No. 425A21-2 TENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

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

and

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

and

RAFAEL PENN, CHARLOTTE-MECKLENBURG BRANCH OF THE STATE CONFERENCE OF THE NAACP *et al.*,
Plaintiffs-Intervenors-Appellees,

v.

STATE OF NORTH CAROLINA,
Defendant-Appellee,

And

THE STATE BOARD OF EDUCATION
Defendant-Appellee,

and

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION
Realigned Defendant-Appellee,

and

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

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

Intervenor Defendants-Appellants.

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LEGISLATIVE-INTERVENORS' APPELLEE BRIEF

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LEGISLATIVE-INTERVENORS' APPELLEE BRIEF

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ISSUES PRESENTED

1. Did the trial court violate the separation of powers, reflected in Article I, section 6 of the North Carolina State Constitution, by purporting to exercise legislative powers that are entrusted exclusively to the General Assembly?

2. Did the trial court err by issuing a statewide "remedy," in the form of Plaintiffs' proposed Comprehensive Remedial Plan, despite this Court's express instruction in *Leandro II* that the only judgment—and any mandates that flow from it—must be limited to just Hoke County?

3. Did the trial court err by entering a statewide judgment based on a supposed statewide constitutional violation that was never asserted, never made the subject of a judgment, and on which there was never any evidence submitted at trial?

4. Did the trial court's 10 November 2021 Order violate the Appropriations Clause of the North Carolina State Constitution, N.C. Const. art V, § 7, by purporting to issue orders directing State officials pay moneys out of the Treasury without a legislative appropriation?

5. Did the trial court err by refusing to presume that the measures adopted in the 2021 Appropriations Act—which is an act of the General Assembly—were constitutional and sufficient to provide children a sound basic education?

6. Did the trial court apply the wrong standard when assessing the constitutionality of the 2021 Appropriations Act, by judging it not against the constitutional standards for a sound basic education set forth in *Leandro I* and *II*, but instead by whether it funded the individual measures Plaintiffs had requested through the Comprehensive Remedial Plan?

7. Did the trial court err by concluding that each of the at least 146 actions in the Comprehensive Remedial Plan was necessary to remedy alleged violations of the State's obligation to provide children a sound basic education and that no alternatives to those proposals existed?

INTRODUCTION

In the eighteen years since *Leandro II*,[1] Plaintiffs, Plaintiff-Intervenors,[2] and now the Department of Justice ("DOJ"),[3] have distorted this Court's unanimous decision, which unambiguously held: "***[B]ecause the only trial was "premised on evidence as it pertains to Hoke County[,]. . . our holding mandates cannot be construed to extend to the other four rural school districts named in the complaint***." 358 N.C. at 614, 599 S.E.2d at 376, n. 5 (referencing to the plaintiff school districts from Cumberland, Halifax, Robeson, and Vance Counties) (emphasis added).

The Court grounded this limitation not only in judicial restraint, but also the fundamental notion that Plaintiffs must first prove their claims and establish the violation of a constitutional right before they can invoke the court's power to provide a remedy. As *Leandro I* and *II* both explained: ""The courts of this State must grant every reasonable deference to the legislative and executive branches when

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1 *Hoke Cnty. Bd. of Educ. v. State*, 358 N.C. 605, 645, 599 S.E.2d 365, 395 (2004) ("*Leandro II*").

2 For simplicity, this brief refers to Plaintiffs and Plaintiffs-Intervenors collectively as "Plaintiffs" unless otherwise indicated. Capitalized terms not otherwise defined in this brief have the same meaning as in Legislative-Intervenors' Appellant Brief, filed on 1 July 2022.

3 For clarity, Legislative-Intervenors refer to the Executive-Branch agencies represented by the DOJ collectively as "DOJ" rather than "the State." Legislative-Intervenors have intervened pursuant to statutes which provide that, in any action challenging an act of the General Assembly, "both the General Assembly and the Governor constitute the State of North Carolina." *See* N.C. Gen. Stat. § 1-72.2(a). Accordingly, DOJ alone does not represent the State in this matter. Similarly, it does not represent the whole of the Executive Branch, as the Controller—an executive branch official—has intervened separately to oppose the DOJ's position.

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[,]'" and "'a clear showing to the contrary must be made before the courts may conclude that they have not.'" *Id.* 358 N.C. at 622-23, 599 S.E.2d at 381; (quoting *Leandro v. State*, 346 N.C. 336, 357, 488 S.E.2d 249, 261(1997) ("*Leandro I*")). This is because "***[o]nly such a clear showing will justify a judicial intrusion into an area so clearly the province, initially at least, of the legislative and executive branches*** as the determination of what course of action will lead to a sound basic education." *Id.* (emphasis added).

Yet, undaunted by the plain language of this Court's decision, Plaintiffs have persistently tried to recast *Leandro II* as establishing a statewide violation to secure relief that is broader than the judgment they actually obtained.

Worse, Plaintiffs have selectively quoted this Court's decision in *Leandro II* to subsequent trial court judges assigned to the case (along with cherry-picked passages from various, interlocutory procedural orders) in order to claim (i) that *Leandro II* established a statewide violation of the right to a sound basic education and (ii) that this supposed "violation" has persisted for more than two decades.[4] Even before this Court—which issued the decision in *Leandro II*—Plaintiffs argue:

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[4] *See, e.g.*, Plaintiffs-Intervenors' Appellant Br. at 1 ("For 18 years since this Court's unanimous liability ruling in *Leandro II* in 2004, Plaintiffs and Plaintiff-Intervenor families and school districts have waited for a remedy to the State's ongoing constitutional deprivation of a sound basic education.") and at 10 ("Following a trial on the merits, in *Leandro II*, the Supreme Court concluded that the State had 'failed in [its] constitutional duty to provide . . . students with the opportunity to provide a sound basic education")).

> There is also no longer a question in this case that the State has violated—and continues to violate—the Constitution by denying children across North Carolina this fundamental right. In 2004, Justice Orr, again on behalf of this unanimous Court, answered that question and affirmed the trial court's finding that the State is failing to provide students with the opportunity to obtain a sound basic education, particularly to those children at-risk of academic failure.

(Plaintiffs-Appellants' Br. at 3).

Not so—as *Leandro II* makes clear:

> In sum, the trial court found that the State's general curriculum, teacher certifying standards, funding allocation systems, and education accountability standards met the basic requirements for providing students with an opportunity to receive a sound basic education. ***As a consequence, the trial court concluded that "the bulk of the core' of the State's 'Educational Delivery System is sound, valid and meets the constitutional standards enumerated by Leandro."***

358 N.C. at 632, 599 S.E.2d at 386 (emphasis added). Indeed, *Leandro II* "note[d] that the trial court went to great lengths in its efforts to convey its view that the evidence offered no definitive showing that the State's overall funding, resources, and programs scheme lacked the essentials necessary to provide a sound basic education." *Id.* 358 N.C. at 634, 599 S.E.2d at 388.

Try as they might, Plaintiffs and DOJ cannot change the fact that this Court did not find a statewide violation in *Leandro II*, but instead expressly limited its decisions, and any mandates flowing from it, to Hoke County. Indeed, the Court made that limitation clear throughout its opinion:

> [W]e hold that the trial court properly concluded that the evidence demonstrates that over the past decade, an

> inordinate number of ***Hoke County students*** have consistently failed to match the academic performance of their ***statewide public school counterparts***[5] . . . . As a consequence of so holding, we turn our attention to 'inputs' evidence—evidence concerning what the State and its agents have provided for the education of ***Hoke County students***—in an effort to determine the following two contingencies: (1) Does the evidence support the trial court's conclusion that the State's action and/or inaction has caused *Hoke County students* not to obtain a sound basic education and, if so; (2) Does such action and/or inaction by the State constitute a failure to meet its constitutional obligation to provide ***Hoke County students*** with the opportunity to obtain a sound basic education, as defined in Leandro?

Id. 358 N.C. at 630–31, 599 S.E.2d at 386 (emphasis added).

> [W]e must limit our review of the trial court's order to its conclusions concerning 'at-risk' students, we cannot and do not offer any opinion as to whether non 'at-risk' students in Hoke County are either obtaining a sound basic education or being afforded their rightful opportunity by the State to obtain such an education. ***In confining the parameters of our holding to the trial court's findings and conclusions concerning 'at-risk' students within the Hoke County school system***, we turn our attention back to the trial court's evidentiary findings and conclusions relating to whether the State has adequately provided for ***Hoke County schools***.

Id. 358 N.C. at 634, 599 S.E.2d at 388 (emphasis added).

> [W]e affirm those portions of the trial court's order that conclude that there has been a clear showing of a denial of the established right of ***Hoke County students*** to gain their opportunity for a sound basic education and those portions of the order that require the State to assess its education-related allocations to ***the county's*** schools so as

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[5] That the trial court used statewide performance as a benchmark against which to examine whether students in Hoke County were receiving a sound basic education further underscores that it found no statewide violation and suggests that the State was providing the opportunity for a sound basic education at a statewide level.

> to correct any deficiencies that presently prevent the county from offering its students the opportunity to obtain a Leandro-conforming education.

Id. 358 N.C. 605, 638, 599 S.E.2d 365, 391 (emphasis added). Other decisions from this court have similarly recognized that the judgment in *Leandro II* was limited to Hoke County. *Silver v. Halifax Cnty. Bd. of Commissioners*, 371 N.C. 855, 865, 821 S.E.2d 755, 762 (2018) (referring to *Leandro II* as limited to the State "not providing a sound basic education to *Hoke County students*" (emphasis added)).

And while Plaintiffs and DOJ argue there have been many "evidentiary hearings," "status conferences," and "compliance hearings" since *Leandro II*,[6] there has never been a trial on the conditions in any other school district other than Hoke County.[7] And there certainly has never been a judgment entered in accordance with the Rules of Civil Procedure finding the existence of a statewide violation—a conclusion that would be contrary to this Court's decision in *Leandro II*. Indeed, Plaintiffs have repeatedly characterized the trial court's hearings following *Leandro*

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[6] In at least one notice of hearing, issued in March 2005, Judge Manning explained, in response to requests from Plaintiff-Intervenors, that he intended the purpose of the hearing to be "***informational, not adversarial in nature***." (R p 985) (emphasis in original).

[7] At approximately 1:20 p.m. on the date this brief was filed (and the date all parties' appellee briefs were due), Plaintiffs filed a supplement to the record on appeal adding a "Consent Order" dated 6 May 2009, which states that a majority of students in Halifax County Public Schools were not receiving an opportunity for a sound basic education and directs Halifax County Schools to comply with certain directives of the State Board of Education. (R p 3569-74). Even assuming that this newly-introduced order constitutes a proper judgment, the record remains devoid of any basis upon which to conclude that any statewide constitutional violation has been established through adversarial evidentiary proceedings. Plaintiffs' inability to provide the Court with any order other than the one limited to Halifax County in 2009 bolsters this fact.

II, not as pretrial hearings on pending claims, but as post-judgment proceedings held during a "remedial phase" designed to secure compliance with the judgment affirmed in *Leandro II*.

Thus, when pressed, Plaintiffs do not argue that they have proven a statewide violation through clear and convincing evidence, as *Leandro II* requires. Nor do they allege they conducted the trial(s) about the conditions in other school districts for which this case was remanded in 2004. Instead, they point to a consent judgment exclusive to Halifax County and argue that "the State" (represented by DOJ and the Executive Branch agencies that stand to receive additional appropriations under the CRP) "has admitted—repeatedly and unequivocally—that hundreds of thousands of children are still not receiving a *Leandro*-compliant educational opportunity." (Plaintiffs-Appellants' Br. at 4). They then try to shield the resulting error from review by erroneously arguing the various interlocutory orders that led up to, and were expressly incorporated within, the trial court's 10 November 2021 Order, are "law of the case"—an argument that is especially ironic given Plaintiffs' refusal to recognize the limitations imposed by *Leandro II*, *which is law of the case*.

In other words, Plaintiffs hope to make an end-run around the legislative process—capitalizing on the Executive Branch's cooperation and the lack of any genuine adversarial proceedings in the years since Judge Manning's retirement to wrest control of the State's education system from the people and their representatives so they can dictate how North Carolina's public school system will be administered and funded through judicial orders.

No doubt, Plaintiffs mean to do good. Indeed, Legislative-Intervenors do not doubt that Plaintiffs sincerely believe the Comprehensive Remedial Plan ("CRP") they developed in cooperation with the Executive Branch is a "good plan." (Plaintiffs-Intervenors' Appellants Br. at 3). That does not entitle them, however, to an exemption from the legislative process or to substitute their judgment for that of the people's elected representatives. Nor does it entitle them to spend public money without an appropriation as required under the Appropriations Clause found in Article V, Section 7 of the State Constitution.

As set forth in Legislative-Intervenors' opening brief, that there has never been a violation established outside Hoke County (with the possible exception of a consent judgment related to Halifax County)—and that the only judgment following a trial this case held the "bulk of the core" of the State's educational system was sufficient to "meet[] the constitutional standards enumerated in *Leandro*"—has several consequences for this appeal:

First, it means that the trial court had no basis to impose a statewide remedy, and thus erred both by ordering the State both to implement the CRP and directing it to transfer funds from the Treasury to pay for it. Accordingly, the Court should not have to decide whether the judiciary might have the authority under the Constitution to order such sweeping and specific remedies if it were presented with a case in which a statewide violation had been proven. Instead, this appeal can, and should be, decided on narrower grounds.

Second, it means that the State Budget—which the Governor signed just eight days after the trial court's 10 November 2021 Order—must be treated as presumptively constitutional. At this time, no party has challenged the State Budget, much less shown through clear and convincing evidence that it is somehow insufficient to meet the State's obligation to provide North Carolina's children with a sound basic education. Thus, Judge Robinson erred on remand by measuring the constitutionality of the State Budget against the action items in the CRP (*i.e.*, Plaintiff's chosen remedy), rather than the requirements of the State Constitution under *Leandro I* and *II*. Properly considering the effect of the State Budget on the "nature and extent" of the relief granted in the November 10 Order, required Judge Robinson to vacate the entire order so that Plaintiffs could bring a claim based on any alleged deficiencies in State Budget if they wished to do so.

Third, the lack of a statewide violation renders the trial court's effort to prescribe a remedy—and thus answer what steps the State should take to improve North Carolina's public school system—a mere advisory opinion about political questions that our State Constitution reserves, "initially at least," for the Legislative and Executive Branches.

Put simply, even as amended on remand, the trial court's order constitutes error. While removing the so-called "transfer provisions" in the November 10 Order and replacing them with a judgment ensured the order complied with the requirements of the Appropriations Clause, it did not cure the order's fundamental defects. The order still rests on the mistaken assumption that *Leandro II* established

a statewide violation of the right to a sound basic education, and that Plaintiffs have been left waiting for the court to remedy that violation for two decades.[8] Everything else in the order flows from that erroneous conclusion.

For these reasons, the November 10 Order, even as amended by Judge Robinson's order of 26 April 2022, should be vacated in its entirety. Likewise, Plaintiffs' and DOJ's requests to reinstate the November 10 Order's "transfer provisions" should be denied.

I. THE ABSENCE OF A STATEWIDE VIOLATION MEANS THE COURT SHOULD NOT REACH CONSTITUTIONAL QUESTIONS ABOUT THE JUDICIARY'S POWER TO ORDER THE CRP OR DIRECT THE EXPENDITURE OF STATE FUNDS.

Because Plaintiffs have never established a statewide violation or violation outside Hoke County, the Court need not and should not decide whether our State Constitution allows the judiciary to order the State to implement the CRP or issue injunctions purporting to direct the use of State funds to pay for it. The Court should instead decide this case on narrower grounds, without having to reach fundamental questions about the extent of the judiciary's remedial powers under our State Constitution.

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[8] *Compare* November 10 Order, Finding of Fact ¶ 1 (R p 1825 ("In its unanimous opinion in *Leandro II*, the Supreme Court held, 'an inordinate number' of students had failed to obtain a sound basic education and that the State had 'failed in [its] constitutional duty to provide such students with the opportunity to obtain a sound basic education.")) *with Leandro II*, 358 N.C. at 647, 599 S.E.2d at 396 (affirming "the trial court's conclusion that plaintiffs have made a clear showing that an inordinate number of students in *Hoke County* are failing to obtain a sound basic education and that defendants have failed in their constitutional duty to provide *such students* with the opportunity to obtain a sound basic education) (emphasis added).

Although DOJ—in a remarkable understatement—describes the trial court's November 10 Order and its transfer provisions as merely "atypical," (DOJ Br p 18), *amicus* at least acknowledge that imposing such a remedy would require the exercise of authority at the "constitutional limits of the judicial power." (Br of NC Justice Center at 3). In truth, the November 10 Order represents an unprecedented exercise of legislative power by the judicial branch—one that contravenes the text of the Appropriations Clause as well as this Court's unbroken line of decisions which hold that "appropriating money from the State treasury is a power vested *exclusively in the legislative branch*." *Cooper v. Berger*, 376 N.C. 22, 47, 852 S.E.2d 46, 64 (2020) (Ervin, J.) (quoting *Richmond Cty. Bd. of Educ. v. Cowell*, 254 N.C. App. 422, 423, 803 S.E.2d 27, 29 (2017)) (emphasis added).

Reinstating the November 10 Order's transfer provisions would require the Court not only to break with precedent, but also to breach the outer bounds of the judiciary's power under our State Constitution.

But the Court need not go there. As discussed above, this Court made clear in *Leandro I* and *II* that plaintiffs must prove a violation by clear and convincing evidence before they are entitled to a remedy because, "'Only such a showing will justify judicial intrusion into an area so clearly the province, *initially* at least, of the legislative and executive branches.'" *Leandro II*, 358 N.C. at 623, 599 S.E.2d at 365 (quoting *Leandro I* 346 N.C. at 357, 488 S.E.2d at 261). Other decisions similarly require plaintiffs to establish a constitutional violation *before* the Court considers the extent of its inherent power to fashion a remedy. *See Deminski on behalf of C.E.D. v.*

State Bd. of Educ., 2021-NCSC-58, ¶ 16, 377 N.C. 406, 413, 858 S.E.2d 788, 793 ("First, to allege a cause of action under the North Carolina Constitution, a state actor must have violated an individual's constitutional rights."); *see also*, *Corum v. Univ. of N. Carolina*, 330 N.C. 761, 784, 413 S.E.2d 276, 290 (1992) (providing that "what [a] remedy will require will depend on the *facts of the case developed at trial*" (emphasis added)).

This appeal thus provides no opportunity to decide whether the judiciary might have the power to overcome the Appropriations Clause in a case where a statewide violation had been properly established. "Appellate courts must 'avoid constitutional questions, even if properly presented, where a case may be resolved on other grounds.'" *James v. Bartlett*, 359 N.C. 260, 266, 607 S.E.2d 638, 642 (2005) (quoting *Anderson v. Assimos,* 356 N.C. 415, 416, 572 S.E.2d 101, 102 (2002)); *see also Union Carbide Corp. v. Davis,* 253 N.C. 324, 327, 116 S.E.2d 792, 794 (1960) ("Courts must pass on constitutional questions when, but only when, they are squarely presented and necessary to the disposition of a matter then pending and at issue."); *State v. Muse,* 219 N.C. 226, 227, 13 S.E.2d 229, 229 (1941) (an appellate court will not decide a constitutional question "unless it is properly presented, and will not decide such a question even then when the appeal may be properly determined on a question of less moment."). This rule is, itself, an exercise in judicial restraint and reflects a desire to respect the role of the political branches within the Separation of Powers. *See id.*

In order to resolve this case, the Court needs only to enforce the plain language of its decision in *Leandro II*, which expressly held that any mandates resulting from

the court's judgment could not extend beyond Hoke County. There is no reason to go further and answer previously unaddressed questions about the outer reaches of the judiciary's remedial powers under the State Constitution.

II. PLAINTIFFS MISAPPLY THE "LAW OF THE CASE"

Plaintiffs implicitly concede they have never sought to try their claims for any school district other than Hoke County, even though *Leandro II* remanded the case for exactly that purpose. Yet they insist this Court must accept the existence of a statewide violation as established fact because statements they included in various proposed, interlocutory orders that the trial court ultimately adopted were not appealed and therefore have supposedly become "law of the case." This contention misapplies the law of the case doctrine and misstates the decisions from this Court that do constitute the law of this case.

A. Interlocutory Trial Court Orders Leading Up to, and Incorporated in the November 10 Order Are Not "Law of the Case"

In their brief, Plaintiffs cite three, interlocutory orders that they now contend are "law of the case": (1) a "Notice of Hearing and Order Re: Hearing" issued by Judge Manning on 17 March 2015; (2) an order denying the State Board of Education's motion to dismiss pursuant to Rule 12 and for relief from the Court's judgment under Rule 60, entered by Judge Lee on 13 March 2018; and (3) the an "Order Regarding the Need for Remedial, Systematic, Actions for the Achievement of *Leandro* Compliance" dated January 21, 2020, in which the court ordered the Plaintiffs and

DOJ to develop and present what became the Comprehensive Remedial Plan. (Plaintiffs-Appellants' Br. at 3-4).

None of these orders, however, actually constitutes "law of the case."

First, the law-of-the-case doctrine applies only to decisions by our appellate courts. "[A]s a general rule when an *appellate court* passes on a question and remands the cause for further proceedings, the questions there settled become the law of the case, both in subsequent proceedings in the trial court and on subsequent appeal, *provided the same facts and the same questions* which were determined in the previous appeal are involved in the second appeal." *State v. Lewis*, 365 N.C. 488, 504–05, 724 S.E.2d 492, 503 (2012) (emphasis added) (quoting *Hayes v. City of Wilmington,* 243 N.C. 525, 536, 91 S.E.2d 673, 681–82 (1956)). Thus, the trial court orders at issue are not law of the case.

Further, even assuming that there may be some circumstances in which trial court orders (that issue final judgments) might become "law of the case," the doctrine does not apply to interlocutory orders issued in ongoing proceedings to determine a final remedy. *See* Wright & Miller Fed. Prac. & Proc. § 3915.4 (2d ed.) ("Courts should adhere to a simple rule in almost all circumstances: orders made in ongoing proceedings to determine the final remedy are not final."); *Veazey v. Durham,* 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950) ("An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy.").

And while Plaintiffs try to make much of the fact that various orders were "not appealed," interlocutory orders are generally not subject to appeal absent limited exceptions. *See Sharpe v. Worland,* 351 N.C. 159, 161, 522 S.E.2d 577, 578 (1999). Even where those exceptions apply, an appeal from an interlocutory order is "permissive not mandatory," and a party's decision not appeal does not result in waiver of its right to seek review once a final judgment is entered. *Atl. Coast Mech., Inc. v. Arcadis, Geraghty & Miller of N. Carolina., Inc.*, 175 N.C. App. 339, 342, 623 S.E.2d 334, 337 (2006) ("Plaintiffs did not waive its right to appeal after the entry of a final judgment by foregoing an interlocutory appeal"); *DOT v. Rowe*, 351 N.C. 172, 176, 521 S.E.2d 707, 710 (1999) ("[W]here a party is entitled to an interlocutory appeal based on a substantial right, that party may appeal but is not required to do so"). The orders Plaintiffs cite in their brief to establish the supposed existence of a statewide violation are all interlocutory.

First, Plaintiffs cite a 17 March 2015 order, in which they contend that the trial court:

> annually reviewed the academic performance of every school in North Carolina from 2004-2015, as well as teacher and principal data and programmatic resources available to at-risk students, and issued an order in 2015 finding and concluding, "in way too many school districts across the state [ ] thousands of children in the public schools have failed to obtain and are not now obtaining a sound basic education as defined by and required by the *Leandro* decisions."

(Plaintiffs-Appellants' Br. at 3-4 (citing R p 1257)). But that order was not a judgment; it was a notice of hearing. (R p 1244). What is more, Plaintiffs

mischaracterize the quoted passage, which did not reflect a finding or conclusion. Instead, the order summoned the parties to a hearing on 8 April 2015 and stated that the "purpose of this hearing" is to "*review the results of the 2013-14 EOC, EOG and ACT tests from the public schools of North Carolina, which indicate* in way too many school districts across the state that thousands of children in the public schools have failed to obtain and are not now obtaining a sound basic education as defined by and required by the *Leandro* decisions." (R. 1256-57) (emphasis added to language Plaintiffs omitted)). Thus, the quoted language only identifies a question that Judge Manning wanted to investigate and refers to only a single piece of evidence; it was not a finding of fact or conclusion of law following a trial or a proper evidentiary hearing. *See* 5 Am. Jur. 2d Appellate Review § 522 (explaining that law of the case applies only when "there was a hearing on the merits").

Despite this, Plaintiffs and DOJ repackaged this quote from Judge Manning's March 2015 Notice of Hearing into the draft of the November 10 Order that they presented to Judge Lee, once again representing that it reflected a "conclusion" reached after an evidentiary hearing:

> For more than a decade, the Court annually reviewed the academic performance of every school in the State, teacher and principal population data, and the programmatic resources made available to at-risk students. This Court concluded from over a decade of undisputed evidence that "in way too many school districts across this state, thousands of children in the public schools have failed to obtain and are not now obtaining a sound basic education as defined and required by the *Leandro* decision."

(R p 1825-26).[9] DOJ likewise cites the same language to this Court on appeal—even though it represents only a question the trial court posed to the parties and not a finding of any sort. (DOJ Br. at 44).

Second, Plaintiffs cite Judge Lee's order on 13 March 2018, in which he denied a motion by the State Board of Education. In that motion, the State Board of Education alternatively sought dismissal of any remaining claims against the State under Rule 12(b)(6) or relief from the judgment in *Leandro II* under Rule 60. (R p 1280, 1285). According to Plaintiffs, the order established that "children across the state are still not receiving the constitutionally required opportunity for a sound basic education." (Plaintiffs-Appellants' Br. at 4).

But it is well established that the denial of a motion to dismiss under Rule 12(b)(6) does not establish any facts. Instead, it is "interlocutory because it simply allows an action to proceed." *Baker v. Lanier Marine Liquidators*, Inc., 187 N.C. App. 711, 717, 654 S.E.2d 41, 46 (2007) (quoting *Howard v. Ocean Trail Convalescent Ctr.*, 68 N.C.App. 494, 495, 315 S.E.2d 97, 99 (1984) ("Denial of a motion to dismiss for failure to state a claim upon which relief can be granted is not a final determination")). Similarly, Plaintiffs fail to explain how denying the State Board of Education's motion for relief from the judgment in *Leandro II* could somehow expand that judgment beyond the limits set by this Court. *Leandro II*, 358 N.C. at 614, 599

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[9] The quote is not even accurate. *Compare id.* ("across this state, thousands . . . ") *with* R. 1256-57 ("across the state *that* thousands" (emphasis added)).

S.E.2d at 376, n. 5 (holding that any mandates resulting from the court's order could not extend to any other plaintiff school district).

Finally, Plaintiffs cite Judge Lee's order on January 21, 2020, in which he received the West Ed Report and ordered the parties to develop a comprehensive remedial plan based on its directives. (See Plaintiffs-Appellants' Br at 4). But that order is necessarily interlocutory. It did not impose a final judgment, nor did it reach a final determination on the merits. Instead, it merely reflected an order "made in ongoing proceedings to determine the final remedy." Wright & Miller Fed. Prac. & Proc. § 3915.4.

Moreover, even if the Court's 21 January 2020 order were not interlocutory, it would still be subject to review by this Court. The November 10 Order expressly incorporated "the findings and conclusions of the Court's prior Orders" that led up to is issuance of the transfer orders. (November 10 Order at n.1 (Rp1825)). This included the court's orders (i) appointing WestEd as the Court's consultant; (ii) requiring the parties to develop the CRP based on WestEd's recommendations; and (iii) directing the State to implement the CRP. (*Id.*) The list of prior orders Judge Lee incorporated into the November 10 Order includes the 21 January 2020 Order cited in Plaintiffs' brief. (*Id.*) Legislative-Intervenors' appealed both the November 10 Order, as amended by the court's 26 April 2022 Order on Remand, as well "all findings, conclusions, directives, and prior related orders incorporated" into those orders. (R 2648). Accordingly, the Court's review properly extends, not only to the November 10 Order, but the series of interlocutory orders that led to its entry and on

which it was necessarily predicated.[10] Indeed, this would be true even if Legislative-Intervenors had not specifically said so in their notice of appeal. *See Nelson v. Hartford Underwriters Ins. Co.*, 177 N.C. App. 595, 604, 630 S.E.2d 221, 228 (2006) (holding that the Court of Appeals could review preceding order when subsequent order "was necessarily predicated, in part, on the factual and legal conclusions reached" in the preceding order).

In sum, Plaintiffs' efforts to declare (without authority) that various interlocutory orders are "law of the case" fails on both the law and the facts. The orders Plaintiffs cite do not represent rulings on the merits of their claims, do not establish the existence of a statewide violation, and similarly do not qualify for status as "law of the case."

B. Plaintiffs Ignore this Court's Decisions in *Leandro I* and *II*, Which *Are* Law of the Case.

Plaintiffs' attempt to use "law of the case" to shield from appellate review various trial court findings that conflict with this Court's decision in *Leandro II* is ironic. Unlike interlocutory orders, appellate decisions are law of the case. *See Hayes v. City of Wilmington, 243 N.C. 525, 536, 91 S.E.2d 673, 681–82 (1956)*; *Transportation, Inc. v. Strick Corp.*, 286 N.C. 235, 239, 210, S.E.2d 181, 183 (1974). Accordingly, this Court has held that when a trial court order on remand fails to

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[10] In the alternative, Legislative-Intervenors request that the Court grant their Conditional Petition for Writ of Certiorari under N.C. R. App. P. 21, which provides that "the writ of certiorari may be issued in appropriate circumstances . . . to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action."

conform with this Court's mandates, the order is "unauthorized and void." *Lea Co. v. N. Carolina Bd. of Transp.,* 323 N.C. 697, 699, 374 S.E.2d 866, 868 (1989) ("'We have held judgments of Superior [C]ourt which were inconsistent and at variance with, contrary to, and modified, corrected, altered or reversed prior mandates of the Supreme Court . . . to be unauthorized and void.'" (quoting *Collins v. Simms*, 257 N.C. 1, 8, 125 S.E.2d 298, 303 (1962))).

Yet, Plaintiffs, in their bid to justify judicial imposition of the CRP, have persistently ignored this Court's findings and directives in *Leandro I* and *II* (1) that the Court's judgment in *Leandro II* was "limited to the issues relating solely to Hoke County as raised at trial," *Leandro II*, 358 N.C. at 613, 599 S.E.2d at 375; (2) that legislative efforts to provide for a sound basic education must be treated as presumptively constitutional absent a "clear showing" to the contrary, *Id.* 358 N.C. at 622–23, 599 S.E.2d at 381; (3) that "the State's overall funding and resource provisions scheme was adequate on a statewide basis," *Id.* 358 N.C. at 637, 599 S.E.2d at 390; (4) that "there will be more than one constitutionally permissible method of solving" the "problems of financing and managing a statewide public school system," *Leandro I*, 346 N.C. at 356, 488 S.E.2d at 260 (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42-43 (1973)); and (5) that the court should refrain from ordering specific remedies, such as the expansion of pre-kindergarten programs unless the evidence establishes that doing so is the "only qualifying means" to meet the requirements for a sound basic education.

Plaintiffs are correct that the law of the case dictates the outcome of this appeal. But *Leandro I* and *Leandro II* compel the opposite of the outcome that Plaintiffs seek. Based on this Court's prior decisions in this case, the November 10 Order constituted error and should be reversed.

C. Judge Robinson Properly Considered the Writ of Prohibition—Which Represented the Controlling Decision of an Appellate Court—In Issuing His Order on Remand.

In their effort to shield as much of the trial court's November 10 Order as possible from appellate review, Plaintiffs and DOJ also make the erroneous argument that Judge Robinson erred by ensuring that his Order on Remand complied with the Court of Appeals' Writ of Prohibition. According to them, Judge Robinson should have limited his review to "the math" and should not have considered the Court of Appeals' binding order enjoining enforcement of the November 10 Order's transfer provisions.

Plaintiffs and DOJ, however, ignore that this Court charged Judge Robinson with doing more than simple mathematical calculations. Instead, it remanded the case to Judge Robinson to determine "what effect, if any, the enactment of the State Budget has upon the ***nature and extent*** of the relief" granted in the November Order. (Order, 18 March 2022 at 2 (emphasis added)). Accordingly, the Court authorized him "to make any necessary findings of fact and conclusions of law and to certify any amended order that it chooses to enter" within thirty days. (*Id.*)

Considering the effect of the State Budget on the "***nature***" of the relief granted in the November 10 Order necessarily required Judge Robinson to consider whether he

had authority, under the Constitution and binding precedent, to order the transfer provisions or whether the order should instead be amended to take the form of a judgment.

Thus, the trial court correctly noted on remand that "[t]he Court of Appeals' 30 November Order has not been overruled or modified and . . . it is binding on the trial court. Accordingly, this court cannot and shall not consider the legal issue of the trial court's authority to order State officers to transfer funds from the State treasury to fund the CRP. Rather, the undersigned believes that this court should, by an amended order, comply with the Court of Appeals' determination." (Order on Remand, pp. 10-11). To do otherwise would have violated the law-of-the-case doctrine and the Court of Appeals' writ of prohibition.

Plaintiffs nevertheless respond that Judge Robinson should have ignored the Court of Appeals' writ of prohibition because it was part of a collateral proceeding that they had already appealed to the Supreme Court. However, that argument gets the analysis backward. Appellate decisions are binding on lower courts, whether or not they are decided in the same case. Appellate decisions are binding on lower courts, whether or not they are decided in the same case. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, *unless it has been overturned by a higher court*."). Decisions by the Court of Appeals also remain binding unless and until they are

overturned—merely seeking review is not enough to stay the effect of the Court of Appeals' decision. *Id.*

Accordingly, the trial court did not err on remand by removing the transfer provisions to comply with the Court of Appeals' binding and ongoing writ of prohibition.

III. THE NOVEMBER 10 ORDER'S "TRANSFER PROVISIONS" VIOLATED THE STATE CONSTITUTION AND SHOULD NOT BE REINSTATED.

Plaintiffs and the DOJ both argue that the Court should reinstate the "transfer provisions" of the trial court's November 10 Order, which purported to require State officials to transfer money out of the State Treasury to fund the CRP and to treat its order "as an appropriation." As explained above, the Court need not, and should not, reach that issue. But even if the Court were to reach the constitutionality of the November 10 Order and its transfer provisions, it should hold the trial court exceeded its authority under the State Constitution and therefore should not be reinstated.

A. The November 10 Order's Transfer Provisions Violate Express Provisions of the State Constitution and the Separation of Powers.

The trial court offered two, interrelated theories to justify the transfer provisions in the November 10 Order. First, it reasoned the Appropriations Clause did not prohibit it from ordering State officials to transfer the funds because "Article I, Section 15 of the North Carolina Constitution represents an ongoing constitutional appropriation of funds" and therefore amounts to an appropriation "made by law." (R p 1836). Second, the trial court reasoned it could order the transfer

as an exercise of its "inherent and equitable powers" to fashion remedies for claims under the State Constitution. (R p 1839). DOJ echoes those same theories in asking this Court to restore the November 10 Order on appeal.

As discussed more fully below, neither theory—nor any of the various arguments DOJ offers to support them—withstands scrutiny.

First, treating the Educational Provisions as "an ongoing constitutional appropriation" would violate other express provisions of the Constitution, as well as this Court's decisions protecting the Separation of Powers. The Appropriations Clause provides that money cannot be distributed from the State Treasury without an appropriation by the General Assembly. *See* N.C. Const. art V, § 7. This Court's decisions likewise hold that the Appropriations Clause prevents the judiciary from ordering state officials to pay money without a legislative appropriation. *See, e.g.*, *Cooper v. Berger*, 376 N.C. 22, 37, 852 S.E.2d 46, 64 (2020) (Ervin, J.). DOJ's arguments misread the Education Provisions and, just as problematically, fail to read those provisions *in pari materia* with the Appropriations Clause and other provisions that establish the process for adopting the State budget and appropriating public money.

Second, the November 10 Order cannot be justified as an exercise of the court's inherent authority. As this Court has held, "[e]ven in the name of its inherent power, the judiciary may not arrogate a duty reserved by the constitution exclusively to another body." *In re Alamance Cnty. Ct. Facilities*, 329 N.C. 84, 99, 405 S.E.2d 125, 132 (1991). Courts therefore cannot use their "inherent authority" to displace the

political branches in the performance of their exclusive duties to make appropriations for matters, such as education, that are unrelated to the functioning of the judiciary.

B. Reinstating the November 10 Order Would Violate the Plain Language of the Appropriations Clause.

Reinstating the November 10 Order would violate the plain language of the Appropriations Clause, which provides: "No money shall be drawn from the State treasury but in consequence of appropriations made by law . . . ." N.C. Const. art V, §7(1).

Although DOJ now argues this language is loose enough to allow the judiciary to order money out of the State Treasury, this Court has consistently held otherwise. Indeed, Justice Ervin reiterated just two years ago that, under the mandatory language of the Appropriations Clause, "appropriating money from the State treasury is a power vested *exclusively in the legislative branch*." *Cooper*, 376 N.C. at 37, 852 S.E.2d at 64 (quoting *Richmond Cnty. Bd. of Educ. v. Cowell*, 254 N.C. App. 422, 423, 803 S.E.2d 27, 29 (2017) (emphasis added)). Putting it even more directly, the Court admonished: "The appropriations clause 'states in language no man can misunderstand that the legislative power is supreme over the public purse.'" *Id. (quoting State v. Davis,* 270 N.C. 1, 14, 153 S.E.2d 749, 758 (1967)); *see also In re Alamance Cty.,* 329 N.C. at 94, 405 S.E.2d at 129 (holding that the Appropriations Clause "prohibits the judiciary from taking public monies without statutory authorization").

This principle serves a critical role in protecting the people's right to Separation of Powers, which itself is part of the Declaration of Rights. *See* N.C. Const.

art I, § 6 ("The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other.") The Appropriations Clause traces its history to North Carolina's original State constitution,[11] ratified in 1776, and is intended to "ensure that the people through their elected representatives in the General Assembly have full and exclusive control over the allocation of the state's expenditures." *Cooper*, 376 N.C. at 37, 852 S.E.2d at 64; John V. Orth & Paul Martin Newby, THE NORTH CAROLINA STATE CONSTITUTION at 154 (2d ed. 2013) (noting that early Americans were "acutely aware of the long struggle between the English Parliament and the Crown over the control of public finance and were determined to secure the power of the purse for their elected representatives"). Indeed, the Court has explained that the "'power of the legislature over the power of the purse is one of the most essential in the system of a government of the people by the people, and its abandonment under any pretext whatever can never be safely allowed.'" *Cooper*, 376 N.C. at 37, 852 S.E.2d at 64 (quoting *White v. Worth*, 126 N.C. 570, 599–600, 36 S.E. 132, 141 (1900) (Clark, J., dissenting)).

As a result, both the text of the Appropriations Clause specifically, and the doctrine of Separation of Powers generally, prevent the judicial branch from ordering

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[11] The North Carolina Constitution of 1776 provided that "the Governor, for the time beings shall have the power to draw for and apply such some of money *as shall be voted by the general assembly*, for the contingencies of government and be accountable to them for the same." N.C. Const. of 1776, § XIX (emphasis added). The current language of the Appropriations Clause comes from the Constitution of 1868, which, like the current version, provided: "No money shall be drawn from the Treasury but in consequence of appropriation made by law . . . ." *See* N.C. Const. of 1868, Art. XIV, § 3.

State officials to transfer money out of the State Treasury. *See State v. Smith,* 289 N.C. 303, 321, 222 S.E.2d 412, 424 (1976)*; Able Outdoor v. Harrelson,* 341 N.C. 167, 172, 459 S.E.2d 626, 629 (1995) (holding that "the Judicial Branch of our State government [does not have] the power to enforce an execution [of a judgment] against the Executive Branch"); *Person v. Bd. of State Tax Comm'rs*, 184 N.C. 499, 115 S.E. 336, 340 (1922); *Garner v. Worth*, 122 N.C. 250, 29 S.E. 364, 365 (1898). This is true even where the violation involves an alleged failure to follow another provision of the constitution. *See Richmond Cty. Bd. of Educ.*, 254 N.C. App. at 426, 803 S.E.2d at 31.

Indeed, in *Richmond County*, the Court of Appeals overturned lower court orders that purported to direct transfers from the State Treasury under circumstances substantially similar to those here. As this Court later explained in adopting *Richmond County's* reasoning, the case holds that "'appropriating money from the State treasury is a power vested exclusively in the legislative branch' and [accordingly] the judicial branch lacked authority to 'order state officials to draw money from the State treasury.'" *Cooper*, 376 N.C. at 47, 376 S.E.2d at 64 (quoting *Richmond Cty. Bd. of Educ.*, 254 N.C. App. at 423, 803 S.E.2d at 29).

Richmond County involved claims by a local school board, alleging that the State (under previous General Assemblies) violated Article IX, section 7, when it used fines from certain criminal offenses to pay for county jails, rather than giving them to the schools as the provision requires. *Id.* 254 N.C. App. at 423, 254 S.E.2d at 29. The School Board prevailed on its claim, and the court entered a judgment in its favor. But by the time the order was entered, the proceeds of the fines had been spent.

Plaintiffs ultimately persuaded the trial court to issue a writ of *mandamus* directing State officials to transfer money out of the Treasury to pay the judgment. *Id.*, 254 N.C. App. at 423, 254 S.E.2d at 30. The Court of Appeals reversed. In doing so the court explained that, while it could enter an injunction requiring the State to return the proceeds of the fines, once they were spent the Appropriations Clause prohibited the court from issuing additional orders directing the transfer of funds out of the State Treasury. *Id.*, 254 N.C. App. at 424, 254 S.E.2d at 30.

Richmond County thus establishes that while the judiciary has the power to find a constitutional violation—and can issue injunctions or monetary judgments to remedy those violations—it cannot order the State to transfer unappropriated funds from the Treasury:

> Under long-standing precedent from our Supreme Court, ***the judicial branch cannot order the State to pay money from the treasury to satisfy this judgment***…. As our Supreme Court explained in a similar case, ***having entered a money judgment against the State, the judiciary has 'performed its function to the limit of its constitutional powers.'*** From here, satisfaction of that money judgment 'will depend upon the manner in which the General Assembly discharges its constitutional duties.'

254 N.C. App. at 424, 803 S.E.2d at 32 (quoting *Smith v. North Carolina*, 289 N.C. 303, 321, 222 S.E.2d at 424 (1976)) (emphasis added); *see also id.* 254 N.C. App. at 429, 222 S.E.2d at 32 ("We have pronounced our judgment. If the other branches of government still ignore it, the remedy lies not with the courts, but at the ballot box.")

The trial court acknowledged both *Richmond County* and *Cooper v. Berger* as binding precedent in the November 10 Order. DOJ similarly cites *Cooper v. Berger* as controlling law in its brief and argues that the Court need not consider *Richmond*

County because it dealt with damages, rather than "prospective relief"—a distinction that does not appear anywhere in the caselaw.

The November 10 Order's transfer provisions, however, directly contravene the plain language of the Appropriations Clause and this Court's unbroken line of decisions holding that the judiciary lacks the power to appropriate funds from the State Treasury. Thus, this Court should not reinstate the transfer provisions.

1. The Framers Did Not Intend the Education Provisions to Serve as a "Constitutional Appropriation."

The trial court reasoned the Appropriations Clause did not bar it from ordering disbursements from the Treasury because Article I, Section 15 could be read as an "ongoing constitutional appropriation" that satisfies the requirement for an appropriation "made by law." (R p 1836). On appeal, DOJ seeks to bolster that argument, contending that such a "constitutional appropriation" arises, not just out of Article I, Section 15, but also a series of other provisions in Article IX that authorize the General Assembly to provide for the public schools and require certain, specific categories of money—such as gifts, fines, and forfeitures—to be used to fund education. (DOJ Br at 29-30).

The problem with DOJ's argument is that neither the text, the structure, nor the history of the Education Provisions show that they were meant to create an exception to the Appropriations Clause. To the contrary, the provisions repeatedly

make clear that, just like all other public money, money for education must be appropriated by the General Assembly before it can be spent.

a. *The Text of the Education Provisions Does Not Create a "Constitutional Appropriation."*

First the text: The only provision the trial court cited in its November 10 Order was Article I, Section 15. But that section does not mention appropriations. Instead, it provides: "The people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right." N.C. Const. art. I, § 15. While DOJ may be correct that "one meaning" of the word "maintain" may be "[t]o support financially," (DOJ Br. at 29 (citing Black's Law Dictionary (2019)), that does not mean the drafters meant the Article I, Section 15 to create an exception to the Appropriations Clause.[12]

The other sections DOJ cites do not show an intent to create an exception to the Appropriations Clause either.

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[12] Nor is there any evidence that the word "maintain" was necessarily intended to mean financial support. DOJ relies on the modern version of *Black's Law Dictionary* for that definition and, even then, has to resort to the *fifth entry* to support its argument. *See Maintain*, *Black's Law Dictionary* (11th Ed. 2019). The first four entries make no mention of financial support, but instead define "maintain" to mean "1. to continue (something"); "2. to continue in possession"; "3. To assert (a position or opinion"; or "4. to care for (property)." *Id.*

The contemporary dictionaries DOJ cites from the 1860s are similar, and do not define "maintain" to mean "to support the expense of" or "to bear the expense of" until the fourth entry. *See Maintain*, *Webster's American Dictionary of the English Language* (1862); *Maintain*, *A Dictionary of the English Language* (1865). Those dictionaries show that word "maintain" was more commonly defined as "1. to hold, preserve, or keep in any particular condition"; or "2. To . . . . not lose or surrender." *See Maintain*, *Webster's American Dictionary of the English Language* (1862).

Article IX, Section 6 requires the State to use "[t]he proceeds of all lands," gifts, and other enumerated categories of property given to the State to be used "for the purposes of public education." N.C. Const. art IX, § 6. The clause also states that those proceeds "shall be paid into the State Treasury," and "*shall be faithfully appropriated* and used exclusively for establishing and maintaining a uniform system of free public schools." *Id.* (emphasis added). Article IX, Section 7, requires that the "clear proceeds" of penal fines and forfeitures collected by counties and State agencies "*shall be faithfully appropriated* and used exclusively for maintaining free public schools." N.C. Const. art IX, §§ 7(a) and (b) (emphasis added).

Similarly, Article IX permits, but does not require, the General Assembly to appropriate general revenue to supplement the specific sources of funds in Sections 6 and 7. Thus, Article IX, Section 6, provides that the proceeds of lands shall be appropriated "*together with such revenue as the State may set aside for that purpose*." N.C. Const. art. IX, § 6 (emphasis added). Likewise, Article IX, Section 2 provides that "[t]he General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools . . . ." N.C. Const. art IX, §2(1).

As the Court of Appeals explained in its Writ of Prohibition, these clauses all presuppose that the General Assembly must first appropriate revenue from these sources *before* it can be spent on education. This is true even for the categories of money (gifts, fines, and forfeitures) that the Constitution specifically requires to be spent on education in Sections 6 and 7. Both sections require that such funds "*shall be faithfully appropriated*." N.C. Const. art IX, §§ 6 and 7. If the Education Provisions

established an "ongoing constitutional appropriation," as DOJ suggests, there would be no need to require the General Assembly to "faithfully appropriate" the funds specified in these provisions. Accepting the DOJ's position would thus render whole portions of Article IX meaningless, in direct contravention of this Court's prior decisions requiring courts to give meaning to every constitutional provision. *See Rhyne v. K-Mart Corp.*, 358 N.C. 160, 174, 594 S.E.2d 1, 11 (2004) (holding that, in construing the constitution, courts must strive to give meaning to every provision, and should not adopt an interpretation that renders part of the constitution "mere surplusage").

b. ***The Structure of the Constitution Shows the Drafters Intended Educational Spending to be Subject to the Appropriations Clause.***

Structure, too, shows that the framers intended the Appropriations Clause to apply to education spending and did not intend the Education Provisions to create an exception or "ongoing constitutional appropriation," as DOJ contends.

First, longstanding precedent requires the Court to read the Education Provisions in *pari materia* with the Appropriations Clause and the other provisions of the State Constitution establishing the budget process. *See Stephenson v. Bartlett*, 355 N.C. 354, 378, 562 S.E.2d 377, 394 (2002) (citing *In re Peoples*, 296 N.C. 109, 159, 250 S.E.2d 890, 919 (1978)). As this Court has explained, "our Constitution mandates a three-step process with respect to the State budget" and the appropriation of public money. *See In re Separation of Powers*, 305 N.C. 767, 775, 295 S.E.2d 589, 594 (1982); *see also Cooper*, 376 N.C. at 37, 852 S.E.2d at 59 (2020) (explaining that the

Constitution "defines the manner in which this three-branch governmental structure should operate in the budgetary context"). First, Article III, Section 5(3) directs that the "Governor shall prepare and recommend to the General Assembly a comprehensive budget of the anticipated revenue and proposed expenditures" for the upcoming fiscal period. N.C. Const. art. III, §5(3). Second, under Article II, the General Assembly has the power to adopt a budget "'although the legislature has no duty to adopt it as recommended.'" *Cooper*, 376 N.C. at 37, 852 S.E.2d at 59 (quoting John V. Orth & Paul Martin Newby, THE NORTH CAROLINA STATE CONSTITUTION at 118 (2d ed. 2013)); *see also In re Separation of Powers*, 305 N.C. at775, 295 S.E.2d at 594. This is, of course, why the Appropriations Clause provides that money cannot be spent "but in consequence of appropriations made by law." N.C. Const. Art. V, § 7. Finally, Article III, Section 5(3) requires that "[t]he budget *as enacted by the General Assembly* shall be administered by the Governor." N.C. Const. art III, § 5(3) (emphasis added); *see also Cooper*, 376 N.C. at 37, 852 S.E.2d at 59 (explaining that, "while the Governor is required to make budgetary recommendations . . . and is entitled to veto budget legislation, he has no ultimate say about the contents" and "must faithfully administer the budget adopted by the General Assembly once it has been enacted." (citing Orth & Newby at 118)).

Reviewing these provisions, this Court has concluded the Appropriations Clause and constitutional budget process apply to all money deposited into the State Treasury, regardless of the source or the reasons for which it is spent. *See Cooper*, 376 N.C. at 44, 852 S.E.2d at 62 (holding that the General Assembly has the power

to direct the appropriation of federal block grants because the Appropriations Clause and constitutional budget process apply to all funds deposited into the State Treasury). Thus, the provisions of the Constitution requiring that gifts, fines, and forfeitures "shall be faithfully appropriated" for use by the public schools, N.C. Const. art IX, §§ 6 and 7, and that the General Assembly "shall provide . . . for a general and uniform system of free public schools," N.C. Const. art. IX, § 2, should be read in context with the Constitution as a whole, which requires a legislative appropriation before any money can be disbursed from the State Treasury. *See* N.C. Art. V, §7.

Second, DOJ contends that not all appropriations have to be approved by the General Assembly and signed by the Governor because the Appropriations Clause only requires an appropriation "made by law" to disburse State funds. (DOJ Br at 37-39). According to DOJ, this language is broad enough to suggest the drafters meant to include "constitutional appropriations" because the Constitution itself is a "law." (*Id.*) But focusing only on the general definition of the word "law" ignores that the actual phrase used in the Constitution was "appropriations *made by law*." N.C. Const. art. V, § 7 (emphasis added). The Constitution uses the phrase "by law" thirty-one times over the course of the document. In virtually every instance, the context shows that the drafters meant "by law" to mean laws adopted by the General Assembly.[13] For instance, Article II, Section 8 provides that elections for the General

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[13] *See, e.g.*, N.C. Const. art. I, § 31 (prohibiting quartering of soldiers during times of war, "but in a manner prescribed by law"); art. II, § 8 (providing that elections for members of the General Assembly shall be held every two years "at the places and on the day prescribed by law"); art. II, § 10 (providing that vacancies in the General Assembly "shall be filled in a manner prescribed by law"); art. II, § 11 (providing that

Assembly shall be held every two years "at places and on the day prescribed *by law*." N.C. Const. art II, § 10 (emphasis added). Article III, Section 9 provides that members of the Council of State shall receive compensation "*prescribed by law*." N.C. Const. art. III, § 9 (emphasis added). Article III, Section 11 similarly provides that administrative departments, agencies, and offices shall have those powers and duties

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the General Assembly shall meet in regular session every two years "on the day prescribed by law"); art. II, § 16 (members of the General Assembly shall receive compensation and allowances "prescribed by law"); art. III, §§ 3(1) and (3)(2) (providing that the order of succession for Governor shall begin with the Lieutenant Governor and then proceed "as prescribed by law"); art. III, § 5 (providing that the Governor may grant pardons "subject to regulations prescribed by law"); art. III, § 6 (Lieutenant Governor to receive compensation and allowances "prescribed by law"); art. III, §7(6) ("The General Assembly shall by law prescribe" the procedures for determining incapacity of State officers, other than the Governor); art. III § 9 (compensation of the Council of State shall be "prescribed by law"); art. III, § 11 (administrative departments, agencies, and offices shall be established and have the powers and duties as "allocated by law"); art. IV, § 10 (District Court Judges shall be elected "in manner prescribed by law"); art. IV, § 12 ("The Supreme Court also has jurisdiction to review, when authorized by law, direct appeals from a final order or decision of the North Carolina Utilities Commission."); art. IV, § 17 ("Any [Superior Court] Clerk so removed from office shall be entitled to an appeal as provided by law."); art. V, §§ 6(1) and (2) (providing that money in sinking funds for the retirement of bonds, or invested in the Teachers and State Employees' Retirement System, "May be invested as authorized by law."); art. V, § 10 (providing that municipalities may own or operate electric generation and transmission facilities, "in addition to other powers conferred upon them by law"); art. VI, § 2 (providing that no person convicted of a felony shall be permitted to vote "unless that person shall be first restored to the rights of citizenship in the manner prescribed by law"); art. VI, § 3 (requiring that every person casting a vote in an election must first be registered "as herein prescribed and in the manner provided by law"); art. VII, § 2 (providing that sheriffs are subject to removal "for cause as provided by law"); art. VII, § 3 (providing that any local government formed by the merger of counties with cities or towns "may exercise any authority conferred by law on counties"); art. IX, § 10 (requiring that escheats be used to provide for the education of worthy and needy students and that the "method, amount, and type of distribution shall be prescribed by law"); art. XIV, § 5 (providing that land acquired for the State Nature and Historic Preserve "shall not be used for purposes except as authorized by law").

"*allocated by law*." N.C. Const. art. III, § 11 (emphasis added). In other words, the drafters used the phrase "by law" when they wanted the General Assembly to adopt legislation addressing specific matters. Other provisions, too, equate "laws" with acts of the General Assembly as distinguished from the Constitution itself. For instance, Article XIV, Section 4, which provides for the continuation of statutes enacted before the enactment of the 1971 Constitution, provides: "*The laws of North Carolina not in conflict with this Constitution* shall continue in force until lawfully altered." N.C. Const. art. XIV, § 4 (emphasis added). And this Court's cases have recognized the same distinction. *See McCrory v. Berger*, 368 N.C. 633, 641, 781 S.E.2d 248, 254 (2016) (explaining that the power to appoint officials to offices "which shall be created by law" was deleted from the appointments clause in the 1868 constitution to remove the Governor's power to appoint "statutory officers," but not officers established under the Constitution).

Finally, even if one were to accept *arguendo* that the specific provisions governing gifts, fines, and forfeitures in Sections 6 and 7 of Article IX were intended to be "constitutional appropriations," the same logic would not apply to appropriations from the State's general fund. The framers knew how to require the General Assembly to use specific categories of money for education when they wanted to. Under the canon of *"inclusio unius est exclusio alterius*," *see In re Spivey*, 345 N.C. 404, 410, 480 S.E.2d 693, 696 (1997), because the framers required the General Assembly to appropriate gifts, fines, and forfeitures for use by the public schools

means they did not intend those provisions to create "constitutional appropriations" for other categories of money as well.

Indeed, that is the teaching of *Wake v. Raleigh*, 88 N.C. 120 (1883), which is the only case DOJ cites for the proposition that the Education Provisions were intended as "constitutional appropriations." *Wake* involved claims that the City of Raleigh had failed to transfer fines and forfeitures to Wake County to use for the public schools as required by the State Constitution. The Supreme Court rejected that argument, holding that because Article IX, Section 6 (previously N.C. Const. of 1868, Art. IX, § 4) only applies to fines "*collected in the several counties*," it "does not extend" to fines collected by cities and towns. *See id.*, 88 N.C. at 123 (emphasis in original) (holding that fines collected by cities "cannot, upon any reasonable interpretation, be deemed to be with in the intent of the framers of the organic law, as they are not within the terms in which the intent is expressed").

Of course, this case does not involve a dispute over fines and forfeitures. The trial court's November 10 Order purported to direct State officials to treat the order as "an appropriation from the General Fund." Thus, the specific provisions in Sections 6 and 7 of Article IX cannot authorize the order's transfer provisions. DOJ impliedly concedes as much in its brief. It thus does not identify a single, specific provision that supposedly serves as the source of the "constitutional appropriation" it hopes to establish. Instead, it argues more generally that the Education Provisions, taken together, "*provide guidance* on how the State is to fulfill its duty to 'guard and maintain' Article I, Section 15's 'right to the privilege of education.'" (DOJ Br at 30

(emphasis added)). Even if that were true, nothing in the Constitution suggests the Education Provisions were intended to create an exception to the Appropriations Clause or to authorize the judiciary to direct funds out of the State Treasury.

c. *The History of the Educational Provisions Does Not Support the Conclusion They Were Intended to be "Constitutional Appropriations."*

History does not support DOJ's position either. Although DOJ devotes pages to the history of our State's public school system, nothing in that history suggests the drafters of the Constitution intended the Education Provisions to serve as a "constitutional appropriation" or to exempt education spending from the constitutionally required appropriations process.

According to DOJ's telling, the current Education Provisions were included in the 1868 Constitution as a reaction to the State's decisions to eliminate the Office of the Superintendent of Common Schools in 1865 and to eliminate the public school system entirely in 1866 out of "fear[] that the federal government would force integration of black pupils into the statewide school system." (DOJ Br at 33 (citing Bell, Samuel Stanford Ashley, Carpetbagger and Education, 72 N.C. Hist. Rev. 456, 476 (1995) and M.C.S. Noble, A History of the Public Schools of North Carolina at 279-280 (1930))). The drafters of the 1868 Constitution then added the language now found in Article I, Section 15, declaring that "[T]he people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right." N.C. Const. of 1868 art. I, §27. They also added the language in what is now Article IX, § 2, which directs: "The General Assembly shall provide by taxation and otherwise for

a general and uniform system of public schools, which shall be maintained at least nine months in every year, and wherein equal opportunities for education shall be provided for all students." N.C. Const. of 1868 art. IX, § 2.

This history shows that the drafters meant to require the State to establish and maintain a statewide public school system and to prohibit the State from eliminating it again. It also shows that the drafters meant for the General Assembly to make provisions for the public school system. And, as this Court held in *Leandro I*, that obligation includes a duty that the State provide educational opportunities that meet a "minimum standard of quality." 346 N.C. at 346, 488 S.E.2d at 253. The history also indicates that it was *not* the intention of the drafters to establish a "constitutional appropriation" that would permit the judiciary to dictate the level of educational funding for the State or to order appropriations that contravene a duly enacted State budget, adopted by the General Assembly and signed by the Governor—especially when that budget has never been the subject of judicial review and appropriates more for public education than any other budget in State history.

To the contrary, this Court recognized in *Leandro I* and *II t*hat the Constitution does not dictate the level of funding the State provides to the public school system. Instead, the Court defined what constitutes a sound basic education in terms of *substance*, and specifically warned that future courts "should not rely on the single factor of school funding" to determine whether the State is meeting its obligations. *Leandro I*, 346 N.C. at 357, 488 S.E.2d at 260 (noting "available evidence suggests that substantial increases in funding produce only modest gains in schools" and

"every fiscal year since 1969-70, the General Assembly has dedicated more than forty percent of its general fund operating appropriations to the public primary and secondary schools"). Similarly, the Constitution expressly entrusts the General Assembly with the power to determine the amount of money that should be appropriated to the public schools. *See* N.C. Const. art IX, § 2 (providing that the "General Assembly shall provide by taxation and otherwise for a general and uniform system of public schools") and § 6 (requiring the General Assembly to appropriate the proceeds from lands given to the State "*together with so much revenue of the State as may be set apart for that purpose*" (emphasis added)).

If anything, history teaches that the drafters of the Constitution wanted to "ensure that the people through their elected representatives in the General Assembly have full and exclusive control over the allocation of the state's expenditures." *Cooper*, 376 N.C. 22, 37, 852 S.E.2d 46, 64 (citing John V. Orth & Paul Martin Newby, THE NORTH CAROLINA STATE CONSTITUTION at 154 (2d ed. 2013)). They also believed that decisions about the administration of public schools are "best left to the legislative and executive branches of government." *Leandro I*, 346 N.C. at 357, 488 S.E.2d at 261 ("Courts of the state must 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.")

This case might be different if the General Assembly had wholly failed to provide for the public school system or sought to eliminate it entirely. But that is not

what happened here, nor is it the question before this Court. There also has never been a judgment finding that the statewide public school system fails, as a whole, to meet minimum constitutional standards. Indeed, Judge Manning—in the only liability judgment ever entered following a trial in this case—found exactly the opposite. *See Leandro II*, 358 N.C. t 632, 599 S.E.2d at 387 ("[T]he trial court concluded that 'the bulk of the core' of the State's 'Educational Delivery System is sound, valid, and meets the constitutional standards enumerated by *Leandro*"). The State Budget, as amended by the Appropriations Act signed by the Governor just this past month,[14] appropriates more than $21.8 billion in net general revenue to K-12 education over the 2021-22 and 2022-23 biennium—which is more than 40% of the State's total operating budget during those years. Such efforts certainly fall "within the limits of rationality" and accordingly are entitled to respect. *See Leandro I*, 346 N.C. at 356, 488 S.E.2d at 260 ("Within the limits of rationality, 'the legislature's efforts to tackle the problems' should be entitled to respect" (quoting *Jefferson v. Hackney*, 406 U.S. 535 (1972)).

Nothing in the history of our Constitution suggests that the drafters meant for the judicial branch to remove the power to make decisions about education from the people's representatives under such circumstances.

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[14] *See* Current Appropriations Act of 2022, N.C. Sess. L. 2022-74 (signed by the Governor on 11 July 2022); Current Appropriations Act of 2021, N.C. Sess. L. 2021-180 (adopted and signed 8 November 2021).

2. The November 10 Order Cannot Be Justified as an Exercise of the Judiciary's Inherent Power.

DOJ also argues the November 10 Order can be justified as an exercise of the judiciary's inherent power to provide remedies for violation of the State constitution when no other adequate remedy exists. (DOJ Br at 43-46). That position, however, ignores the limits that our Constitution and this Court's decisions impose on the exercise of such power.

As this Court held in *Corum v. University of North Carolina*, 330 N.C. 761, 784, 413 S.E.2d 276, 291 (1992), "when called upon to exercise its inherent constitutional power to fashion a common law remedy for violation of a particular constitution right . . . the judiciary must recognize two critical limitations." *Id.* "First, [the court] must bow to established claims and remedies" where they "provide an alternative to the extraordinary exercise of [the judiciary's inherent power]." *Id.* (citing *Alamance Cnty.*, 329 N.C. at 100-01, 405 S.E.2d at 132). Second, in exercising its inherent power, "the judiciary must minimize encroachment upon other branches of government—in appearance and in fact—by seeking the least intrusive remedy available and necessary to right the wrong." *Id.*

a. *The Trial Court Failed to Consider, Much Less Defer, to Existing State Remedies.*

Following these mandates, this Court explained in *Leandro I* and *II* that bowing to established claims and remedies requires the Court to grant "every reasonable deference to the legislative and executive branches when considering whether they have established and are administering a system that provides children

of the various school districts across the state a sound basic education." *Leandro II*, 358 N.C. at 622-23, 599 S.E.2d at 381 (citing *Leandro I*, 358 N.C. at 355-57, 488 S.E.2d at 259-60). It also requires that "the legislature's efforts to tackle" issues related to public education must be "entitled to respect." *Leandro I*, 346 N.C. at 356, 488 S.E.2d at 260.

In issuing the November 10 Order, however, the trial court blew past these limitations. Although DOJ and Plaintiffs contend the trial court "exercised tremendous deference to the political branches," (DOJ Br at 26), it really exercised no deference at all. Rather than require Plaintiffs to first prove the existence of a violation outside Hoke County by clear and convincing evidence, as this Court required in *Leandro II*, the trial court merely assumed—without a trial, judgment, or even adversarial proceedings—that the whole of the State's educational system was constitutionally deficient. It then skipped straight to imposing a sweeping remedy that leaves virtually no portion of the State's education system untouched.

Moreover, in proceeding straight to a remedy, the trial court failed to even consider whether the State Budget's efforts to provide for the public school system were sufficient, much less treat those efforts a presumptively constitutional. *Cooper,* 376 N.C. at 33, 852 S.E.2d at 56 (requiring that acts of the General Assembly must be treated as presumptively constitutional unless proven otherwise "beyond a reasonable doubt" (citing *Hart v. State*, 368 N.C. 122, 131, 774 S.E.2d 281, 287 (2015)). It also failed to provide the legislative branch with "an unimpeded chance, 'initially at least' to correct constitutional deficiencies revealed at trial" (which of

course, never occurred for any school district other than Hoke County). *See Leandro II*, 358 N.C. at 638, 599 S.E.2d at 391 (quoting *Leandro I*, 346 N.C. at 357, 488 S.E.2d at 261). Astonishingly, the trial court did so despite acknowledging in its November 10 Order that "[w]hen the General Assembly fulfills its constitutional role through the normal (statutory) budget process, there is no need for judicial intervention to effectuate a constitutional right." (R p 20).

Similarly, Plaintiffs cannot show that the existing remedy Judge Robinson granted them through his amended order of 26 April—*i.e.*, a money judgment—is inadequate to provide relief for their claims. While the Appropriations Clause prevents the judiciary from ordering money out of the State Treasury without a legislative appropriation, *see Richmond County*, 254 N.C. App. 422, 424, 803 S.E.2d 27, 30 (2017) (citing *Smith v. State*, 289 N.C. 303, 321, 222 S.E.2d 412, 424 (1976)), the same is true of all judgments against the State. Still, this Court has repeatedly held that issuing a money judgment is enough to provide plaintiffs with an adequate remedy under the Constitution. *See Corum*, 330 N.C. at 785, 413 S.E.2d at 291 (explaining that the Court permitted direct causes of action for damages under the Constitution in previous cases because "it was unable to fashion a common law remedy less intrusive than money damages" (discussing *Sale v. Highway Comm'n*, 242 N.C. 612, 89 S.E.2d 290 (1955)); *see also Deminski*, 2021-NCSC-58, ¶ 21, 377 N.C. 406, 414, 858 S.E.2d 788, 794 (holding plaintiffs must be allowed to pursue a direct claim for monetary damages for denial of their right a sound basic education,

notwithstanding sovereign immunity, because a claim limited to injunctive relief would be inadequate).

b. *The Trial Court Failed to Minimize Encroachment Upon the Other Branches.*

The trial court likewise failed to "minimize encroachment upon other branches" and to "do[] no more than is necessary" for the administration of justice. *Alamance Cnty. Ct. Facilities*, 329 N.C. at 99, 405 S.E.2d at 132 ("[D]oing what is 'reasonably necessary for the proper administration of justice' means doing no more than is reasonably necessary.") As this Court held in *Alamance County*, doing so would have required the court to "recogniz[e] . . . [the] explicit constitutional rights and duties [that] belong[] uniquely to the other branch" under the Appropriations Clause. *Id.*

Thus, "even in the name of its inherent power, the judiciary may not arrogate a duty reserved by the constitution exclusively to another body." *Id.* 329 N.C. at 99, 405 S.E.2d at 132. "The courts have absolutely no authority to control or supervise the power vested by the Constitution in the General Assembly as a coordinate branch of the government.'" *Marriott v. Chatham Cnty.*, 187 N.C. App. 491, 495, 654 S.E.2d 13, 16 (2007) (quoting *Person v. Board of State Tax Com'rs,* 184 N.C. 499, 503, 115 S.E. 336, 339 (1922)). Accordingly, "while courts are authorized to interpret and declare the law, the judicial branch has no authority to direct a legislative body to enact legislation." *Id.* (citing *In re Markahm*, 259 N.C. 566, 570, 131 S.E.2d 329, 333 (1963)).

Yet, in ordering the State to implement and fund the CRP as part of its November 10 Order, the trial court exercised powers that the Constitution vests exclusively in the legislative branch. Unlike the amended order issued by Judge Robinson, Judge Lee's November 10 Order purported to exercise the General Assembly's exclusive power to make appropriations directly, instructing State officials to "treat the foregoing funds as an appropriation from the General Fund." (R p 1841).

Nor is there any evidence the trial court ever considered whether there were less-intrusive means to provide a sound basic education than requiring the State to fund the CRP (assuming, of course, that a statewide violation had been proven at trial). Instead, the trial court merely accepted Plaintiffs' and DOJ's representations that the each of the 146 measures in the CRP were constitutionally necessary, and that ordering the General Assembly to fully fund was the only way to provide the State's children a *Leandro*-compliant education—a notion this Court expressly rejected in *Leandro I*, 346 N.C. at 356, 488 S.E.2d at 249 ("[T]he very complexity of the problems of financing and managing a statewide public school system suggests that there will be more than one constitutionally permissible method of solving them."); (*compare* (R p 1831 (reciting that Plaintiffs and DOJ have represented that each of the actions in the CRP are "necessary" and "must be implemented to address the continuing constitutional violations")). And it did so even though Plaintiffs and DOJ readily admitted that many of the measures they wanted the court to order under the CRP would require legislative action. (*See* Order on Comprehensive

Remedial Plan (R p 1719) (requiring that the State "[r]evise the NC General Statutes and State's Every Student Succeeds act" to adjust academic accountability measures); (R p 1752) (requiring the State to "revise" its "school funding formula" established under current statutes)); (R p 1756) (requiring the State to "revise" the charter school funding formula established under N.C. Gen. Stat. § 115C-218.105)).[15]

Despite its representations to the trial court (when this case was unopposed), DOJ now concedes that "alternative means of securing a party's compliance may exist" and professes that it "welcomes this Court's guidance" about the existence of such alternatives. (DOJ Br at 52). That admission alone should be grounds for remand, since *Alamance County, Corum, Leandro I*, and *Leandro II,* all require the trial court to consider (and exhaust) less intrusive alternatives before issuing orders in the name of its inherent authority that displace a coequal branch in the exercise of core functions delegated to it under the State Constitution.

c. *DOJ Misreads This Court's Decision in Alamance County.*

Throughout its brief, DOJ persistently cites *Alamance County* as authority for the transfer provisions in the November 10 Order. DOJ, however, misreads this Court's decision in that case.

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[15] Indeed, the CRP goes even further by purporting to require the State to issue bonds to fund school construction in Year 4—an action that can be accomplished only by a vote of the people themselves under our State Constitution. (R p 1713 (requiring the State to "[i]ssue a $2 billion bond to support school capital needs" and recognizing that "this step requires appropriations for debt service")); *see also* N.C. Const. art. V, § 3 (prohibiting the State from issuing debt "unless approved by a majority of the qualified voters of the State.")

First, *Alamance County* involved orders directed against *a county* and its board of commissioners. Accordingly, the case did not involve the judicial exercise of powers that belong to a coequal branch of government and did not raise the same separation of powers concerns. Unlike the General Assembly, counties "exist solely as political subdivisions of the State and are creatures of statute." *Davidson Cnty. v. City of High Point*, 321 N.C. 252, 257, 362 S.E.2d 553, 557 (1987). They are thus "agencies of the state, constituted for the convenience of local administration" of government. *Commissioners of Cumberland Cnty. v. Commissioners of Harnett Cnty.*, 157 N.C. 514, 73 S.E. 195, 196 (1911); *O'Neal v. Jennette*, 190 N.C. 96, 129 S.E. 184, 185 (1925).

Moreover, in *Alamance County* there was no question that the General Assembly had already authorized the county to spend the funds at issue. As the Court recounted, State statutes "obligate[ed] counties and cities to provide physical facilities for the judicial system operating in their boundaries." *Id.* 329 N.C. at 99, 405 S.E.2d at 132 (citing N.C. Gen. Stat. § 7A–300(a)(11) (1989); N.C. Gen. Stat. § 7A–302 (1989)). Unlike the distribution of State funds under the Appropriations Clause, the Constitution permits counties to spend local funds so long as they do so "by authority of law." N.C. Const. art V, § 6(2). The statutes at issue thus provided the requisite legislative authority.

Second, DOJ fails to recognize that the trial court's order in *Alamance County* was vacated on appeal. 329 N.C. at 107, 405 S.E.2d at 137 ("We hold that the order sub judice exceeded what was reasonably necessary to the administration of justice under the circumstances of this case, and in so doing strained at the rational limits

of the court's inherent power.") In doing so, the Court held the Superior Court "overreached" and "exceeded what was reasonably necessary" to ensure the proper functioning of the judicial branch when it issued *ex parte* orders purporting to require the county to fund facilities that met the court's specifications. *Id.* The better approach, the Court held, would have been for the judge to issue a show cause order as to why he should not issue a writ of *mandamus* requiring the commissioners to provide the minimum facilities necessary for the court to operate as required by statute. *Id.*[16] Such an order would have been preferable, the Court explained, because mandamus is limited to "compelling public officials to perform purely ministerial duties." Thus, issuing *mandamus* would be limited to enforcing existing statutes directing the county to provide adequate court facilities, and would avoid substituting the court's judgment for either those in the Legislative Branch or the county commissioners.

Finally, the Court made clear it could only consider exercising the judiciary's inherent authority in such a manner because doing so would be necessary to ensure the court had the necessary facilities to perform its basic functions. *See Richmond Cnty. Bd. of Educ.,* 254 N.C. App. at 427, 803 S.E.2d at 31 (explaining that *Alamance* County applies only when there is a "refus[al] to fund the judicial branch to such an

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16 The Court further held the trial court's order was issued in error because the county commissioners "were not parties to the action from which the order issued" and therefore "were not subject to its mandates," 329 N.C. at 107, 405 S.E.2d at 137, which renders the Court's discussion of various constitutional issues mere *orbiter dictum*. *Trustees of Rowan Tech. Coll. v. J. Hyatt Hammond Assocs., Inc.*, 313 N.C. 230, 242, 328 S.E.2d 274, 281 (1985) ("Language in an opinion not necessary to the decision is *obiter dictum* and later decisions are not bound thereby.")

extent that the judiciary cannot perform its own constitutional functions"). As the Court explained, the judiciary's inherent authority is only "plenary within its branch" and is normally limited to matters that are "discretely within the judicial branch":

> 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" *Beard v. N.C. State Bar*, 320 N.C. at 129, 357 S.E.2d at 696. *See Commonwealth ex rel. Carroll v. Tate*, 442 Pa. 45, 54, n. 274 A.2d 193, 198 n. 9, *cert. denied*, *Tate v. Pennsylvania ex rel. Jamieson*, 402 U.S. 974, 91 S.Ct. 1665, 29 L.Ed.2d 138 (1971) (quoting *In re Surcharge of County Commissioners*, 12 Pa. Dist. & Co. R. 471: "That courts have inherent power to do all things that are reasonably necessary for the proper administration of their office within the scope of their jurisdiction is a well-settled principle of law.") This Court has upheld the application of the inherent powers doctrine to a wide range of circumstances, from dealing with its attorneys, *Gardner v. N.C. State Bar*, 316 N.C. 285, 341 S.E.2d 517 (1986), to punishing a party for contempt, *Ex Parte McCown*, 139 N.C. 95, 51 S.E. 957 (1905).
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> **Typically, however, the exercise of inherent power by courts of this state has been limited to matters discretely within the judicial branch**. *See, e.g., Crist v. Moffatt*, 326 N.C. 326, 337, 389 S.E.2d 41, 48 (1990) (Trial court's broad, inherent discretionary power includes control of course of trial so as to prevent injustice to any party); *In re Mental Health Center*, 42 N.C.App. 292, 296, 256 S.E.2d 818, 821, *cert. denied*, 298 N.C. 297, 259 S.E.2d 298 (1979) (in proceedings to determine whether disclosure of privileged information was necessary for proper administration of justice in criminal action, superior court has inherent power to assume jurisdiction and issue necessary process in order to fulfill its mission of administering justice efficiently and promptly). *See also* cases cited in *Beard v. N.C. State Bar*, 320 N.C. at 129, 357 S.E.2d at 695.

Alamance County, 329 N.C. at 94, 405 S.E.2d at 129-30 (emphasis added).

The Court similarly held that the judiciary's inherent power does not extend beyond judicial matters: "Just as the inherent power of the judiciary is plenary within its branch, it is curtailed by the constitutional definition of the judicial branch and other branches of government." 329 N.C. at 94, 405 S.E.2d at 129-30. Accordingly,

the judiciary's inherent power cannot be used to "arrogate a duty reserved by the constitution exclusively to another body." *Alamance Cnty. Ct. Facilities*, 329 N.C. at 99, 405 S.E.2d at 132.

Put simply, *Alamance County* does not support DOJ's position, nor does it authorize the November 10 Order's transfer provisions. To the contrary, the case involved lower court orders reversed on appeal *precisely because they exceeded the judiciary's inherent authority*. *Alamance County* therefore is not any example in which the judiciary was allowed to exercise the power of the purse. Instead, it serves as a caution that courts must not, even in the name of their inherent authority, arrogate duties that belong exclusively to the other branches, and even then, must ensure they "minimize encroachment on the other branches." *Id.* 329 N.C. at 100-01, 405 S.E.2d at 132.

d. *The Appropriations Clause Does Not Create Exceptions for Court Orders Granting "Prospective Relief"*

In a last-ditch effort to revive the November 10 Order, DOJ argues that even though the plain language of the Appropriations Clause and this Court's decisions prohibit the judiciary from ordering money of the State Treasury without an appropriation, this Court can do so because it would only be granting "prospective relief." (DOJ Br. at 46-47).

Tellingly, DOJ cites no authority to show there is an exception for court orders that grant "prospective relief." The text of the Appropriations Clause itself creates no such distinction. Indeed, it categorically requires that "*No money shall be drawn*

from the State treasury but in consequence of appropriations made by law." N.C. Const. art V, § 7. This Court's decisions create no such distinction, either. Instead, they uniformly hold that "appropriating money from the State treasury is a power vested *exclusively in the legislative branch*" and that the judicial branch "lack[s] the authority to 'order State officials to draw money from the State treasury.'" *Cooper v. Berger*, 376 N.C. 22, 47, 852 S.E.2d 46, 64 (2020) (Ervin, J.) (quoting *Richmond Cnty. Bd. of Educ. v. Cowell*, 254 N.C. App. 422, 423, 803 S.E.2d 27, 29 (2017)); *State v. Smith,* 289 N.C. 303, 321, 222 S.E.2d 412, 424 (1976)*; Able Outdoor v. Harrelson,* 341 N.C. 167, 172, 459 S.E.2d 626, 629 (1995) ("[T]he Judicial Branch of our State government [does not have] the power to enforce an execution [of a judgment] against the Executive Branch").

What is more, the decisions on which DOJ relies fail to support the proposition that a court can grant the relief contained in the November 10 Order. At the end of its brief, DOJ cites *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971), for the proposition that "*Once a right and a violation have been shown*, the scope of a [federal] district court's equitable powers . . . is broad." *Id.,* 402 U.S. at 15; (DOJ Br. at 46). But that, of course, is part of the problem—there has been no clear showing of a violation here, and there is no basis to invoke the Court's power to prescribe a remedy. The trial court's November 10 Order imposed a sweeping remedy—one that would substitute Plaintiffs' and the court's judgment in place of the political branches regarding the administration of the State's entire educational system—without ever requiring Plaintiffs to show first that the current system violates the Constitution.

For this reason, questions about the outer boundaries of the judicial branch's inherent authority to create a remedy ought to be beside the point. Plaintiffs must prove a violation first. This Court made clear in the *Leandro II* that additional trials on the conditions outside Hoke County would be necessary to make such a showing, but they never occurred. The mere fact that Plaintiffs and the trial court disregarded that instruction and held "status conference after status conference" for the 18 years since *Leandro II* was decided in the purported exercise of the court's remedial powers does not alleviate the requirement that they prove their claims before obtaining a remedy.

C. Reinstating the November 10 Order Would Violate the Separation of Powers.

Finally, the Court should refuse to reinstate the November 10 Order on the grounds that doing so would require an unprecedented violation of the Separation of Powers. As the Court of Appeals held, enforcing the transfer provisions would "devastate the clear separation of powers between the Legislative and Judicial branches and threaten to wreck the carefully crafted checks and balances that are the genius of our system of government." *In re*: *The 10 November 2021 Order in Hoke Cty. Bd. of Educ. v. State of North Carolina*, NCOA P. 21-511 (Wake County File 95CVS1158). Indeed, enforcing the transfer provisions would require the judiciary to wholly displace popular control over the power of the purse by overriding the State Budget adopted by the General Assembly and signed by the Governor.

"The clearest violation of the separation of powers clause occurs when one branch exercises power that the constitution vests exclusively in another branch."

McCrory v. Berger, 368 N.C. 633, 645, 781 S.E. (2016) (citing *Houston v. Bogle*, 32 N.C. 496, 503–04 (1849)). But that is exactly what DOJ and Plaintiffs are asking the Court to do here. As this Court has held, the General Assembly's exclusive power to make appropriations under Article V, Section 7 of the Constitution is "one of the most essential" within our tripartite system of government. *See Cooper*, 376 N.C. at 37, 852 S.E.2d at 64 (The "'power of the legislature over the power of the purse is one of the most essential in the system of a government of the people by the people, and its abandonment under any pretext whatever can never be safely allowed.'") (quoting *White v. Worth*, 126 N.C. 570, 599–600, 36 S.E. 132, 141 (1900) (Clark, J., dissenting)).

Vesting exclusive control over State appropriations in the Legislature was intended to serve as a check against the other branches. "Early Americans 'were acutely aware of the long struggle between the English Parliament and the Crown over the control of public finance and were determined to secure the power of the purse for their elected representatives.'" *Cooper*, 376 N.C. at 37, 852 S.E.2d at 58 (John V. Orth & Paul Martin Newby, THE NORTH CAROLINA STATE CONSTITUTION, 154 (2d ed. 2013)). The Appropriations Clause was thus intended "to ensure that the people, through their elected representatives in the General Assembly, had full and exclusive control over the allocation of the state's expenditures." *Cooper*, 376 N.C. at 37, 852 S.E.2d at 58. Further, it was intended, not just as a check against the Executive, but the Judiciary as well. As the Court of Appeals explained in *Richmond County*, "[a]lthough most Separation of Powers cases (in modern times, at least) involve clashes between the legislative and executive branches, in many ways the

judiciary branch poses the greatest risk to the doctrine" because the exercise of its inherent power is limited only by the Constitution and the boundaries between it and the other branches. *Richmond Cnty. Bd. of Educ.*, 254 N.C. App. at 426, 803 S.E.2d at 30. Prohibiting the judiciary from taking public money from the Treasury without an appropriation serves as a check against that power. *See* Hamilton, A., *The Federalist*, No. 78 ("The judiciary, on the contrary, has no influence over the sword or the purse.")

In their briefs, DOJ and Plaintiffs assure the Court that exercising the power of the purse—maybe just this once, since the circumstances of this case are "unique"—will not pose any harm because there are "sufficient funds available" in the State Treasury to comply with the order. (DOJ Br. at 47). But that is not true. In fact, there is no way for the State to comply with both the State Budget and the Court's November 10 Order.

The State Budget is prepared using figures drawn from the "Consensus Revenue Forecast," which is jointly prepared by the Executive Branch's Office of State Budget and Management ("OSBM") and non-partisan staff economists in the General Assembly's Fiscal Research Division ("FRD"). (Affidavit of Mark Trogdon ¶¶ 19-25 (R p 2334-35)). That forecast is then incorporated into an availability statement, which the State Budget and Fiscal Control Act requires to be included in each appropriations bill and which sets out the amount of unappropriated, unreserved revenue available for additional appropriations. (Affidavit of Mark Trogdon at ¶¶ 29-36 (R p 2337-40)); *see also* N.C. Gen. Stat. § 143C-5-3 (requiring that an availability

statement must be included in each appropriations bill). Based on those availability statements—the validity of which is not disputed—the 2021 Appropriations Bill anticipated that there would only be $128 million in appropriated, unreserved revenue remaining at the conclusion of fiscal year 2022-23. 2021 N.C. Sess. L. 180, § 2.2(a). Although DOJ correctly notes that the forecast was adjusted upwards in May, the current budget, reflected in the 2022 Appropriations Act, accounts for virtually all of that money, and anticipates that there will only be $25 million in unappropriated, unreserved funds remaining at the end of the year. 2022 N.C. Sess. L. 74, § 2.2(a).

Put simply, there is no way for the State to comply with both the appropriations in the State Budget and the November 10 Order if it is reinstated (even if the overall amount is reduced to $785 million to reflect those items in the CRP that are already funded as set forth in the Order following Remand).[17] Reinstating the November 10 Order thus will require the Court to judicially override the State Budget, and thus require either the Court, or Executive Branch officials, to pick-and-choose which appropriations should be funded and which should be disregarded.

Neither the Constitution nor the State Budget Act anticipates such a result. As set forth above, the Constitution establishes a regime of shared powers that

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[17] This amount should be further reduced to reflect additional appropriations in the 2022 Appropriations Act, however, this would still not leave sufficient unappropriated, unreserved funds to satisfy both the trial court's order and the budget.

requires the Governor and the General Assembly to engage in negotiations over the State Budget. *Cooper*, 376 N.C. at 37, 852 S.E.2d at 59; *see also In re Separation of Powers*, 305 N.C. at 775, 295 S.E.2d at 594. Thus, while the Governor is required to submit a recommended budget to the General Assembly, he has no power to enact it himself, and instead must secure the General Assembly's approval before it can be adopted. (*See* Section III.B.1.b., *supra*). Likewise, if the General Assembly chooses to adopt a budget that differs from the Governor's recommendations, it must secure approval from the Governor, who has the power veto budget legislation, although he must do so on an up-or-down basis. (*Id.*)

Reinstating the November 10 Order would upend this system of checks and balances between the political branches. The current State Budget reflects years' of negotiations between not only the Legislative and Executive Branches, but also the House and Senate, not to mention the individual members of the General Assembly, regarding how best to allocate the State's limited resources to meet competing demands. This is also the first biennium since Governor Cooper took office in which he has agreed to sign the budget, implying that he believes both the 2021 Appropriations Act and the 2022 Appropriations Act represent acceptable (and constitutional) compromises between the two branches. Despite this, DOJ continues to advocate that the Court undo the compromise reached between the political branches and approve additional appropriations to three Executive Branch agencies—DPI, DHHS, and the UNC System—that were not part of the deal. The Court should not permit the Executive Branch to use the Judiciary to circumvent the

General Assembly in such a manner. If the Executive believes more funds are necessary—whether for education or any other purpose—the Constitution requires that it convince the people's popularly elected representatives in the General Assembly.

In response, DOJ and the Plaintiffs point out that the State Budget includes transfers to replenish the State's Savings Reserve (commonly known as the "Rainy Day Fund"), which is established under the State Budget Act. *See also* N.C.G.S. §143C-4-2 ("Savings Reserve"). But this does not mean money in the Savings Reserve is "available" to satisfy the November Order. Nor does it mean the Court can tap the reserve without violating the Separation of Powers. Under the State Budget Act, moneys held in reserve can be expended "only for the purposes for which the reserve is established" and can only be released pursuant to the procedures set forth in the statute governing the reserve. N.C.G.S. §143C-4-8. Indeed, the statutes governing the Savings Reserve expressly require a further vote of the General Assembly (and in some cases a two-thirds majority) to approve expenditures. N.C.G.S. §143C-4-2(b) and (b1). In other words, the General Assembly must pass an appropriation before money can be transferred out of the Savings Reserve.

Just as importantly, the Court of Appeals already rejected the notion that courts can order transfers out of the State's emergency reserves in *Richmond County Board of Education.* There, the plaintiffs argued the court should order the State to transfer money out of the Contingency and Emergency Reserve to repay the fines and forfeitures they claimed were due under the Constitution. The court nevertheless

rejected the plaintiffs' argument on separation of powers grounds, because the decision when to use emergency funds is a political question that is expressly committed to the executive and legislative branches:

> It is hard to imagine a more discretionary process than the one required to obtain emergency funds—a process that permits State agencies to request the funds, then permits the Governor to decide whether to approve that request, and then calls for the Council of State to review the agency's request and the Governor's recommendation, and to vote on whether to approve it. N.C. Gen. Stat. § 143C-4-4.
>
> Moreover, **commanding members of the Council of State and other executive branch officials to approve payment from this type of discretionary emergency fund is no less offensive to the Separation of Powers Clause than commanding the legislature to appropriate the money.** *See Alamance Cty. Court Facilities*, 329 N.C. at 100, 405 S.E.2d at 133. The Contingency and Emergency fund, as its name suggests, was created to fund "contingencies and emergencies" for which no separate appropriation exists but which must be addressed before the General Assembly convenes to appropriate new funds. Determining what constitutes an emergency worthy of this special fund is a task for which executive branch officials are uniquely suited. The judiciary "has no power, and is not capable if it had the power" of substituting its own judgment for that of the executive branch officials charged with making these discretionary decisions. *Id.* at 101 . . . .

Richmond Cty. Bd. of Educ., 254 N.C. App. at 428–29 (emphasis added).

The same is true here. The Savings Reserve is one of the only reliable, large sources of funds the State has to address shortfalls in economic downturns or respond to natural disasters. Accordingly, the State Budget Act limits its use to emergency situations, such as covering revenue shortfalls and responding to natural disasters.

While those statutes also permit the General Assembly to expend funds to "pay costs imposed by a court or administrative order," N.C.G.S. §143C-4-2(b), the same was true of the Contingency Reserve at issue in *Richmond County*. *See* 254 N.C. App. at 429 (observing that N.C.G.S. §143C-4-4 permits the Council of State to use the contingency reserve for "'expenditures required . . . by a court.'") The Court nevertheless held that the decision to use those funds constituted a nonjusticiable political question. *Id.; see also, Leandro II*, 358 N.C. at 639 (explaining that issues constitute nonjusticiable, political questions "'(1) when the Constitution commits an issue, as here, to one branch of government; *or* (2) when satisfactory and manageable criteria or standards do not exist for judicial determination of the issue.'" (quoting *Baker v. Carr*, 369 U.S. 186, 210 (1962))). This is because there are simply no "judicially manageable standards" to decide how much to transfer to the reserve or when to access it. Doing so would require the Court to weigh the State's current needs against the risk of future emergencies to determine which must be addressed, in what amount, and in what order. That is not a legal analysis. Instead, it is precisely the type of determination the people must make through their elected representatives.

All told, Plaintiffs and DOJ fail address the numerous, unintended consequences that would result if judges took the power of the purse unto themselves and began ordering appropriations from the bench. As the Court of Appeals warned, accepting reasoning of the trial court's November 10 Order "would result in a host of ongoing constitutional appropriations, enforceable through court order." (Writ of

Prohibition at 2). Our State Constitution, however, requires the State to maintain a balanced budget. *See* N.C. Const. art. III, § 5. Yet, Plaintiffs and DOJ offer no explanation as to how the inevitable conflicts created by such judicially imposed budget directives should be resolved. Moreover, while Plaintiffs may claim there is enough money this year to fund Years 2 and 3 of the CRP, Plaintiffs and DOJ do nothing to explain what should happen in future years if there is an economic downturn or revenue shortfall. Where should the money come from? Which competing priorities should go unfunded? And who should decide which ones must go unaddressed? Deciding what to do in that case would necessarily require decision-makers to consider the budget as a whole and weigh the competing demands for the State's resources. That of course, is what the General Assembly was established to do, and why the Constitution requires that the people's representatives approve the Budget.

Reinstating the trial court's November 10 Order thus would push the judiciary well beyond its established role and require it to answer questions and exercise powers that the Constitution reserves exclusively for the political branches. Worse, it would require it to upend a duly enacted State Budget—approved by both the Executive and Legislative Branches—without any showing that the budget is inadequate to provide educational opportunities to North Carolina's children. The Court should refuse Plaintiff and DOJ's invitation to second-guess the political branches' efforts to address the complex and ever-changing needs facing the people of North Carolina.

CONCLUSION

For each of the foregoing reasons, as well as those set forth in their opening brief, Legislative-Intervenors ask that the 10 November 2021 Order, as amended by the order of 26 April 2022, including its directive purporting to require the State to implement a statewide remedy in the form of the CRP, be vacated in its entirety. Similarly, Legislative-Intervenors ask that the Court deny DOJ's and Plaintiffs' requests to reinstate the 10 November 2021 Order.

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