Whether the State meets this challenge remains to be determined." *Leandro II*, 358 N.C. at 649, 599 S.E.2d at 397. The answer must be that this Court has the authority to protect the fundamental rights of children set out in our Constitution after 17 years of failed attempts by the State and, now, General Assembly recalcitrance.

Respectfully submitted, this the 12th day of August 2022.

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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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