No. 425A21-2 TENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

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

and

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

and

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

v.

STATE OF NORTH CAROLINA,
Defendant-Appellee,

And

THE STATE BOARD OF EDUCATION
Defendant-Appellee,

and

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION
Realigned Defendant-Appellee,

and

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

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

Intervenor Defendants-Appellants.

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LEGISLATIVE-INTERVENORS' REPLY BRIEF

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ARGUMENT

I. PLAINTIFFS ASK THIS COURT TO AFFIRM A STATEWIDE REMEDY DESPITE THE ABSENCE OF A VALID FINDING—OR EVEN ALLEGATIONS—OF A STATEWIDE VIOLATION.

Plaintiffs, Plaintiff-Intervenors,[1] and the Executive Branch agencies represented by the Department of Justice ("DOJ")[2] simply refuse to accept that this Court's decision in *Leandro II*[3] limited the one-and-only "Liability Judgment" entered after the one-and-only trial in this matter—and any mandates that flow from them—to just Hoke County. They also ignore that *Leandro* II upheld the trial court's findings that the "bulk of the core" of the State's educational delivery system, including its "funding allocation systems," met constitutional standards. 358 N.C. at 632, 599 S.E.2d at 386.

Instead, Plaintiffs and DOJ persistently try to recast both this Court's decision in *Leandro II* and the trial court's subsequent remedial proceedings to suggest that they somehow, at some unidentified point in time, resulted in a judgment

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

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

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

establishing a statewide violation that might support the trial court's imposition of the Comprehensive Remedial Plan ("CRP") and its orders requiring the State to pay for it.

The manner in which Plaintiffs, Plaintiff-Intervenors, and DOJ have responded to Legislative-Intervenors' arguments regarding the scope of *Leandro II* is telling. Even though they all maintain there was a judgment establishing a statewide violation, they cannot agree when it happened. Instead, they point in all directions. DOJ, for instance, contends that *Leandro II* itself established a statewide violation—a point that the decision itself shows is false. Plaintiffs, in turn, contend that the trial in this case involved statewide evidence, or, alternatively, that a 2002 letter from the State Board of Education constituted a "definitive legal position" that any remedy would have to be imposed statewide. In yet another rendition, Plaintiff-Intervenors contend that the subsequent post-trial remedial proceedings were in fact a trial, and that DOJ accordingly tried the existence of statewide violation by "consent." The problem with all of those arguments, of course, is that they directly contravene this Court's binding decision in *Leandro II*.

Indeed, when pressed, Plaintiffs first try for misdirection. In their brief, they disingenuously argue that Legislative-Intervenors' arguments reflect a belief that only students in Hoke County are entitled to a sound basic education. (Plaintiffs' Appellee Br. at 16 n.6). That characterization oversimplifies and distorts Legislative-Intervenors' position. *Leandro I*[4] made clear that all North Carolina students have a

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[4] *Leandro v. State*, 346 N.C. 336, 357, 488 S.E.2d 249, 261(1997) ("*Leandro I*").

right to a sound basic education. That does not mean, however, that Plaintiffs have ever shown that North Carolina's entire statewide public school system fails to provide them with that right.

The requirement that Plaintiffs first establish a violation before they can obtain a remedy serves a critical purpose. As *Leandro I* and *II* both explained: "'The courts of this State must grant every reasonable deference to the legislative and executive branches when considering whether they have established and are administering a system that provides the children of the various school districts of the state a sound basic education[,]'" and "'a clear showing to the contrary must be made before the courts may conclude that they have not.'" *Id.* 358 N.C. at 622-23, 599 S.E.2d at 381; (quoting *Leandro v. State*, 346 N.C. 336, 357, 488 S.E.2d 249, 261(1997) ("*Leandro I*")). This is because "***[o]nly such a clear showing will justify a judicial intrusion into an area so clearly the province, initially at least, of the legislative and executive branches*** as the determination of what course of action will lead to a sound basic education." *Id.* (emphasis added).

But the trial court, at Plaintiffs' urging, failed to heed this requirement and instead issued sweeping orders requiring the State to implement the CRP and then worse, purported to appropriate funds to pay for it through its November 10 Order in violation of our State Constitution. There has never been a judgment establishing a statewide violation that would support such extraordinary and unprecedented relief. Indeed, the interests of more than 100 of North Carolina's 115 school districts are not

even represented in this action, and the claims Plaintiffs asserted never alleged a violation anywhere other than the plaintiff school districts.

This Court's instructions in *Leandro II* were clear and specific—the trial court's mandates could not extend beyond Hoke County unless or until it conducted a trial proving a violation in the other plaintiff school districts. The fact the trial court disregarded that mandate and instead spent many years considering and purporting to decide claims for non-parties and issues that were neither before the court nor within the scope of this Court's remand in *Leandro II* does not render the trial court's decision proper or valid.

A. Plaintiffs Did Not Allege a Statewide Violation.

In the face of Plaintiffs' relentless insistence that this case is about a statewide failure to provide an opportunity to obtain a sound basic education, it is helpful to return to the claims Plaintiffs actually asserted in their complaint.

In the Amended Complaint, Plaintiffs devoted 41 paragraphs to allegations that the named plaintiff school districts are at a disadvantage because they lack the local resources available to other districts. (R., pp. 42-56 at ¶¶ 40-81). The fundamental premise of Plaintiffs' Complaint and Amended Complaint thus was not that the State's method of funding education resulted in students in *all districts* being denied an opportunity to obtain a sound basic education. To the contrary, their premise was that *students in the plaintiff districts* were being treated differently

because they were being denied educational opportunities afforded to students in other North Carolina districts.[5]

As this Court explained in *Leandro II*: "This litigation started primarily as a challenge to the educational funding mechanism imposed by the General Assembly that resulted in disparate funding outlays among low wealth counties and their more affluent counterparts." 358 N.C. at 609. After *Leandro I*, the primary focus turned from the issue of funding to "one requiring the analysis of the qualitative educational services provided"—not to all students in the State, but rather "**to the respective plaintiffs and plaintiff-intervenors**." *Id.* (emphasis added).

Put simply, Plaintiffs never even alleged a claim that would support statewide relief. Instead, their theory of the case has always been unique to the conditions in the plaintiff school districts.

B. *Leandro II* Expressly Limited the Trial Court's Judgment to Hoke County.

After considering the procedural history and the scope of the remand in *Leandro I*, this Court in *Leandro II* went to great lengths to clarify that "**our consideration of the case is properly limited to the issues relating solely to Hoke County as raised at trial**." 358 N.C. at 613, 599 S.E.2d at 375 (emphasis added). Thus, the Court made clear that its mandates could not extend beyond Hoke County, explaining: "**[B]ecause this Court's examination of the case is**

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[5] Plaintiff-Intervenors' claims were even more narrow and related only to assignment plans and allocations of resources within Charlotte-Mecklenburg Schools. (R p 951-52).

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." *Id.* 358 N.C. at 613, 599 S.E.2d at 375 n. 5. (emphasis added).

Consistent with these limitations, the Court in *Leandro II* devoted nearly eight pages of its opinion to a discussion of the evidence regarding the conditions in the Hoke County School System. *Id.*, 358 N.C. at 623-31, 599 S.E.2d at 381-87. To the extent the Court examined evidence regarding the performance of students in other districts, it did so only as a basis for comparison to Hoke County.[6]

Despite this Court's unequivocal and repeated statements in *Leandro II* limiting its holdings to Hoke County, DOJ insists that *Leandro I*, *II,* and *III* somehow established the existence of statewide violation. (DOJ Response Br. at 20-22). In support of this remarkable proposition, DOJ cites to passages with general pronouncements of the right to education. It is, of course, true that "all children" in North Carolina have a right to receive an opportunity to obtain a sound basic

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[6] *See e.g.*, *Leandro II*, 358 N.C. at 625, 488 S.E.2d at 382 ("At trial, EOG and EOC test scores from across the state and from Hoke County were submitted into evidence. In addition, education and testing experts were called to testify about what the scores mean, *how statewide scores compared to those of Hoke County*, and what such comparisons might indicate."(emphasis added)); 358 N.C. at 629, 488 S.E.2d at 385 (Hoke County graduates in the UNC system required remedial core courses at nearly double the rate of statewide counterparts, and Hoke County graduates were placed in advanced English classes at a rate of 6.4% as opposed to the rate of 12.2% for students "from around the state"); 358 N.C. at 630, 488 S.E.2d at 385 (Hoke County graduates returned to second year of college with GPA of 2.0 or better at less than half the rate of other NC public school graduates and gradated within 5 years at a rate of 31.3%, compared to 51.6% of all NC high school students)

education. Declaring the existence of such a right, however, is not equivalent to finding a violation of that right. DOJ conveniently glosses over this critical distinction and asks this Court to ignore its ruling in *Leandro II*, which limited the trial court's judgment finding a constitutional violation to Hoke County.

Plaintiff-Intervenors take a less direct route to escape *Leandro II*'s limitations. According to Plaintiff-Intervenors, even though the Court limited the trial court's judgment to Hoke County, it somehow authorized broader relief when it instructed the trial court to defer to the political branches when fashioning a remedy. (Plaintiff Intervenors' Br. at 82).

That reading, however, ignores the plain language of this Court's decision in *Leandro II*. The Court did not authorize a statewide remedy. Instead, it held:

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

358 N.C. at 638, 599 S.E.2d at 391 (emphasis added). Far from affirming an order that the State assess its education funding priorities for every school district, this Court affirmed only a requirement for the State to assess its education allocations to Hoke County.

Plaintiff-Intervenors point out that the Court praised Judge Manning for giving "the legislative and executive branches . . . an unimpeded chance, 'initially at

least . . .' to correct constitutional deficiencies revealed at trial . . ." *Id.* Accordingly, they argue, in circuitous fashion, that Judge Lee could properly grant statewide relief because the CRP is "a remedy crafted by the State itself." (Plaintiff-Intervenors' Appellee Br. at 82). However, it is an exaggeration to suggest that "the State" created the CRP. In fact, the CRP was proposed only by DOJ and certain executive agencies. The record here is devoid of any indication that the legislative branch was given a chance, unimpeded or otherwise, to participate in the correction of constitutional deficiencies through a remedy in this litigation.

Finally, issuing a statewide remedy directly contradicts this Court's holding in *Leandro II* that the "'bulk of the core' of the State's 'Educational Delivery System . . . is sound, valid and meets the constitutional standards enumerated by *Leandro*." 386 N.C. at 632, 599 S.E.2d at 387. Consequently, ordering a statewide remedy would not, as Plaintiff-Intervenors contend, be consistent with this Court's prior decisions in this case. *Leandro II* limited the trial court's judgment to Hoke County and upheld rulings that the statewide education system, as a whole, was constitutional. Those decisions are binding on both the Plaintiffs and the trial court.

C. DOJ and the Plaintiffs Cannot, By Consent or Implication, Expand the Scope of this Court's Holdings.

Plaintiffs attempt to circumvent *Leandro II's* express limitations by arguing that DOJ consented to—even insisted on—a statewide remedy or that the pleadings were "amended" by implication. Those assertions are wrong as a matter of fact—the trial court never conducted a trial after this Court remanded in the case in *Leandro II*. They are also wrong on the law: Plaintiffs and DOJ could not expand the scope

of this Court's decision in *Leandro II* by "consent," nor could they bargain away the Legislature's constitutional role as a co-equal branch of government.

1. *This Court Expressly Rejected Any Attempt to Expand the Scope of Post-Leandro I Proceedings Beyond Hoke County.*

In an effort to create the appearance of a seamless continuum of events by which "the State" insisted on proceedings that focused on statewide conditions and relief, Plaintiffs' brief conflates events that occurred before and after *Leandro II*. To understand why this matter was never expanded by "consent," it is helpful to differentiate the events that occurred before *Leandro II* from those that occurred after.

After this Court held in *Leandro I* that there is a qualitative component to the constitutional requirement to provide free public education—specifically, a right to an opportunity to obtain a sound basic education—it remanded the case to the superior court for further proceedings. *Leandro I*, 358 N.C. at 649, 599 S.E.2d at 397. The issues for trial were bifurcated between urban and rural school district plaintiffs, and the first (and only) trial focused on Hoke County. *Leandro II*, 348 N.C. at 613, 599 S.E.2d at 375. Judge Manning issued his "Liability Judgment" based on that trial on 4 April 2002 (R p 678), which initiated what Plaintiffs now call the "remedial phase" of the proceedings. On July 29, 2002, in response to inquiries from the trial court, the Chairman of the State Board of Education and the State Superintendent of the Department of Public Instruction ("DPI") sent a letter assuring Judge Manning of the State Board of Education and DPI's commitment to providing effective instructional programs to at-risk students. (R p 800-823).

Based on the letter's assurance that the State Board and DPI were "taking concrete actions to improve educational opportunities for at-risk students in the plaintiff-party LEAs **along with their similarly disadvantaged peers across the State**" (R., 800) (emphasis added), Plaintiffs contend that the State took "a definitive legal position" that it "could not" tailor a remedy specific to Hoke County and that its "*Leandro* remedial efforts would be implemented on a statewide basis." (Plaintiffs' Appellee Br. at 71-72). The letter, however, does not purport to be a "definitive legal position," nor does it indicate that a remedy specific to Hoke County or the other plaintiff districts would be impossible. Instead, it merely responds to the trial court's inquiry and recites the State Board and DPI's understanding of its obligation to provide an opportunity for all students to obtain a sound basic education. Even if the letter were what Plaintiffs claim it to be, however, it would not be sufficient by itself to bind the entirety of the executive and legislative branches to proceedings on statewide remedies. Nor would the State Board of Education and DPI have the authority to bind all of the non-party school districts and students in the State to a litigation process in which they were not parties or in any way represented.

More importantly, whatever effect the 2002 letter had, it was superseded by this Court's decision in *Leandro II*, which was decided two years later. There, the Court expressly held:

> The Court recognizes that the trial court took evidence on, and made conclusions about, student performance across the state. **However, we remain mindful that the issues of the instant case pertain only to evidence, findings, and conclusions that apply to Hoke County in particular. As a consequence, 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.**

358 N.C. at 387, 599, S.E.2d at 387 n.14 (emphasis added).

Thus, even if there had been an "agreement" among the parties after *Leandro I* to present statewide evidence, and such agreement had been of any effect, this Court's holding in *Leandro II* superseded and rendered that agreement irrelevant when it expressly limited the trial court's "Liability Judgment" to Hoke County.

2. *This Court's Decision in Leandro II is Law of the Case and Any Subsequent Action Contrary to that Decision Was Void.*

Plaintiffs cannot escape this Court's *Leandro II* holdings that (i) the trial court's "Liability Judgment" must be limited to Hoke County and (ii) the "bulk of the core" of the State's "educational delivery system" was sufficient to meet constitutional standards. To the extent Plaintiffs point to proceedings *before Leandro II* to claim that the trial court found a statewide violation (or that one was tried by "consent") those proceedings were superseded by *Leandro II*. To the extent the trial court sought to mandate measures outside Hoke County as part of the remedial proceedings after *Leandro II*, its orders contravened the law of this case and this Court's instructions on remand and are therefore void.

Appellate decisions are law of the case and are binding on the superior court on remand. *See Hayes v. City of Wilmington,* 243 N.C. 525, 536, 91 S.E.2d 673, 681–82 (1956); *Transportation, Inc. v. Strick Corp.*, 286 N.C. 235, 239, 210, S.E.2d 181, 183 (1974). Accordingly, this Court has held that when a trial court order on remand fails to conform with this Court's mandates, the order is "unauthorized and void." *Lea*

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

Leandro II expressly limited the trial court's 2002 liability judgment to Hoke County. 358 N.C. at 613, 599 S.E.2d at 375 ("Our consideration of the case is properly limited to the issues relating solely to Hoke County as raised at trial." (emphasis added)). The Court further made clear that its mandates could not extend beyond Hoke County without a trial establishing a violation in the other plaintiff counties. *Id.* 358 N.C. at 613, 599 S.E.2d at 375 n. 5. ("**[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**.") Finally, the trial court affirmed Judge Manning's conclusion that the "'the bulk of the core' of the State's 'Educational Delivery System" which included its "general curriculum, teacher certification standards, funding allocation systems, and education accountability standards" is "sound, valid, and meets the constitutional standards enumerated by [*Leandro I*]." 358 N.C. at 632, 499 S.E.2d at 387.

Despite these holdings, Plaintiffs contend that the November 10 Order properly ordered a statewide remedy because DOJ consented to statewide proceedings and submitted only statewide evidence in post-*Leandro II* remedial

proceedings. (Plaintiffs' Appellee Br. at 72). Plaintiffs further accuse the Legislative-Intervenors of ignoring what has transpired in the trial court since *Leandro II* and recite a litany of evidence that the trial court supposedly received, not at trial, but in the remedial phase of this litigation, regarding districts outside of Hoke County. (Plaintiffs' Appellee Br. at 70).

Plaintiff-Intervenors take these arguments a step further and contend that the parties' supposed litigation of statewide claims post-*Leandro II* amounts to an amendment by express or implied consent under Rule 15(b) of the North Carolina Rules of Civil Procedure. (Plaintiff-Intervenors' Appellee Br. at 86). However, the effect of the parties' supposed "agreement" or "consent" to proceedings does not change the binding nature of this Court's decision in *Leandro II*, nor can it excuse the trial court's decision to disregard that decision on remand. The provisions of Rule 15(b) permit claims to be amended to conform to the evidence "*at trial*." *See* N.C. R. Civ. Proc. 15(b) (emphasis added). This rule ensures that issues between the named parties tried to a verdict without objection are not later subject to reversal because they cannot be found in the pleadings. Rule 15, however, does not permit the parties to bypass binding appellate decisions limiting the scope of a court's liability judgment merely because they presented additional evidence during subsequent post-trial "remedial" proceedings.

Plaintiffs also contend indignantly that, since DOJ supposedly assented to the presentation of statewide student performance data, Legislative-Intervenors are attempting to "fault the trial court and Plaintiffs for taking the State at its word."

(Plaintiffs Appellee Br. at 72). Plaintiffs mischaracterize Legislative-Intervenors' position. The fault lies not in being too trusting, as Plaintiffs cynically imply. Rather, it lies in the fact that the Plaintiffs, trial court, and at some point even DOJ, disregarded this Court's decision in *Leandro II*. This Court affirmed the trial court's decision that the statewide educational delivery system was adequate, declined to extend its ruling beyond Hoke County, and ordered the trial court to conduct further proceedings (meaning a trial or trials) on only the "pending cases" involving the "other rural school districts or urban school districts . . . in a fashion that is consistent with the tenets outlined in this opinion." 358 N.C. at 649, 599 S.E.2d at 397. The trial court's decision to conduct "remedial" proceedings that focused on school districts that were not part of the "pending cases" therefore contradicted this Court's decision in *Leandro II* and are void. The fact that the DOJ allowed the court to review statewide student performance data, or that the trial court persisted in its violation of this Court's directives on remand for a long time do not render them valid. Longevity and complicity cannot validate a process that was void from the start.

3. *The Executive Branch Does Not, By Itself, Represent the Position of "the State."*

Plaintiffs also contend that this Court should reject Legislative-Intervenors' appeal because it is at odds with the position of "the State" as presented by DOJ. According to Plaintiffs, accepting Legislative-Intervenors' position in this appeal would cause the State to "blow hot and cold in the same breath." (Plaintiffs' Appellee Br. at 74). Their argument that such inconsistency would be impermissible, however,

depends on the mistaken premise that the Legislature cannot be an agent of the State because DOJ has already filled the role.

That premise is directly at odds with the entire notion of our constitutionally prescribed tripartite government. Disagreement among branches is not only permissible—it is inherent in the structure of our government. The Legislature cannot be displaced in its role as the representatives of the people merely because its position is at odds with the Executive Branch. This is particularly true in a case such as this one where the matter at issue implicates constitutional powers vested exclusively in the legislative branch.

The United States Supreme Court recently considered this very issue and noted:

> Within wide constitutional bounds, States are free to structure themselves as they wish. Often, they choose to conduct their affairs through a variety of branches, agencies, and elected and appointed officials. These constituent pieces sometimes work together to achieve shared goals; other times they reach very different judgments about important policy questions and act accordingly.... Some States may judge that important public perspectives would be lost without a mechanism allowing multiple officials to respond. It seems North Carolina has some experience with just these sorts of issues. More than once a North Carolina attorney general has opposed laws enacted by the General Assembly and declined to defend them fully in federal litigation.

Berger v. N. Carolina State Conf. of the NAACP, 546 U.S. ___, 142 S. Ct. 2191, 2197–98 (2022). As in *Berger v. NC State Conf. of the NAACP*, Plaintiffs (and DOJ) here cannot "identify anything to support [their] suggestion that the State's executive branch holds a constitutional monopoly on representing North Carolina's practical

interests in court." *Id.* at 2202-2203. To the contrary, and as the United States Supreme Court recognized, N.C. Gen. Stat. § 1-72.2 was adopted specifically to address the "possibility that different branches of government may seek to vindicate different and valuable state interests." *Id.* at 2205.

Plaintiffs might prefer that the Legislature's position in this appeal be ignored, but their suggestion that the Legislature is not a legitimate agent of the State merely because its position contradicts the position that the State has taken through DOJ defies North Carolina law and risks reaching an outcome that fails to consider fully the State's position by shutting out the voice of the people's representatives in the General Assembly. As the United States Supreme Court explained:

> [W]here a State chooses to divide its sovereign authority among different officials and authorize their participation in a suit challenging state law, a full consideration of the State's practical interests may require the involvement of different voices with different perspectives. To hold otherwise would risk allowing a private plaintiff to pick its preferred defendants and potentially silence those whom the State deems essential to a fair understanding of its interests.

Id. at 2203. North Carolina has deemed the voice of the Legislature "essential to a fair understanding of its interests" in circumstances like those before the Court now, and it cannot be silenced merely because it is not in harmony with other State voices.

Nor is it accurate or fair to argue here, as Plaintiffs have, that the Legislature has somehow waived its right to speak up for its constitutional authority because it did not intervene sooner. Plaintiff-Intervenors contend that the Legislative-Intervenors "could have intervened at several earlier junctures but chose not to do

so." (Plaintiff-Intervenors' Brf. at 66). They further note, "Regardless of whether Intervenor-Defendants could have intervened as of right, though, there was, [sic] ample opportunity for them to seek *permissive* intervention…." (Plaintiff-Intervenors' Brf. at 75). They then argue that the Legislative-Intervenors waived their appeal because they "did not seek to intervene earlier in this case…." (Plaintiff-Intervenors' Brf. at 76). This entire argument is based on a fundamental mistruth. The General Assembly moved for leave to intervene in 2011 (prior to the adoption of N.C. Gen. Stat. § 1-72.2). The trial court denied this motion. *See Hoke County Bd. of Educ., et al. v. State,* 2011 WL 11028382 (N.C. Super. September 2, 2011). Having already been denied permissive intervention, the Legislature was prevented from joining the suit until the budget legislation was enacted in November of 2021. Enacting the budget rendered the November 10 Order a challenge to an act of the General Assembly, giving rise to a right to intervene. In between the time of the Legislature's first attempt to join at the trial court's discretion and its intervention as of right, the trial court's disregard of this Court's mandate in *Leandro II* continued unabated.

In short, the mere fact that the Legislature's position is at odds with that of the DOJ and certain executive branch agencies does not compel the conclusion that the Legislature's position is "impermissible" or should not be heard and considered in this appeal.

D. A "Zone of Interest" Analysis Cannot Justify the Expansion of this Case to Statewide Claims and Relief.

Finally, Plaintiffs cite to this Court's decision in *Leandro II* for the proposition that statewide relief is appropriate because the statewide interest implicated in the November 10 Order is within the "zone of interest" protected by the constitutional right to a sound basic education. (Plaintiffs' Appellee Br. at 76). Plaintiffs' reliance on this analysis, however, is curious as the Court in *Leandro II* held that plaintiffs could, at most, represent only the interests of the students in their respective school districts, and not the State as a whole.

In *Leandro II*, this Court considered whether the named plaintiffs were limited to presenting evidence that they had suffered individual harm, such that any remedy would target only their circumstances. The Court noted that the "unique procedural posture and substantive importance" of the case compelled the application of "broadened parameters of a declaratory judgment action that is premised on issues of great public interest." 358 N.C. at 377, 599 S.E.2d at 377. But the Court ruled that such consideration only justified extending the "zone of interest" implicated by Plaintiffs' claims to Hoke County Schools, and thus went on to examine "whether plaintiffs made a clear showing that harm had been inflicted on Hoke County students. . . ." *Id.*

In other words, this Court already considered the "zone of interest" implicated by Plaintiffs' claims and concluded that they could not be extended to make Plaintiffs representatives for the entire State. The "zone of interest" analysis therefore does not support the imposition of statewide relief. Instead, it merely extended the scope

of available relief beyond the individual named plaintiffs to the entirety of the Hoke County School System, as reflected in the scope of this Court's decision in *Leandro II*.

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In sum, Plaintiffs, Plaintiff-Intervenors, and DOJ fail to show that there has ever been a judgment establishing a statewide violation that would support statewide relief. To the contrary, *Leandro II* expressly limited the one and only judgment in this case, and any mandates that flowed from it, to just Hoke County. And, while the Court remanded the case for trial(s) into the conditions in the other plaintiff-school districts, those trials never happened. Instead, the trial court pushed forward with a "remedial phase" that simply disregarded this Court's decision in *Leandro II*. As a result, the Court's effort to impose a statewide remedy in the form of the CRP constituted error and should be reversed.

II. LEGISLATIVE INTERVENORS HAVE PROPERLY APPEALED THE TRIAL COURT'S IMPOSITION OF THE CRP, AS WELL AS ITS ASSUMPTION REGARDING THE EXISTENCE OF A STATEWIDE VIOLATION.

Faced with the absence of a statewide violation that might justify the implementation of the CRP as a statewide remedy, Plaintiffs and DOJ devote most of their time to arguing that the Court has to accept the trial court's assumptions that *Leandro II* established a statewide violation, and that the CRP was the only and necessary means to fix it. According to Plaintiffs and DOJ, the Court must accept these assumptions even if they were erroneous and even if they directly contravene this Court's decision in *Leandro II*. To that end, Plaintiffs-Intervenors devote 16

pages of their appellee brief to arguing that Legislative-Intervenors did not make Judge Lee's imposition of the CRP part of their appeal. (Plaintiff-Intervenors Appellee' Br. at 62-75). That argument, however, is wrong for several reasons.

First, the issues related to the trial court's imposition of the CRP arise from interlocutory orders that are properly subject to review as part of this appeal. *See* Wright & Miller Fed. Prac. & Proc. § 3915.4 (2d ed.) ("Courts should adhere to a simple rule in almost all circumstances: orders made in ongoing proceedings to determine the final remedy are not final."); *Veazey v. Durham,* 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950) ("An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy."). Appeal of interlocutory orders, even if they impact a substantial right, is permissive rather than mandatory. *DOT v. Rowe*, 351 N.C. 172, 176, 521 S.E.2d 707, 710 (1999) ("[W]here a party is entitled to an interlocutory appeal based on a substantial right, that party *may* appeal *but is not required to do so*.") (emphasis added). Thus, Legislative-Intervenors did not "waive" their right to appeal the orders that led up to Judge Lee's order on 10 November 2021 and have properly appealed them here.[7]

Second, the November 10 Order (which Plaintiffs drafted) expressly incorporated "the findings and conclusions of the [trial court's] prior Orders—including the January 21, 2020 Consent Order, September 11, 2020 Consent Order,

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[7] Plaintiffs' contentions that these interlocutory orders constitute "law of the case" similarly fail for the reasons stated in Legislative-Appellants' Appellee Brief. (*See* Legislative-Intervenors' Appellee Br. at 15-21.)

June 7, 2021 Order on Comprehensive Remedial Plan, September 22, 2021 Order, and October 22, 2021 Order." (November 10 Order at n.1 (Rp1825)). Thus, by appealing the November 10 Order, Legislative-Intervenors necessarily appealed all orders incorporated therein and on which that Order relied. *See Nelson v. Hartford Underwriters Ins. Co.*, 177 N.C. App. 595, 604, 630 S.E.2d 221, 228 (2006) (holding that the Court of Appeals could review preceding order when subsequent order "was necessarily predicated, in part, on the factual and legal conclusions reached" in the preceding order). Plaintiffs-Intervenors' attempt to distinguish *Nelson* fails. Plaintiffs-Intervenors acknowledge that the Court of Appeals determined in *Nelson* that it could review "underlying conclusions from an earlier motion" because it involved similar questions of law. (Plaintiff-Intervenors' Appellee Br. at 72). The same is true here. The Court can review the orders incorporated in the November 10 Order because they involve the same questions of law at issue in the November 10 Order.

Third, even if the Court's imposition of the CRP were not part of this appeal, the Court should still reach it. No one disputes that the imposition of the CRP involves some of the most important questions that come before this Court. Indeed, if left to stand, the CRP would dictate educational policy and spending for all of North Carolina for the better part of a decade, effectively removing it from the regular legislative process. That is no small matter, and it is one that is worthy of appellate review. Legislative-Intervenors have accordingly filed a conditional petition for *writ of certiorari* to ensure that the Court's review extends to all of the findings and

conclusions that were incorporated into the November 10 Order, including the Court's assumptions that there was a statewide violation and that the CRP was the "necessary" and "only" means to remedy it. (See Legislative-Intervenors' Conditional Petition for Writ of Certiorari, filed 1 July 2022). Rule 21 of the North Carolina Rules of Appellate Procedure provides that "the *writ of certiorari* may be issued in appropriate circumstances . . . to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action." Thus, even if Legislative-Intervenors lost a right to appeal the trial court's prior orders (which is not the case), any alleged defect in appellate jurisdiction can be corrected by granting their pending Conditional Petition for *Writ of Certiorari*.

Likewise, Rule 2 of the North Carolina Rules of Appellate Procedure provides that, "[t]o prevent manifest injustice to a party, or to expedite decision in the public interest, either court of the appellate division may . . . suspend or vary the requirements or provisions of any of these rules in a case pending before it upon application of a party or upon its own initiative." N.C. R. App. P. 2. "Rule 2 relates to the residual power of our appellate courts to consider, in exceptional circumstances, significant issues of importance in the public interest or to prevent injustice which appears manifest to the Court." *State v. Campbell*, 369 N.C. 599, 603, 799 S.E.2d 600, 602 (2017). The Court has "been more willing to invoke Rule 2" in "civil cases that involve either substantial constitutional claims or issues of first impression," such as redistricting cases. *Stann v. Levine*, 180 N.C. App. 1, 11–12, 636 S.E.2d 214, 220–21 (2006). This case qualifies as one involving substantial

constitutional claims and is a clear candidate for application of Rule 2 with respect to any argument that Legislative-Intervenors' waived arguments. Indeed, Plaintiffs themselves invoked Rule 2 of the North Carolina Rules of Appellate Procedure in their opening brief. (Plaintiffs' Appellant Br. at 12 n.2). Thus, if necessary (which it is not), the Court should apply Rule 2 to negate any alleged waiver of arguments asserted by Legislative-Intervenors.

Put simply, Plaintiffs and DOJ cannot avoid review based on mere technicalities. Legislative-Intervenors' appeal properly encompasses the trial court's decisions to impose the CRP and its (erroneous) assumption that Plaintiffs had established the existence of a statewide violation that would justify statewide relief. Those issues are thus properly before this Court.

III. THE TRIAL COURT ERRED BY REFUSING TO TREAT THE STATE BUDGET AS PRESUMPTIVELY CONSTITUTIONAL.

Plaintiffs and DOJ argue the trial court afforded the State Budget "the proper level of deference" when it failed to apply the presumption of constitutionality that governs the review of all legislation. In doing so, they seek to reduce the State Budget to little more than a precatory document that expresses how the political branches would *prefer* State funds to be spent unless or until a court orders otherwise. Indeed, Plaintiff-Intervenors go so far as to argue that "the State Budget Act is only relevant to the extent that it funded items in the CRP." (Plaintiff-Intervenors' Appellee Br. at 91). Those assertions, however, get the analysis exactly backward.

As set forth above, there has never been a judgment that establishes a violation outside of Hoke County, and certainly never one that establishes a violation statewide. To the contrary, *Leandro II* affirmed the trial court's judgment that "'the bulk of the core' of the State's 'Educational Delivery System . . . is sound, valid, and meets the constitutional standards enumerated by [*Leandro I*]." *Leandro II*, 358 N.C. at 632, 499 S.E.2d at 387. That included the trial court's conclusion that the State's "funding allocation system" was sufficient to provide North Carolina children with the opportunity to obtain a sound basic education. *Id.* Accordingly, the trial court was required to treat the State Budget as presumptively constitutional unless Plaintiffs could prove otherwise beyond a reasonable doubt (assuming such a claim was not barred by *res judicata* in the first place). *See 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"); *see also Leandro II*, 358 N.C. at 623-24, 599 S.E.2d at 381 ("'[T]he courts of this state must grant every reasonable deference to the legislative and executive branches when considering whether they have established and are administering a system that provides children of the various school districts with a sound basic education,' and 'a clear showing to the contrary must be made before the courts may conclude that they have not.'" (quoting *Leandro I*, 346 N.C. at 357, 488 S.E.2d at 261). The trial court, however, explicitly did not

treat the State Budget as presumptively constitutional precisely because it would require Plaintiffs to put on evidence to carry their burden and prove their claims:

> The Court declines to determine . . . 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.

(R p 2628).

Plaintiffs' and DOJ's various efforts to excuse the trial court's failure to treat the State Budget as presumptively constitutional are unpersuasive. Many amount to nothing more than mere tautologies.

First, Plaintiffs and DOJ argue that "no party has challenged the State Budget," and that they could not have done so because the Governor did not sign the 2021 Appropriations Act into law until November 18, 2021—eight days after the November 10 Order. That argument, however, ignores the effect of the November 10 Order itself. When it was entered, it inherently challenged the continuation budget in effect at the time. It purported to make appropriations that were not authorized by the continuation budget, and it did so precisely because the political branches *had not approved* such appropriations. When a new budget was enacted only eight days later, the November 10 Order stood as a challenge to the appropriations made in the Budget Act. The trial court on remand then continued, and compounded, that error by assuming the November 10 Order—and thus the CRP—served as the measure of whether the Budget Act was constitutional in the first place.

Second, Plaintiffs argue that "budgets are not constitutional remedial plans." (Plaintiffs Appellee Br. at 78-79). But it is unclear what that means or why it matters. Plaintiffs first must prove a violation before they can invoke the Court's remedial powers. Plaintiffs are not entitled to have the Court *assume* that the statewide educational system fails to meet constitutional standards just so they can obtain court orders redirecting State funds. Indeed, both Plaintiffs and Plaintiff-Intervenors start with the assumption that they had proven a statewide violation and that the only question before the court by the time of the November 10 Order was how to remedy it—something *Leandro II* expressly rejects. The State Budget was not merely a counterproposal to the CRP, nor was it a remedial effort to fix "ongoing constitutional violations," as Plaintiffs suggest. It is a statute that was validly passed by both houses of the General Assembly and signed by the Governor. It represents the political branches' effort to provide for the State's educational system—and thus meet their Constitutional obligations—*in the usual course*. It is thus entitled to deference, and a presumption of constitutionality, unless and until Plaintiffs prove otherwise.

Plaintiffs complain that if the State Budget were deemed presumptively constitutional it would force them into an endless feedback loop—requiring them to challenge each State Budget to show it is insufficient before obtaining a remedy. Not so. Plaintiffs would, however, need to prove a statewide claim—that is, show that the "State's 'Educational Delivery System" established under the State Budget fails to meet constitutional standards—before the court could even consider a statewide remedy.

The trial court failed to recognize that *Leandro II* rejected Plaintiffs' statewide claims and limited the one-and-only "liability judgment" in this case to the Hoke County School System. *Leandro II*, 358 N.C. at 633 n. 14 ("[W]e remain mindful that the issues of the instant case pertain only to evidence, findings, and conclusions that apply to Hoke County in particular."). It also failed to treat the political branches' efforts to provide for and administer the State's educational system through adoption of the State Budget as presumptively constitutional. These are errors of law, and they require the trial court's order to be reversed.

IV. THE TRIAL COURT IMPROPERLY ISSUED CONSTITUTIONAL RULINGS IN THE ABSENCE OF A GENUINE CONTROVERSY.

The parties' arguments on appeal highlight why courts lack jurisdiction to issue decisions in "friendly suits," where "all parties seek the same result" and there is no "genuine controversy" between parties with conflicting interests. *State ex rel. Edmisten v. Tucker*, 312 N.C. 326, 345, 323 S.E.2d 294, 307 (holding that "friendly suits" are the "quicksand of the law'" and that existence of a "genuine controversy" is "a jurisdictional necessity." (quoting *Greensboro v. Wall*, 247 N.C. 516, 520, 101 S.E.2d 413, 416 (1984))).

For instance, Plaintiffs argue that—despite the breadth of the CRP and the November 10 Order's attempt to appropriate $1.7 billion in State funds to pay for it—the trial court somehow took steps to "minimize [its] encroachment" into the other branches because it allowed the State Board of Education and DPI to draft the CRP. (Plaintiffs' Appellee Br. at 33-34). But that narrative ignores reality.

First, Plaintiffs and DOJ jointly asked Judge Lee to enter "consent orders" appointing WestEd in 2018 as the court's advisor. Similarly, both parties jointly sought an order requiring the State to draft and implement the CRP in 2020 and 2021, even though *Leandro II* expressly held that the "bulk of the core" of the State's "educational delivery system" was sufficient to meet constitutional standards and that its mandates could not extend beyond Hoke County without a trial on the conditions in the other plaintiff-school districts. *Leandro II*, 358 N.C. at 632, 599 S.E.2d at 387; *see also id*. 358 N.C. at 613, 599 S.E.2d at 375 n. 5. In other words, Plaintiffs and DOJ asked the Court to invoke its "remedial powers" and displace the other branches in the performance of their constitutional duty to maintain the State's public school system, all without any judgment that the existing system was unconstitutional. Second, even if the State Board of Education and DPI had prepared the CRP independently (which is not the case),[8] Plaintiffs ignore that those agencies represent *only the Executive Branch*, and accordingly cannot, under our State Constitution, consent to measures in the CRP that require the State to rewrite statutes or appropriate funds.

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[8] As set forth in Legislative-Intervenors' Opening Brief, although the June 2021 consent order adopting the CRP recited that the plan was received from the State, the order bore a document stamp from Plaintiffs' law firm. (R p 1679) ("PPAB 6336941v.1.docx"). Subsequent reporting has revealed that the WestEd report and CRP were funded, in part, by two executive branch agencies controlled by the Governor, DHHS ($600,000) and the Department of Administration ($200,000)—not by the State Board of Education or DPI. *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).

Had the proceedings leading up to the November 10 Order been "tested by fire in the crucible of actual controversy," *State ex rel. Edmisten*, 312 N.C. at 345, 323 S.E.2d at 307, Judge Lee may have been alerted that he was being asked to implement a statewide remedy that far exceeded this Court's decision in *Leandro II*. He may also have recognized that the Executive Branch agencies represented by DOJ stood to gain from the entry of orders against the State, since it would permit them to obtain funding for their desired policy measures without having to secure approval from the General Assembly under the State Constitution. Judge Lee, however, was never afforded that chance. Instead, Plaintiffs and DOJ forced him to accept, on their own *ipse dixit*, that the State's public school system was failing children "across the State" and that ordering the requested measures in the CRP—*all 146 of them*—was "necessary" to meet the State's constitutional obligations.[9]

On remand, the trial court was clearly troubled by DOJ's effort to secure orders *against the State* and its decision to "appeal" the November 10 Order merely to have it affirmed. Accordingly, it made clear in its 26 April Remand Order that DOJ had

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[9] The State Board of Education urges the Court to accept its conclusory assertions that every measure required by the CRP is "necessary" to provide children with a sound basic education, even on appeal. In its brief, the State Board of Education "acknowledge[es] that there could be more than one constitutionally acceptable remedy in this case," but nevertheless argues it "stands by its assertion that [t]he actions outlined in [CRP] are necessary . . . to address ongoing constitutional violations." (State Bd. of Educ. Br. at 11). In other words, the State Board of Education recognizes this court held in *Leandro I* and *II*, that there will more than constitutionally permissible way to provide children with a sound basic education, but ask the Court to treat each of the CRP's 146 measures as "necessary" just because it says so.

only been representing the interests of the Executive Branch, and not "the State" as a whole:

> While elemental to our system of government, this case demonstrates the fact that there are three co-equal branches of government — the judicial branch, the executive branch, and the legislative branch. **The record before this Court demonstrates that, until very recently, the "State Defendants" actively participating in this action were comprised of the executive branch (the Governor's office, the State Department of Education, the State Department of Public Instruction, and the State Department of Health and Human Services) but not the Legislative Branch.** In fact, the record discloses that in 2011 the Legislature sought to intervene in this proceeding but its motion was denied by the trial court in its discretion.

(26 April 2022 Order at 2-3, n. 1 (R pp 2619-20) (Emphasis added)).

In their briefs, Plaintiffs and DOJ respond to these concerns with telling dismissiveness. Plaintiffs, DOJ, and the State Board of Education all admit they worked together to secure orders imposing the CRP and requiring the State to "appropriate" funds to pay for it outside the legislative process. (Plaintiffs Appellee Br. at 67-68; DOJ Appellee Br. at 26; State Board of Education Br. at 4). The November 10 Order itself confirms that is the case. (R p 1827) (reciting that "Plaintiffs and Penn Intervenors . . . as well as the State Defendants all agreed" to have the court appoint WestEd and require them to develop the CRP). Yet Plaintiffs and DOJ insist—with increasing fervor—that any allegation the CRP and November 10 Order were the result of friendly proceedings is "utterly baseless," or even "absurd," because the State and Plaintiffs *previously had* an adversarial relationship

before they jointly requested Judge Lee to appoint WestEd in 2018. (DOJ Response Br. at 23; Plaintiffs Appellee Br. at 67). That argument, however, misses the mark.

The timeline reveals that DOJ's decision to start cooperating with the Plaintiffs in 2018 in order to mandate the CRP judicially was not merely an effort to "achieve compliance with remedial court orders" after it lost a trial on the merits, as it contends. (DOJ's Response Br. at 25). *Leandro II* expressly rejected Plaintiffs' claim that there was a statewide violation and held, unequivocally, that the court's mandates from the trial court's judgment could not extend beyond Hoke County. *See* 358 N.C. at 632, 599 S.E.2d at 387; *see also id.* 358 N.C. at 613, 599 S.E.2d at 375 n. 5. Plaintiffs' request to have the court order a statewide remedial plan thus represented a *new phase* of the litigation on a *new set of claims* (even if they were nowhere in the pleadings) that alleged a statewide violation *wholly distinct* from those found in *Leandro II*.[10] The fact DOJ actively opposed the Plaintiffs' lawsuit up

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[10] In a separately filed brief, the State Board of Education alleges that it chose to cooperate with the Plaintiffs in 2018 because it could not overcome the trial court's "findings of fact" in the order denying its motion to dismiss under Rule 12, or alternatively for relief from the 2002 liability judgment affirmed in *Leandro II* under Rule 60. (State Bd. of Educ. Br. at 6-7). In particular, the Board points to Judge Lee's statement that evidence in the record was insufficient to show "even remote compliance" with the tenets of *Leandro I* and *II*, and contends that such a finding of fact is "unassailable" on appeal. (*Id.*) (citing R p 1303). However, rulings on motions to dismiss under Rule 12(b)(6) do not include findings of fact. Further, to the extent Judge Lee improperly assumed *Leandro II* found a statewide violation, or improperly shifted the burden onto the State to prove compliance with the Constitution, his rulings represented errors of law that, to the extent contrary to *Leandro II*, were void *ab initio*. *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))).

until that time does not matter—DOJ joined Plaintiffs in asking Judge Lee for a statewide remedy in 2018 and never sought to correct Plaintiffs' misrepresentations about the "law of the case" or the proper limits of court's remedial powers under the Constitution after that point.

This Court's decisions prohibit judges from issuing decisions in "friendly suits" precisely because of the risk they pose to the separation of powers. *See 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"); *Lide v. Mears*, 231 N.C. 111, 118 (1949) (explaining that, even in declaratory judgment actions, the courts "preserve inviolate the ancient and sound juridic concept that the inherent function of judiciary tribunals is to adjudicate genuine controversies between antagonistic litigants with respect to their rights, status, or other legal relations"); *see also Chicago & G.T. Ry. Co. v. Wellman*, 143 U.S. 339, 344-45 (1892) ("[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.")

The trial court erred by entering orders on a constitutional issue when DOJ's and Plaintiffs' requests to mandate the CRP judicially were the product of a friendly

suit. It also should have recognized the very real possibility that the Executive Branch was using a decades-old lawsuit to mandate measures judicially without having to secure political approval in the usual budget process. Indeed, the Court need look only to DOJ's actions in the course of this appeal to conclude that it involves an effort by the Executive Branch to circumvent the legislative process. Although DOJ appealed the November 10 Order and filed a bypass petition asking this Court to grant immediate review, it has now devoted two briefs, totaling more than 100 pages, to arguing that the November 10 Order was "correct" and that its "transfer provisions" should be reinstated. (DOJ Appellant's Br. at 18). In doing so, DOJ has taken a position directly opposite to the one it took in *Richmond County*, where the same lawyers appearing in this case argued that the Appropriations Clause categorically prohibits courts from ordering state officials to disburse public moneys without a legislative appropriation:

- "Any court that orders State officials to pay a money judgment does so in violation of the separation of powers established by the North Carolina constitution, as only the General Assembly possesses the power to allocate funds to public entities."

- "Orders such as these, requiring the State to satisfy a judgment, clearly violate the separation of powers provision contained in North Carolina's Constitution. *See* N.C. Const. art. I, § 16 ("Separation of Powers: The legislative, executive and supreme judicial powers of the State government shall be forever separate and distinct from each other."

- "N.C. Const. art. V, § 7(1) means that there must be legislative authority in order for money to be validly withdrawn from the treasury ... [i]n other words, the legislative power is supreme over the public purse." *State ex rel. White v. Hill*, 125 N.C. 194, 200, 34 S.E. 432, 433 (1899); accord [*Goldston v. State*, 199 N.C. App. 618, 629, 683 S.E.2d 237, 244-45 (2009)]. Accordingly, neither the executive nor the judicial

> branch may take or expend public monies without statutory authorization. *Id.* (noting that the Governor's duty is to administer the budget as enacted by the General Assembly); *see also In re Alamance Cnty. Court Facilities*, 329 N.C. 84, 405 S.E.2d 125 (1991) (judiciary prohibited from taking public monies without statutory authorization)."

See State's Appellant Br. at 9-10, *Richmond Cnty. Bd. of Educ. v. Cowell*, 254 N.C. App. 422, 803 S.E.2d 27 (2017) (No. COA17-112) (App. 013-014)); *also* State's Reply Br. at 2-4,, *Richmond Cnty. Bd. of Educ. v. Cowell*, 254 N.C. App. 422, 803 S.E.2d 27 (2017) (No. COA17-112) (App. 024-026)).

DOJ does not offer any legitimate reason why the outcome in this this case should be different than the one for which it argued so forcefully in *Richmond County*. Indeed, the only difference this time around is that the Executive Branch stands to gain from cooperating with the plaintiffs by using a friendly lawsuit to obtain additional funding outside the legisaltive process. The Appropriations Clause, however, requires that the Executive Branch first secure approval from the General Assembly before it obtains appropriations. That point remains just as true today as it did five years ago when *Richmond County* was decided.

V. BY ORDERING THE CRP AS A REMEDY IN THE ABSENCE OF A VIOLATION, THE TRIAL COURT RENDERED AN ADVISORY OPINION ON POLITICAL QUESTIONS.

As set forth in Legislative-Intervenor's opening brief, the trial court's orders requiring the State to implement the CRP and appropriate State funds to pay for it should be vacated for the independent reason that they constituted impermissible advisory opinions on nonjusticiable political questions. Plaintiffs and DOJ's

arguments to the contrary are unavailing and ignore this Court's prior decisions in *Leandro I* and *II*.

A. The Trial Court's Imposition of the CRP Constitutes an Impermissible Advisory Opinion.

The trial court's imposition of the CRP violated the well-established prohibition against advisory opinions. As set forth above, *Leandro II* expressly limited the trial court's "liability judgment" to just Hoke County and upheld the trial court's findings that the "bulk of the core" of the State's "educational delivery system" was sufficient to meet constitutional standards. *Leandro II*, 358 N.C. at 632, 499 S.E.2d at 387.

As a result, the CRP was not a "remedy" designed to address any claim asserted in the pleadings in this case, all of which focus on the specific and varying conditions in certain, named county school systems. Nor can it possibly be justified as an effort to enforce the one-and-only judgment entered in this matter, which under "the law of the case" is limited to Hoke County. Instead, the CRP purported to answer an abstract policy question—*i.e.*, what statewide measures can be undertaken to improve the whole of North Carolina's educational system—that was divorced from any of the claims actually asserted or decided in this case.

Accordingly, the Court lacked authority to issue the CRP, since doing so merely constituted an advisory opinion on the purely hypothetical question of what remedies might be necessary (or constitutionally permissible) in the event Plaintiffs had shown a persistent failure to cure an (otherwise nonexistent) statewide violation of the right to a sound basic education. *Little v. Wachovia Bank & Tr. Co.,* 252 N.C. 229, 243, 113

S.E.2d 689, 700 (1960) ("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."); *Wise v. Harrington Grove Cmty. Ass'n, Inc.*, 357 N.C. 396, 408, 584 S.E.2d 731, 740 (2003) (holding that deciding an issue not "drawn into focus by [the court] proceedings" would "render an unnecessary advisory opinion"); *Lide v. Mears*, 231 N.C. 111, 117, 56 S.E.2d 404, 409 (1949) (Ervin, J.) (holding that, even under the Declaratory Judgment Act, litigants cannot "convert tribunals into counsellors and impose upon them a duty of giving advisory opinions to any parties whom come into court and ask for either academic enlightenment or practical guidance concerning their legal affairs." (citing *Tryon v. Duke Power Co.*, 222 N.C. 200, 22 S.E.2d 450 (1942))).

Plaintiffs and DOJ largely ignore the advisory nature of the trial court's order, which itself was an outgrowth of their effort to have the court issue orders in the absence of a genuine controversy. However, despite their insistence, the CRP was, in fact, a free-floating remedy that sought to address a statewide violation that was never alleged and never established. It accordingly should be rejected as an improper advisory opinion.

B. The Trial Court's Orders Requiring the CRP Address Nonjusticiable Political Questions.

The trial court's imposition of the CRP should also be vacated because, in purporting to dictate *how* the State should allocate its educational resources and go about providing a *Leandro*-compliant education, the court sought to answer

nonjusticiable political questions that the Constitution reserves exclusively to the political branches.

In response, Plaintiffs argue that this Court "rejected the State's 'political question' argument" in *Leandro I*. (Plaintiffs Appellee Br. at 65). But, as with so many of their arguments, Plaintiffs read too much into this Court's decisions. In *Leandro I*, this Court held that it could determine "whether the people's constitutional right to education has any qualitative content, that is, whether the state is required to provide children with an education that meets some minimum standard of quality." *Leandro I*, 346 N.C. at 345, 488 S.E.2d at 254 ("We answer that question in the affirmative and conclude that the right to education provided in the State constitution is a right to a sound basic education.") Likewise, the Court confirmed in *Leandro II* that courts have the power to determine *whether* the educational opportunities (in the Hoke County School System) met or fell below the qualitative standards set by the constitution. *Leandro II*, 358 N.C. at 638, 599 S.E.2d at 390.

Yet, while the Court held that determining *whether* the State's educational opportunities meet minimum constitutional standards is a justiciable issue, it likewise held *how* the State goes about doing so constitutes a political question. Indeed, *Leandro I* and *Leandro II* both recognized that the North Carolina Constitution commits the question of how to provide a sound basic education to the legislative and executive branches. *Leandro I*, 346 N.C. at 353, 488 S.E.2d at 258 (holding that the General Assembly "has inherent power [under the North Carolina

Constitution] to do those things reasonably related to" providing a sound basic education); *Leandro II*, 358 N.C. at 643, 599 S.E.2d at 393 ("[T]he 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").

In particular, *Leandro II* reversed trial court orders that sought to (1) require that the State expand prekindergarten services to at-risk students in Hoke County; and (2) decide issues related to the appropriate age for compulsory education, precisely because they constituted "nonjusticiable" questions." *Leandro II*, 358 N.C. at 643, 599 S.E.2d at 393. In doing so, the Court relied not only on "the applicable statutory and constitutional provisions," which required the General Assembly to provide public schools for every child of an appropriate age,[11] but also the lack of "satisfactory or manageable judicial criteria that could justify mandating changes with regard to the proper age for school children." *Id.* (citing *Baker v. Carr*, 369 U.S. 186, 210 (1962)).

As a result, *Leandro II* rejected a "court order compelling the legislative and executive branches to address [the need to provide a sound basic education] in a singular fashion" because "imposition of a narrow remedy . . . would effectively undermine the authority and autonomy of the government's other branches." *Leandro II*, 358 N.C. at 643, 599 S.E.2d at 393. In so doing, *Leandro II* further reiterated *Leandro I*'s guidance that (1) there is more than one way to provide a sound basic

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[11] *See* N.C. Const. art. IX, § 3 ("School attendance. The General Assembly shall provide that every child of appropriate age and of sufficient mental and physical ability shall attend public school.").

education, and (2) the General Assembly is entitled to deference when it comes to education:

> 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.

Id. 358 N.C. at 644, 599 S.E.2d at 394–95. And though *Leandro I* held that the political question doctrine did not bar it from considering *whether* a right to a sound basic education "arises under the North Carolina Constitution" because that question was a routine matter of interpreting the North Carolina Constitution, *Leandro I* emphasized the shortcomings of the judiciary in comparison to the Legislative and Executive Branches in identifying *how* to provide a sound basic education:

> We have announced [the definition of a sound basic education] with some trepidation. We recognize that 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. . . . 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 just 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 hearings and committee meetings at which it can hear and consider the views of the general public as well as educational 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. . . .
>
> [W]e reemphasize our recognition of the fact that the administration of the public schools of the state is best left to the legislative and executive branches of government. Therefore, the courts of the state must grant every reasonable deference to the legislative and executive branches when considering whether they have established and are administering a system that provides the children of the various school districts of the state a sound basic education.

Id. 346 N.C. at 355, 357, 488 S.E.2d at 260-61 (agreeing with the Supreme Court of the United States' recognition 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, and that within the limits of rationality, the legislature's efforts to tackle the problems should be entitled to respect" because "[*o*]*n even the most basic questions in this area the scholars and educational experts are divided.*" (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42–43 (1973) (emphasis in original))).

In stark juxtaposition to the narrow and specific remedies the Court rejected in *Leandro II*, the CRP would purport to dictate virtually every aspect of educational policy (and spending), over an eight-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-kindergarten programs, and early college courses. Indeed, the CRP would require that the State revise its "staffing model" for assigning and compensating teachers (R p 1692); "[r]evise the North Carolina Statutes and State's Every Student Succeeds Act" to adjust the academic accountability measures the State uses to evaluate teachers and school systems, (R p 1719); rewrite statutes governing school funding formulas, (R pp 1752, 1756); and even "[i]ssue a $2 billion bond to support school capital needs" in Year 4 of the plan. (R p 1713).

Whether to implement these measures, however, constitutes a nonjusticiable political question. As this Court held in *Leandro II*, the subject of "public school education . . . is clearly designated in our state Constitution as the shared providence of the legislative and executive branches." *Leandro II*, 358 N.C. at 643, 599 S.E.2d at 393. Thus, just as Article IX, Section 3 requires the General Assembly to "provide that every child of appropriate age . . . attend public schools," other sections vest the General Assembly with the responsibility to "provide by taxation and otherwise for a uniform system of public schools," N.C. Const. art. IX, § 2, and to appropriate "so much of the revenue of the State as may be set apart for that purpose." N.C. Const. art. IX, § 6. Further, the Constitution provides that the State Board of Education (i.e., the Executive Branch) "shall supervise and administer the free public school system" and "make all needed rules and regulations in relation thereto, *subject to the*

laws enacted by the General Assembly." N.C. Const. art. IX, § 5; *see also N.C. Bd. of Educ. v. State,* 371 N.C. 149, 159, 814 S.E.2d 54, 61 (2018).

The Constitution thus delegates decisions about how to fund and administer the State's public school system to the Legislative and Executive Branches. As a result, decisions about the level of funding, "staffing models," teacher compensation, curriculum, and accountability standards all represent nonjusticiable political questions. "Under North Carolina law, courts will not hear 'purely political questions.' . . . Purely political questions are those questions which have been wholly committed to the 'sole discretion' of a coordinate branch of government, and those questions which can be resolved only by making 'policy choices and value determinations.'" *Harper v. Hall*, 380 N.C. 317, 356, 868 S.E.2d 499, 529 (2022) (quoting *Bacon v. Lee*, 353 N.C. 696, 717, 549 S.E.2d 840 (2001) "Purely political questions are not susceptible to judicial resolution. When presented with a purely political question, the judiciary is neither constitutionally empowered nor institutionally competent to furnish an answer." *Id.*; *see also 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 v. North Carolina*, 368 N.C. 122, 126, 774 S.E.2d 281, 285 (2015) ("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.")

Thus, while *Leandro I* and *Leandro II* establish the standard to determine *whether* the State has complied with its obligation to provide a sound basic education, they reject the judiciary's ability to upend the role of the legislative and executive branches by answering the political question of *how* to provide a sound basic education by imposing a specific remedy impacting education policy, appropriations, and budget allocation.[12] The Supreme Court of Minnesota described this balance as follows:

> In essence, appellants' claims ask the judiciary to answer a yes or no question—whether the Legislature has violated its constitutional duty to provide "a general and uniform system of public schools" that is "thorough and efficient," Minn. Const. art. XIII, § 1, and ensures a regular method throughout the state, whereby all may be enabled to acquire an education which will fit them to discharge intelligently their duties as citizens of the republic. To resolve this question, the judiciary is not required to devise particular educational policies to remedy constitutional violations, and we do not read appellants' complaint as a request that the judiciary do so. Rather, the judiciary is asked to determine whether the Legislature has violated its constitutional duty under the Education Clause. We conclude that the courts are the appropriate domain for

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[12] That the trial court outsourced development of the Comprehensive Remedial Plan to the parties and their appointed third-party consultant underscores that the trial court itself did not have satisfactory and manageable criteria or standards for devising a specific remedy itself.

> such determinations and that appellants' Education Clause claims are therefore justiciable.

Cruz-Guzman v. State, 916 N.W.2d 1, 9 (Minn. 2018).

Many other states have reached similar conclusions in determining that the political question doctrine bars courts from dictating education policy. *See, e.g.*, *Nebraska Coal. for Educ. Equity & Adequacy (Coal.) v. Heineman*, 273 Neb. 531, 557, 731 N.W.2d 164, 183 (2007) ("We conclude that the relationship between school funding and educational quality requires a policy determination that is clearly for the legislative branch. . . . This court is simply not the proper forum for resolving broad and complicated policy decisions or balancing competing political interests."); *Citizens for Strong Sch., Inc. v. Fla. State Bd. of Educ.*, 262 So. 3d 127, 142–43 (Fla. 2019) ("Petitioners invite this Court to not only intrude into the Legislature's appropriations power, but to inject itself into education policy making and oversight. We decline the invitation for the courts to overstep their bounds" and noting lack of evidence showing "causal relationship between additional financial resources and improved student outcomes"); *Coal. for Adequacy & Fairness in Sch. Funding, Inc. v. Chiles*, 680 So. 2d 400, 408 (Fla. 1996) ("[A]ppellants have failed to demonstrate . . . an appropriate standard for determining 'adequacy' that would not present a substantial risk of judicial intrusion into the powers and responsibilities assigned to the Legislature, both generally (in determining appropriations) and specifically (in providing *by law* for an adequate and uniform system of education)."); *Ex parte James*, 836 So. 2d 813, 817 (Ala. 2002) ("[T]he pronouncement of a specific remedy 'from the bench' would necessarily represent an exercise of the power of that branch

of government charged by the people of the State of Alabama with the sole duty to administer state funds to public schools: the Alabama Legislature. . . . [A]ny specific remedy that the judiciary could impose would, in order to be effective, necessarily involve a usurpation of that power entrusted exclusively to the Legislature."); *Comm. for Educ. Rts. v. Edgar*, 174 Ill. 2d 1, 29, 672 N.E.2d 1178, 1191 (Ill. 1996) ("To hold that the question of educational quality is subject to judicial determination would largely deprive the members of the general public of a voice in a matter which is close to the hearts of all individuals in Illinois."); *Oklahoma Educ. Ass'n v. State ex rel. Oklahoma Legislature*, 158 P.3d 1058, 1066 (OK 2007) ("The plaintiffs are attempting to circumvent the legislative process by having this Court interfere with and control the Legislature's domain of making fiscal-policy decisions and of setting educational policy by imposing mandates on the Legislature and by continuing to monitor and oversee the Legislature. To do as the plaintiffs ask would require this Court to invade the Legislature's power to determine policy. This we are constitutionally prohibited from doing."); *Shea v. State*, 510 P.3d 148, 154–55 (Nev. 2022) ("[T]he plain language of Nevada's education clauses demonstrates a clear, textual commitment of public education to the Legislature by granting the Legislature broad, discretionary authority to determine public education policy in this state. . . . [O]pining as to the adequacy of public education funding and the allocation of resources in this state would require us to venture into issues that entail quintessential value judgments that the Nevada Constitution expressly entrusts to the broad discretion of the Legislature."); *Campaign for Quality Educ. v. State of California*, 246 Cal. App. 4th

896, 915, 209 Cal. Rptr. 3d 888, 903 (2016) ("In the absence of a challenge to any legislative enactment, we conclude sections 1 and 5 of article IX, standing alone, do not allow the courts to dictate to the Legislature, a coequal branch of government, how to best exercise its constitutional powers to encourage education and provide for and support a system of common schools throughout the state."); *see also Lobato v. State*, 304 P.3d 1132, 1140 (CO 2013) ("While the trial court's detailed findings of fact demonstrate that the current public school financing system might not be ideal policy, this Court's task is not to determine whether a better financing system could be devised, but rather to determine whether the system passes constitutional muster.").

In sum, the Court should reject the trial court's imposition of the CRP because the North Carolina Constitution commits the provision of a sound basic education and funding of same to the legislative and executive branches, and there are no satisfactory and manageable criteria or standards for courts to determine how best to provide a sound basic education.

VI. THE APPROPRIATIONS CLAUSE AND SEPARATION OF POWERS PREVENT THE COURT FROM ORDERING TRANSFERS FROM THE STATE TREASURY.

Plaintiffs and DOJ devote most of their briefs to arguing that this Court has to accept the trial court's assumptions that *Leandro II* established a statewide violation and that the CRP was the only and necessary means to fix it, even if they were erroneous and even if they directly contravene this Court's decision in *Leandro II* limiting the trial court's judgment to Hoke County. They also contend that Judge Robinson, having been charged with assessing the impact of the State Budget on the

"nature of the extent" of the relief granted in the November 10 Order, somehow erred by abiding the Court of Appeals Writ of Prohibition, which barred enforcement of the transfer provisions because they violated the Appropriations Clause and Separation of Powers. The sum of those arguments is an exceptionally constrained view of the procedural posture and this Court's role—one that would force it to accept constitutional errors and push it to exceed the well-established limits of the judicial power within our tripartite system of government.

When they finally reach the substantive validity of the November 10 Order's "transfer provisions," however, the arguments Plaintiffs and DOJ offer for its reinstatement are unavailing. Plaintiffs and DOJ ignore the text of the Constitution and this Court's unbroken line of decisions confirming that "appropriating money from the State treasury is a power vested *exclusively in the legislative branch*" and that the judicial branch "lack[s] the authority to 'order State officials to draw money from the State treasury.'" *Cooper v. Berger*, 376 N.C. 22, 47, 852 S.E.2d 46, 64 (2020) (Ervin, J.) (quoting *Richmond Cty. Bd. of Educ. v. Cowell*, 254 N.C. App. 422, 423, 803 S.E.2d 27, 29 (2017)).

DOJ makes the most brazen argument. In *Richmond County*, it argued unequivocally that, "N.C. Const. art. V, § 7(1) 'means that *there must be legislative authority* in order for money to be validly withdrawn from the treasury'" and "[a]ccordingly, neither the executive nor the judicial branch may take or expend public monies *without statutory authorization*." *See* State's Appellant Br. at 9-10, *Richmond Cnty. Bd. of Educ. v. Cowell*, 254 N.C. App. 422, 803 S.E.2d 27 (2017) (No.

COA17-112) (emphasis added) (App. 013-014) (quoting *Goldston v. State*, 199 N.C. App. 618, 683 S.E.2d at 237 (2009) and citing *White v. Hill*, 125 N.C. 194, 200, 34 S.E. 432, 433 (1899) and *In re Alamance Cnty. Court Facilities*, 329 N.C. 84, 405 S.E.2d 125 (1991)). Yet, DOJ now argues that this exact same interpretation would require the Court to read the Appropriations Clause to "mean[] something other than what it says." (DOJ Response Br. at 48).

This Court, however, has consistently read the Appropriations Clause's requirement for an "appropriation made by law" as requiring *legislative* approval. *See, e.g., Cooper v. Berger,* 376 N.C. at 36, 852 S.E.2d at 58 (holding that "in light of" the Appropriations Clause, "'[t]he power of the purse is the exclusive prerogative of the General Assembly" (quoting John V. Orth & Paul Martin Newby, The North Carolina State Constitution 154 (2d ed. 2013)); *In re Alamance Cnty. Court Facilities*, 329 N.C. at 99, 405 S.E.2d at 132 (1991) ("Article V prohibits the judiciary from taking public monies *without statutory authorization*." (emphasis added)); *In re Separation of Powers*, 305 N.C. 767, 775, 295 S.E.2d 589, 594 (1982) (noting the Constitution requires the Governor to administer the budget "as enacted by the General Assembly."); *White v. Hill*, 125 N.C. 194, 34 S.E. 432, 433 (1899) ("The constitution [under what is now Article V, § 7] provides that no money shall be drawn from the treasury but in consequence of appropriations made by law, *i.e. by legislative authority*." (emphasis added) (citing *Garner v. Worth*, 122 N.C. 250, 29 S.E. 364 (1898)). Other provisions of the Constitution likewise require appropriations *by the General Assembly* in order to expend public money—Article III, Section 5 requires

that, "The Budget *as enacted by the General Assembly* shall be administered the Governor." N.C. Const. art. III, §5(3) emphasis added. As this Court has explained, our Constitution establishes a "three-step" process for the establishment of a budget that requires legislative approval in order to make appropriations:

> Our Constitution mandates a three-step process with respect to the State's budget. (1) Article III, Section 5(3) directs that the "Governor shall prepare and recommend to the General Assembly a comprehensive budget ... for the ensuing fiscal period." (2) Article II vests in the General Assembly the power to enact a budget [one recommended by the Governor or one of its own making]. (3) After the General Assembly *enacts* a budget, Article III, Section 5(3) then provides that the Governor shall administer the budget "as enacted by the General Assembly."

In re Separation of Powers, 305 N.C. 767, 776, 295 S.E.2d 589, 594 (1982) (quoting N.C. Const. art. 3, § 5(3)); *see also Cooper v. Berger*, 376 N.C. at 37, 852 S.E.2d at 59 ("As a result, while the Governor is required to make budgetary recommendations to the General Assembly and is entitled to veto budget legislation, he has no ultimate say about the contents of the final budget as adopted by the General Assembly and must faithfully administer the budget adopted by the General Assembly once it has been enacted.")

DOJ nevertheless argues that the Appropriations Clause allows for exceptions based the novel theory that the Education Provisions of the State Constitution create an "ongoing constitutional appropriation." But, as Legislative-Intervenors have already shown, nothing in the text, structure, or history of the Constitution supports the conclusion that the Education Provisions were intended to create an exception to the Appropriations Clause or the usual budget process. (*See* Legislative-Intervenors'

Appellee Br. at 25-55). To the contrary, even where the Constitution requires that certain categories of money have to be used for education, it still requires an appropriation from the General Assembly before they can be spent. *See, e.g.,* N.C. Const. art. IX, §§ 6, 7 (requiring that moneys from lands, gifts, fines, and forfeitures be used for education, and "shall be faithfully *appropriated*" for that purpose); N.C. Const. art. IX, § 6 (permitting, but not requiring, the General Assembly to supplement money from gifts, fines, and forfeitures by appropriating "so much of the revenue of the State as may be set apart for that for that purpose."); N.C. Const. art. IX, § 2 ("The General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools.") Reading all provisions of the Constitution *in pari materia*, requires that these references be read as invoking the usual, *legislative* budget and appropriations process required by the Constitution under the Appropriations Clause and Article V, Section III.

DOJ also attempts to distinguish *Richmond County*—which constitutes the closest case on point—by arguing that it only applies to claims for retroactive damages and therefore does not bar the judiciary from withdrawing money from the treasury to fund "prospective" relief. (DOJ Response Br. at 48). But *Richmond County* makes no such distinction. The case involved claims that the State (through previous General Assemblies) failed to ensure that fines for improper equipment offenses were used for the public schools and instead used them to pay for the operation of county jails. *Richmond Cnty. Bd. of Educ.*, 254 N.C. App. at 423, 803 S.E.2d at 29. The Court of Appeals first observed that, "if the school board had sought

and obtained an injunction to stop the county jail program from using the money, courts might have the power to order that the existing money returned." *Id.*, 254 N.C. App. at 424, 803 S.E.2d at 30. However, since the money was spent, "the only way the State [could] satisfy the judgment entered by the trial court [was] to pay *new* money from the State treasury—money not obtained from the improper equipment fees, but from taxpayers and other sources of general revenue." *Id.*, 254 N.C. App. at 428, 803 S.E.2d at 32. In other words, *Richmond County* did not draw a distinction between *retroactive* and *prospective* relief. Instead, it merely observed that a court could order the State to return money that comes from a specific, identified source that the Constitution requires be used for education, but it could not require the State to appropriate "new"—meaning general—revenue.

However, DOJ's argument that the judiciary should be allowed to order the expenditure of State funds so long as it does so on a "prospective" basis ultimately runs into a bigger problem. Ordering State agencies to use public funds to pay for government programs on a *prospective* basis goes to the very heart of the appropriations power and the budget process required under our Constitution. *See* N.C. Const. art. III, § 5 (requiring the Governor to prepare "a comprehensive budget of the anticipated revenue and *proposed expenditures* of the State for the ensuing fiscal period" and then to administer the budget ultimately "approved by the General Assembly"); *see also* N.C. Gen. Stat. § 143C-1-1(d)(1) (defining "appropriation" to mean "[a]n enactment by the General Assembly authorizing the withdrawal of money from the State treasury"); N.C. Gen. Stat. § 143C-1-1(d)(3) (defining "budget" to mean

"[a] plan to provide and spend for specified programs, functions, activities, or objects during a fiscal year"). Put simply, ordering State agencies to spend money on a *prospective* basis is exactly what the General Assembly does when it passes a budget and appropriates money. The rule DOJ advocates would thus have the odd effect of countenancing judicial intrusion into the power of the purse only when it would cause the clearest violation of the Separation of Powers. *See McCrory v. Berger*, 368 N.C. 633, 645, 781 S.E.2d 248, 256 (2016) ("The clearest violation of the separation of powers clause occurs when one branch exercises power that the constitution vests exclusively in another branch.")

Plaintiffs' arguments fare no better. Plaintiff-Intervenors argue that this Court has upheld trial court orders directing payments from the Treasury, citing *White v. Worth*, 126 N.C. 570, 36 S.E.2d 132 (1900), *Hickory v. Catawba Cnty*, 206 N.C. 165, 174, 173 S.E. 56, 17 (1934), *Mebane Graded Sch. Dist. v. Alamance Cnty*., 211 N.C. 213, 223, 189 S.E. 873, 880 (1937). None of those cases, however, hold that courts can appropriate money in the absence of a statutory appropriation. To the contrary, Plaintiffs acknowledge that *White* involved claims by the chief inspector to reimburse expenses that were due him under *statutes* that established the state shellfish commission. (*See also* Plaintiff-Intervenors' Appellee Br. at 33 (describing *White* as a case involving court orders "to transfer funds when necessary to protect a *statutory* right" (emphasis in original)). The Court concluded that the statutes retroactively repealing the compensation of the commissioner, while at the same time leaving him in office, were unconstitutional, accordingly the Court ordered that he be

paid pursuant to an existing legislative appropriation. *White*, 126 N.C. 570, 36 S.E. 132, 139 (1900). ("The court has not undertaken to decide that the treasurer of North Carolina can be made to pay out money in a case where no appropriation by the general assembly has been made. There is not a member of the court who would think of doing such a thing. . . . The decision of the court rests upon the foundation and proposition that the general assembly has appropriated a particular fund for the payment of plaintiff's claim.") Indeed, Plaintiff-Intervenors' focus on *White* is paradoxical. This Court cited *White* just two years ago for the proposition that "[t]he power of the legislature over the public purse is the most essential one in the system of government of people by the people, and its abandonment under any pretext whatever can never be safely allowed." Cooper v. Berger, 376 N.C. at 37, 852 S.E.2d at 58 (2020) (quoting White, 126 N.C. at 599–600, 36 S.E. at 141 (1900) (Clark, J., dissenting)).

Hickory and *Mebane Graded School District*, are even further afield. Those cases involved orders that required counties to assume debts incurred by special, city school districts to build facilities that were transferred to the county when the districts merged. *Mebane Graded Sch. Dist.*, 211 N.C. at 223, 189 S.E. at 880; *Hickory*, 206 N.C. 165, 174, 173 S.E. at 57. As the Court recounted in both cases, the underlying statute required counties to assume the "indebtedness of 'all the districts' lawfully incurred for the necessary buildings and equipment" after they took those districts over. *See Mebane Graded Sch. Dist.*, 211 N.C. at 223, 189 S.E. at 880 (citing "Section 5599, as amended") *Hickory*, 206 N.C. at 174, 173 S.E. at 60 (same). The

orders in those cases thus involved writs of mandamus to require the counties to comply with governing statutes—they did not involve judicial orders purporting to appropriate money from the State treasury in the absence of legislative authority.

Ultimately, Plaintiffs' resort to rhetoric and aphorisms. Citing *Marbury v. Madison*, 5 U.S. 137, 163 (1803), Plaintiff-Intervenors argue "that every right, when withheld, must have a remedy." (Plaintiff-Intervenors' Br. at 31-32). But that does not mean Plaintiffs were entitled to *this remedy—i.e.*, an order directing the State officials to disburse more than $1.7 billion from the State Treasury and to treat the court's directives "as an appropriation from the General Fund." (R p 1841). (It also does not mean that Plaintiffs showed a violation outside Hoke County that would have entitled them to a statewide remedy.) The mere fact that our Constitution prohibits the judiciary from appropriating funds without legislative authorization does not mean the Court is powerless to fashion an appropriate remedy in this case (assuming Plaintiffs established a violation that would support it), nor does it mean the power to order appropriations is necessary to "preserve the integrity of the judiciary," as Plaintiffs claim.

If Plaintiffs were to prove the existence of a statewide violation (which they have not done), the trial court could certainly identify less intrusive means to provide a remedy. Indeed, Judge Manning made clear in his 2002 "liability judgment," which was upheld in *Leandro II*, that the real problem in Hoke County was not with the "bulk of the core" of the State's "educational delivery system." Instead, he "was convinced 'that neither the State . . . nor [the Hoke County School System] [were]

strategically allocating the available resources to see that at-risk children have the equal opportunity to obtain a sound basic education." Thus, the problem was not a lack of money, but a failure by the State (and specifically, the State Board of Education), to oversee local administrators who had proven incapable of managing their school district. To that end, Judge Manning advocated not for funding, but common-sense, practical solutions that focused on correcting poor management within the Plaintiff school district itself:

> The State must step in with an iron hand and get this mess straight. If it takes removing an ineffective Superintendent, Principal, teacher, or group of teachers and putting effective, competent ones in their place, so be it. If the deficiencies are due to a lack of effective management practices, then it is the State's responsibility to see that effective management practices are put in place.

(R p 677). Put simply, there are numerous steps courts can take to fix the problems in the Plaintiff school districts that do not require the judiciary to seize the power of the purse.

All told, Plaintiffs cannot show they are entitled to reinstate the November 10 Order's "transfer provisions." Our Constitution prohibits the judiciary from seizing the power of the purse for itself and from directing State officials to disburse public money without a legislative appropriation. That limitation is not meant as a threat to the judiciary, nor is it meant to "exalt the legislative branch over the other branches" as Plaintiffs claim. (Plaintiffs' Appellee Br. at 2). Instead, it merely reflects the role of the respective branches within the system of checks and balances our founders created. The trial court thus properly deleted the transfer provisions in its

26 April Order following remand. To the extent any portion of the order remains in effect, the trial court's decision to enter a judgment, rather than a sweeping injunction purporting to appropriate money through judicial fiat, should be affirmed.

CONCLUSION

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

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

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NO. COA17-112 TENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

****

RICHMOND COUNTY BOARD OF EDUCATION,

Plaintiff-Appellee,

v.

JANET COWELL, NORTH CAROLINA STATE TREASURER, in her official capacity only, LINDA COMBS, NORTH CAROLINA STATE CONTROLLER, in her official capacity only, LEE ROBERTS, NORTH CAROLINA STATE BUDGET, DIRECTOR in his official capacity only, FRANK L. PERRY, SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY, in his official capacity only, ROY COOPER, ATTORNEY GENERAL OF THE STATE OF NORTH CAROLINA, in his official capacity only,

Defendants-Appellants.

From Wake County

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DEFENDANTS-APPELLANTS' BRIEF

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NORTH CAROLINA COURT OF APPEALS

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RICHMOND COUNTY BOARD OF EDUCATION, Plaintiff-Appellee, v. JANET COWELL, NORTH CAROLINA STATE TREASURER, in her official capacity only, LINDA COMBS, NORTH CAROLINA STATE CONTROLLER, in her official capacity only, LEE ROBERTS, NORTH CAROLINA STATE BUDGET, DIRECTOR in his official capacity only, FRANK L. PERRY, SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY, in his official capacity only, ROY COOPER, ATTORNEY GENERAL OF THE STATE OF NORTH CAROLINA, in his official capacity only, Defendants-Appellants.	)	From Wake County

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DEFENDANTS-APPELLANTS' BRIEF

****

ISSUE PRESENTED

I. WHETHER THE TRIAL COURT ERRED IN ORDERING STATE OFFICIALS TO PAY FUNDS TO THE RICHMOND COUNTY BOARD OF EDUCATION WHEN THE GENERAL ASSEMBLY NEVER AUTHORIZED SUCH A PAYMENT.

INTRODUCTION

The issue presented in this case goes to the very heart of the North Carolina Constitution – the respective powers of the three branches of government. The trial court believes that it has the authority to order state officals to pay a judgment against the State when the General Assembly has neither authorized the payment of the judgment nor appropriated the funds to do so. This Order not only clearly violates the seperation of powers provision in the North Carolina Constitution, its affirmation would fundamentally alter the State's budetary process.

STATEMENT OF THE CASE

On 16 February 2012, Plaintiff-Appellant Richmond County Board of Education ("Board") filed a Complaint for Declaratory Judgment in Superior Court, Wake County ("Superior Court"), case no. 12 CVS 2414, naming Defendants-Appellants ("Defendants"), all of whom are State

officials sued in their official capacities.[1] With this action, the Board sought an Order declaring that: 1) N.C. Gen. Stat. § 7A-304(a)(4b), insofar as it directs that all $50 improper equipment fees collected in Richmond County should be forwarded to the Statewide Misdemeanant Confinement Fund ("SMCF"), violates N.C. Const. art. IX, § 7(a); and 2) all such fees collected in Richmond County for the benefit of the SMCF should be remitted to the Clerk of Superior Court, Richmond County, for the benefit of the Board.

Pursuant to the doctrine of sovereign immunity, on 14 March 2012 Defendants moved to dismiss the Board's complaint pursuant to Rules 12(b)(1), 12(b)(2) and 12(b)(6) of the North Carolina Rules of Civil Procedure. On 23 May 2012, the Honorable W. Osmond Smith entered an Order denying Defendants' motion to dismiss. Defendants appealed, and this Court affirmed. Richmond Cnty. Bd. of Educ. v. Cowell, 225 N.C. App. 583, 739 S.E.2d 566 (2013) ("Cowell I"). The North Carolina Supreme Court then denied Defendants' Petition for Discretionary Review. Richmond Cnty. Bd. of Educ. v. Cowell, 367 N.C. 215, 747 S.E.2d 553 (2013).

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[1] Certain State officials named as parties were substituted for by their successors. (R pp 112-13)

Subsequently, the parties filed cross motions for summary judgment. On 27 June 2014, the Honorable Michael R. Morgan entered an Order granting summary judgment in favor of the Board, while denying Defendants' motion for summary judgment.

Defendants appealed Judge Morgan's Order to this Court. By an opinion filed on 1 September 2015, this Court affirmed summary judgment for the Board. Richmond Cnty. Bd. of Educ. v. Cowell, 776 S.E.2d 244 (2015) ("Cowell II"). Defendants did not seek further appellate review of that decision.

On 22 December 2015, the Board filed a motion in Superior Court seeking an Order directing Defendants to appear and show cause why a writ of mandamus should not issue to compel them to pay to the Clerk of Superior Court for Richmond County the monies collected in Richmond County, pursuant to § 7A-304(a)(4b), for the benefit of the SMCF. (R pp 3-8) On 9 March 2016, the Honorable Michael J. O'Fogludha entered an Order denying the Board's motion, without prejudice, but allowing the Board to "renew its motion at a later time in its discretion." (R pp 21-23)

On 1 September 2016, the Board filed a second show cause motion in Superior Court seeking the same relief requested in its previous motion. (R pp 24-34) On 28 October 2016, the Honorable Donald W. Stephens entered an Order ("the Stephens Order") directing that:

> Linda Combs, or her successor, in her official capacity as North Carolina State Controller, to issue a warrant for the payment back to the Richmond County Clerk of Superior Court the sum of $272,300.00 for all $50.00 improper equipment fees collected in Richmond County pursuant to N.C. Gen. Stat. § 7A-304(a)(4) from its enactment in 2011 to 19 September 2015.

(R p 109) The Stephens Order also directed that the warrant from Defendant Combs be forwarded to "Janet Cowell, or her successor, in her official capacity as North Carolina State Treasurer, to pay said warrant." (R p 109)

On 1 December 2016, Defendants filed their notice of appeal of the 28 October 2016 Order. (R pp 114-15) The Record in this matter was settled by stipulation on 26 January 2016. (R p 118)

GROUNDS FOR APPELLATE REVIEW

This is an appeal from a final judgment pursuant to N.C. Gen. Stat. § 7A-27.

STATEMENT OF THE FACTS

In 2011, the North Carolina General Assembly enacted legislation creating the SMCF in order to fund the Statewide Misdemeanant Confinement Program ("Program") established under N.C. Gen. Stat. § 148-32.1(b2). N.C. Sess. Laws 2011-145, § 31.26(a), codified at N.C. Gen. Stat. § 148-10.4 (2013). The purpose of the Program is to provide housing for misdemeanants "serving sentences imposed for a period of more than 90 days and for all sentences imposed for impared driving under G.S. 20-138.1, regardless of length . . . in local confinement facilites." N.C. Gen. Stat. § 148-32.1(b2) (2013). In addition, the General Assembly added subsection (4b) to N.C. Gen. Stat. § 7A-304:

> [t]o provide for contractual services to reduce county jail populations, the sum of $50.00 for all offenses arising under Chaper 20 of the General Statutes and resulting in a conviction of an improper equipment offense, to be remitted to the Statewide Misdemeanant Confinement Fund in the Department of Corrections.

N.C. Sess. Laws 2011-145, § 31.26(c), codified at N.C. Gen. Stat. § 7A-304(4b).[2] The statutory provisions took effect on 1 July 2011. N.C. Sess. Laws 2011-145, § 32.6.

In 2015, the General Assembly amended N.C. Gen. Stat. § 7A-304(4b) by substituting "[f]or additional support of the General Court of Justice" in the first sentence in place of "[t]o provide for contractual services to reduce county jail populations". The General Assembly further directed that the collected funds be remitted to the State Treasurer rather than to the "Statewide Misdemeanant Confinement Fund in the Division of Adult Corrections of the Department of Public Safety." N.C. Sess. Laws 2015-241, §§ 18A-11 and 18A.23(b)

From the creation of the SMCF to the amendment of N.C. Gen. Stat. § 7A-304(4b) in 2015, proceeds from the $50 assessement for convictions on improper equipment offenses were collected by counties in North Carolina and remitted to the SMCF to be used for the fund the Program. A total of $272,300 was collected from Richmond County. (R p 108)

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[2] Effective 1 January 2012, the General Assembly substituted 'Division of Adult Corrections of the Department of Public Safety" for "Department of Correction." N.C. Sess. Laws 2011-145, § 19.1(h).

STANDARD OF REVIEW

A challenge to a trial court's subject matter jurisdiction to award specific relief is a question of law, which is reviewable on appeal *de novo*. In re Officials of Kill Devil Hills Police Dep't, 223 N.C. App. 113, 733 S.E.2d 582 (2012).

ARGUMENT

THE TRIAL COURT HAS NO POWER TO ORDER STATE OFFICIALS TO PAY FUNDS TO THE RICHMOND COUNTY CLERK OF SUPERIOR COURT

Any court that orders State officials to pay a money judgment does so in violation of the separation of powers established by the North Carolina constitution, as only the General Assembly possesses the power to allocate funds to public entities. Consequently, while Defendants acknowledge that this Court determined in Cowell II that the $50 improper equipment fees collected in Richmond County with the intention of funding the SMCF violated Article IX, § 7A of the North Carolina constitution, and also acknowledge that the Superior Court had the authority to determine that the Board is owed $272,300, the Stephens Order must be vacated for lack of jurisdiction over the sovereign.

After this Court's decision in Cowell II, the General Assembly amended N.C. Gen. Stat. § 7A-304(4b) by deleting the provision that made the $50 assessement for improper equipment convictions payable to the SMCF. N.C. Sess. Laws 2015-241, §§ 18A-11 and 18A.23(b).[3] Nevertheless, at the behest of the Board, the trial court ordered members of the executive branch to pay public monies to satisfy a judgment against the State, even though the payment of such monies has not been specifically authorized by the General Assembly. Orders such as these, requiring the State to satisfy a judgment, clearly violate the seperation of powers provision contained in North Carolina's Constituion. See N.C. Const. art. I, § 16 ("Separation of Powers: The legislative, executive and supreme judcial powers of the State government shall be forever separate and distinct from each other.").

In that regard, this Court has determined that:

> [The North Carolina Constitution] mandates a three-step process with respect to the State's budget. (1) Article III, Section 5(3) directs that the "Governor shall prepare and recommend to the General Assembly a comprehensive budget . . . for the ensuing fiscal period." (2) Article II vests in the General Assembly the power to enact a budget, one recommended by the Governor or one of its own making. (3) After the

[3] This amended provision has not been judicially challenged.

> General Assembly enacts a budget, Article III, Section 5(3) then provides that the Governor shall administer the budget as enacted by the General Assembly.

In re Separation of Powers, 305 N.C. 767, 776, 295 S.E.2d 589, 594 (1982) (quoting N.C. Const. art. 3, § 5(3)); accord Goldston v. State, 199 N.C. App. 618, 683 S.E.2d 237 (2009). "N.C. Const. art. V, § 7(1) means that there must be legislative authority in order for money to be validly withdrawn from the treasury . . . [i]n other words, the legislative power is supreme over the public purse." State ex rel. White v. Hill, 125 N.C. 194, 200, 34 S.E. 432, 433 (1899); accord Goldston 199 N.C. App. at 245, 683 S.E.2d at 629-30. Accordingly, neither the executive nor the judical branch may take or expend public monies without statutory authorization. Id. (noting that the Governor's duty is to administer the budget as enacted by the General Assembly); see also In re Alamance Cnty. Court Facilities, 329 N.C. 84, 405 S.E.2d 125 (1991) (judiciary prohibited from taking public monies without statutory authorization).

Moreover, in Smith v. State, the Supreme Court of North Carolina rejected the legal argument asserted by the Board below when it affirmed the principle that execution of a judgment obtained against the State cannot be dictated by the courts. 289 N.C. 303, 222 S.E.2d 412

(1976). The plaintiff in Smith, a medical doctor hired to be the Superintendent of Broughton Hospital, was fired before the expiration of his six-year term, and therefore sued several state officials for breach of contract seeking monetary damages. Id. at 303, 222 S.E.2d at 412. The State officials moved to dismiss the claims on the grounds of sovereign immunity. Ultimately, the Supreme Court concluded that the State was not immune from the plaintiff's breach of contract claim. Id at 321, 222 S.E.2d at 424. The Supreme Court further noted, however, that:

> In the event plaintiff is successful in establishing his claim against the State of North Carolina, **he cannot, of course, obtain execution to enforce the judgment. The validity of his claim, however, will have been judicially ascertained. The judiciary will have performed its function to the limit of its constitutional powers.** Satisfaction will depend upon the manner in which the North Carolina General Assembly discharges its constitutional duties.

Id. at 321, 222 S.E.2d at 424 (emphasis added; internal citations omitted).

As Smith makes clear, in cases that seek money damages from the State, the limit of the courts' authority is to determine the validity of the claims, not to compel satisfaction of or execution upon any judgment

obtained. In Cowell II, this Court merely affirmed the superior court's ruling that the Board was entitled to summary judgment because the statutory provision contested by the Board violated the North Carolina Constitution. Cowell II, 776 S.E.2d at 249. The rendering of that opinion was the extent of the constitutional authority bestowed upon the judicial branch.

Yet, the Stephens Order goes one impermissible step further by directing specific State officials – the Controller and the Treasurer – to pay a judgment imposed against the State. As such, the Stephens Order is in the nature of mandamus. To obtain the extraordinary writ of mandamus, the petitioner must demonstrate a clear legal right to the act requested. Snow v. N.C. Bd. of Architecture, 273 N.C. 559, 570, 160 S.E.2d 719, 727 (1968). As Smith explains, however, the Board has no clear legal right to satisfaction of its judgment from Defendant Combs, Defendant Cowell, or any entity other than the General Assembly. Accordingly, the Stephens Order must be vacated.

CONCLUSION

For the reasons set forth above, Defendants-Appellants respectfully request that this Court reverse the 28 October 2016 Order of Judge Stephens.

Respectfully submitted this 24th day of March, 2017.

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CERTIFICATE OF COMPLIANCE WITH RULE 28(j)(2)

I HEREBY CERTIFY that the foregoing brief complies with Rule 28(j)(2) of the Rules of Appellate Procedure in that, according to the word processing program used to produce this brief, the document does not exceed 8,750 words, exclusive of cover, index, table of authorities, certificate of compliance, certificate of service, and appendices.

This the 21st day of March, 2017.

Thomas M. Woodward
Assistant Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing BRIEF FOR DEFENDANTS-APPELLANTS upon Plaintiff-Appellee by placing same in the United States mail, first-class postage prepaid, and addressed as follows:

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This the 24th day of March, 2017.

Thomas M. Woodward
Assistant Attorney General

NO.COA17-112 TENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

****

RICHMOND COUNTY BOARD OF EDUCATION, Plaintiff-Appellee, v. JANET COWELL, NORTH CAROLINA STATE TREASURER, in her official capacity only, LINDA COMBS, NORTH CAROLINA STATE CONTROLLER, in her official capacity only, LEE ROBERTS, NORTH CAROLINA STATE BUDGET, DIRECTOR in his official capacity only, FRANK L. PERRY, SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY, in his official capacity only, ROY COOPER, ATTORNEY GENERAL OF THE STATE OF NORTH CAROLINA, in his official capacity only, Defendants-Appellants.	)	Wake County

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DEFENDANTS-APPELLANTS' REPLY BRIEF

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****

DEFENDANTS-APPELLANTS' REPLY BRIEF

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ARGUMENT

Defendants-Appellants, pursuant to Rule 28(h) of the North Carolina Rules of Appellate Procedure, respectfully submit this brief in reply to certain arguments and to rebut new and additional issues presented in Plaintiff-Appellee's Response Brief to this Court.

I. THE TRIAL COURT ERRED IN ORDERING STATE OFFICIALS TO PAY THE CLERK OF COURT FOR RICHMOND COUNTY – FOR THE BENEFIT OF THE APPELLEE – THE SUM OF $272,300.00 FOR ALL $50.00 IMPROPER EQUIPMENT FEES COLLECTED IN RICHMOND COUNTY PURSUANT TO N.C. GEN. STAT. § 7A-304(a)(4b) USED TO FUND THE NORTH CAROLINA MISDEMEANT PROGRAM.

A. The Trial Court cannot compel State Officials to take discretionary actions in order to make funds available to pay a judgment.

Appellee cites two possible sources from which the State could obtain funds to pay the judgment without requiring an appropriation from the General Assembly. (Appellant's Br. p. 16) Both N.C.G.S. § 143C-4-4 (Contingency and Emergency Fund) and N.C.G.S. § 143C-6-4 (Budget Adjustments Authorized) give State officials the discretion to request that funds be made available for the payment of certain extraordinary events. However, State officials are not required to make these requests for funds as both statutes clearly state that a request "may" be made. N.C.G.S. § 143C-4-4 (c) (2015) (("State may (receive) an allocation from the Contingency and Emergency Fund . . . [i]f the Council of State approves

the request")) and N.C.G.S. § 14C-6-4 (b) (2015) ("State agency may, with the approval of the Director of the Budget, spend more than was appropriated in the certified budget by adjusting the authorized budget"). In each instance, another authority must act in its discretion to approve or disapprove the request for funds. Courts cannot compel any of these entities to perform a discretionary act.

B. *Cowell II* did not order Appellants to pay the judgment.

Appellee contends that this Court in *Richmond County Bd. of Educ. v. Cowell*, 747 S.E.2d 533 (N.C. App., August 27, 2013) ("*Cowell II*") ordered Appellants to pay the earlier judgment. This contention misinterprets this Court's decision. In *Cowell II*, this Court affirmed that summary judgment was proper for the Appellee. It further stated that "we hold that it is appropriate – as the trial court ordered – that this money be paid back to the clerk's office in Richmond County." *Id.* at p. 12. This decision is wholly consistent with *Smith v. State*, 289 N.C. 303, 222 S.E.2d 412 (1976), the seminal case in North Carolina concerning the issues presented in this appeal. As in *Smith*, the Court can determine that a judgment against the State is proper and the amount of the judgment, as well as indicate that the judgment should be paid. However, as the *Smith* Court observed, while "the validity of his claim . . . will have been judicially ascertained," the " [s]atisfaction will depend upon the manner in which the North Carolina General Assembly

discharges its constitutional duties." *Smith*, 289 N.C. at 321, 222 S.E.2d at 424 (emphasis added) (internal citations omitted)

CONCLUSION

For the reasons set forth in Defendants-Appellants' Brief and this Reply Brief, the Order of the Wake County Superior Court entered on September 19, 2015 should be reversed.

Respectfully submitted this 20th day of March, 2017.

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This the 20th day of April, 2017.

/s/ Thomas M. Woodward
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Assistant Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing DEFENDANTS-APPELLANTS' REPLY BRIEF upon Plaintiff-Appellee by placing same in the United States mail, first-class postage prepaid, and addressed as follows:

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This the 20th day of April, 2017.

/s/ Thomas M. Woodward
Thomas M. Woodward
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