

SUPREME COURT OF NORTH CAROLINA

HOKE COUNTY BOARD OF)
EDUCATION, *et al.*,)
Plaintiffs-Appellees,)
))
and)
))
CHARLOTTE-MECKLENBURG BOARD)
OF EDUCATION,)
Plaintiff Intervenor-Appellee,)
))
and)
))
RAFAEL PENN, *et al.*,)
Plaintiff Intervenors-Appellees,)
))
v.)
))
STATE OF NORTH CAROLINA,)
Defendant-Appellant,)
))
and)
))
STATE BOARD OF EDUCATION,)
Defendant-Appellee,)
))
and)
))
CHARLOTTE-MECKLENBURG BOARD)
OF EDUCATION,)
Realigned Defendant-Appellee,)
))
and)
))
PHILIP E. BERGER, in his official capacity)
as President *Pro Tempore* of the North)

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

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

PLAINTIFFS-APPELLEES’ RESPONSE TO DEFENDANT-APPELLANT STATE OF
NORTH CAROLINA’S PETITION FOR DISCRETIONARY REVIEW PRIOR TO A
DETERMINATION BY THE NORTH CAROLINA COURT OF APPEALS
(Filed 23 February 2022)

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Plaintiffs-Appellees Hoke County Board of Education, Halifax County Board of Education, Robeson County Board of Education, Cumberland County Board of Education, and Vance County Board of Education (collectively, “Plaintiffs”) agree that this Court should certify this matter for bypass review, as requested by the Defendant-Appellant State of North Carolina. In the event the bypass request is granted, Plaintiffs further agree with the State—in light of the substantial overlap of factual and legal issues —that this appeal and Plaintiffs’ related appeal (No. 425A21) should be consolidated under Rule of Appellate Procedure 40.

To avoid unnecessary duplication, Plaintiffs do not repeat the arguments advanced by the State in support of bypass review and consolidation. Rather, Plaintiffs respectfully elaborate on two points that they are uniquely situated to address. Plaintiffs also identify, pursuant to Rule of Appellate Procedure 15(d), additional issues to be briefed in the event bypass review is granted.

I. IMMEDIATE AND FINAL ANSWERS TO CRITICAL CONSTITUTIONAL QUESTIONS ARE NECESSARY TO PREVENT CONTINUING IRREPARABLE AND SUBSTANTIAL HARM TO NORTH CAROLINA CHILDREN.

There are few, if any, cases that so directly affect the foundations of our civic life, liberty and welfare, and it is difficult to imagine a more apt case for bypass review. This Court—the highest Court in the State charged with the responsibility of safeguarding the constitutional rights of North Carolina citizens, young and old—is the appropriate forum to answer the questions of paramount constitutional significance that remain in this case.

This Court previously recognized this when it granted the parties' joint request for bypass discretionary review earlier in this litigation, which led to the *Leandro II* decision. In that unanimous decision, this Court agreed that the subject matter of this case “concerns an issue of significant, if not paramount, public interest” and noted that “[t]he children of North Carolina are our state’s most valuable renewable resource.” *Hoke Cnty. Bd. of Educ. v. State*, 358 N.C. 605, 615-16, 599 S.E.2d 365, 377 (2004) (“*Leandro II*”). “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....*” *Id.* (emphasis added). That message rings true today but with increasing amplification. Without immediate review by this Court, substantial harm to children will continue unabated.

The harm is real and irreparable. Today, the State of North Carolina continues to deny inordinate numbers of children in Plaintiff districts and beyond their fundamental constitutional right to obtain a sound basic education. In its recent Petition, the State acknowledges the alarming and “undisputed” fact that “*hundreds of thousands of North Carolina children* continue to be denied the opportunity for a sound basic education.” See Petition at 19 (emphasis added).

This admission is consistent with the trial court’s previous orders (which were not appealed) finding 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 pp 1244-45) and the State’s evidence is “wholly inadequate to demonstrate ... substantial compliance with the constitutional mandate of *Leandro* measured by the applicable educational standards” (R p 1304).

The State has repeatedly and unequivocally admitted to its continuing violation of the Constitution. See, e.g., R pp 1634, 1646 (State acknowledging 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 (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 (“North Carolina’s PreK-12 education system leaves too many students behind, especially students of color and economically

disadvantaged students. As a result, thousands of students are not being prepared for full participation in the global, interconnected economy and the society in which they will live, work, and engage as citizens.”); R p 1772 (acknowledging “that additional actions are required” to remedy the constitutional violations).

For more than two decades, the Plaintiff parties have sought legal redress for these established constitutional violations. During that time, countless students were failed by the State and wrongfully denied what the Constitution promised them. There is only a limited amount of time remaining to address the rights of the children currently in our schools before they leave the public education system. Each academic year that passes, thousands of students drop out or age out, unprepared to “function in a complex and rapidly changing society,” to “make informed choices with regard to issues that affect . . . [their] community, state, and nation,” to “successfully engage in post-secondary education or vocational training,” or to “compete on an equal basis with others in further formal education or gainful employment in contemporary society.” *Leandro v. State*, 346 N.C. 336, 347, 488 S.E.2d 249, 255 (1997).

The Constitution is the supreme law of the land. Among the rights guaranteed to the citizens, the right to education is uniquely valued in the Declaration of Rights, which this Court has recognized as having “primacy...in the minds of the framers.” *Corum v. University of North Carolina*, 330 N.C. 761, 782, 413

S.E.2d 276, 290 (1992). Plaintiffs respectfully submit that the children have waited long enough to have their constitutional rights vindicated. Final, dispositive answers to the remaining critical constitutional questions in this case are needed now so that we do not “imperil even one more class unnecessarily.” *Leandro II*, 358 N.C. at 616, 599 S.E.2d at 377.

II. BYPASS REVIEW AND CONSOLIDATION SERVE JUDICIAL ECONOMY AND WILL SAVE PLAINTIFF DISTRICT’S SCARCE RESOURCES.

Plaintiffs, who are among the poorest districts in North Carolina, have pursued this litigation to vindicate the constitutional rights of North Carolina children with scarce and limited resources that are needed within their districts to educate children. The granting of a bypass petition will save these local school districts additional and duplicative appellate expenses.

Moreover, North Carolina taxpayers will be forced to shoulder the State’s costs and fees associated with the prosecution of these appeals, as well as the additional costs and private-counsel legal fees incurred by Senator Philip Berger and Representative Timothy Moore (represented by their private lawyers) and State Controller Linda Combs (represented by yet another private lawyer). Certification of a discretionary bypass and the consolidation of the appeals will save the taxpayers additional and duplicative appellate expenses.

ISSUES TO BE BRIEFED

In addition to those raised by other litigants in this case, Plaintiffs identify the following issues pursuant to Rule of Appellate Procedure 15(d):

1. Whether the General Assembly's authority to appropriate funds pursuant to Article V, § 7 of the North Carolina Constitution overrides and renders meaningless the constitutional right to a sound basic education under Article I, § 15 and Article IX, § 2?
2. Whether the judiciary has the express and/or inherent authority to order a remedy for established constitutional violations that have persisted for over seventeen (17) years where the State has failed to act and, if so, what specific remedies may the judiciary order?
3. Whether the State's obligations under the North Carolina Constitution to provide for a "general and uniform system of free public schools" that affords all students the opportunity for a sound basic education is unenforceable and therefore meaningless when the General Assembly refuses to appropriate the funds necessary to do so?
4. 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"?

Only this Court can provide the final answers to these critical questions about the role and power of the judiciary in addressing and correcting established (and continuing) constitutional violations. These answers will determine whether this Court's previous unanimous decisions in *Leandro I* and *Leandro II*, and indeed the rights enumerated in Articles I and IX of our Constitution, have any real meaning or whether they ring hollow. They will determine whether the courts of North Carolina may meaningfully enforce a fundamental constitutional right or if they are

subservient to the will of the General Assembly. And, they will determine whether our State's "most valuable renewable resource" will be preserved by our tri-partite system of government, or destroyed by it. *Leandro*, 358 N.C. at 616, 599 S.E.2d at 377. Review of these critical issues by this Court is urgently needed to resolve these constitutional questions of paramount importance.

This the 24th day of February 2022.

Electronically Submitted

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

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CERTIFICATE OF SERVICE

I hereby certify that on 24 February 2022 the foregoing was served upon the parties by electronic mail and US Mail addressed as follows:

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