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-INTERVENOR APPELLANTS OPENING BRIEF

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PHILIP E. BERGER, in his official capacity as President *Pro Tempore* of the

From Wake County
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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-INTERVENOR APPELLANTS' OPENING BRIEF

****

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 issue an impermissible advisory opinion by dictating the programs and funding that must be implemented for North Carolina's statewide educational system, over an eight-year period, in the absence of any claim or judgment that the State system as a whole was somehow insufficient to provide children the opportunity for a sound basic education?

3. Did the trial court improperly decide a political question by issuing an order requiring the State to implement, and fund, each element of the Plaintiff's proposed Comprehensive Remedial Plan ("CRP")?

4. 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?

5. 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?

6. 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?

7. 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?

8. 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?

Legislative Intervenors-Defendants / Appellants, 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, on behalf of the General Assembly and as agents of the State (together, "Legislative-Intervenors"), hereby submit their Opening Brief.

INTRODUCTION

This Court's first opportunity to consider this matter came in 1996. In that opinion, Chief Justice Burley Mitchell specifically articulated the limits on judicial review and supervision of education policy and funding in North Carolina, holding that the "administration of the public schools of the state is best left to the legislative and executive branches of government." *Leandro v. State*, 346 N.C. 336, 357, 488 S.E.2d 249, 261 (1997) ("*Leandro I*"). Six years later, this Court reiterated the principles of judicial restraint that Chief Justice Mitchell articulated, noting the superior expertise of the legislative and executive branches, and recognizing the Judicial Branch's limitations in providing remedies "in service to a subject matter, such as public school education, that is within their primary domain." *Hoke Cnty. Bd. of Educ. v. State*, 358 N.C. 605, 645, 599 S.E.2d 365, 395 (2004) ("*Leandro II*").

In the succeeding 20 years, the trial court has increasingly disregarded this Court's holdings on the limits of judicial authority over public education policy and funding. During that time, a decision that this Court expressly limited to the constitutionality of school conditions in Hoke County mutated into a platform for seemingly permanent judicial supervision over all aspects of public education policy and funding in the State of North Carolina. This Court, applying its prior decisions

in this very case, should reiterate the limitations of the Judicial Branch's authority to provide remedies for violations related to public education and the limited scope of the matter that is actually before the Court and, accordingly, reverse and vacate the Order on Appeal.

STATEMENT OF THE CASE

This case was initially filed in May 1994, and in the intervening years has resulted in at least three appeals prior to this one. *See Leandro v. State*, 346 N.C. 336, 488 S.E.2d 249 (1997) ("*Leandro I*")*; Hoke Cnty. Bd. of Educ. v. State,* 358 N.C. 605, 599 S.E.2d 365 (2004) ("*Leandro II*")*; and Hoke Cnty. Bd. of Educ. v. North Carolina*, 367 N.C. 156, 749 S.E.2d 451 (2013) ("*Leandro III*").

The present action involves an appeal by Plaintiffs, Plaintiff Intervenors, certain executive branch agencies represented by the Department of Justice ("DOJ") and Legislative–Intervenors, from a 10 November 2021 Order entered in Wake County Superior Court by the Honorable David W. Lee, as amended on remand pursuant to this Court's directives. On 18 March 2022, this Court granted DOJ's petition seeking review prior to a decision of the Court of Appeals. (18 March 2022 Order (No. 425A21-1)). The Court then immediately remanded the case to the trial court for purpose of "allowing the trial court to determine what effect, if any, the enactment of the State Budget" which was passed after the entry of the November 10 Order, "has upon the nature and the extent of the relief that the trial court granted."

(*Id.*).[1] The case was assigned to the Honorable Michael L. Robinson, Special Superior Court Judge for Complex Business Cases. (R p 1873). Pursuant to the Court's directive on remand, Judge Robinson entered an Order Following Remand on 26 April 2022, amending the November 10 Order and entering judgment in favor of Plaintiffs, the North Carolina Department of Health and Human Services ("DHHS"), North Carolina Department of Public Instruction ("DPI"), and UNC System, in the total amount of $785,106,248. (R p 2641).

It is from this Amended Order that the parties have filed cross-appeals.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

In the 28 years since its filing, this case has come to be referenced as shorthand for the State constitutional right to an opportunity to obtain a sound basic education. Over time, however, as evidenced by the sweeping relief in the Order on Appeal, the ability to make facile references to "Leandro," as if the case itself implicates all aspects of a statewide constitutional right has obscured the actual scope of the lawsuit. Review of the trial court's order below, however, requires attention, not just

[1] The Court's order directed that all other pending petitions and appeals be held in abeyance pending remand to the trial court. (*Id.*). On 31 May 22, the Court issued an order granting all pending petitions seeking review of the trial court's order as amended.

to symbols, but the precise procedural history of this litigation, and, in particular, what was and was not established as a result of the only trial held in this matter.

I. <u>The Parties and Plaintiffs' Initial Claims</u>.

This action was filed on May 25, 1994, against the State of North Carolina and the State Board of Education. (R p 3). The original Plaintiffs were local school boards responsible for overseeing five "relatively poor school systems" in Cumberland, Halifax, Hoke, Robeson, and Vance Counties, as well as students and parents from those school systems. *Leandro I*, 346 N.C. at 342, 488 S.E.2d at 252. They were later joined by a series of intervening Plaintiffs that included the local school boards for six "relatively large and wealthy school systems" in the City of Asheville and Buncombe, Wake, Forsyth, Mecklenburg, and Durham Counties; students and parents from those school systems; as well as the North Carolina State Conference for the National Association for the Advancement of Colored People. *Id.* 346 N.C. at 342, 488 S.E.2d at 252.

As this Court explained in *Leandro I*, the claims asserted by these two sets of Plaintiffs were not the same. Plaintiffs from the "poor" school districts alleged their students were being "denied an equal education because there is a great disparity between the educational opportunities available [in their districts] and those offered in more wealthy districts of our state." *Id.* In doing so, Plaintiffs focused their allegations on what they believed were deficiencies in the "State's *system of financing* education," which required local governments to fund capital expenses, as well as at least twenty-five percent of current expenses for schools, as well as the conditions in

their individual districts. *Id.* (Emphasis added.) Even though their districts had imposed higher tax rates than wealthier districts, Plaintiffs alleged "those higher tax rates could not make up for their lack of resources or for the disparities between systems." *Id.* They also alleged that the supplemental funding provided by the State to finance schools in "low-wealth" districts was not enough to meet the requirements of the State's Basic Education Program, established in 1988 and required under statutes in place at the time. According to Plaintiffs, this resulted in poor conditions in their individual districts, including substandard school facilities and insufficient educational resources, producing an inadequate substantive education, as evidenced by standardized test scores. *Id.*

Plaintiffs from the wealthy school districts essentially alleged the opposite. They alleged that by "singling out certain rural districts to receive supplemental state funds" the State had "failed to recognize comparable if not greater needs in urban school districts," which must serve large populations of students with special needs, such as those who require services for disabilities, English-language instruction, or programs for the academically gifted. *Id.* Given that they came from wealthier school districts, the intervening Plaintiffs' claims did not include allegations that school facilities in the district were in poor condition or that their districts lacked basic instructional materials.

Based on these allegations, both sets of Plaintiffs asserted causes of action for, *inter alia*, (1) failure to provide adequate educational opportunities in violation of Article I, Section 15, and Article IX, Section 2 of the State Constitution; (2) violation

of the equal protection under Article I, Section 19; (3) violation of Article IX, Section 2(1)'s requirement that the State establish "a general and uniform system of free public schools"; as well as (4) failure to provide an education that complied with the requirement of State statutes governing education. (R pp 57-63; 177-184).

II. ***<u>Leandro I</u>*.**

Defendants moved to dismiss Plaintiffs' claims under Rules 12(b)(1), (2) and (6), asserting that the trial court lacked subject matter and personal jurisdiction and that the Plaintiffs had failed to state a claim. The trial court (per Superior Court Judge E. Maurice Braswell) denied the motion to dismiss, and Defendants appealed. On review, the Court of Appeals reversed, holding that the complaints should have been dismissed because the constitutional right to education was limited to one of equal access to the existing system of education and did not encompass a qualitative standard. *Leandro v. North Carolina*, 122 N.C. App. 1, 11, 468 S.E.2d 543, 550 (1996).

In 1997, this Court decided *Leandro I*, partially overturning the Court of Appeals, and holding that Plaintiffs could proceed on their claims that they were denied a constitutionally adequate education. In an opinion by Chief Justice Mitchell, the Court held that "Article I, Section 15, and Article IX, Section 2 of the North Carolina Constitution combine to guarantee every child of the state an opportunity to receive a sound basic education in our public schools." *Leandro I,* 346 N.C. at 347, 488 S.E.2d at 255. The Court then defined what constitutes a "sound basic education," not in terms of money or funding, but in terms of "substance," explaining as follows:

> For purposes of our Constitution, a "sound basic education" is one that will provide the student with at least: (1) sufficient ability to read, write, and speak the English language and a sufficient knowledge of fundamental mathematics and physical science to enable the student to function in a complex and rapidly changing society; (2) sufficient fundamental knowledge of geography, history, and basic economic and political systems to enable the student to make informed choices with regard to issues that affect the student personally or affect the student's community, state, and nation; (3) sufficient academic and vocational skills to enable the student to successfully engage in post-secondary education or vocational training; and (4) sufficient academic and vocational skills to enable the student to compete on an equal basis with others in further formal education or gainful employment in contemporary society.

Id. Based on this, the Court concluded "that some of the allegations in the complaints . . . state claims upon which relief may be granted if they are supported by substantial evidence." *Id.* at 355, 488 S.E.2d at 259.

At the same time, the Court held that, because the Constitution explicitly authorizes local governments to use local revenue to "add to or supplement" public schools in Article IX, Section 2(2), it "does not require substantially equal funding or educational advantages in all school districts." *Id.* at 349-50, 488 S.E.2d at 256 (noting that "the Constitution itself contains provisions that contradict plaintiffs' arguments" as it "so clearly creates the likelihood of unequal funding among districts as a result of local supplements"). Accordingly, the Court held that Plaintiffs' claims under the equal protection clause of Article I, section 19, and uniform schools provision in Article IX, section 2, were properly dismissed, explaining that mere

differences in funding or educational opportunities among districts, standing alone, "do not violate constitutional principles." *Id.* at 350, 488 S.E.2d at 256.

In remanding the case, the Court outlined evidentiary factors for the trial court to consider when determining whether Plaintiffs proved their claims. Those factors included: (1) the level of performance of the children on standardized achievement tests; (2) any educational goals and standards adopted by the legislature; (3) the level of the State's general educational expenditures and per-pupil expenditures; and (4) any other factors that may be relevant for consideration when determining educational adequacy issues under the Constitution. *Id.* at 355-57, 488 S.E.2d at 259-60. Yet, while the Court noted that per-pupil funding may be "one factor" in the Court's consideration, it noted the substantial sums spent on education by successive General Assemblies on education and agreed that "available evidence suggests that substantial increases in funding produce only modest gains in most schools." *Id.* at 356-7, 488 S.E.2d at 260. Accordingly, it warned that courts "should not rely upon the single factor of school funding levels in determining whether a state is failing its constitutional obligation to provide a sound basic education." *Id.*

The Court also stressed that decisions over how to administer the State's educational program should be left to the democratic process. It explained that "[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***." *Id.* 346 N.C. at 354 (emphasis added). Therefore, "within the limits of rationality, the legislature's efforts to tackle the problems should be

entitled to respect." *Id.* In doing so, the Court acknowledged that the legislative process provides a better forum to make such determinations:

> We acknowledge that ***the legislative process provides a better forum than the courts for discussing and determining what educational programs and resources are most likely to ensure that each child of the state receives a sound basic education***. The members of the General Assembly are popularly elected to represent the public for the purpose of making such decisions. The legislature, unlike the courts, is not limited to addressing only cases and controversies brought before it by litigants. The legislature can properly conduct public hearing and committee meetings at which it can hear and consider the views of the general public as well as education experts and permit the full expression of all points of view as to what curricula will best ensure that every child of the state has the opportunity to receive a sound basic education.

Id. at 354-55 (emphasis added) (announcing definition of sound basic education "with some trepidation" because "judges are not experts in education and are not particularly able to identify in detail those curricula best designed to ensure that a child receives a sound basic education"); *see also id.* at 357 ("We reemphasize . . . that the administration of the public schools of the state is best left to the legislative and executive branches of government.")

Finally, the Court set out "the standard of proof plaintiffs must meet in making their case." *See 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). Citing the need to respect separation of powers, the Court admonished that the judiciary "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[,]" and "a clear showing to the contrary must be made before the courts may conclude that they have not." *Leandro I*, 358 N.C. at 357, 488 S.E.2d at 261. "Only such a clear showing," the Court explained, would "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.*

With this guidance, the case was remanded to the trial court and then subsequently assigned to the Honorable Howard E. Manning, Jr. under Rule 2.1 of the General Rules of Practice. (R p 245).

III. <u>Trial and Judgment Limited to the Conditions in the Hoke County Schools</u>.

After remand, Judge Manning, with agreement of the parties, bifurcated the issues and conducted a trial limited to the conditions in Hoke County. *Leandro II*, 348 N.C. at 613, 599 S.E.2d at 375. The trial was conducted periodically over fourteen months, beginning in September 1999, and was conducted primarily in federal courtrooms provided by the U.S. District Court for the Eastern District of North Carolina. (R pp 247 – 249). Following conclusion of the trial, the parties submitted post-trial briefing and Judge Manning issued his judgment, set out in a four-part "Memorandum of Decision" that spanned more than 400-pages, the last installment of which was entered on April 4, 2002.[2]

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[2] *See* Memorandum of Decision – Section One (filed 12 October 2002) (R pp 234 – 427); Memorandum of Decision – Section Two (filed 26 October 2000) (R pp 428 – 471); Memorandum of Decision – Section Three (filed 26 March 2001) (R pp 472 – 559);

In his Memorandum of Decision, Judge Manning concluded the State's (i) curriculum (as reflected in the State's Standard Course of Study); (ii) system for licensing, certifying, and employing teachers; (iii) standards for academic accountability; as well as its (iv) "educational funding delivery system" were all sufficient to provide children with an opportunity to obtain a sound basic education. (R pp 424 – 427). Importantly, Judge Manning also rejected Plaintiffs' arguments that differences in educational opportunities in Hoke County were attributable to a lack of funding. (R p 558-59 ("[P]laintiffs and plaintiff-intervenors have yet to convince this Court, by clear and convincing evidence, that the State of North Carolina is not presently providing sufficient funding to its LEAs to meet the Constitutional mandate that each child have an equal opportunity to receive a sound basic education."); *see also* R p 474 ("Instead, the Court believes that the funds presently appropriated and otherwise available are not being effectively applied . . . .")).[3] Judge Manning, however, did conclude that Plaintiffs had shown that at-risk students in Hoke County were "not receiving an equal opportunity to receive a sound basic education." (R pp 667-68). Accordingly, he ordered the State to develop a plan to address the deficiencies in the educational services provided to students in Hoke County, and to keep the Court apprised of its remedial actions

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Order Amended Memorandum of Decision Dated 26 March 2001 (R pp 560 – 570); and Memorandum of Decision – Section Four (filed 4 April 2002) (R pp 570 – 682).

[3] *See also Leandro II*, 358 N.C. at 634, 599 S.E.2d at 388 ("We note 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 program scheme lacked the essentials necessary to provide a sound basic education.")

through written reports filed every ninety-days. *See Leandro II*, 358 N.C. at 608-09, 599 S.E.2d at 372-73. At the same time, Judge Manning expressly stated the "nuts and bolts of how this task should be accomplished is not for the Court to do." (R p 680). Instead, "[c]consistent with the direction of *Leandro*," he concluded "this task belongs to the Executive and Legislative Branches of Government." (R p 680). The Court also ordered that the State expand pre-kindergarten educational programs so that they reach all qualifying "at-risk" students. *Id.*

IV. ***Leandro II*.**

The State and the Plaintiffs cross-appealed Judge Manning's decision. In its appeal, the State argued that the Court erred in finding a violation of the right to a sound basic education in the Hoke County School System and had likewise exceeded its authority in ordering the expansion of pre-kindergarten programs. Plaintiffs, in turn, argued the trial court erred by considering educational services provided by *federal* funds when determining whether the State is meeting its constitutional obligations, instead of limiting its examination to just those programs provided by *State* funds. *Id.*

The Court in *Leandro II* began with the observation that, "[w]ith the [*Leandro I*] *decision* . . . the thrust of this litigation turned from a funding issue to one requiring the analysis of the qualitative educational services provided to the respective plaintiffs and plaintiff-intervenors." *Leandro II*, 358 N.C. at 609; 599 S.E.2d at 373. The Court also explained that, because the trial had been limited to the conditions in Hoke County, "***our consideration of this case is properly limited to the issues***

relating in Hoke County as raised at trial." *Id.* at 613, 599 S.E.2d at 375 (emphasis added). For this reason, the Court held that its mandates did not extend beyond Hoke County, and that trials would be necessary on Plaintiffs' claims regarding the other counties:

> The Court recognizes that plaintiffs from the four other original rural districts—those representing Cumberland, Halifax, Robeson, and Vance Counties—were not eliminated as parties as a result of the trial court's decision to confine evidence to its effect on Hoke County schools. ***However, because this Court's examination of the case is premised on evidence as it pertains to Hoke County in particular, our holding mandates cannot be construed to extend to the other four rural districts***, the case is remanded to the trial court for further proceedings that include, but are not necessarily limited to, presentation of relevant evidence by the parties, and findings of and conclusions of law by the trial court.
>
> Moreover, the Court emphasizes that its holding in the instant case is not to be construed in any fashion that would suggest that named plaintiffs from the other four rural districts are precluded from pursuing their claims as presented in the complaint.

Id. (Emphasis added).

As to the substance of the trial court's judgment, the Court upheld Judge Manning's finding that the State had failed to provide a significant number of Hoke County School children an opportunity to receive a sound basic education. *Id.* at 609, 599 S.E.2d 373. In doing so, the Court held Judge Manning properly considered evidence regarding both "outputs" (*i.e.*, evidence regarding student performance, including results of standardized testing) as well as "inputs" (evidence regarding the resources made available to districts and students) in finding the existence of a

violation. At the same time, the Court noted that, given the "free-wheeling nature" of the trial court's judgment, it could not tell "pro or con" whether the trial court's findings were limited to only "at-risk" students. *Id.* at 622, 634, 599 S.E.2d at 380, 388. Accordingly, the Court explained: "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." *Id.* at 634, 599 S.E.2d at 388.

The Court in *Leandro II* also rejected Plaintiffs' argument that it should ignore federal funding when determining whether the State has met its obligations. As the Court explained, "[w]hile the State has a duty to provide the means for such [constitutionally sufficient] educational opportunity, no statutory or constitutional provisions require that it is concomitantly obliged to be the exclusive source of the opportunity's funding." *Id.* at 646, 599 S.E.2d at 395.

Finally, the Court addressed the remedies Judge Manning sought to impose. First, the Court held that the trial court "demonstrated admirable restraint by refusing to dictate how existing problems should be approached and resolved," instead "defer[ing] to the expertise of the executive and legislative branches of government in matters concerning the mechanics of the public education process." *Id.* at 638, 599 S.E.2d at 390-91. Accordingly, the Court upheld "those portions of the trial court's order . . . that require the State to assess its education-related allocations to the county's schools [*i.e.*, the schools in Hoke County] so as to correct any

deficiencies that presently prevent the county from offering its students the opportunity to obtain a *Leandro*-conforming education." *Id.* at 638, 599 S.E.2d at 391. But the Court reversed the portion of the trial court's order directing the State to extend pre-kindergarten services to all at-risk students, reasoning as follows:

> In our view, while the trial court's findings and conclusions concerning the problem of "at-risk" prospective enrollees are well supported by the evidence, a similar foundational support cannot be ascertained for the trial court's order requiring the State to provide pre-kindergarten classes for either all of the State's "at-risk" prospective enrollees or all of Hoke County's "at-risk" prospective enrollees. Certainly, when the State fails to live up to its constitutional duties, a court is empowered to order the deficiency remedied, and if the offending branch of government or its agents either fail to do so or have consistently shown an inability to do so, a court is empowered to provide relief by imposing a specific remedy and instructing the recalcitrant state actors to implement it . . . . **However, such specific court-imposed remedies are rare, and strike this Court as inappropriate at this juncture of the instant case for two related reasons: (1) The subject matter of the instant case—public school education—is clearly designated in our state Constitution as the shared province of the legislative and executive branches; and (2) The evidence and findings of the trial court, while supporting a conclusion that "at-risk" children require additional assistance and that the State is obligated to provide such assistance, do not support the imposition of a narrow remedy that would effectively undermine the authority and autonomy of the government's other branches . . . .**
>
> The state's legislative and executive branches have been endowed by their creators, the people of North Carolina, with the authority to establish and maintain a public school system that ensures all the state's children will be given their chance to get a proper, that is, a *Leandro*-conforming, education. As a consequence of such empowerment, those two branches have developed a

> shared history and expertise in the field that dwarfs that of this and any other Court. While we remain the ultimate arbiters of our state's Constitution, and vigorously attend to our duty of protecting the citizenry from abridgments and infringements of its provisions, **we simultaneously recognize our limitations in providing specific remedies for violations committed by other government branches in service to a subject matter, such as public school education, that is within their primary domain**. Thus, we conclude that the trial court erred when it imposed at this juncture of the litigation and on this record the requirement that the State must provide pre-kindergarten classes for all "at-risk" prospective enrollees in Hoke County. In our view, based on the evidence presented at trial, such a remedy is premature, and **its strict enforcement could undermine the State's ability to meet its educational obligations for "at-risk" prospective enrollees by alternative means.**

Id. at 643-45, 599 S.E.2d at 394 (emphasis added).

The Court concluded its decision by directing that the Superior Court should proceed with trials on the "pending cases involving either other rural school districts or urban school districts" on remand. *Id.* at 649, 599 S.E.2d at 397. However, the Court recognized that it "ultimately" was remanding the case "into the hands of the legislative and executive branches." *Id.*

V. **<u>"Remedial Phase" Following Remand</u>.**

Although the Court in *Leandro II* remanded the case to the trial court with the expectation that it would conduct trials concerning the other named school districts, as well as those students who did not meet the definition of "at-risk," no such trial

ever occurred.[4] Instead, the Court and the parties pushed forward with post-judgment enforcement proceedings, which they now refer to as the "remedial phase" of this litigation. During that time, Judge Manning summoned the parties to appear at a series of status conferences and required Defendants to provide periodic reports and updates on their progress fixing the deficiencies identified in the course of the trial. At some point, the scope of those conferences, as well as the reports the State submitted, inexplicably expanded beyond Hoke County to include progress on statewide initiatives and standardized test results across all 115 local school districts.

VI. <u>**Plaintiffs Cooperate with DOJ to Obtain Consent Orders Purporting to Grant Statewide Relief**</u>.

Following Judge Manning's retirement in 2016, the case was reassigned to Judge Lee. (R p 1278). After the case was reassigned, DOJ and the executive branch agencies it represents changed tact. From that point on, DOJ began cooperating with the Plaintiffs to secure a series of consent orders purporting to require Defendants to take actions and fund various initiatives that would otherwise require legislative approval.

In 2018, DOJ, together with the Plaintiffs, asked the court to appoint WestEd, a San-Francisco-based consultant, to work with the Governor's newly-appointed

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[4] Consistent with the Court's holding in *Leandro II* that its mandates did not extend beyond Hoke County, the Charlotte-Mecklenburg Board of Education and North Carolina NAACP filed a Second Amended Complaint on 30 September 2005—apparently recognizing that a trial on their claims had not occurred and that such a trial would be necessary to secure a judgment. (R p 1008). On 4 May 2006, the Asheville City Board of Education, Buncombe County Board of Education, Durham Public Schools Board of Education, Wake County Board of Education, and Winston-Salem Board of Education voluntarily dismissed their claims. (R p 1037).

Commission on Access to a Sound Basic Education to develop proposals to correct deficiencies in the educational offerings in the Plaintiffs' school districts. (13 March 2018 Order at n. 1 (R p 1306); *see also* 10 November 2021 Order at p 5 (R p 1827)). Through a joint motion, DOJ and the Plaintiffs asked the court to charge the consultant with an expanded scope, and thus to develop recommendations, not just for Hoke County, but "every public school in North Carolina" to:

> a. To provide a competent, well-trained teacher in every classroom ***in every public school in North Carolina***;
>
> b. To provide well-trained, competent principal for ***every public school in North Carolina***; and
>
> c. To identify resources necessary to ensure ***that all children in public school***, including those at-risk, have an equal opportunity to obtain a sound basic education, as defined in *Leandro I.*

(Order on Joint Motion for Case Management and Scheduling Order, dated 1 February 2018 (R pp 1293-94) (emphasis added)). The parties also asked that the Court direct that WestEd be given access to, and be allowed to participate in, all meetings of the Governor's Commission.[5] (R p 1295). DOJ and the Plaintiffs, however, did not ask Judge Lee to direct WestEd to work with the General Assembly, and the West Ed report makes clear the authors did not consult any members of the General Assembly in developing their recommendations, despite purportedly

[5] The WestEd report was funded, in part, by two executive branch agencies controlled by the Governor, DHHS ($600,000) and the Department of Administration ($200,000). *See* "Pivotal Report in NC School Funding Lawsuit Costs $2 Million, WRAL.com (3 Nov. 2021), available at, https://tinyurl.com/39cfzevy (last visited 1 July 2022).

"engaging" more than 1,310 "stakeholders" including superintendents, teachers, central office staff, members of the board of education, and members of the Governor's Commission. (R p. 1349).

WestEd's Report was submitted to Judge Lee in June 2019, but the court directed that it initially remain under seal. In January 2020, after the WestEd report was finally released to the public, the trial court signed a jointly-prepared consent order directing the State to create a plan to implement WestEd's recommendations. (R p 1669-70). The consent order expanded the scope of the court's mandates even further by directing that the plan include the following *statewide* components:

> 1. A system of teacher development and recruitment that ensures each classroom is staffed with a high-quality teacher who is supported with early and ongoing professional learning and provided competitive pay;
>
> 2. A system of principal development and recruitment that ensures each school is led by a high-quality principal who is supported with early and ongoing professional learning and provided competitive pay;
>
> 3. A finance system that provides adequate, equitable, and predictable funding to school districts and, importantly, adequate resources to address the needs of all North Carolina schools and students, especially at-risk-students as defined by the *Leandro* decisions;
>
> 4. An assessment and accountability system that reliably assesses multiple measures of student performance against the *Leandro* standard and provides accountability consistent with the *Leandro* standard;
>
> 5. An assistance and turnaround function that provides necessary support to low-performing schools and districts;
>
> 6. A system of early education that provides access to high-quality pre-kindergarten and other early childhood

> learning opportunities to ensure that all students at-risk of educational failure, regardless of where they live in the State, enter kindergarten on track for school success; and
>
> 7. An alignment of high school to postsecondary and career expectations, as well as the provision of early postsecondary and workforce learning opportunities, to ensure student readiness to all students in the State.

(R pp 1635-36).

On 15 March 2021, DOJ submitted a "Comprehensive Remedial Plan" ("CRP") to the trial court, which largely mirrored items the Governor and State Board of Education had requested in the Governor's proposed budget.[6] (R p 1679-80). Although the 2002 judgment that resulted from the only trial in this matter was limited to at-risk children attending schools in Hoke County, *see Leandro II,* 358 N.C. at 613, 599 S.E.2d at 375, n.5, the CRP included proposals to rework virtually every element of the State's education program over an eight year period. In its submission, DOJ represented that each of the 146 proposed actions items in the Plan were "necessary and appropriate actions that must be implemented to address continuing constitutional violations." (*See* 10 November 2021 Order (R p 1831) (quoting State's March 20 Submission at 3, 4 (emphasis added by court))).

The Plaintiffs consented to the Plan, and in June 2021, the Court issued an order—again drafted by the parties—approving the Plan and requiring the State to implement it. (R p 1678). The Executive-branch agencies that prepared the CRP acknowledged in numerous places that their proposals would require approval of the

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[6] *See* Governor Cooper Proposes Budget, dated 24 March 2021, *available at* https://tinyurl.com/ycxf5tcw (last visited 27 June 2022).

North Carolina General Assembly—either to amend existing statutes or appropriate money for the proposals. (*See, e.g.,* R pp 1687-1742 (listing "General Assembly" among the "Responsible Parties"). Indeed, while the funding necessary to accomplish many of the tasks was marked "TBD," the Appendix attached to the Plan estimated that, by FY 2028, it would require at least $5.4 billion each year in recurring appropriations, with another $3.6 billion in non-recurring appropriations over the course of the eight-year plan. (R pp 1743-71).

Plaintiffs and DOJ later conceded in hearings before Judge Robinson that they never sought to consult the General Assembly, either in the course of developing the CRP or after they secured an order directing them to implement it. (Tr pp 71:19-25, 72:1-25, 73:1-16). In status conferences, however, DOJ repeatedly complained that executive agencies could not implement the plan because, at the time, no budget had been adopted for the FY 2021-22 and 22-23 biennium. (R pp 1772-73).

VII. Trial Court's 10 November 2021 Order.

In November 2021, Plaintiffs and DOJ submitted briefs and a proposed order to Judge Lee that purported to, in the absence of a budget, require the State Controller and Treasurer to transfer nearly $1.7 billion out of the State treasury to fund Years 2 and 3 of the CRP. The Order rested on the erroneous assumption that *Leandro II* held there was a *statewide* failure to provide children with a sound-basic education. (R p 1825 (reciting that "in *Leandro II*, the Supreme Court held, 'an inordinate number' of students had failed to obtain a sound basic education," and that this led the trial court to "annually review[] the academic performance data ***for every***

school in State." (emphasis added))). The Order thus purported to fault the State for "failing" to remedy this supposed statewide violation, without any reference to the fact that *Leandro II*—and the only judgment in this case—were limited to at-risk students in Hoke County. (R pp 1840-41); *see also Leandro II,* 358 N.C. at 609; 599 S.E.2d at 373 ("[B]ecause this Court's examination of the case is premised on evidence as it pertains to Hoke County in particular, our holding mandates cannot be construed to extend to the other four rural districts.")

The trial court acknowledged the Appropriations Clause prohibits drawing money from the treasury unless "in consequence of the appropriations made by law." N.C. Const. Art. V, § 7. It also acknowledged that this Court's cases hold that the General Assembly has the exclusive power over appropriations (R pp 1836-37 (citing *Cooper v.* Berger, 376 N.C. 22, 852 S.E.2d 46 (2020) (Ervin, J.) and *Richmond Cnty. Bd. of Educ. v. Cowell*, 254 N.C. App. 422, 803 S.E.2d 27 (2017))). Nevertheless, Judge Lee reasoned that the trial court could order the requested appropriation. In doing so, he accepted Plaintiffs' argument that "Article I, Section 15 of the North Carolina Constitution represents an ongoing constitutional appropriation of funds," and thus concluded that the court had "inherent power" to order the appropriations to fund the CRP. (R p 1837).

Judge Lee directed that the Office of State Management and Budget ("OSBM"), Treasurer, and Controller transfer $1,754,153,000 to the Department of Public Instruction, Department of Health and Human Services, and the University of North Carolina System for that purpose and to "treat the foregoing funds as an

appropriation from the General Fund." (R p 1841). At the conclusion of the Order, Judge Lee stayed its implementation for 30 days to "preserve the *status quo*." (R p 1842).

VIII. <u>Adoption of the Budget and Issuance of Writ of Prohibition</u>.

On 18 November 2021, while Judge Lee's order was stayed, the General Assembly enacted the Current Operations and Appropriations Act of 2021, N.C. Sess. Law. 2021-180 (the "2021 Appropriations Act" or "Budget"), which the Governor signed into law the same day. Among other things, the Budget appropriated $21.5 billion in net General Funds over the FY 2021-23 biennium for K-12 public education—approximately 41% of the total biennial budget. The Budget, however, did not contain allocations identical to the Executive Branch's CRP.

On 24 November 2021, Linda Combs, Controller for the State of North Carolina and a non-party, petitioned the North Carolina Court of Appeals to issue a writ of prohibition restraining implementation of the November 10 Order, noting that the Budget and the Order created conflicting directives with which it would be impossible to comply. (R p 1893).

On 29 November 2021, the Court of Appeals issued a writ of prohibition "restrain[ing] the trial court from enforcing the portion of its order requiring petitioner to treat the $1.7 billion in unappropriated funding . . . 'as an appropriation from the General Fund . . . .[" (R p 2009). In issuing the writ, the Court of Appeals held that the trial court erred in several respects.

First, treating Article I, section 15 as a "constitutional appropriation" would contravene decisions, such as those in *Cooper v. Berger* and *Richmond Bd. of Education v. Cowell*, which have consistently held that "appropriating money from the State treasury is a power vested exclusively in the legislative branch" under the Appropriations Clause. (R p 2008). Second, such an interpretation would "render another provision of our Constitution meaningless." (R p 2008). As the court recounted, Article IX, which deals with education, includes numerous sections which "provid[e] specific means of raising funds for public education . . . including the proceeds of all penalties, forfeitures, as well as fines imposed by the State, various grants, gifts, and devises." N.C. Const. Art IX, § 6, 7. It also authorizes the General Assembly to supplement these sources of funding "by so much of the revenue of the State as may be set apart for that purpose." N.C. Const. Art. IX, § 6. The Constitution requires that all such funds "shall be faithfully appropriated and used exclusively for establishing and maintaining the uniform system of free public schools." *Id.* If Article I, section 15 were treated as an "ongoing appropriation," the court reasoned that "there [would be] no need for the General Assembly to 'faithfully appropriate' the funds" and "it would render these provisions . . . unnecessary and meaningless." (R p 2008).

Finally, the Court of Appeals held the November 10 Order "would result in a host of ongoing appropriations, enforceable through court order, that 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." (R p 2009).

On 15 December 2021, Plaintiffs filed a "Notice of Appeal, Petition for Discretionary Review and, Alternatively, Petition for Writ of *Certiorari*" seeking review of the Court of Appeals' 30 November 2021 Order. Plaintiffs-Intervenors likewise filed a "Notice of Appeal and Petition for Discretionary Review" the same day. Legislative Intervenors and the Controller both moved to dismiss Plaintiffs' purported appeals as of right, and opposed their petitions for discretionary review and *certiorari*, because, among other things, the passage of the Budget rendered Judge Lee's order moot. (Controller's Resp. to Pets. for Writ of Cert. and Mot. to Dismiss Appeal (No. 425A21); Legis. Intervenors' Mot. to Dismiss Pls' and Pls-Intervenors' Notices of Appeal and Pets. for Disc. Rev. (No. 425A21)).

On 7 December 2021, DOJ appealed Judge Lee's November 10 Order. (R p 1847). The next day, the General Assembly, by and through the Legislative Intervenors, intervened as of right pursuant to N.C. Gen. Stat. § 1-72.2, in the trial court and filed a notice of appeal as well. (R p 1851).

On 14 February 2022, DOJ filed a petition asking the Supreme Court to bypass the Court of Appeals and take up the parties' appeals from the November 10 Order immediately. Once again, Legislative-Intervenors opposed the bypass petition on the grounds that (i) "passage of the Budget Act rendered the Trial Court's Order moot"; (ii) "adoption of the Budget Act means that there is no longer enough unappropriated money in the General Fund to meet the trial court's $1.7 billion-

dollar directive"; (iii) implementing the Order would "completely displac[e] the role of the Legislature" because either the courts, or executive branch officials, would have to pick and choose which appropriations to fund; and (iv) because there had been no judgment establishing a statewide violation, and no party had yet challenged the Budget Act, there had been no determination that such an extraordinary intrusion in the Legislative power was indeed necessary to provide a sound basic education. (See Legislative-Intervenors' Resp. to State's Pet. for Discretionary Review (No. 425A21-2) (filed 28 Feb. 2022)).

Consistent with Legislative-Intervenors' arguments, the Supreme Court granted DOJ's Bypass Petition on 18 March 2022, but simultaneously remanded the case to the trial court "for the purpose of allowing the trial court to determine what effect, if any, the enactment of the State Budget has upon the nature and the extent of the relief that the trial court granted" in the November Order. (18 March 2022 Order Remanding Case, at 2 (No. 425A21)).[7] The next day, the case was reassigned to Judge Robinson. (R p 1873).

IX. <u>Proceedings on Remand to Determine Effect of the Budget.</u>

After receiving the case, Judge Robinson entered scheduling orders requesting that the parties submit evidence and briefing concerning the impact of the Budget on Judge Lee's November 10 order, and in particular, addressing the following issues:

> a. The amount of the funds appropriated in the 2021 Appropriations Act, 2021 N.C. Sess. Laws 180, that

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[7] The Court's order directed that all other pending petitions and appeals be held in abeyance pending remand to the trial court. (18 March 2022 Order Holding Pending Filings in Abeyance (No. 425A21)).

directly fund the various programs and initiatives called for in the Comprehensive Remedial Plan;

b. The amount of funds remaining in the General Fund currently both in gross and net of appropriations in the 2021 Appropriations Act;

c. The effect of the appropriations in the 2021 Appropriations Act on the ability of the Court to order the Legislature to transfer funds to the Department of Health and Human Services, Department of Public Instruction, and the University of North Carolina System. *See Richmond Cty. Board of Education v. Cowell,* 254 N.C. App. 422 (2017).

(R pp 1878-80).

Pursuant to this Order, DOJ submitted affidavits from Kristin L. Walker, Chief Deputy Director of State Budget for the North Carolina Office of State Management and Budget, providing calculations and figures answering the questions posed by Judge Robinson and showing, in her opinion, what portions of the years 2 and 3 of the CRP were funded by the Budget. (R pp 2014-39). In response, the Legislative-Intervenors submitted an affidavit from Mark Trogdon, Director of Fiscal Research at the nonpartisan Fiscal Research Division, which explained the legislative budget process in detail, outlined measures taken by the General Assembly that were not included in the CRP, and addressed items in the CRP over which there was disagreement. (R pp 2329-2399). Following the submission of extensive briefing by all parties, Judge Robinson held hearings on 13 April and 21 April 2022, to address the issues on remand.

On 26 April 2022, Judge Robinson entered an Order on Remand, partially answering the questions posed by the Supreme Court. In doing so, Judge Robinson

first addressed the parties' disagreement over the scope of the Court's review on remand. Judge Robinson concluded he was bound by the Court of Appeals' Writ of Prohibition, which "has not been overruled or modified" and was therefore "binding on the trial court." (R pp 2627-28). Accordingly, he held "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," but instead stated he would "comply with the Court of Appeals' determination" by amending the November 10 Order "to remove [the] directive that State officers or employees transfer funds from the State treasury to fully fund the CRP." (R pp 2629, 2640).

Although the Supreme Court's Remand Order directed Judge Robinson to address both "***the nature and the extent*** of the relief" granted in the November 10 Order, (R pp 1876, 2623-24 (emphasis added)), Judge Robinson limited his review to primarily a mathematical exercise. In doing so, Judge Robinson declined to address arguments that, as an act of the General Assembly, the Appropriations Act should be treated as presumptively constitutional, and therefore it would be premature to grant Plaintiffs' relief unless or until they can show that those appropriations are insufficient to provide children in Hoke County a sound basic education. (R p 2628). Indeed, Judge Robinson declined to apply such a presumption precisely because doing so would require Plaintiffs to put forth significant evidence to prove their claims:

> The Court also declines to determine, as Legislative Intervenors urge, that the Budget Act as passed presumptively comports with the constitutional guarantee for a sound basic education. To make a determination on the compliance of the Budget Act with the constitutional right to a sound basic education would involve extensive

> expert discovery and evidentiary hearings. This Court does not believe that the Supreme Court's Remand Order intended the undersigned, in a period of 30 days, or, as extended, 37 days, to perform such a massive undertaking.

(R p 2628).

Adopting this narrow understanding of the trial court's task on remand, Judge Robinson engaged in a detailed review of the parties' submissions showing which of the measures in Years 2 and Years 3 of the CRP were funded under the Budget. In doing so, Judge Robinson expressly held that appropriations from federal block grants, most of which come from COVID-relief funds, should count toward satisfying the requirements of the CRP, even though they do not come from State revenue. Judge Robinson also noted that the Budget makes significant appropriations for measures not included in the CRP, but did not address whether those measures could serve as alternative means of providing children with an opportunity for a sound basic education. Based on this review, Judge Robinson concluded that the Budget provided $968,046,752 of the money required under the CRP for Years 2 and 3, and that the amounts due the various executive agencies should be reduced accordingly. He thus amended the decretal provision of the November 10 Order to grant a *judgment* awarding $142,900,000 to DHHS, $608,006,248 to DPI, and $34,200,000 to the UNC System, but struck provisions that such judgment be treated as "an appropriation from the General Fund." (R p 2618-2647).

In accordance with this Court's directives, Judge Robinson certified his Order to this Court the day it was entered. Plaintiffs, the Plaintiff-Intervenors, DOJ, and Legislative-Intervenors each timely filed notices of appeal from the amended order.

(R pp 2648-70). On 31 May 2022, this Court issued an order granting all outstanding petitions and granting review of the November 10 Order, as amended by the Judge Robinson's order of April 26.

STANDARD OF REVIEW

"Whether a trial court has subject-matter jurisdiction is a question of law, reviewed *de novo* on appeal." *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010); *see also In re A.L.L.*, 376 N.C. 99, 101, 852 S.E.2d 1 (2020) (same). Indeed, "[t]he question of subject matter jurisdiction may be raised at any time, even in the Supreme Court." *Lemmerman v. A.T. Williams Oil Co.*, 318 N.C. 577, 580, 350 S.E.2d 83, 85 (1986). And, "[i]t is a universal rule of law that parties cannot, by consent, give a court, as such, jurisdiction over subject matter of which it would otherwise not have jurisdiction. Jurisdiction in this sense cannot be obtained by consent of the parties, waiver, or estoppel.'" *Pulley v. Pulley*, 255 N.C. 423, 429, 121 S.E.2d 876, 880 (1961) (quoting *Hart v. Thomasville Motors, Inc.*, 244 N.C. 84, 88, 92 S.E.2d 673, 676 (1956)), appeal dismissed and *cert. denied*, 371 U.S. 22 (1962); *see also In re Peoples*, 296 N.C. 109, 144, 250 S.E.2d 890, 910 (1978) (same).

Moreover, this Court "review[s] constitutional questions *de novo*." *Cooper v. Berger*, 370 N.C. 392, 413, 809 S.E.2d 98, 110 (2018). "In exercising *de novo* review, [this Court] presume[s] that laws enacted by the General Assembly are constitutional, and [this Court] will not declare a law invalid unless [it] determine[s] that it is unconstitutional *beyond a reasonable doubt*. In order to determine whether the violation is plain and clear, we look to the text of the constitution, the historical context in which the people of North Carolina adopted the applicable constitutional

provision, and our precedents." *Cooper*, 370 N.C. at 413–14, 809 S.E.2d at 110–11 (emphasis added and internal quotation marks and citations omitted). "[W]hen the constitutionality of a legislative act depends on the existence or nonexistence of certain facts or circumstances, [this Court] will presume the existence or nonexistence of such facts or circumstances, if reasonable, to give validity to the statute." *Hart v. State*, 368 N.C. 122, 131, 774 S.E.2d 281, 288 (2015).

Here, the Court's review properly extends to the trial court's assumption that the CRP is necessary, and indeed the only means, to provide children a sound basic education, as well as the trial court's intermediate orders imposing the CRP, all of which are expressly incorporated into the Order of 10 November by reference. (R p 1825, n.1). *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).[8]

To be clear, the only judgment resulting from the only trial in this matter was

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[8] To the extent that Plaintiffs argue that this Court cannot the Court's Orders requiring implementation of the CRP, their argument fails because (1) the CRP was an interlocutory order, and (2) the General Assembly could not intervene as of right until enactment of the Budget at which time this case involved a challenge to an act of the General Assembly. *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."); 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."); N.C. Gen. Stat. § 1-72.2(a) (requiring that validity or constitutionality of act of the General Assembly be challenged before General Assembly can intervene as of right).

limited to whether *at-risk students in Hoke County* were receiving a sound basic education, and the case involves claims related to the conditions in certain, specified school districts. There thus has never been a judgment finding a statewide violation of the right to a sound basic education, nor one finding that the Budget is insufficient to provide for the State's educational system. Indeed, no party has ever brought such a claim. This has been masked by more than twenty years of proceedings and loose characterizations by Plaintiffs and DOJ. But the only dispute before this Court is whether the State has complied with the requirements of the trial court's judgment related to *Hoke County*. Because Plaintiffs are "not free to raise a completely new claim for the first time on appeal" or, in other words, "'swap horses between courts in order to get a better mount in the Supreme Court,'" the Court must limit its review to Hoke County rather than all students across North Carolina's 100 counties. *New Hanover Cnty. Bd. of Educ. v. Stein*, 380 N.C. 94, 114, 868 S.E.2d 5, 19 (2022) (quoting *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836 (1934)).

Taken in this light, the trial court's November 10 Order, as amended, should be vacated.

ARGUMENT

While Judge Robinson properly amended the November 10 Order to remove the provisions instructing State officials to transfer money out of the treasury—and thus ensured the order adheres to the Appropriations Clause and this Court's decisions interpreting it—the amended order still suffers from at least three fundamental errors. Each represents a direct departure from this Court's decisions in *Leandro I* and *II*, and, left unchecked, would sanction an unprecedented intrusion

by the judiciary into the Legislature's role in making decisions regarding our State's educational system.

First, the trial court erred by exceeding its jurisdiction and authority and imposing a sweeping statewide remedy, in the form of the CRP, that purports to judicially dictate educational policy for the entire State over an eight-year period. The Court in *Leandro II* made clear that the only judgment in this case—and any mandates that flow from it—are limited to just at-risk students in Hoke County. 358 N.C. at 614, 599 S.E.2d at n. 5. Plaintiffs have never obtained a judgment extending those rulings beyond Hoke County, and no trial has ever been conducted into conditions in the other plaintiff school districts. Indeed, no party has even ever asserted a claim alleging a statewide failure to provide children with a sound basic education.

Second, the trial court on remand erred in failing to find that the relevant question after the adoption of the Budget—specifically, whether the Budget fails to provide children an opportunity to receive a sound basic education—has not been raised and is not pending before the Court because no party has ever sought to challenge the Budget. The trial court was required to *presume* that the measures adopted in the Budget—which is, of course an act of the General Assembly—are constitutionally sufficient to address the needs of the State's children unless or until the Plaintiffs prove otherwise. The trial court, however, explicitly declined to apply that presumption. As a result, the trial court failed to require Plaintiffs to first assert relevant claims—*i.e.*, that the Budget is somehow insufficient to provide children a

sound basic education—and then prove those claims before granting the sweeping remedy they requested. In doing so, the trial court also applied the wrong standard. Rather than measuring the Budget's constitutionality against the requirements of *Leandro I* and *II*, which focus, not on funding, but on the substance of the education delivered in the classroom, the court reduced its analysis to a mathematical exercise, simply assessing whether the Budget funded the measures Plaintiffs hoped to obtain through the CRP.

Finally, the trial court erred in setting the amount of the judgment and in its findings regarding the availability of money in the General Fund to pay for the CRP.

For each of these reasons, the portions of the trial court's order should be reversed in its entirety, including the provisions requiring the State to implement the CRP and entering a monetary judgment against the State for its supposed failure to fund each and every item in the CRP.

I. THE TRIAL COURT'S ORDER SHOULD BE REVERSED AND VACATED FOR EXCEEDING THE COURT'S JURISDICTION AND AUTHORITY.

In *Leandro I* and *Leandro II* this Court stated unequivocally that the trial court's findings of a violation of Plaintiff's right to a sound basic education were limited to Hoke County and established clear boundaries around the role that the court should play in crafting any "remedy" for such violations. But, left to its own devices for twenty years, the trial court disregarded and ultimately defied this Court's prior rulings by purporting to impose specific educational funding and policy

requirements for the entire State in the Order on Appeal. In so doing, the trial court exceeded its authority under established law and the law of this case.

A. The Trial Court's Order Disregards this Court's Prior Rulings that Developing and Implementing Specific Educational Policies and Funding Priorities is Inherently Political.

In *Leandro I,* Chief Justice Mitchell warned that, while the judiciary has the power to "define" the minimum requirements for a "sound basic education" under the State Constitution, the "legislative process provides a better forum than the courts for discussing and determining what educational programs and resources are most likely to ensure that each child of the state receives a sound basic education." 346 N.C. at 354, 488 S.E.2d at 259. This is not just because "members of the General Assembly are popularly elected to represent the public for the purpose of making such decisions," but because, "[t]he legislature, unlike the courts, is not limited to only cases and controversies brought by litigants." *Id.* Accordingly, it can conduct "hearings and committee meetings at which it can hear and consider the views of the general public as well as educational experts" in order to "permit the full expression of all points of view." *Id.*

Courts in other States have issued similar warnings. In 2007, the Nebraska Supreme Court held that it would not dictate specific and narrow remedies regarding the programs and funding necessary to provide for the State's public schools, explaining:

> Nebraska's constitutional history shows that the people of Nebraska have repeatedly left school funding decisions to the Legislature's discretion. … We conclude that the relationship between school funding and educational

> quality requires a policy determination that is clearly for the legislative branch. … In brief, it is beyond our ken to determine what is adequate funding for public schools. This court is simply not the proper forum for resolving broad and complicated policy decisions or balancing competing political interests. … The landscape is littered with courts that have been bogged down in the legal quicksand of continuous litigation and challenges to their states' school funding systems. Unlike those courts, we refuse to wade into that Stygian swamp.

Nebraska Coal. for Educ. Equity & Adequacy (Coal.) v. Heineman, 273 Neb. 531, 557, 731 N.W.2d 164, 183 (2007).

Heeding Justice Mitchell, this Court in *Leandro I* and *II* established clear guardrails to ensure the trial court did not veer into the "Stygian Swamp" of answering legislative questions.

First, before Plaintiffs can ever obtain a judicial remedy, they must first establish the existence of a violation by *clear and convincing evidence*. "'Only such a clear showing," the Court has now twice held, "will justify a 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 381 (quoting *Leandro I*, 346 N.C. at 357, 488 S.E.2d at 261). Thus, because the only trial in this matter was limited to the conditions in just one County, the Court made clear in *Leandro II*, that the court's mandates could not extend to other counties throughout the State. 358 N.C. at 613, 599 S.E.2d at 375.

Similarly, *Leandro II* reiterated that, even if a violation is proven, courts may not exceed the judicial power and seek to provide answers to political questions by dictating the "nuts and bolts" of how the State administers its educational program:

> While we remain the ultimate arbiters of our state's Constitution, and vigorously attend to our duty of protecting the citizenry from abridgments and infringements of its provisions, we simultaneously recognize our limitations in providing specific remedies for violations committed by other government branches in service to a subject matter, such as public school education, that is within their primary domain.

358 N.C. at 644, 599 S.E.2d at 394–95. Thus, the Court overturned orders purporting to direct the State to extend pre-kindergarten services to at-risk students in Hoke County and lower the age of compulsory education, because such determinations (1) involve political questions committed to the Executive and Legislative branches under our Constitution, and (2) Plaintiffs could not show the remedies were the "only qualifying means" to remedy deficiencies in Hoke County's educational system. *Id.* at 645, 588 S.E.2d 395.

In the two decades since this Court decided *Leandro II*, however, the trial court has increasingly disregarded this Court's unequivocal guidance as to the scope of this case, specifically, and the limitations on the judiciary's authority on matters of education policy, generally. The steady trot at which the trial court assumed ever greater authority over educational policy eventually accelerated to a full gallop as the Executive Branch aligned its position with Plaintiffs' position and finally culminated in the November 10 Order that is now on appeal. In that Order, the trial court shed any pretense of judicial restraint and undertook to dictate to the political branches every dollar of education spending and every detail of education policy for at least the next eight years. This unprecedented judicial intrusion into a matter that is within

the "primary domain" of the political branches exceeded the trial court's jurisdiction and authority.

B. <u>The Trial Court's Order Is an Impermissible Advisory Opinion that Purports to Answer Questions that Were Not Before the Court</u>.

As this Court has explained:

> The courts have no jurisdiction to determine matters purely speculative, enter anticipatory judgments, . . . deal with theoretical problems, give advisory opinions, . . ., provide for contingencies which may hereafter arise, or give abstract opinions.

Little v. Wachovia Bank & Tr. Co., 252 N.C. 229, 243, 113 S.E.2d 689, 700 (1960). Similarly, in *Wise v. Harrington Grove Cmty. Ass'n, Inc.*, this Court held that deciding an issue not "drawn into focus" by the court proceedings would "render an unnecessary advisory opinion." 357 N.C. 396, 408, 584 S.E.2d 731, 740 (2003).

The trial court's imposition of the CRP violates this well-established prohibition against advisory opinions. The CRP is not a "remedy" designed to address any of the claims asserted in the pleadings in this case, all of which focus on the specific and varying conditions in certain, named county school districts. Nor can it possibly be justified as an effort to enforce the one-and-only judgment entered in this matter, which the law of the case limits to Hoke County.

Instead, the CRP purports to answer an abstract policy question—*i.e.*, what statewide measures should be undertaken to improve the whole of North Carolina's educational system—that is divorced from any of the claims actually asserted or decided in this case.

i. <u>The November Order Granted Relief to Non-Parties on Questions that Were Not Before the Court.</u>

In *Leandro I* the Court remanded this matter to the trial court for further proceedings. Over the course of more than a year, Judge Manning conducted a trial that dealt exclusively with the conditions in Hoke County schools. In *Leandro II*, this Court repeatedly made clear that any finding of a constitutional violation was limited to students in Hoke County, and not the other plaintiff school districts (much less the remainder of the State):[9]

- "The Court recognizes that the trial court took evidence on, and made conclusions about, student performance across the state. However, we remain mindful that <u>the issues of the instant case **pertain only** to evidence, findings or conclusions that apply **to Hoke County**</u> in particular. As a consequence, <u>any findings or conclusions that were intended to apply to the state's school children beyond those of Hoke County **are not relevant** to the inquiries at issue</u>. *Leandro II*, 358 N.C. at 633 n.14 (emphasis added).

- "[T]his Court affirms the trial court's conclusion that plaintiffs have made a clear showing that an inordinate number of students <u>in Hoke County</u> are failing to obtain a sound basic education and that defendants have failed in their constitutional duty to provide <u>such students</u> with the opportunity to obtain a sound basic education." *Leandro II*, 358 N.C. at 647 (emphasis added).

With respect to the remaining plaintiffs, this Court held:

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[9] Such rulings constitute "law of the case" and are binding on both Plaintiffs and the trial court. *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); *see also 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))).

> **[B]ecause this Court's examination of the case is premised on evidence as it pertains to Hoke County in particular, our holding mandates cannot be construed to extend to the other four rural districts named in the complaint.** With regard to the claims of named plaintiffs from the other four rural districts, the case is remanded to the trial court for further proceedings that include, but are not necessarily limited to, presentation of relevant evidence by the parties, and findings and conclusions of law by the trial court.

Leandro II, 358 N.C. at 613, n.5, 599 S.E.2d at 375, n.5 (emphasis added).

Yet, in the years that have followed, this case has somehow mutated into a platform for the trial court oversee public education funding and policy for the entire State. Since this Court decided *Leandro II* there has been no effort to add the remaining school districts in the State as plaintiffs. There likewise has been no legislative action, court order, or amendment to the pleadings that would expand the scope of the case or confer special authority on the trial court to assume such power over the State's educational system as a whole. Judge Manning retained jurisdiction over the case for more than a decade and ordered numerous "status conferences" to monitor the progress of the State's efforts to comply with *Leandro I* and *II*—that is, to enforce the court's judgment as to *Hoke County*. But, he never conducted the trial(s) into the other plaintiff school districts for which this case was remanded. Similarly, Plaintiffs never sought a judgment on their claims concerning the other school districts, whether under Rule 56 or any other method allowed by the Rules of Civil Procedure. And Judge Lee never conducted a trial after the case was assigned to him in 2016. Thus, the status of the only judgment in this case has remained unchanged since *Leandro II* was decided.

Despite this, Plaintiffs—and now DOJ—have urged the trial court to take judicial control of the State's entire education system by persistently mischaracterizing *Leandro II* as supposedly holding that "the children of this State had been, and were being denied 'a constitutionally guaranteed sound basic education.'" (*See* State's Renewed Motion to Suspend Appellate Rules and Expedite Decision at 2; *see also Pls' Petition for Discretionary Review Prior to Determination by Court of Appeals* at 10 (claiming *Leandro II* "affirmed the trial court's conclusion that the State had failed in its constitutional duty to provide certain students with the opportunity to obtain a sound basic education.").

Plaintiffs' effort to recast *Leandro II* as a decision establishing a statewide violation is all the more remarkable given that Judge Manning expressly held the "bulk" of the State *was* provided a sound basic education:

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

Leandro II, 358 N.C. at 632 (emphasis added).[10] To that end, this Court noted that "the trial court went to great lengths in its efforts to convey its view that the evidence

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[10] Judge Manning was explicit in his findings that Plaintiffs and Plaintiff-Intervenors had not carried their burden in proving a statewide violation:

> [T]he plaintiffs and plaintiff-intervenors have yet to convince this Court by clear and convincing evidence, that

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.* at 634.[11] The same is true today. Even the WestEd report showed that *statewide* average for math and reading scores essentially matches the national average, which undermines any suggestion that the State has failed to provide a sound basic education statewide (R pp 1368-69).

Thus, the only "remedial proceedings" that should have occurred on remand to the trial court should have been limited to Hoke County, and Hoke County alone. To the extent there are open issues remaining about the conditions in the other plaintiff

> the State of North Carolina is not presently providing sufficient funding to its [Local Education Areas] to meet the Constitutional mandate that each child have an equal opportunity to receive a sound basic education.

(R p 558).

[11] Indeed, both Judge Manning and this Court analyzed whether at-risk students in Hoke County were being afforded an opportunity to receive a sound basic education by comparing the educational results in Hoke County *to the rest of the State*. In other words, both this Court and the trial court used the rest of North Carolina as a baseline for comparison, presupposing that the remainder of the state *was* receiving a sound, basic education. *See*, *e.g.*, (R p 490) ("[S]tandardized test scores of Hoke students in grades 3-8 persistently *trail their peers in the State as a whole*.") (emphasis added); (R p 574) ("In analyzing whether or not Hoke County students were obtaining a sound basic education, the Court *compared Hoke with other school systems' student performance*."); *see also Leandro II*, 358 N.C. at 629 ("Hoke County graduates . . . consistently trailed behind the average grades attainted by other public school graduates from around the state); *id.* at 630 ("[A]n inordinate amount of Hoke County students have consistently failed to match the academic performance of their statewide public school counterparts"); *id.* at 631 ("Hoke County students have consistently failed to match the achievements of their statewide counterparts.").

school districts, they have never been tried, never been the subject of evidentiary proceedings, and cannot serve to justify the imposition of any further injunctive relief.

Despite this, the trial court required the State to implement a plan, in the form of the CRP, that purports to dictate educational policy (and spending) on a statewide basis, over an 8-year period, prescribing measures that address everything from teacher recruitment and training, educational performance measures, curriculum content, staffing models, teacher compensation, revision of the State's educational finance system and funding formulas, expansion of pre-K programs, to early college courses. (R pp1687-1771). It even purports to dictate funding for programs and entities that have no connection to *Leandro I* and *II*, including the University of North Carolina System Office, the North Carolina State Education Assistance Authority, the North Carolina Teaching Fellows Commission, East Carolina University, the North Carolina Department of Health and Human Services, and the North Carolina Partnership for Children (and its 75 local partnerships) (*id.*)—a veritable wish list of appropriations the Plaintiffs and Executive Branch would make if they alone controlled the legislature.

In its attempt to exert authority over matters so far beyond the scope of the questions actually at issue, the trial court's order in this case violates well-established limitations on judicial authority and intrudes impermissibly into political policy questions that our constitution entrusts to the political branches. Put simply, the trial court acceded to requests from the Plaintiffs (and the Executive Branch through DOJ) to use this case as a platform for controlling education policy outside of the

legislative process, irrespective of this Court's express instruction in *Leandro II*'s that any mandates on the current judgment must be limited to Hoke County.

The propriety of the State's education system as a whole, however, is not the subject any claim or controversy that was ever presented to the trial court. The court's effort to judicially dictate educational policy for the State and school systems outside of Hoke county is thus purely advisory. The court should not have undertaken to decide what policies North Carolina should adopt to improve the State's public school system, nor should it have permitted Plaintiff and the Executive Branch to use this case as a vehicle to obtain court orders securing measures that require Legislative approval.

ii. <u>The Adoption of the Budget Rendered Any Order Imposing a Requirement to Implement the CRP Purely Advisory</u>.

Even if the trial court had entered an order on 10 November 2021 that properly stayed within the limits of the court's authority that this Court previously established in *Leandro I* and *Leandro II* (for example, by considering only a remedial plan for Hoke County), that determination still would have been rendered purely advisory upon the Budget's adoption. As explained further in Section II, *infra*, as a duly enacted law the Budget was entitled to a presumption of validity. *See Cooper v. Berger*, 376 N.C. at 33, 852 S.E.2d at 56 (2020). Upon the Budget's adoption, the focus of any challenge to the constitutional sufficiency of public education policy and funding should have shifted to an analysis of whether the measures adopted in the

Budget are sufficient to provide a sound and basic education under this Court's definition in *Leandro I.*

No party to this matter (or any other school district in the State) has asserted a claim challenging the sufficiency of the duly-enacted Budget. In the absence of any such challenge, an order purporting to impose a remedy is inherently hypothetical and an improper advisory opinion, as it necessarily assumes the existence of a constitutional violation that has not yet been established.

C. <u>The Trial Court Erred in Making a Constitutional Determination in a Friendly Suit.</u>

The trial court similarly erred in declaring that the CRP is constitutionally necessary and ordering that the State must implement it because, prior to the General Assembly's intervention, this was merely a "friendly suit" and there was no actual controversy before the court. As stated above, there has been no claim, and certainly no judgment, that would support a statewide remedy or extend this case beyond Hoke County. Nevertheless, since 2018 both sides—meaning Plaintiffs and DOJ—have asked the trial court to enter a series of consent orders that purport to require the "State" to comply with the CRP and take other measures that they readily admit would require approval by the General Assembly.

Such "friendly suits," where "all parties seek the same result" have been called "quicksand of the law"—and for good reason. *State ex rel. Edmisten v. Tucker*, 312 N.C. 326, 345, 323 S.E.2d 294, 307 (quoting *Greensboro v. Wall*, 247 N.C. 516, 520, 101 S.E.2d 413, 416 (1984)). As the Court has explained, sound judicial decisions result when "specific legal problems are tested by fire in the crucible of actual

controversy." *Id.* "Thus, while a determination of the constitutionality of a statute may be a proper subject for declaratory judgment, jurisdiction under the Declaratory Judgment Act may be invoked only in a case in which there is an actual or real existing controversy between parties having adverse interests in the matter in dispute." *Id.* at 338, 323 S.E.2d at 303; *see also Lide v. Mears*, 231 N.C. 111, 118 (1949) ("While the Uniform Declaratory Judgment Act thus enables courts to take cognizance of disputes at an earlier stage than that ordinarily permitted by the legal procedure which existed before its enactment, it preserves inviolate the ancient and sound juridical concept that the inherent function of judicial tribunals is to adjudicate genuine controversies between antagonistic litigants with respect to their rights, status, or other legal relations. This being so, an action for a declaratory judgment will lie only in a case in which there is an actual or real existing controversy between parties having adverse interests in the matter in dispute."). Thus, appellate courts will not decide constitutional questions "in friendly, non-adversary proceedings; in advance of the necessity of deciding them; in broader terms than are required by the precise facts to which the ruling is to be applied." *Rescue Army v. Mun. Ct. of City of Los Angeles*, 331 U.S. 549, 569, (1947); *see also Comm. to Elect Dan Forest v. Emps. Pol. Action Comm.,* 376 N.C. 558, 595, 853 S.E.2d 698, 725 (2021) (explaining that the prohibition against advisory opinions helps to ensure "concrete adverseness" between the parties necessary to "sharpen [] the presentation of the issues" and is itself an exercise in "self-restraint in the exercise of our judicial powers").

This is not a concept unique to North Carolina; indeed, the U.S. Supreme Court has long adhered to the same principle:

> [Determining the constitutionality of legislation] is legitimate only in the last resort, and as a necessity in the determination of real, earnest, and vital controversy between individuals. It was never thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act.

Chicago & G.T. Ry. Co. v. Wellman, 143 U.S. 339, 344-45 (1892). In fact, this Court has repeatedly held that, when dealing with important constitutional questions like the one in this case, the existence of a genuine controversy is jurisdictional. *City of Greensboro v. Wall*, 247 N.C. 516, 519, 101 S.E.2d 413, 416 (1958) (noting the existence of "genuine controversy" between parties with conflicting interests is "a jurisdictional necessity."); *State ex rel. Edmisten v. Tucker*, 312 N.C. 326, 338, 323 S.E.2d 294, 303 (1984) (same); *Town of Tryon v. Duke Power Co.*, 222 N.C. 200, 22 S.E.2d 450, 452 ("[T]he court will not entertain an *ex parte* [declaratory judgment] proceeding which, while adversary in form, yet lacks the essentials of genuine controversy."); *Griffin v. Fraser*, 39 N.C. App. 582, 587, 251 S.E.2d 650, 654 (1979) ("It is a 'jurisdictional necessity' that a genuine controversy between parties having conflicting interests exist."); *cf. Lide v. Mears*, 231 N.C. at 118, 56 S.E.2d at 409 (noting that if a party fails to plead "an actual controversy," the other party "cannot confer jurisdiction on the court to enter a declaratory judgment by failing to demur to the insufficient pleading").

Here, it cannot be said that the trial court's orders imposing the CRP and directing the State to fund it were the result of a "genuine controversy," or that the named parties were actually "adverse." Instead, Plaintiffs, Plaintiff-Intervenors, and DOJ have worked together to obtain judicial orders mandating their desired policies—policies that mirror their legislative agendas and the Governor's proposed budget. (R p 1772).

For example, in the January 2020 consent order Plaintiffs and DOJ drafted to require development of the CRP, the parties noted that they *had agreed* that the CRP was the proper course and that the State had conceded it was not in constitutional compliance:

> [T]he parties to this case—Defendants State of North Carolina ("State") and the State Board of Education ("State Board") (collectively the "State Defendants"), as well as the Plaintiffs and Plaintiff-Intervenors (collectively "Plaintiffs")—***are in agreement*** that the time has come to take decisive and concrete action (*i.e.*, immediate, short term actions and the implementation of a mid-term and long-term remedial action plan) to bring North Carolina into constitutional compliance so that all students have access to the opportunity to obtain a sound basic education.

(R p 1634) (emphasis added). Later in the same consent order, the parties included passages praising the Governor and revealing that DOJ only intended to represent the interests of the Executive Branch, and not those of the General Assembly:

> The Court is also encouraged by Governor Cooper's creation of the governor's Commission on Access to Sound Basic Education and the Commission's work thus far and is **hopeful** that the parties, with the help of the Governor, can obtain the support necessary from the General Assembly and other public institutions to implement and sustain the necessary changes to the State's educational

> system and deliver the constitutional guarantee of *Leandro* to every child in the State.

(R p 1634) (emphasis added).

This cooperation continued, and it appears may not have been fully disclosed to the trial court. When Judge Lee signed the parties' jointly-drafted consent order on the CRP, he recited that it had been "received from the State." (R p 1679) (noting the court "received from the State of North Carolina ("State") and the State Board of Education ("State Board") (collectively "State Defendants) on March 15, 2021, a Comprehensive Remedial Plan and Appendix which are attached to this Order as "Exhibit A" and "Exhibit B" respectively . . . ."). The order, however, bears a document stamp from Parker Poe Adams & Bernstein LLP—the law firm that represents Plaintiffs. (*Id.*) ("PPAB 6336941v.1.docx").

Oddly, after advocating for it, DOJ appealed the November Order and is an appellant before this Court. However, the Court should not be fooled into thinking that means DOJ or the Executive agencies it represents are adverse to the Plaintiffs. On remand, the Judge Robinson inquired into DOJ's position, first asking why the State appealed the trial court's November Order requiring the State to transfer funds out of the treasury to pay for the CRP:

> THE COURT: Mr. Majmundar. The State. Excuse me. The Government Defendant appealed Judge Lee's Order on December seven. Is that correct?
>
> MR. MAJMUNDAR: Correct.
>
> THE COURT: To the Court of Appeals?
>
> MR. MAJMUNDAR: Correct.

> THE COURT: Why?

(Tr p 61:10-16). Despite repeated questions, the State failed to identify any error with the Order. Indeed, DOJ noted it did "not disagree" with the adoption of the orders requiring its clients to comply with the CRP:

> MR. MAJMUNDAR: Because of the complicated constitutional issues embedded within Judge Lee's Order.
>
> THE COURT: Well, you supported the entry of the June order. Right, you told me that's what the State wanted. Your client wanted.
>
> MR. MAJMUNDAR: I think that the State participated in the crafting of the comprehensive remedial plan, believed that the crafting believed that the comprehensive remedial plan was the way to achieve minimal constitutional compliance and that the June order adopted that plan. And **I don't think the State disagreed with the adoption of that plan, Your Honor.**

(Tr pp 61:17-25, 62:1-2). Similarly, DOJ "did not disagree" with the November order on appeal here, which purported to require transfers from the State Treasury in violation of the Appropriations Clause:

> THE COURT: And then in November, also with the November 10 order, Judge Lee attempted to enforce that plan by directing the state to pay for it. To fund it. Correct?
>
> MR. MAJMUNDAR: Yes, sir.
>
> THE COURT: What was wrong with Judge Lee's order?
>
> MR. MAJMUNDAR: Judge Lee's order implicates a novel issue, and that issue of this and I say novel, but at least in the context of this case had not been raised before.
>
> THE COURT: How did you - - how do you contend Judge Lee erred in the November 10 order?

> MR. MAJMUNDAR: I think the appeal, your honor, is seeking, given *Leandro II* and the Court's admonition that the State must comply with its constitutional obligations and that this order reflects an enforcement of that compliance. We had to be sure, Judge, that this is what the Supreme Court intended with *Leandro II*.

(Tr p 62:3-18). As this exchange makes clear, although DOJ purports to represent the "Defendants," it is actually seeking to aid the *Plaintiffs* in achieving their shared policy goals without the need for legislative approval. Accordingly, since DOJ began cooperating with the Plaintiffs in 2018, this has been a "friendly suit."

Thus, while this case may appear "adversary in form," *Tryon*, 222 N.C. at 200, 22 S.E.2d at 402, there is no "genuine controversy," nor any "conflicting interests" as between the Defendants and Plaintiffs. *See Greensboro*, 247 N.C. at 519, 101 S.E.2d at 416. The Court therefore lacks jurisdiction to consider it. *Id.* (noting "genuine controversy" and "conflicting interests" are a "jurisdictional necessity"). Here, where the question is a constitutional one, the Court should take particular care to exercise restraint.

Indeed, "[w]ithout present genuine controversy a case that may once have been alive becomes moot." *Crumpler v. Thornburg*, 92 N.C. App. 719, 723, 375 S.E.2d 708, 711 (1989). And, in this very case, this Court has held that "[o]nce the issues on appeal become moot, the appropriate disposition is to dismiss the appeal *ex mero motu* and to vacate the decision of [the lower court]." *Leandro III*, 367 N.C. 156, 159, 749 S.E.2d 451, 454 (2013).

II. **THE TRIAL COURT ERRED BY REQUIRING THE GENERAL ASSEMBLY TO FUND EACH ELEMENT OF THE CRP IN THE BUDGET.**

The trial court similarly erred on remand by refusing to treat the Budget, and thus the General Assembly's efforts to provide for the State's educational system, as presumptively constitutional. *Leandro I* and *II* require that Plaintiffs first must prove their case—that is, show that the State has somehow failed to provide constitutionally sufficient educational opportunities—before the court even considers the imposition of a remedy. Yet, in reducing its assessment of the Budget to a mathematical exercise and assuming that the CRP was the only means to provide a *Leandro*-compliant education, the trial court got the analysis backward. It started with the assumption that the Budget was *insufficient*, and then skipped straight to asking whether the General Assembly had provided Plaintiffs with their chosen remedy.

Judge Lee's 10 November Order was entered eight days before the Budget was adopted, and therefore could not have involved or decided a challenge to the Budget. Likewise, there has been no evidence to show that the measures in the Budget are somehow insufficient to provide children in Plaintiffs' school districts with a sound basic education, much less that the remaining measures in the CRP are still necessary to do so following the Budget's adoption.

The question of the Budget's sufficiency to support a sound basic education simply has never been raised before the trial court. It therefore must be presumed to be constitutional unless or until proven otherwise *beyond a reasonable doubt*.

Cooper v. Berger, 376 N.C. at 33, 852 S.E.2d at 56 (citing *Hart*, 368 N.C. at 131, 774 S.E.2d at 287 (requiring courts to "begin with a presumption that the laws duly enacted by the General Assembly are valid" and only reach a contrary conclusion if a law's "unconstitutionality is demonstrated beyond a reasonable doubt." *Cooper v. Berger,* 376 N.C. at 33, 852 S.E.2d at 56 (2020) (citing *Hart v. State*, 368 N.C. 122, 131, 774 S.E.2d 281, 287 (2015)); *see also State ex rel. Martin v. Preston*, 325 N.C. 438, 448, 385 S.E.2d 473, 478 (1989) (stating that an act of the General Assembly will be declared unconstitutional only when "it [is] plainly and clearly the case" (*quoting Glenn v. Bd. of Educ.*, 210 N.C. 525, 529–30, 187 S.E. 781, 784 (1936))).

The trial court's decision on remand is directly at odds with this well-established presumption of legislative validity. Presented with the task of considering the effect of the Budget on the November 10 Order, the trial court limited its analysis to a comparison of the CRP to the Budget and expressly declined to treat the Budget as presumptively constitutional because doing so would require "extensive evidentiary hearings":

> The Court also declines to determine, as Legislative Intervenors urge, that the Budget Act as passed presumptively comports with the constitutional guarantee for a sound basic education. To make a determination on the compliance of the Budget Act with the constitutional right to a sound basic education would involve extensive expert discovery and evidentiary hearings. This Court does not believe that the Supreme Court's Remand Order intended the undersigned, in a period of 30 days, or, as extended, 37 days, to perform such a massive undertaking.

(R p 2628). The trial court was not clear whether the hearings it envisioned would have required Plaintiffs to put on evidence to prove their claims, or whether they

would somehow place the burden on the wrong party and require the General Assembly to prove the Budget is sufficient. In either event, the court erred. Applying a presumption does not require "extensive expert discovery and evidentiary hearings." Instead, it simply reflects the assumptions the court must make in the *absence of evidence*.

Similarly, applying the presumption in favor of constitutionality would not have required either the court, or the Plaintiffs, to undertake "extensive" evidentiary proceedings in the short, one-month period this case was on remand, as Judge Robinson apparently believed. The Supreme Court's remand order directed Judge Robinson to address the effect of the Budget on both the "***the nature and the extent*** of the relief" granted in the November 10 Order, and to enter any amended order he concluded was appropriate after doing so. (18 March Order at 2). Because the November 10 Order could not possibly have considered the Budget, Judge Robinson only needed to hold that the Order should be vacated so that Plaintiffs could then be given an opportunity to bring a challenge to the Budget if they wished to do so—either by amending their current complaint in or by filing a new and separate lawsuit.

At minimum (and even if the question of the constitutionality of statewide educational policy and funding had been properly before the court), the trial court should have held that additional proceedings would be necessary to determine which, if any, of the CRP's 146 measures were necessary to provide children with a sound basic education following the adoption of the Budget. When fashioning a remedy, the Court must do "*no more* than is reasonably necessary" to correct the alleged

constitutional violation. *In re Alamance Cty. Court Facilities,* 329 N.C. 84, 99, 405 S.E.2d 125, 133 (1991) (Exum, J.) (emphasis in original); *Leandro II*, 358 N.C. at 373-74, 588 S.E.2d at 610 (holding that any relief granted must "correct the failure with minimal encroachment on the other branches of government").

Despite this, the trial court accepted, at least implicitly, Plaintiffs' arguments that the CRP represents the "*only way*" to provide a sound basic education to children in the Plaintiff school districts and that anything other than their chosen remedy simply will not do. The Supreme Court, however, rejected that exact argument at the outset of this case. In *Leandro I*, the Court explained that "[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." 346 N.C. at 354, 488 S.E.2d at 260 (emphasis added). Therefore, "within the limits of rationality, the legislature's efforts to tackle the problems should be entitled to respect." *Id.* Put simply, the legislative process provides a better forum to make such determinations. Indeed, that is exactly what Justice Mitchell explained in *Leandro I*:

> We acknowledge that ***the legislative process provides a better forum than the courts for discussing and determining what educational programs and resources are most likely to ensure that each child of the state receives a sound basic education***. The members of the General Assembly are popularly elected to represent the public for the purpose of making such decisions. The legislature, unlike the courts, is not limited to addressing only cases and controversies brought before it by litigants. The legislature can properly conduct public hearing and committee meetings at which it can hear and consider the views of the general public as well as

> education experts and permit the full expression of all points of view as to what curricula will best ensure that every child of the state has the opportunity to receive a sound basic education. . . .

Id. 346 N.C. at 355, 357, 488 S.E.2d at 260-61 (emphasis added).

The Court's instruction in *Leandro I* comports with this Court's other holdings as well. *See Rhyne v. K-Mart Corp.*, 358 N.C. 160, 169, 594 S.E.3d 1, 8 (2004) ("[T]he legislative branch of government is without question 'the policy making agency of our government'" and, as such, "it is a far more appropriate forum than the courts for implementing policy-based changes to our laws."); *id.* at 169-70, 594 S.E.3d at 8-9 ("This Court has continually acknowledged that, unlike the judiciary, the General Assembly is well equipped to weigh all the factors surrounding a particular problem, balance competing interests, provide an appropriate forum for a full and open debate, and address all issues at one time."); *Hart*, 368 N.C. at 126, 774 S.E.2d at 285. ("But the role of judges is distinguishable, as we neither participate in this dialogue nor assess the wisdom of legislation. Just as the legislative and executive branches of government are expected to operate within their constitutionally defined spheres, so must the courts."); *see also Britt v. N. Carolina State Bd. of Educ.*, 86 N.C. App. 282, 290, 357 S.E.2d 432, 436–37 (1987) ("[T]he only questions which [the Complaint] raises relate to the wisdom of the Legislature in providing for the present method of funding public education and in providing for and permitting five separate school systems to be maintained in Robeson County. These are matters of purely legislative concern.").

Indeed, every time the trial court has attempted to dictate a specific remedy in this case, the Supreme Court has rejected it. Following the trial in this matter, Judge Manning entered orders directing that the State (1) expand the provision of pre-kindergarten services to at-risk children in Hoke County; and (2) lower the age of compulsory education. The Court in *Leandro II* held that both of those orders were in error both because (1) decisions over education constituted nonjusticiable political questions that are committed to the General Assembly and for which there are no judicially manageable standards, 358 N.C. at 639, 599 S.E.2d at 391 (citing *Baker v. Carr*, 369 U.S. 186, 210 (1962)); and (2) there was insufficient evidence to show that such remedies were "either the only qualifying means or even the only known qualifying means" to ensure children receive a sound basic education. 358 N.C. at 639-45, 599 S.E.2d at 349-95.

Assuming that the CRP constitutes the only viable means to provide a sound basic education contravenes these principles. In contrast to the limited remedies the Court rejected in *Leandro II*, the CRP purports to dictate virtually every aspect of educational policy (and spending), over an 8-year period—prescribing measures that address everything from teacher recruitment and training, to educational performance measures, curriculum content, staffing models, teacher compensation, revision of the State's educational finance system and funding formulas, expansion of pre-K programs, and early college courses. According to OSBM, the CRP includes more than 40 action items that require funding in Years 2 and 3 of the plan alone (R p 2015).

Yet, despite the sweeping nature of the CRP, Plaintiffs insist that the Court should assume what *Leandro I* and *II* requires them to prove—*i.e.*, that there has been a statewide failure to provide a sound basic education and that the CRP is the only constitutionally sufficient method to fix it. To that end, Plaintiffs point to Judge Lee's conclusion that the CRP "is the ***only*** remedial plan" that had been presented to the Court, and that the parties "have presented no alternative remedial plan." (R p 1831, ¶ 20). That is perhaps by design. As stated above, the November Order shows DOJ and Plaintiffs *worked together* to recommend that the Court appoint WestEd to serve as an educational consultant for the express purpose of working with the Governor's newly-appointed Commission on Access to a Sound Basic Education. (R p 827, ¶¶ 9-10). DOJ then continued to work with Plaintiffs to draft and submit the series of consent orders that ultimately led to the entry of the November Order. Rather than advocate for, or seek to protect, the General Assembly's powers under the Appropriations Clause (or, for that matter, the autonomy of executive branch agencies involved in K-12 education), DOJ represented that the plan was "necessary" and persistently complained that it could not implement it because the General Assembly had not appropriated the money to do so.

Because of this, the Court never had an opportunity to look behind the parties' representations to determine if the measures DOJ and Plaintiffs proposed in the CRP were, in fact, necessary, or were instead a political effort to secure funding for their preferred policies outside the legislative process. Plaintiffs have also never presented the Court with any evidence to assess whether there are less intrusive measures to

fix alleged deficiencies in the State's educational program. And because they have never challenged the Budget—which, as an act of the General Assembly, is presumptively valid—Plaintiffs have never offered any evidence to show that it is somehow insufficient to provide a sound basic education or that the remaining items under the CRP are the "only qualifying means" to do so.

What is more, the CRP is not the measure of constitutionality. The touchstone against which the Budget Act must be compared is not the CRP, or the November Order, but instead the constitutional requirement to provide a sound basic education set forth in *Leandro I* and *Leandro II.* As the Court made clear in those decisions, that measure focuses on the delivery of educational services *in the classroom*, not merely the level of funding State agencies receive. *See Leandro I*, 346 N.C. at 348, 488 S.E.2d at 256 (defining a sound basic education as one that "will provide a student with, at least" "sufficient academic and vocational skills to enable the student to compete on an equal basis . . . in further formal education or gainful employment within contemporary society"); *id.* at 357, 488 S.E.2d at 261 (holding court "should not rely on single factor of school funding levels in determining" whether students are receiving a sound basic education); *Leandro II*, 358 N.C. at 610, 599 S.E.2d at 374 (explaining that this case does not involve "a funding issue" but instead concerns "the qualitative educational services provided to the respective plaintiffs"). Thus, the relevant question that remains after the passage of the Budget—if there remains one at all—is whether the educational *programs* (not appropriations) authorized by the

Budget are sufficient to provide the sound basic education required under the North Carolina Constitution.

Here, the Budget's efforts to provide for the State's educational system certainly fall "within the limits of rationality." *Leandro I*, 346 N.C. at 356, 488 S.E.2d at 260. The currently adopted Budget appropriates $21.5 billion in net general funds over the 2021-23 biennium for K-12 public education—approximately 41% of the total general fund appropriations in the biennial budget. Of that amount, the Budget appropriates nearly $1.17 billion over the biennium to fund programs called for in the CRP, with approximately $640 million appropriated in FY 2021-22 and another $529 million in FY 2022-23. (R pp 2344-49). It provides an average 5% pay raise for teachers over the biennium; raises the minimum wage for non-certified personnel to $15 per hour; and provides significant performance and retention bonuses to teachers, with most receiving at least $2,800 in FY 2021. (*Id.*)

The Budget also funds measures that seek to achieve the same goals as the CRP, just through different means. Thus while the CRP would send millions to the UNC system to use on scholarship programs in the hopes of educating students who might become teachers years from now, the Budget provides *$100 million in new, recurring funding* directly to school districts in low-wealth counties to use, in the manner they best see fit, to immediately, attract and retain high-quality teachers and administrators, 2021 N.C. Sess. L. 180 § 7.3, and likewise appropriates additional money to pay additional $1,000 signing bonuses to recruit teachers in small and low-wealth counties. *See id.* §7A.5. In addition, the General Assembly has made extensive

appropriations to K-12 education over the biennium that were not contemplated by the CRP as well as money that comes from outside the General Fund. Those appropriations include: $86.6 million for school business systems modernization; $383 million from the Education Lottery for needs-based public school capital projects; and $80 million, also from the Lottery, for the Public School Building Repair and Renovations Fund. (*See* Affidavit of Mark Trogdon (R p 2349) at ¶52).

Further, unlike the judicial process that led to the implementation of the CRP—which would lock the State into an eight-year plan developed based on data collected *before* the COVID-19 pandemic—the Legislative process reflects the State's ongoing effort to address children's needs that allows officials to respond to changing conditions. Indeed, at the time of this writing, the General Assembly has released and is voting to approve a new appropriations act that would amend the budget for the second year of the biennium (FY 2022-23), in order to provide even more money for education, including measures called for the CRP. *See* Current Operations Appropriations Act of 2022, H.B. 103 (2022), available at https://tinyurl.com/3br8r89a (last visited 1 July 2022).

Plaintiffs have not—at least at this juncture—carried their burden to show continued implementation of the November Order is necessary to remedy an alleged constitutional violation. The General Assembly has responded to their proposed remedial plan the only way it can—through a vote of the entire body—and has passed a Budget that must, until proven otherwise, be presumed to be sufficient to satisfy the State's constitutional obligations. The trial court's refusal to treat those

measures as presumptively constitutional, and its corresponding assumption that the CRP constitutes the only viable means to meet the Constitution's requirements, constitute error.

III. THE TRIAL COURT ERRED IN ITS FINDINGS REGARDING THE AMOUNT OF THE JUDGMENT AND AVAILABILITY OF FUNDS TO PAY FOR THE CRP.

A. The Trial Court Failed to Consider the Billions of Dollars Made Available to Districts Through COVID-Relief Funds.

In *Leandro II*, this Court held that, in assessing the sufficiency of the State's educational offerings, the court should include programs funded with federal money because "the North Carolina Constitution do[es] not forbid the State from including federal funds in its formula for providing the state's children with the opportunity to obtain a sound basic education." 358 N.C. 605, 646, 599 S.E.2d 365, 395. This is because, "[w]hile the State has a duty to provide the means for such educational opportunity, no statutory or constitutional provisions require that it is concomitantly obliged to be the exclusive source of the opportunity's funding." *Id.* In fact, the State and its education agents often position themselves to augment state educational funding requirements by designing and implementing education-related programs—*i.e.,* Bright Beginnings—that qualify for federal subsidies, thereby providing education funds that contribute to the State's effort of providing a *Leandro*-

conforming educational opportunity for North Carolina's children. *Id.* 358 N.C. at 646, 599 S.E.2d at 395–96.

Consistent with *Leandro II*, the Order on Remand held that, "[w]here the Budget Act appropriates sufficient federal monies from" some federal funding to fund the CRP, that should be credited as funding "up to the amount of funding required for the CRP program in question." (¶ 42(a)). But despite *Leandro II*'s holding that the source of the funds does not matter, in determining the remaining amount of funding that the General Assembly is required to provide to fund the CRP, the trial court failed to consider the leftover billions of unspent COVID-relief funds that have been provided directly to local school districts and remain available to pay for the measures in the CRP.

Since the pandemic began, school districts have received unprecedented sums through COVID-relief programs. Indeed, they have been provided *more than $5.8 billion in additional federal and State funding*, often with the only limitation that the money be used to address "learning loss."[12] This reflects such an influx of cash that, across the State, 58% of the COVID-relief funds (approximately $3.625 billion) allocated to local school districts still remain unspent. Hoke County Public Schools alone has received more than $37.5 million in additional funding, with 54% (approximately $21.5 million) still unspent as of May 31, 2022.[13]

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[12] *See* COVID Funds, North Carolina Department of Public Instruction, Financial and Business Services, available at https://tinyurl.com/35tb83ns (last visited, February 28, 2022).

[13] *Id.*

As Judge Manning held in 2000, before they can obtain a remedy, Plaintiffs must show by clear evidence that "all available financial resources—State, federal, and local—have been exhausted to provide other programs necessary to provide the children with an equal opportunity to obtain a sound basic education." (R p 317). Put another way, Plaintiffs should not be permitted to obtain a judgment requiring the State to appropriate money for programs until they can show they do not have the resources to fund those programs themselves. The trial court should have accordingly considered the more than $3 billion the districts have remaining to use, virtually in their discretion, to supplement their educational programs. Indeed, the permissible uses of these funds are so broad that they can certainly be used to fund measures in the CRP; the local school districts simply have to choose to do so. *See* COVID Funds, NC Department of Public Instruction (April 2021) (describing "[p]ermissible use" as "very broad" with only 20% (approximately $640 million) required to "address learning loss," which falls within some of the 146 individual CRP items); Allotment Policy Manual for Funds Related to COVID-19 (describing permissible uses of COVID funds as including "Providing principals and other school leaders with resources to address the needs of their individual schools" and "Addressing learning loss among students . . . including by— (A) Administering and using high-quality assessments that are valid and reliable, to accurately assess students' academic progress and assist educators in meeting students' academic needs, including through differentiating instruction. (B) Implementing evidence-based activities to meet the comprehensive needs of students. . .").

Thus, local school districts have available resources—over and above the amounts appropriated in the Budget—to help fund the CRP. The Court erred by not first considering, and requiring school districts use, those resources before entering a judgment against the State.

B. <u>The Trial Court's Findings that Money Allocated to the Savings Reserve are Unnecessary and Erroneous</u>.

Though it should be considered *dicta*, the trial court similarly erred when it held that funds transferred to reserves *pursuant to the Budget Act* enacted by the General Assembly and signed by the Governor are "available" to satisfy a judgment. (R p 2617, ¶ 45-46, 53-54 (holding that funds transferred at the discretion of the General Assembly to Capital and Infrastructure Reserve and Savings Reserve in excess of statutorily mandated minimum were unappropriated funds available to satisfy judgment)).

The Budget Act establishes several reserves, including the Savings Reserve, N.C. Gen. Stat. § 143C-4-2; the State Capital and Infrastructure Fund, N.C. Gen. Stat. § 143C-4-3.1; the Contingency and Emergency Fund, N.C. Gen. Stat. § 143C-4-4; and the Pay Plan Reserve, N.C. Gen. Stat. § 143C-4-9, among others. Under the Budget Act, moneys that the General Assembly appropriates into a reserve "may be expended only for the purpose or purposes for which the reserve was established" and can only be released pursuant to the procedures set forth in the governing statute. *See* N.C. Gen. Stat. § 143C-4-8. Indeed, the statute governing the Savings Reserve expressly requires a further vote of the General Assembly (and in some cases a two-thirds majority) to approve expenditures. N.C. Gen. Stat. §143C-4-2(b)-(b1).

Further, the Budget Act limits the use of the Savings Reserve to emergency situations, such as revenue shortfalls and natural disasters. N.C. Gen. Stat. § 143C-4-2(b). The Savings Reserve is thus one of the only reliable, large sources of funds the State has to address shortfalls in economic downturns or respond to natural disasters.[14] The Court of Appeals already rejected the notion that courts can order transfers out of the State's emergency reserves in *Richmond County.* There, plaintiffs argued the court should order the State to transfer money out of the Contingency and Emergency Reserve to repay fines and forfeitures that should have flowed to them under the State Constitution. *See* N.C. Const. art. IX, § 7 (requiring the proceeds of penalties and forfeitures to be used exclusively for public schools). Unlike the Savings Reserve, expenditures from the Contingency Reserve can be approved by the Council of State. N.C. Gen. Stat. § 143-4-4. The court nevertheless held that an order "[C]ommanding 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." *Richmond Cty.*, 254 N.C. App. at 428–29**.**

The same is true here. Further, there are no "judicially manageable standards" to decide how much to transfer to the reserve or when to access it—as making that decision requires a political assessment. Doing so would require the Court to weigh

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[14] Indeed, since 2016, the General Assembly has had to expend $1.12 billion from the Savings Reserve to fund ten separate disaster relief packages. *See* 2016 N.C. S.L. 2016-124; 2017 N.C. S.L. 119; 2018 N.C. S.L. 5; 2018 N.C. S.L. 134; 2018 N.C. S.L. 136; 2019 N.C. S.L. 250; 2020 N.C. S.L. 97.

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.

Accordingly, the Court erred when it stated that funds in reserves in excess of statutory minimum amounts are available to satisfy a judgment. The Appropriations Clause does not include any exception for funds held in the reserves, nor does it allow a court to demand that the State transfer money out of the Treasury so long as it is "available." The plain language of the Appropriations Clause and this Court's precedent are unequivocal: the General Assembly has the exclusive authority to appropriate funds; there is no "use it or lose it" exception.

IV. THE TRIAL COURT PROPERLY AMENDED THE NOVEMBER ORDER TO COMPLY WITH THE APPROPRIATIONS CLAUSE.

Finally, although Plaintiffs will no doubt argue otherwise, the trial court properly concluded that it was bound by the Writ of Prohibition issued by the Court of Appeals and its reasoning. Accordingly, by amending the November 10 Order to eliminate the provisions requiring State officials to transfer funds from the Treasury and instead imposing a monetary judgment, Judge Robinson merely ensured the Order complied with the requirements of the Appropriations Clause and this Court's decisions.

As Justice Ervin reminded us two years ago, the Supreme Court has consistently held "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 Cty. Bd. of Educ. v. Cowell*, 254 N.C. App. 422, 423, 803 S.E.2d 27, 29 (2017) (emphasis added)). Under the Constitution, "the power of the purse is the exclusive prerogative of the General Assembly." *Id.* And, accordingly, "the Separation of Powers clause prevents the judicial branch from reaching into the public purse on its own" even if to remedy the violation of another constitutional provision directing how those funds must be used. *Richmond Cty. Bd. of Educ.*, 254 N.C. App. at 426, 803 S.E.2d at 31; *see also In re Alamance Cty. Court Facilities,* 329 N.C. 84, 94, 405 S.E.2d 125, 129 (1991) (holding that the Separation of Powers Clause "prohibits the judiciary from taking public monies without statutory authorization"); *State v. Davis,* 270 N.C. 1, 14, 153 S.E.2d 749, 758 (1967) ("[T]he appropriations clause "states in language no man can misunderstand that the legislative power is supreme over the public purse").

These rules flow directly from text of the State Constitution. The "Appropriations Clause" found in Article V, section 7, provides, "No money shall be drawn by the State treasury *but in consequence of appropriations made by law*." N.C. CONST. art V, § 7(1) (emphasis added). As the Supreme Court has explained, our founders intended the Appropriations Clause "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. Indeed, the legislative branch's exclusive power over the purse was intended to

be one of the principal checks over the other branches of government, including the judiciary. *See* John V. Orth & Paul Martin Newby, THE NORTH CAROLINA STATE CONSTITUTION, 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"); Hamilton, A., *The Federalist*, No. 78 ("The judiciary, on the contrary, has no influence over the sword or the purse.")

As the Supreme Court has explained, "[t]he 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 (2016). A judicial order requiring State officials to transfer funds out of the Treasury involves just such a violation, because the power to appropriate funds is one the constitution commits exclusively to the General Assembly in its role as elected representatives of the people. N.C. CONST. art. V, § 7(1).

Indeed, in *Richmond County,* the Court of Appeals rejected an effort to transfer funds from the State Treasury under circumstances virtually identical to those here. As the Supreme Court later explained in an opinion 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 that the judicial branch lacked the authority to 'order State officials to draw money from the State treasury.'" *Cooper*, 376 N.C. 22; *see also Richmond Cty.*, 254 N.C. App. at 423 ("Under the Separation of Powers Clause in our state constitution, no court has the power to order

the legislature to appropriate funds or to order the executive branch to pay out money that has not been appropriated.")[15]

Richmond County makes clear 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 expend 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 (quoting *Smith v. North Carolina*, 289 N.C. 303, 321 (1976)) (emphasis added); *see also id.* at 429 ("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."); *North Carolina v. Davis*, 270 N.C. 1, 13 (1967) ("Moneys paid into the hands of the State Treasurer by virtue of a State law become public funds for which the Treasurer is responsible and *may be disbursed only in accordance with legislative authority*.") (emphasis added); *Robinson v. Barfield*, 6 N.C. 391 (1818) ("The Legislature acts because the judicial power is incompetent to give relief."); *cf. Able Outdoor, Inc. v. Harrelson*, 341 N.C. 167, 172 ("We do not believe the Judicial

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[15] In ruling on the writ of prohibition in this case, the Court of Appeals noted that the Supreme Court has "quoted and relied" on the relevant language in *Richmond County*. (R p 2008-09).

Branch of our State government has the power to enforce an execution against the Executive Branch.").

The November 10 Order's directive purporting to require the disbursement of funds from the Treasury to pay for the items in the CRP stood in direct contravention of these precedents. The trial court's subsequent amendment of the order on 26 April imposing a judgment, rather requiring the transfer or appropriation of funds, merely ensured that the order adhered to the requirements of the Appropriations Clause and this Court's decisions interpreting it. Thus, while the Order should be vacated in its entirety, if the Court determines that any part of the Order should remain in force, it should ensure that it complies with the requirements of the Appropriations Clause, and thus is entered only as a judgment - not an injunction purporting to transfer money out of the State Treasury.

CONCLUSION

Although it has now been amended to remove provisions that would have caused a direct and unprecedented usurpation of the General Assembly's exclusive power of the purse, the trial court's order still violates the separation of powers and impermissibly intrudes into core political questions. As this Court made clear in *Leandro I* and *II*, questions over how best to provide the State's children with a sound basic education is best are best answered by the people and their elected representatives. Continuing to assume the CRP represents the only way to provide a sound basic education, and entering near-billion-dollar judgments against the State simply because its Budget does not fund each and every measure Plaintiffs have

proposed in the CRP, improperly removes decision-making over education from the people and the democratic process.

Disagreements among the elected officials and branches of State government over how to educate the State's children are nothing new. They are fueled not just by political divisions, but sincere differences of opinion about what is best for the State's children and how to improve its educational system. Yet, as this Court has recognized, there is no single path to this worthy destination, nor is there a magical sum of money that is, by definition, constitutionally "enough." There is, however, a constitutionally-mandated process for resolving such disagreements and determining a path forward. It is the legislative process. Only that process provides an opportunity for the people to be heard and to decide—through their elected representatives—how to spend the State's money and provide the State's children with a *Leandro*-compliant education. The State Constitution does not permit the judiciary to take that power from the people and reassign it to the courts—or worse, a small group of unelected lawyers. The Court should refuse to second-guess the judgment of the State's elected officials by enforcing the November Order now that the Budget has been adopted, particularly in the absence of any evidence that it somehow fails to meet the requirements of the State Constitution.

Accordingly, Legislative-Intervenors ask that the November 10 2021 Order, as amended by the order of April 26, 2022, be vacated in its entirety.

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

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