

No. 425A21-2

TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

HOKE COUNTY BOARD OF EDUCATION; et al.,
Plaintiffs

and

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION,
Plaintiff-Intervenor

and

RAFAEL PENN, et al.,
Plaintiff-Intervenors

v.

STATE OF NORTH CAROLINA and the STATE BOARD OF EDUCATION,
Defendants,

and

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION,
Realigned Defendant,

and

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

From N.C. Court of Appeals
22-86

From Wake County
95CVS1158

BRIEF OF THE NORTH CAROLINA INSTITUTE
FOR CONSTITUTIONAL LAW AND THE JOHN LOCKE FOUNDATION
AS *AMICI CURIAE*

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INTRODUCTION

Amici Curiae The North Carolina Institute for Constitutional Law (“NCICL”) and The John Locke Foundation (“JLF”) respectfully submit this brief to provide critical argument relevant to the Court’s consideration of appellant’s argument that the trial court erred by amending the 10 November 2021 Order to lift the directive that the State Budget Director, State Controller, and the State Treasury transfer funds from the State Treasury.¹ The trial court’s removal of that unconstitutional directive was consistent with the scope of this Court’s Remand Order and with the law. In its 26 April 2022 Order, the trial court struck the requirement in the 10 November 2021 Order that certain State actors transfer funds needed to comply with the Comprehensive Remedial Plan. The trial court acted consistently with this Court’s Remand Order and with the law.² The 10 November 2021 Order directing certain state officers and employees was unconstitutional; however, assuming *arguendo* such an order could have been lawful, the bases for the transfer directive ceased to exist once the Budget Act was enacted.

I. THE TRIAL COURT CORRECTLY AMENDED THE 10 NOVEMBER 2021 ORDER TO REMOVE THE DIRECTIVE THAT CERTAIN STATE

¹ No one other than counsel and *amici curiae* participated in drafting or funding this brief.

² Plaintiffs separately appealed from, and petitioned for discretionary review—and, alternatively, for a *writ* of certiorari—of the Court of Appeals’ *writ* of prohibition (see P21-511, 425A21). Those matters are held in abeyance by Order of this Court signed on 18 March 2022 and issued on 21 March 2022.

OFFICERS OR EMPLOYEES TRANSFER FUNDS OUT OF THE STATE TREASURY.

A. The Enactment of the State Budget Limited the Nature of the Relief Available by Depriving the Trial Court All Supposed Inherent Authority to Order Unconstitutional Transfers from the State Budget.

This Court's Remand Order remanded this matter to the trial court "to determine what effect, if any, the enactment of the State Budget has upon the nature and extent of the relief that the trial court granted in its 10 November 2021 Order." The trial court correctly amended the 10 November Order to remove the directive to certain state actors that they transfer money from the State Treasury. The Court of Appeals previously issued a writ of prohibition which, as the trial court noted, had not been modified or lifted. The trial court viewed that writ as part of the law of the case. But, even were that not correct, the enactment of the budget would undermine whatever supposed authority might have existed for a court to order a transfer of funds from the State Treasury.

Judge David Lee, then assigned to this case, explicitly premised the 10 November Order on the fact that "as of the date of [the] Order no budget has passed." In light of the lack of a state budget, Judge Lee crafted a determination that he could use the court's "inherent authority" or treat Article I, § 15 as an "ongoing constitutional appropriation." (R p 1837). The 10 November Order explained, "When the General Assembly fulfills its constitutional role through the normal (statutory) budget process, there is no need for judicial intervention to effectuate the

constitutional rights.” (R p 1841). The adoption of the Budget Act eliminated the foundations upon which Judge Lee had crafted the authority to order the transfer.

The 10 November Order invoked the nebulous concept of the court’s “inherent authority.” This ill-defined concept provided the cornerstone on which rested the transfer directive. But, “inherent authority is limited. While it may be used by a judge to fill in gaps not addressed by the statutes or rules, *inherent authority does not empower a court to override legislative decisions.*” *Inherent Authority, North Carolina Superior Court Judges’ Benchbook*, Michael Crowell, UNC School of Government 1 (2015) (emphasis added) (“Judges’ Benchbook”) ((viewable at <https://benchbook.sog.unc.edu/sites/default/files/pdf/Inherent%20Authority.pdf> (last viewed July 26, 2022))).

The source of a court’s inherent authority is derived from the nature of a court. *Id.* (citing *Ex parte McCown*, 139 N.C. 95, 103 (1905)). In *McCown*, this Court addressed the inherent authority of the court in a contempt case but wrote of the origins and scope of inherent authority generally: “It is a power not derived from any statute, but arising from *necessity.*” *In re McCown*, 139. N.C. at 103 (emphasis added). The trial court expressly premised its exercise of inherent authority on the “need” for the trial court to order the transfer. Specifically, the trial court explained that “when” the legislature enacts a budget, “there is no need for judicial intervention to effectuate the constitutional rights.” Once the General Assembly enacted the State Budget, the supposed need for judicial intervention evaporated, so too evaporated the purported inherent authority to order the transfers at issue.

The Budget Act is the very kind of legislative decision a court cannot override through exercise of its inherent authority. The enactment of the State Budget stripped the trial court of whatever inherent authority it claimed have had to order the transfer directive. Assuming only for the sake of argument that a court could order a transfer from the State Treasury, the trial court's justification for doing so in the 10 November Order was the fact a State Budget had not passed. With the enactment of the Budget Act, the trial court's justification for its unconstitutional order disappeared.

Even if a court determines that it is not satisfied with the legislative decisions of the General Assembly, a court may not stretch its authority (constitutional, statutory, or inherent) to override legislative decisions. *See, e.g., In re Swindell*, 326 N.C. 473, 475 (1990) (“there is a limit to what the judiciary can do. In ordering treatment and rehabilitation programs for juvenile delinquents, the courts must make do with what is currently provided by the General Assembly”); *In re Wharton*, 305 N.C. 565 (1982) (court could not create new program for juveniles because it deemed the alternatives approved by legislation were inadequate); *State v. Hardy*, 293 N.C. 105, 125 (1977) (court may have inherent authority to order discovery when the issue is not addressed by legislation but it did not have the authority to order discovery of a witness statement where disclosure was specifically prohibited by statute).

When this Court has considered a court's use of its “inherent authority” to remedy inadequate court facilities, the Court cautioned, “The inherent power of the

court must be exercised with as much concern for its potential to usurp the powers of another branch as for the usurpation it is intended to correct,” adding “its wielding must be no more forceful or invasive than the exigency of the circumstances requires.” *In re Alamance Cty. Court Facilities*, 329 N.C. 84, 100 (1991). Here, even if the trial court had inherent authority for its transfer directive—which Amici maintain it did not—the trial court’s use of inherent authority became more forceful and invasive than the exigency of the circumstances as soon as the state budget was enacted. As Professor Crowell wrote, “When the legislature has addressed a subject, the court does not have inherent authority to act just because the court concludes that the legislative act is inadequate” *Superior Court Benchbook 2*. Thus, the enactment of the state budget—the very the reason for this Court’s Remand Order—changed both the *nature* and *extent* of the relief.

B. Enactment of the State Budget Satisfied the Constitutionally Mandated Budget Process of Article V and the Trial Court on Remand Correctly Refused to Issue an Unconstitutional Directive to Certain State Officers and Employees to Transfer Money from the State Treasury.

Ordering the transfer of money from the State Treasury violates the constitutionally mandated budget process and interferes with the governor’s duty to faithfully execute the laws. Most of the legal arguments in this long-running case have focused on the provisions of Article IX (“Education”) and Article I (Declaration of Rights”). But the nature of the relief in the 10 November 2021 Order is also inconsistent with the multistep budget provisions of Article III (“Executive”), that

inconsistency was set in bas-relief when the General Assembly enacted the State Budget.

1. *The Constitution Establishes the Process for Enacting and Administering the Budget, and The Courts are not Part of that Process.*

Article III, § 5(3), which states:

(3) *Budget.* The Governor shall prepare and recommend to the General Assembly a comprehensive budget of the anticipated revenue and proposed expenditures of the State for the ensuing fiscal period. **The budget as enacted by the General Assembly shall be administered by the Governor.**

N.C. Const. Art. III, § 5(3).

This underscores that the General Assembly has supreme control over the public purse, and other state actors (and branches of government) must carry out the budget as enacted. If the courts had authority to order the drawing of money from the treasury, the General Assembly would not have ultimate control over the budget and, indeed, a governor could not administer the budget as enacted because any money transferred by court order would necessarily alter the budget enacted.

The Governor's duty to administer the budget was not a part of our State's first two constitutions. Prior to 1971, the Governor was *ex officio* director of the budget pursuant to statute.³ However, as part of a substantial modernization of the Constitution in 1971, that statutory responsibility was given constitutional status. Shortly thereafter, in 1977, Article III, § 5(3) was amended to require a balanced

³ "The Governor is the Director of the Budget." N.C. Gen. Stat. § 143C-2-1. See also N.C. Gen. Stat. § 143C-1-1(11) Defining "Director" in the State Budget Act as "The Director of the Budget, who is the Governor."

budget. The Governor was given the constitutional duty to survey the collection of revenue and “effect the necessary economies in State expenditures” to prevent a budget deficit. This Court has previously held that the Governor does not have the authority to spend money which has not been appropriated in the state budget. No authority suggests the courts do either. The courts have no role in the state budget process,⁴ either in its enactment or its administration, so the justification for permitting a court order transferring money from the treasury is even more attenuated than the transfers made by the governor and which this court declared unconstitutional. There is simply no constitutional basis for permitting a court to order an expenditure or transfer of funds, particularly where, as here, the General Assembly fulfilled its obligation to enact a budget.

As previously noted, Article III, § 5(3) of the North Carolina Constitution requires the Governor, as head of the executive branch, to prepare and recommend to the General Assembly a biennial budget in which anticipated revenue is equal to proposed expenditures. The General Assembly debates and enacts a biennial budget. After a budget for a specific “fiscal period” is enacted into law, the Governor as *ex officio* Executive Director of the budget, administers it, i.e., he is responsible for disbursing the tax revenue in accordance with legislative directives. N.C. Const. Art. III, § 5(3); N.C. Gen. Stat. § 143C-2-1. See also *Styers v. Phillips*, 277 N.C. 460 (1971) (noting generally Governor is *ex officio* Director of the Budget).

⁴ The Chief Justice must approve and certify an estimate of the judicial branch’s financial needs, which estimate must be included by the Director of the Budget in the Governor’s proposed budget. N.C. Gen. Stat. § 143C-3-2.

Nothing in Article III, § 5(3) or elsewhere in the Constitution empowered the courts to unilaterally supplement the budget allotments for education. Even if a constitutional shortcoming exists, rewriting of the budget is not an option given to the judicial branch. It bears repeating: “When the legislature has addressed a subject, the court does not have inherent authority to act just because the court concludes that the legislative act is inadequate” *Superior Court Judges’ Benchbook* 2. One might argue a court might have some kind of authority to order budget transfers where the other branches are not carrying out their budget duties, but that would be counterfactual in this case. The General Assembly enacted a budget and the Executive is administering it; the courts have no authority to interfere.

2. Caselaw Recognizes that Courts Do Not Have the Authority to Draw Money from the State Treasury.

Cases in the context of taxes and debts have implicitly relied on the principle that courts cannot order the drawing of money from the treasury. Consider, for example, *Heatherly v. State*, 189 N.C. App. 213 (2008), in which the Court of Appeals considered the creation of the North Carolina State Lottery Fund, an enterprise fund within the State Treasury, as critical to its determination of whether the State or the Lottery Commission alone would be liable to lottery prize winners. That question was central to determining if the Lottery Act pledged the faith of the State or raised money on the credit of the State. *Id.* at 218. Imagine a scenario in which the Lottery Commission did not or could not pay a lottery prize. If money beyond the Lottery Fund were available to satisfy payments to lottery

winners and a court could order a transfer to pay a lottery prize, would *Heatherly* have been wrong to reject a challenge to the Lottery Act's enactment?

Likewise, whether the credit of the State has been pledged is often determined by whether bonds are payable solely from specified revenues. But, if a court could order debt payments and compel the transfer of funds to pay them, any restriction on the source of payments would be meaningless in determining whether the credit of the State has been pledged. One notable example is *N.C. Turnpike Auth. v. Pine Island, Inc.*, 265 N.C. 109, 117 (1965). There this Court held that the credit of the State was not pledged by the issuance of turnpike authority bonds because the bonds were “payable *solely* from revenues from the turnpike” and the enabling legislation made it clear that they were not issued on the credit of the State). *See also Martin v. N.C. Hous. Corp.*, 277 N.C. 29 (1970) (where housing authority legislation specified that obligations were payable from the assets and revenues of the Housing Corporation, so no State debt was created). These and similar cases implicitly recognized courts do not have authority to order a transfer of funds from the State Treasury.

In sum, it is the legislative branch to which is assigned plenary constitutional authority and responsibility to accurately forecast what amount of revenue will be available to meet expenditures in the current fiscal period and what expenditures are reasonable and proper and not more than its predictions of anticipated revenue from taxpayers. Enactment of the State Budget Act is the only constitutionally permissible authorization for the drawing of money from the State Treasury. Once

the Budget Act became law, it stripped the court of any supposed “inherent authority” the court might theoretically have had to justify the transfer directive in the 10 November Order. After all, as this Court put it, “there is a limit to what the court can do by fiat.” *Wharton*, 305 N.C. at 574.

This Court should hold that any court order directing the transfer or disbursement of money from the State Treasury, in the absence of an appropriation by the General Assembly, is unconstitutional. To do otherwise would result in judges across the State writing a new budget and ordering the executive branch to execute that budget. This is a legislative power the Constitution reserves solely to the legislative branch. N.C. Const. art. I, § 6; N.C. Const. art. II, § 1. Article I, § 6 of the North Carolina Constitution states: “The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other.” Each distinct branch has its appropriate function. One branch cannot control the action of the other in the sphere of its constitutional power and duty. *State v. Holden*, 64 N.C. 829 (1870). The rewriting and executing of a new budget violates the doctrine of the separation of powers which is an inviolate part of the North Carolina Constitution. The General Assembly enacted a budget and bears sole authority to appropriating funds from the state treasury. The courts cannot claim “inherent authority” to order state officers and employees to draw money from the treasury, most especially where, as here, the legislature has acted. The trial court was correct when it amended the 10 November Order to remove the transfer directive.

CONCLUSION

For the reasons stated above, Amici respectfully request the Court affirm that portion of the trial court's order in which it determined that it did not have authority to order state officials to transfer funds from the State Treasury.

Respectfully submitted, this the 29th day of July 2022.

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