No. 425A21-2 TENTH 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, et al.,
Plaintiff-Intervenors-Appellees,

v.

STATE OF NORTH CAROLINA and STATE BOARD OF EDUCATION,
Defendants-Appellees,

and

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION,
Realigned Defendant-Appellee,

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-Appellants.

From the North Carolina Court of Appeals
No. COA 22-86

From Wake County
95 CVS 1158

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PETITIONER NELS ROSELAND, CONTROLLER OF THE STATE OF NORTH CAROLINA RESPONSE BRIEF

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PETITIONER NELS ROSELAND, CONTROLLER OF THE STATE OF NORTH CAROLINA RESPONSE BRIEF

****

Petitioner Nels Roseland, Controller of the State of North Carolina (hereinafter "Controller"), by and through undersigned counsel, hereby submits his Brief in Response to Appellants' Briefs.

INTRODUCTION

Following the entry of the 28 April Order by Judge Robinson, Plaintiffs, Plaintiff-Intervenors, Defendant-Appellants "State of North Carolina" and the Legislative-Intervenors, individually filed notices of appeal and opening briefs. The Controller's brief is filed in response to all briefs filed by the Plaintiffs, the Plaintiff-Intervenors and the Defendant-Appellant State of North Carolina which raise substantially the same contentions. As succinctly stated by the Attorney General these contentions are whether the trial court (1) exceeded the scope of this Court's remand order, (2) misapplied the law of the case doctrine and (3) violated long standing precedent that a later superior court judge may not overrule an earlier superior court ruling on the same issues in the same case. Def.-App.'s Br. at 20. As explained hereinafter all of these contentions are unpersuasive.

The statutory mechanisms the Appellants seek to reinstate creates problematic issues for the Controller. The Appellants, aligned with the Plaintiffs, ignore these issues in their briefs which were raised in the trial court below and the Court found persuasive. For example, were this Court to reinstate the transfer provisions the Court would place the Controller and his staff in civil and criminal liability, and would violate both controlling, well settled precedent of this Court and Article V, Section 7 of the North Carolina Constitution.

The Controller takes no position on any other issues raised by the Legislative-Intervenor Appellants or other party. Unlike the other parties, Intervenor requests the Court to simply affirm the 28 April Order and dismiss the remainder of the appeals including any further appellate review of the Writ of Prohibition.[1]

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Office of the State Controller

The Office of the State Controller was created pursuant to Section 143B-426.36 of the Executive Organization Act of 1973 and is an agency within the

[1] We note the case called for argument only involves the appeal of the 28 April 2022 Order (Case No. 425A21-2) and not the writs or notices of appeal filed in the appeal of the 30 November, 2021 Writ of Prohibition (Case No. 425A21-1) but considering the issues involved in both cases. Controller assumes the resolution of the second case will resolve the issues arising from the first case which is still subject to this Court's abeyance ruling of 18 March, 2022.

Executive Branch of the State of North Carolina. N.C.G.S. §§ 143B-6 and 143B-426.36. The Office of the State Controller has three primary roles in the appropriation/budget/cash flow process for the State of North Carolina, as follows:

> (1) First - OSC is the maintainer and custodian and the system of record of cash; NCGS 143B-426.37.
>
> (2) Second - OSC only moves money to various accounts when directed by general statue or Session Law. NCGS 143C-1-1(b) and Article V, Section 7(1) of the N.C. Constitution.
>
> (3) Third - OSC checks funds availability at the budget code level within the North Carolina Financial System (NCFS) to ensure adequate budget levels are available prior to paying vendors. (OSC Statewide Accounting Division, Central Compliance EPay Process).Controller Aff. ¶ 8(a)(i) (R p 2060); *see also* N.C.G.S. § § 143B-426.38 to 426.39

(R p 2047). The Controller's interest in this litigation is to insure these duties and other statutes implementing Article V, Section 7 as follows.

Recent Procedural History concerning the Controller

On 10 November 2021, the Honorable Superior Court Judge W. David Lee entered an order in the in the 10th Judicial District in "Hoke County Board of Education vs State of North Carolina" (95 CVS 1158). p 1823). The Order was presented to Judge Lee upon consent of the parties still in the lawsuit and

followed submission of a Memorandum of Law dated 8 November 2021 supplied to Judge Lee by the Attorney General of North Carolina and other parties (R p 1939).

The "November 10th Order required the Controller, as well as other specified state agencies and officials, to

> . . . take the necessary actions to transfer the total amount of funds necessary to effectuate years 2 & 3 of the Comprehensive Remedial Plan, from the unappropriated balance within the General Fund to the state agents and state actors with fiscal responsibility for implementing the Comprehensive Remedial Plan as follows:
>
> (a) Department of Health and Human Services ("DHHS"): $189,800,000.00;
>
> (b) Department of Public Instruction ("DPI"): $1,522,053,000.00; and
>
> (c) University of North Carolina System: $41,300,000.00.

Hoke Cty. Bd. of Educ. v. State of North Carolina, (95 CVS 1158, Wake Cty.) (R p 1841).

The November 10th Order mandated that "Any consultation contemplated by N.C. Gen. Stat. § 143C-6-4(b1) shall take no longer than five (5) business days after issuance of this Order[,]" *Id.*, and further directed the Controller to "treat the foregoing funds as an appropriation from the General

Fund as contemplated within N.C.G.S. § 143C-6-4(b)(2)(a) and to carry out all actions necessary to effectuate those transfers[,]" *Id.,* and further to "take all actions necessary to facilitate and authorize those expenditures[.]" *Id.* (R p 1842). The November 10th Order contained a partial stay delaying its implementation for thirty days "to permit the other branches of government to take further action consistent with [its] findings and conclusions . . . ." *Id.*

Immediately after being made aware of the Order by the press reports, the Controller sought representation from the Attorney General, who recognized a conflict of interest and the Controller was granted permission to seek private counsel, which was approved by the Governor. On 24 November 2021, the Controller, who is not a named party to the underlying action and was neither served nor given an opportunity to be heard prior to the entry of the November 10th Order, filed a Petition for Writ of Prohibition[2], Temporary Stay and Writ of Supersedeas arguing, in part the November 10th Order contravenes the North Carolina Constitution, and General Statutes. (R p 1893).

On 29 November 2022, the Court of Appeals entered an Order directing all parties to the underlying action who wished to file a response to the Controller's

[2] The Petition for Writ of Prohibition was filed by Linda Combs who was then the State Controller. On July 1, 2022, Nels Roseland was appointed State Controller and, on motion, was substituted for Ms. Combs as Controller in this action. For continuity throughout the brief, the Controller uses the pronoun "his" to refer to the Controller, since that is the pronoun used by Mr. Roseland.

petition do so by 9:00 a.m. on 30 November 2021. Order Directing Response, *In re*: *The 10 November 2021 Order in Hoke Cty. Bd. of Educ. v. State of North Carolina*, NCOA P. 21-511 (Wake County File 95CVS1158).

The State of North Carolina, the Plaintiffs, and Penn-Intervenors filed their respective responses to the Controller's petition on 30 November 2021. *See* Response of Plaintiffs and Penn-Intervenors in Opposition to Petition for Writ of Prohibition, Temporary Stay and Writ of Supersedeas, *In re*: *The 10 November 2021 Order in Hoke Cty. Bd. of Educ. v. State of North Carolina*, NCOA P. 21-511 (Wake County File 95CVS1158) (R p 1949), and The State of North Carolina's Response to the Petition for Writ of Prohibition, Temporary Stay and Writ of Supersedeas, *In re*: *The 10 November 2021 Order in Hoke Cty. Bd. of Educ. v. State of North Carolina*, NCOA P. 21-511 (Wake County File 95CVS1158) (R p 1991).

On 30 November 2021, the North Carolina Court of Appeals granted the Controller's Petition for Writ of Prohibition, s*ee* Order Allowing Writ of Prohibition, *In re*: *The 10 November 2021 Order in Hoke Cty. Bd. of Educ. v. State of North Carolina*, NCOA P. 21-511 (Wake County File 95CVS1158) (R p 2008), and dismissed the Controller's Petitions Writ of Supersedeas and Motion for Temporary Stay as moot. *See* Order Dismissing Petition for Writ of Supersedeas and Motion for Temporary Stay, *In re*: *The 10 November 2021 Order in Hoke Cty.*

Bd. of Educ. v. State of North Carolina, NCOA P. 21-511 (Wake County File 95CVS1158).

Following the entry of the Court of Appeals order granting the Controller's Petition for Writ of Prohibition, the Writ became the subject of several timely filed petitions for writs of certiorari and notices of appeal by some of the parties in *Leandro* in December 2021 (R p 2263—2265). The appealing parties used the case caption for the *Leandro* case to give notice of appeal of the Writ of Prohibition. The State of North Carolina's Petition for Discretionary Review Prior to Determination by the Court of Appeals, filed 14 February 2022, and Plaintiff's Petition for Discretionary Review Prior to Determination by the Court of appeals, were allowed by Order of the Supreme Court of North Carolina entered 18 March 2022. *Hoke Cty. Bd. of Educ. v. State*, 381 N.C. 266, 266, 869 S.E.2d 321, 321 (2022) (R p 2652). No party filed a petition for writ of supersedeas with this Court, nor has any action been taken to stay the order granting the Controller's Writ of Prohibition.

On 18 March 2022, this Court held the appeals in abeyance. *Hoke Cty. Bd. of Educ. v. State*, 381 N.C. 264, 264-265, 869 S.E.2d 322, 323 (2022). On the same date, the Supreme Court remanded the case to Judge Robinson. *Hoke Cty. Bd. of Educ. v. State*, 381 N.C. 266, 266, 869 S.E.2d 321, 321 (2022). The Court remanded the matter to this court "for the purpose of allowing [this 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." *Id.* And instructed this court "to make any necessary findings of fact and conclusions of law and to certify any amended order that it chooses to enter" within thirty days of entry of the Order granting the parties' Petitions for Discretionary Review. *Id.*

On 24 March 2022, the trial court entered the Scheduling and Order and Notice of Hearing requiring that the parties' briefs be filed before 5:00 p.m. on Friday, 8 April 2022. Scheduling Order and Notice of Hearing, *Hoke Cty. Bd. Of Educ. V. State*, (95 CVS 1158, Wake Cty.) (R p 1878). Subsequently, in its Supplemental Briefing Order entered 25 March 2022, the trial court requested that the parties provide to the Court information and legal argument regarding the following:

> a. The amount of the funds appropriated in the 2021 Appropriations Act, 2021 N.C. Sess. Laws 180, that directly fund the various programs and initiatives called for in the Comprehensive Remedial Plan;
>
> b. The amount of funds remaining in the General Fund currently both in gross and net of appropriations in the 2021 Appropriations Act;
>
> c. The effect of the appropriations in the 2021 Appropriations Act on the ability of the Court to order the Legislature to transfer funds to the

> Department of Health and Human Services, Department of Public Instruction, and the University of North Carolina System. *See Richmond Cty. Board of Education v. Cowell,* 254 N.C. App. 422 (2017).

Supplemental Briefing Order, *Hoke Cty. Bd. Of Educ. v. State* (95 CVS 1158, Wake Cty.) (R p 1882).

The trial court held a hearing on 13 April 2022 and entered its Order on Remand in compliance with this Court's Order of Remand on 26 April 2022. (R pp 2618—2643).

In its 26 April 2022 Order the Trial Court made two Conclusions of Law that are critical herein which read in pertinent part as follows:

> 48. Based upon the Supreme Court's Remand Order, and the express directive contained therein, this Court has authority to reconsider the trial court's 10 November Order. Further, pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure, a trial court can reconsider any interlocutory ruling, like the 10 November Order, at any time prior to entry of final judgment and adjudication of the rights and liabilities of all parties to the proceeding. *See Pender Farm. Dev., LLC v. NDCO, LLC*, 2020 NCBS LEXIS 110, at *4 (N.C. Super. Ct. Sep. 25, 2020). Reconsideration is with the trial courts discretion *W4 Farms Inc. v. Tyson Farms Inc.*, 2017 NCBC LEXIS 99, at *5 (N.C.. Super. Ct. Oct. 19, 1017), and may be especially appropriate where an intervening development or change in controlling law has occurred. *See e.g. Pender v. Bank of Am. Corp.*, No. 3:05-CV-

> 238-MU, 2011 U.S. Dist. LEXIS 1838, at *7 (W.D.N.C. Jan.7, 2011 (citations omitted).
>
> . . . .
>
> 55. The Court of Appeals has determined that the trial court had no proper basis in law to direct the transfer by State officers or departments of funds to DHHS, DPI, and the UNC System. As such, this Court concludes that the 10 November Order should be amended to remove a directive that State officers or employees transfer funds from the State Treasury to fully fund the CRP but should amend 10 November Order to determine that the State of North Carolina has failed to comply with the trial court's prior order to fully fund years 2 and 3 of the CRP.

Order Following Remand (R pp 2638, 2640).

The Order Following Remand was then appealed by all parties, except the Controller. (R pp 2648—2670). On 31 May 2022 by Order of the Supreme Court all writs of certiorari and notices of appeal then pending in the Supreme Court were granted and a briefing order was established. *Hoke Cty. Bd. of Educ. v. State*, 872 S.E.2d 530, 530-31 (N.C. 2022). Subsequently on 1 July 2022 the North Carolina General Assembly enacted the 2022 Budget Act which became law on 11 July 2022 when it was signed by the Governor. Current Operations Appropriations Act of 2022, S.L. 2022-74, § 2.1(a) https://www.ncleg.gov/Enacted Legislation/SessionLaws/PDF/2021-2022/SL2022-74.pdf. This act added addi-

tional funds for the Comprehensive Remedial Plan in a manner not addressed by Judge Robinson's 26 April Order.

ARGUMENT

I. THE 10 NOVEMBER ORDER EXPOSED THE CONTROLLER AND HIS EMPLOYEES THE TO CIVIL AND CRIMINAL LIABILITY WITHOUT DUE PROCESS

On 10 November 2021 Judge Lee entered his order requiring in part the State Controller to "transfer the total amount of funds necessary to effectuate years 2 & 3 of the Comprehensive Remedial Plan, from the *unappropriated balance* within the General Fund to the state agents and state actors with fiscal responsibility for implementing the comprehensive Remedial Plan . . . ." (R p 1841) (emphasis added). The 10 November Order specifically addressed the Controller, even though the Controller was not then and is not now a named party to the underlying action, had received zero notice of the proceeding, and was never afforded the opportunity to be heard. Petition for Writ of Prohibition (R p 1900-1903). As set out above, North Carolina law makes clear that the Office of the State Controller has no legal authority to transfer funds from the unappropriated balance as mandated by the 10 November Order, and that the Controller is, in fact, expressly prohibited from doing so by the North Carolina

Constitution, and by the State Budget Act. N.C. Const. art. V, § 7(1); N.C.G.S. § 143C-1-1(b).

The General Assembly's statutory mechanism for enforcement of these acts includes penalty provisions. These include a requirement the Budget Director report the spending of any unauthorized funds in apparent violation of a penal law to the Attorney General. See 143C-6-7. Furthermore, to "withdraw funds from the State treasury for any purpose not authorized by an act of appropriation" or to "fail or refuse to perform a duty" in violation of this Chapter is a Class 1 misdemeanor which subjects the wrongdoer to a criminal liability, forfeiture of office or impeachment. § 143C-10-1(a)(1), (4) and 143C-10-3.

The Petitioner or his staff would be subject to these penalties in the event he were compelled by the Order to comply with its term. Compliance with the court's order would have violated the Controller's oath of office. *See* G.S. 11-7.[3]

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[3] Article VIII of the Articles of Impeachment of Governor Holden "charges that the accused, as Governor, made his warrants for large sums of money on the public treasurer for the unlawful purpose of paying the armed men before mentioned -- caused and procured said Treasurer to deliver to one A. D. Jenkins, appointed by the accused to be paymaster, the sum of forty thousand dollars; that the Honorable Anderson Mitchell, one of the superior court judges, on application to him made, issued writs of injunction which were served upon the said treasurer and paymaster, restraining them from paying said money to the said troops; that thereupon the accused incited and procured the said A. D. Jenkins paymaster, to disobey the injunction of the court and to deliver the money to another agent of the accused, to-wit: one John B. Neathery ; and thereupon the accused ordered and caused the said John B. Neathery to disburse and pay out the money so delivered to him, for the illegal purpose of

Judge Lee entered his order without regard for the Controller's rights to procedural due process, and in doing so deprived the Controller of the right to be heard prior to the entry of any judgement affecting the Controller's substantial rights. As explained in the Petition for Writ of Prohibition, the November 10th Order placed the Controller in an untenable position in which he would have had to choose between conflicting directives in the Court's Order and the statute enacted by the General Assembly implementing the 2021 Appropriations Act.

In *In re Alamance County*, this Court held that the trial court's order invoking the court's inherent power was procedurally and substantively flawed in part because "the commissioners against whom the order was directed were not made parties to the action[.]" *In re Alamance County Court Facilities,* 329 N.C. 84, 88, 405 S.E. 2d 125, 126 (1991). In *Alamance County*, the trial court initiated proceedings "to inquire into the adequacy of the Alamance County court facilities" and ultimately issued an order scheduling a hearing to that end. *Id.* at 88—89, 405 S.E. 2d at 126. The Alamance County Board of Commissioners, who were served with the trial court's order and provided notice of hearing,

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paying the expenses of, and keeping on foot the illegal military force aforesaid." *Holden, Impeachment Proceedings*, I, 110-112. A complete text of the Articles of Impeachment can be found in the Impeachment Proceedings, I, 9-17. *See also*, *Articles Against W. W. Holden (Raleigh*: James H. Moore, State Printer and Binder), 1871.

attended the hearing but were not parties to the action, and did not participate. *Id. at* 89, 405 S.E. 2d at 127. Following the hearing, the court made findings about the county's revenues, fund balance, undesignated unreserved funds and minimum requirements for court facilities, and that the failure of the county to provide adequate court facilities violated the North Carolina Constitution. *Id.* at 90, 405 S.E. 2d at 127. Based upon its findings, the trial court directed "that the county, acting through its commissioners, immediately take steps to provide adequate facilities[,]" and further specified the precise action the commissioners should take to comply with the order, down to the number and size of courtrooms, chambers, and other facilities the commissioners were required to provide. *Id.* at 91-92, 405 S.E. 2d 128. In *Alamance County,* this Court made clear that, "no procedure or practice of the courts . . . , even those exercised pursuant to their inherent powers, may abridge a person's substantive rights[,]" *id.* at 107, 405 S.E. 2d 137, and further that any action by the court will be "wholly ineffectual as against [one] who is not a party to such action." 329 N.C. at 107, 405 S.E. 2d at 137 (alteration in original) (internal citations omitted). "Because the commissioners were not parties to the action from which the order [had] issued[,]" this Court determined that "they are not bound by its mandates." *Id.* Having so held, this Court vacated the trial court's order.

In this case, as in *Alamance County*, the trial court invoked its inherent power to order the State Controller and other state officials to take specific action—transfer unappropriated funds in violation of North Carolina law—without affording him notice and opportunity to be heard, thereby abridging his substantive due process rights. Even if the trial could otherwise have exercised its inherent powers to enter such an order, because the Controller was never made a party to the underlying action, he cannot be bound by the trial court's mandate.

II. THE COURT OF APPEALS CORRECTLY VOIDED AND JUDGE ROBINSON PROPERLY AMENDED THE TRANSFER PROVISIONS OF THE 10 NOVEMBER 2021 ORDER.

A. Writs of Prohibition

In North Carolina, an appellate court may use a writ of prohibition to restrain lower court judges (1) from proceeding in a matter not within their jurisdiction, (2) from taking judicial action at variance with the rules prescribed by law, or (3) from proceeding in "a manner which will defeat a legal right." *State v. Allen,* 24 N.C. 183, 189 (1841).[4] When an order granting a Writ of Prohibition is entered by the North Carolina Court of Appeals and a petition for review by

[4] North Carolina's law regarding the issuance of Writs of Prohibition, as well as the Controller's arguments supporting the issuance of the Writ of Prohibition in this case are set out in detail in the Controller's Petition for Writ of Prohibition, Temporary Stay and Writ of Supersedeas. (R pp 1896—99).

certiorari has been timely filed in the Supreme Court, application may be made to the Supreme Court for a writ of supersedeas to stay the execution of the Court of Appeals Order. N.C. R. App. P. 23. No such supersedeas application was filed.

In its Order Granting the Controller's Writ of Prohibition, the Court of Appeals noted that, "while our judicial branch has the authority to enter a money judgment against the State or another branch, it has no authority to order the appropriation of monies to satisfy any execution of that judgment." Order Granting Writ of Prohibition, *In re*: *The 10 November 2021 Order in Hoke Cty. Bd. of Educ. v. State of North Carolina*, NCOA P. 21-511, ECF No. 10.4, p 2 (Wake County File 95CVS1158) (citing *State v. Smith*, 289 N.C. 303, 321 (1976)) (R p 2009). Indeed, it is well established that " '[a]ppropriating 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.' " Order Granting Writ of Prohibition, *In re*: *The 10 November 2021 Order in Hoke Cty. Bd. of Educ. v. State of North Carolina*, NCOA P. 21-511, ECF No. 10.4, p 1 (Wake County File 95CVS1158) (first alteration in original) (quoting *Richmond Cty. Bd. of Educ. v. Cowell*, 254 N.C. App. 422, 426 (2017)); (R p 2008). The Court of Appeals makes clear that *Cowell* remains the prevailing law, and is precedent

for this case, noting further "[o]ur Supreme Court quoted and relied on this language from our holding in *Cooper v. Berger*, 376, NC. 22, 47, 852 S.E.2d 46, 64 (2020)." *Id.*

B. <u>Due Process & Personal Jurisdiction</u>

The Controller argued to the Court of Appeals, and we suggest to this Court, that Judge Lee lacked jurisdiction to enter any order against the Office of State Controller on 10 November 2021. As discussed hereinafter, any court order made without proper substantive and procedural jurisdiction is void *ab intio.*

"The fundamental premise of procedural due process protection is notice and the opportunity to be heard." *Peace v. Emp't Sec. Comm'n,* 349 N.C. 315, 322, 507 S.E. 2d 272, 278 (1998) (citing *Cleveland Bd. Of Educ. v. Loudermill*, 470 U.S. 532 (1985)). "[T]he opportunity to be heard must be 'at a meaningful time and in a meaningful manner.'" *Id.* (quoting *Armstrong v. Manzo,* 380 U.S. 545 (1965)). While courts of this state may properly enter orders requiring public officials to perform their duties, "[n]o procedure or practice of the courts . . . even those exercised pursuant to their inherent powers, may abridge a person's substantive rights." *In re Alamance County Court Facilities*, 329 N.C. 84, 107, 405 S.E.2d 125, 137 (1991); N.C. Const. art. IV, § 13(2).

> "[I]n order that there be a valid adjudication of a party's rights, the latter must be given notice of the action and an opportunity to

> assert his defense, and he *must be a party to such proceeding*." *In re Wilson*, 13 N.C. App. 151, 153, 185 S.E.2d 323, 325 (1971) (emphasis added) (quoting 2 Strong's N.C. Index 2d, *Constitutional Law* § 24). "[A]ny judgment which may be rendered in . . . [an] action will be wholly ineffectual as against [one] who is not a party to such action." *Scott v. Jordan*, 235 N.C. 244, 249, 69 S.E.2d 557, 561 (1952). The exercise of the court's inherent power to do what is reasonably necessary for the proper administration of justice must stop where constitutional guarantees of justice and fair play begin. "The law of the land clause . . . guarantees to the litigant in every kind of judicial proceeding the right to an adequate and fair hearing before he can be deprived of his claim or defense by judicial decree." *In re Custody of Gupton*, 238 N.C. 303, 304, 77 S.E.2d 716, 717 (1953). "The instant that the court perceives that it is exercising, or is about to exercise, a forbidden or ungranted power, it ought to stay its action, and, if it does not, such action is, in law, a nullity." *Burroughs v. McNeill*, 22 N.C. at 301.

In re Alamance County Court Facilities, 329 N.C. 84, 107—108, 405 S.E.2d 125, 137-138, (1991).

> Jurisdiction is "[t]he legal power and authority of a court to make a decision that binds the parties to any matter properly brought before it." *In Re T.R.P.,* 360 N.C. 588, 590, 636 S.E.2d. 787, 789 (2006) (internal citations omitted). A court must have personal jurisdiction over the parties to "bring [them] into its adjudicative process." *Id.* at 14 590, 636 S.E.2d. at 790 (internal citations omitted). It is also well-established that "[t] he court may not grant a restraining order unless it has proper jurisdiction of the matter." SHUFORD *North Carolina Civil Practice and Procedure,* 6th Ed., p. 1195. When a court lacks jurisdiction, it is "without authority to enter any order granting any relief." *Swenson v. All American Assurance Co.,* 33 N.C. App. 458, 465, 235 S.E.2d 793, 797 (1977) (finding the court was without authority to enter a temporary restraining order when it had no jurisdiction over the defendant). When a court lacks authority to act, its acts are void. *Russell v. Bea Staple Manufacturing Co.,* 266 N.C. 531, 534, 146 S.E.2d 459,

> 461 (1966). As the Supreme Court stated in *Allred v. Tucci,* 85 N.C. App. 138, 142, 354 S.E.2d 291, 294 (1987): "If the court was without authority, its judgment ... is void and of no effect. A lack of jurisdiction or power in the court entering a judgment always voids the judgment [citations omitted] and a void judgment may be attacked whenever and wherever it is asserted." (citations omitted).

Pet. for Writ of Prohibition (R pp 1901—1902).

"A court of this State having jurisdiction of the subject matter has jurisdiction over a person served in an action pursuant to [Rule 4] of the North Carolina Rules of Civil Procedure." N.C.G.S. 1-75.4. Our law makes clear, where an order is entered without personal jurisdiction, that Order is void. Personal jurisdiction may be obtained by service made pursuant to Rule 4 of the North Carolina Rules of Civil Procedure. Where there has been no service on an individual, there can be no personal jurisdiction. The appellate record is devoid of any evidence of a summons issued to or service effected upon the office of the State Controller; therefore, the trial court had no personal jurisdiction over the State Controller in this matter.

The State argues that the "trial court was correct to order relief against [the Controller] for two reasons: (1) "this court already said as much in *Leandro II*[,]"and (2) the Controller is an agent and employee of the State, a named party in the underlying action. State's Br. at 50. To support its first argument, the State quotes *Leandro II:* "when the state fails to live up to its constitutional

duties… a court is empowered to provide relief by imposing a specific remedy and instructing the recalcitrant state actors to implement it." State's Br. At 50, (quoting *Hoke Cty. Bd. of Educ. v. State*, 358 N.C. 605, 642, 599 S.E.2d 365, 393 (2004) (*Leandro II*). However, it is inconceivable that the *Leandro* Court intended that courts should have the authority to require non-party individuals to take action when the ordered conduct violates statutes and subjects the actor to criminal and civil penalties.

For its second argument, the State points to Rule 65 of the North Carolina Rules of Civil Procedure, which provides "Every order granting an injunction is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys" N.C. Gen. Stat. § 1A-A, Rule 65(d). The State argues that pursuant to Rule 65, the transfer provisions of the 10 November Order are binding upon the Controller, that service of process on the state is binding on its agents, and that any other conclusion would "wreak havoc on litigation seeking injunctive relief against the state" by requiring that a litigant seeking said relief must also join every employee or agent of the state "who might be involved in carrying out the relief that the litigant seeks . . . ." State's Br. at 50.

The State's application of Rule 65 in this case is nonsensical. By its plan language, Rule 65 makes injunctive relief binding on the State, and by

extension its unnamed employees and agents. The November 10 Order enjoins the Controller, not as an unnamed employee of the State "who *might* be involved in carrying out the relief that the litigant seeks [,]" State's Br. at 50, but as a named individual to whom a specific command is directed and who would be individually accountable for his violations of North Carolina Law.

Because of the failure on the part of the Plaintiffs to provide any advance notice to the Controller or other state officials, Judge Lee lacked the authority to directly order the Controller to take any action whatsoever, and as such, that portion of the 10 November Order directing the Controller to transfer unappropriated funds is void and unenforceable.

C. <u>Constitution and State Budget Act</u>

Not only did Judge Lee lack personal jurisdiction but his order was void because it erred in applying the substantive law of North Carolina and applying binding precedential authority from this Court. Article V, Section 7 of the North Carolina Constitution Provides that, "No money shall be drawn from the State Treasury but in consequence of appropriations made by law, and an accurate account of the receipts and expenditures of State funds shall be published annually." N.C. Const. art. V, § 7(1). This constitutional restriction is enacted by statute in Section 143C-1-2 of the State Budget Act, and applies to transfers

made by every State agency, including the Office of the State Controller. N.C.G.S. §§ 143C-1-1(b), 143C-1-2.

Section 143C-4-2 of the Budget Act requires that "Each Current Operations Appropriations Act enacted by the General Assembly shall include a transfer to the Savings Reserve . . . ." N.C.G.S. § 143C-4-2(b1)(d). Further, that section prohibits the transfer of funds from the Savings Reserve "[t]o pay costs imposed by a court or administrative order . . ." without there first being an "appropriation by a majority vote of the membership of the Senate and House of Representatives . . . ." N.C.G.S. § 142C-4-2(b)(3).

Recognizing that "even the most thorough budget deliberations may be affected by unforeseeable events[,]" N.C.G.S. § 143C-6-4, the Budget Act provides that the Governor, who is the Director of the Budget, N.C.G.S. 143C-2-1, may "adjust the enacted budget by making transfers among lines of expenditure, purposes, or programs or by increasing expenditures funded by departmental receipts." N.C.G.S. § 143C-6-4. Furthermore, *with the approval of the Director of the Budget*, a state agency may so adjust the authorized budget for a purpose or program that is required by a court or industrial Commission Order. N.C.G.S. § 143C-6-4(b)(2) (emphasis added). Section 143C-4(b)(3) allows for over expenditures in limited circumstances to continue a purpose or program "due to complications that could not have been foreseen when the budget for the fiscal

period was enacted." N.C.G.S. § 143C-6-4(b)(3). Even if the complications in this case could not have been foreseen, any over expenditure would be limited to the amount of General Fund appropriations authorized by a legislative appropriati0ons bill, that is under the executive control of the affected the department. N.C.G.S. § 143C-6-4(b2). Once the General Assembly has considered and declined an appropriation of funds for a particular purpose, the law forbids the expending of funds for that purpose for the current fiscal period. *See* N.C.G.S. § 143C-6-5.

Section 143C-10-1 of the Budget Act makes it a Class 1 misdemeanor "for a person to knowingly and willfully . . . [w]ithdraw funds from the State treasury for any purpose not authorized by an act of appropriation." N.C.G.S. § 143C-10-1(1). "An appointed officer or employee of the State or an officer or employee of a political subdivision of the State, whether elected or appointed, forfeits his office or employment upon conviction of an offense under this section." N.C.G.S. § 143C-10-1(c). Furthermore, an elected officer of the state is subject to be impeached if he or she withdraws funds from the state treasury for any purpose not authorized by an act of appropriation. N.C.G.C. § 143C-10-1(c).

D. <u>Appellants' contention the language in the constitution justifies an appropriation lacks merit.</u>

"The separation of powers clause declares that '[t]he legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other.' " *State ex rel. McCrory v. Berger,* 368 N.C. 633, 644, 781 S.E.2d 248, 255 (2016) (quoting N.C. CONST. art. I, § 6). "The clearest violation of the separation of powers clause occurs when one branch exercises power that the constitution vests exclusively in another branch." *Id.* at 645, 781 S.E.2d at 256. (citation omitted). "Appropriating money from the State treasury is a power vested exclusively in the legislative branch and '[n]o money shall be drawn from the State treasury but in consequence of appropriations made by law.' " *Richmond Cty. Bd. of Educ. v. Cowell*, 254 N.C. App. 422, 426, 803 S.E.2d 27, 31 (2017) (alteration in original) (quoting N.C. Const. art. V, § 7). "Because the State constitution vests the authority to appropriate money solely in the legislative branch, the Separation of Powers Clause 'prohibits the judiciary from taking public monies without statutory authorization.' " *Id* at 427, 803 S.E.2d 27 at 31 (quoting *In re Alamance Cty. Court Facilities*, 329 N.C. 84, 99, 405 S.E.2d 125, 132 (1991)). "Thus, when the courts enter a judgement against the State, and no funds

already are available to satisfy that judgment, the judicial branch has no power to order State officials to draw money from the State treasure to satisfy it." *Id.*

In *Cowell*, the Richmond County Board of Education obtained a judgment for $272,300.00 based upon its claim that a statute requiring that fees collected from defendants convicted of improper equipment offenses be remitted to the Statewide Misdemeanant Confinement fund was unconstitutional. *Id.* at 424—24, 803 S.E.2d at 29. The trial court's order required that the funds collected by the State be " 'paid back to the clerk's office in Richmond County' to then be paid to the school system as the State constitution requires." *Id.* at 425, 803 S.E.2d at 30. On appeal, the Court of Appeals affirmed the judgment, holding that "the remittance of the $50.00 surcharges collected in Richmond County to the State Confinement Fund [was] unconstitutional" and that the return of the funds to Richmond County was appropriate. *Id.* at 424—25, 803 S.E.2d 30. Despite the Court of Appeals' affirmance of the trial court's order, the State did not pay back to Richmond County the statutory fees because the money had been spent. *Id.* at 425, 803 S.E.2d at 30.

Following the State's failure to "pay back" the fees, the school board moved the court to enter a show cause order against the officials. *Id.* The court declined to do so and dismissed the school board's motion without

prejudice, noting that the State could appropriate the funds necessary to pay the judgment in the coming legislative session. *Id.* When the General Assembly did not appropriate the needed funds, the trial court issued a writ of mandamus ordering the State Controller and other officials to effectuate a transfer of funds from the State treasury. *Id.*

The state officials appealed. Noting that "in many ways the judicial branch poses the greatest risk to the [Separation of Powers] doctrine[,]" *Id.* at 426, 803 S.E.2d at 30, and that "our Supreme Court repeatedly has acknowledged that '[e]ven in the name of its inherent power, the judiciary may not arrogate duty reserved by the constitution exclusively to another body[,]" *Id.* at 426, 803 S.E.2d at 31 (first alteration in original) (citation omitted), the Court of Appeals reversed the writ of mandamus. *Id.* at 429, 803 S.E.2d at 32.

In this case, as was the case in *Cowell*, the trial court's 10 November Order would enforce a judgment against the State by requiring state officials to pay funds that have not been appropriated by the General Assembly. It is well-established that the judiciary lacks the authority to order the General Assembly to appropriate funds, as that power is vested exclusively in the legislative branch. Likewise, no court can require the Controller to transfer funds that have not been appropriated by the legislature.

III. THE TRIAL COURT IN REPLACING THE 10 NOVEMBER 2021 ORDER ACTED AS INSTRUCTED BY THIS COURT'S REMAND ORDER AND DID NOT ERR IN ELIMINATING THE MANDATE ORDERING THE CONTROLLER TO PAY FUNDS WITHOUT AN APPROPRIATION.

Appellants argue that Judge Robinson was without authority to Amend the 10 November Order by striking the transfer provisions of that Order because: (1) the amendment exceeded the court's authority on remand, (2) the Writ of Prohibition on appeal to this Court was not the "law of the case" and (3) because one trial court could not overrule another trial court judge, Judge Robinson lacked jurisdiction to strike this portion of the order. None of these arguments have merit.

As discussed below this Court's language on remand was sufficiently broad to encompass Judge Robinson's action. At the time Judge Robinson issued his order no stay or writ of supersedeas had been issued by any appellate court, and thus the ruling of the Court of Appeals was precedential and the law of the case. Finally, even if this Court's "abeyance" order had somehow limited Judge Robinson's authority, the changed circumstances created two exceptions (changed circumstances and void *ab initio*) to the rule limiting one trial judge from overruling another apply.

A. <u>The plain language of this Court's 18 March 2021 Remand Order granted the trial court jurisdiction to amend the 10 November 2021 order based upon changed circumstances</u>.

Our Supreme Court has established clear law with regard to the authority of a trial court on remand:

> The law of this State is clear with regard to the trial court's authority upon remand. In *D & W, Inc. v. Charlotte*, 268 N.C. 720, 152 S.E.2d 199 (1966), our Supreme Court noted that, "[i]n our judicial system the Superior Court is a court subordinate to the Supreme Court. Upon appeal our mandate is binding upon it and must be strictly followed without variation or departure. No judgment other than that directed or permitted by the appellate court may be entered. 'Otherwise, litigation would never be ended, and the supreme tribunal of the state would be shorn of authority over inferior tribunals.' "*Id.* at 722-23, 152 S.E.2d at 202 (quoting *Collins v. Simms*, 257 N.C. 1, 11, 125 S.E.2d 298, 306 (1962)). *Accord Lea Co. v. North Carolina Bd. of Transportation*, 323 N.C. 697, 374 S.E.2d 866 (1989)

Crump v. Bd. of Educ. of Hickory Admin. Sch. Unit, 107 N.C. App. 375, 378-79, 420 S.E.2d 462, 464 (1992).

Thus, to examine the remand authority of the trial court one must examine the plain language of the text of the remand order to determine the jurisdiction of the trial court. In some cases remand orders are simply limited to a single word, or the entry of an order dismissing the claim or, further, to enter such orders as is necessary to comply with an appeal. This Court's order was broader than is advocated by the Appellants. The trial court's remand jurisdiction allowed it to assess the changes in circumstances which occurred

subsequent to 11 November Order and to make any "necessary findings of fact ….it chooses to enter." *Hoke Cty. Bd. of Educ. v. State*, 381 N.C. 266, 266—67, 869 S.E.2d 321, 321—22 (2022).

The remand order reads as follows:

> This case is remanded to the Superior Court, Wake County . . . for the purpose of allowing the trial court to determine what effect, if any, the enactment of the State Budget has upon the nature and extent of the relief the trial court granted in its 1[0] November 2021 order. The trial court is instructed to make any necessary findings of fact and conclusions of law and to certify any amended order that it chooses to enter with this Court . . . ."

Id. at 266, 869 S.E.2d at 321.

This Appellee does not object to any aspects of the 26 April 2022 Order and requests this court to simply affirm the Order. It is clear the 26 April 2022 Order replaced the 10 November Order based on changed circumstances and the 10 November Order is now of no legal effect. mooted under state law. Put differently, there is no longer an operative court order mandating a legal necessity for the State Controller to be required to pay any funds appropriated by the Legislature for other purposes.[5]

[5] We note in late November, after the Court of Appeals had entered its Writ of Prohibition, Judge Lee had scheduled a hearing to consider any changes necessary brought about by the 2021 Appropriations Act.

Before the 2021 budget was enacted, the Controller could not release funds; however, after the 2021 budget was passed and allocated, the Controller can make available the money which was appropriated in the Budget Act of 2021 and will do so with regard to the funds added to the educational agencies made in the budget amendments in 2022. Current Operations Appropriations Act of 2022, S.L. 2022-74, § 2.1(a) https://www.ncleg.gov/EnactedLegislation/SessionLaws/PDF/2021-2022/SL2022-74.pdf. As explained in the Writ of Prohibition Petition, this is an act the Controller could not have legally performed without an appropriation. The Budget Act of 2021 represented a change in circumstances, the legal consequences affected the jurisdiction available to the trial court to address the altered legal environment which confronted the Court in April, 2022.

The characterization of the remand as "narrow" is meritless and not supported by the language of the order. Judge Robinson could hardly have let the 10 November order remain unchanged given the appellate decision that Judge Lee lacked the jurisdiction to enter the 10 November Order in the first place under existing controlling precedent. The Writ of Prohibition speaks for itself in citing *Richmond County*, 254 N.C. App 422, 803 S.E.2d 27 (2017), which was recently cited with approval by this Court in *Cooper v. Berger* *Cooper v. Berger*, 376, NC. 22, 47, 852 S.E.2d 46, (2020), as controlling

precedent for its Writ. (R p 2008). We note the Writ entered had never been stayed or subject to an entry of an order of supersedeas. The Appellants' contentions suggest trial judges should ignore case holdings directly affecting litigation before them even if those holdings have not been stayed or overruled by a higher appellate authority. This is not the law.

B. <u>In replacing the 11 November Order, the trial court followed the law of the case doctrine.</u>

The federal courts have extensively discussed the use of the law of the case and its applicability, and our Court of Appeals has adopted the logic as follows:

> " "[t]he doctrine of the law of the case is not an inexorable command, or a constitutional requirement, but is, rather, a flexible discretionary policy which promotes the finality and efficiency of the judicial process." *Goetz v. N.C. Dep't of Health & Hum. Servs.,* __ N.C. App. __, __, 692 S.E.2d 395, 403 (2010) (internal quotation marks omitted). Accordingly, the law of the case doctrine does not apply with equal force to every issue and may be disregarded where the issue is of special importance. *Am. Canoe Ass'n v. Murphy Farms, Inc.,* 326 F.3d 505, 515-16 (4th Cir. 2003) (citing 18B Wright, Miller & Cooper, *Federal Practice and Procedure* § 4478.5 (2d ed. 2002) ("The force of law--of--the--case doctrine is affected by the nature of the first ruling and by the nature of the issues involved. If the ruling is avowedly tentative or the issues especially important, it may be said that law--of--the--case principles do not apply.")), *appeal after remand,* 412 F.3d 536 (2005). Thus, when a tribunal is faced with a question of its subject matter jurisdiction, a significantly important issue "which call[s] into

> question the very legitimacy of a court's adjudicatory authority," the goals of the law of the case doctrine are outweighed by the overriding importance and value of a correct ruling on this issue. *Id.* at 515[.]

Watts v. N.C. Dep't of Envtl. & Nat. Res., No. COA09-1499, 2010 N.C. App. LEXIS 1246, at *9 (Ct. App. July 20, 2010) (unpublished).

As explained in the Petition for Writ of Prohibition, the November 10th Order placed the Controller in an untenable position in which she would have had to choose between conflicting directives in the Court's Order and the statute enacted by the General Assembly implementing the 2021 Appropriations Act. In its Order Granting the Controller's Writ of Prohibition, the Court of Appeals noted that, "while our judicial branch has the authority to enter a money judgment against the State or another branch, it has no authority to order the appropriation of monies to satisfy any execution of that judgment." Order Granting Writ of Prohibition, *In re*: *The 10 November 2021 Order in Hoke Cty. Bd. of Educ. v. State of North Carolina*, NCOA P. 21-511, ECF No. 10.4, p 2 (Wake County File 95CVS1158) (citing *State v. Smith*, 289 N.C. 303, 321 (1976)); (R p 2008). Indeed, it is well established that " '[a]ppropriating 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.'" Order Granting

Writ of Prohibition, *In re*: *The 10 November 2021 Order in Hoke Cty. Bd. of Educ. v. State of North Carolina*, NCOA P. 21-511, ECF No. 10.4, p 1 (Wake County File 95CVS1158) (quoting *Richmond Cty. Bd. of Educ. v. Cowell*, 254 N.C. App. 422, 426 (2017); (R p 2008).

Using established principles to apply the law of the case, it is clear the trial court was well within its jurisdiction to enter the order it did given the overriding importance and value of a correct ruling on this issue. This was clearly the intent of the remand Order to get to the substantive constitutional merits of the case.

C. <u>The 10 November 2022 Order was void ab initio and could be replaced by a subsequent trial court</u>.

The Appellants argue the court lacked jurisdiction to amend the 10 November Order because of the doctrine which does not allow a subsequent superior judge to overrule another prior superior court judge in the same case. This doctrine has several well recognized exceptions which are applicable here.

As discussed ante, Judge Robinson was confronted with changed circumstance. "One superior court judge may only modify, overrule or change the order of another superior court judge where the original order was (1) interlocutory, (2) discretionary, and (3) there has been a substantial change of

circumstances since the entry of the prior order." *First Fin. Ins. Co. v. Commercial Coverage*, 154 N.C. App. 504, 507, 572 S.E.2d 259, 262 (2002) (quoting *Stone v. Martin*, 69 N.C. App. 650, 652, 318 S.E.2d 108, 110 (1984)). "A substantial change in circumstances exists if since the entry of the prior order, there has been an 'intervention of new facts which bear upon the propriety' of the previous order." *Id.* (quoting *Calloway v. Motor Co.*, 281 N.C. 496, 505, 189 S.E.2d 484, 490 (1972)).

Judge Robinson was confronted with the Order of the Court of Appeals arising from the Controllers' Writ of Prohibition petition which held the 10 November 2022 Order void jurisdictionally. This is another exception to the general rule. A Second Judge is Not Bound by an Earlier Judge's Order that is Void. If the first judge's order is void *ab initio* because the first judge did not have jurisdiction to enter the order, then the order is a nullity and may be ignored by a second judge. *State v. Sams*, 317 N.C. 230, 235, 345 S.E.2d 179, 182 (1986) (citing *Manufacturing Co. v. Union*, 20 N.C. App. 544, 202 S.E. 2d 309, cert. denied, 285 N.C. 234, 204 S.E. 2d 24 (1974)). "Because the orders of Judges Stephens and Lock were therefore void, Judge Pittman not only possessed the authority to vacate those orders pursuant to Santifort's motions under Rule 60(b) but also committed reversible error in failing to do so. Accordingly, we reverse the portion of Judge Pittman's order denying

Santifort's Rule 60(b) motions." *State v. Santifort*, 257 N.C. App. 211, 222, 809 S.E.2d 213, 221 (2017). If the first judge had jurisdiction to enter an order, even though it is incorrect as a matter of law, the order is merely voidable and remains in effect and must be honored by the second judge until voided by direct challenge to its validity. *Able Outdoor Inc. v. Harrelson*, 341 N.C. 167, 169, 459 S.E.2d 626, 627 (1995); *State v. Sams*, 317 N.C. 230, 235, 345 S.E.2d 179, 182 (1986). Here, the Court of Appeals concluded that the transfer provision of the November order was void under Article V, Section 7 of the North Carolina Constitution. Order Granting Writ of Prohibition, *In re*: *The 10 November 2021 Order in Hoke Cty. Bd. of Educ. v. State of North Carolina*, NCOA P. 21-511, ECF No. 10.4, p 2 (Wake County File 95CVS1158) (citing *State v. Smith*, 289 N.C. 303, 321 (1976)) (R p 2009). As discussed above, the order had not been stayed or the subject of a writ of supersedeas at the time Judge Robinson entered the order.

D. Controller, Legislative staff and the Budget Director supplied new information of which the trial court was not previously aware regarding the statutory procedures implementing Article V, Section 7 of the Constitution, and this new evidence provided the trial court with a basis to correct the error of law in the previous 10 November Order.

During the litigation concerning the establishment of right to a sound basic education, the trial courts were not concerned with monetary damages

but with establishment of declaratory relief –an equitable remedy. Only at the end of the 28-year-old litigation when a monetary remedy was proposed, to authorize the payment of the funds, have Plaintiffs advanced a novel theory regarding execution against the state. Plaintiffs argue the plain language of the Constitution is "self-executing" and can authorize a court to adjudicate an appropriation.

The appellants put emphasis on that portion of the Constitution involving the right to a sound basic education. N.C. Const. art. I, § 15 ("The people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right."). Like this provision, there are other sections of the Constitution which are equally commanding and aspirational, in part the open courts provision, welfare policy, natural resources, the right to hunt and fish, and charitable institutions. However, each is subject to Article V, Section 7 when drawing public money. In the event there is a conflict between the aspirational goals of the Constitution and the specific section on drawing public money, the Constitution must be in *pari materia*. *Blankenship v. Bartlett*, 363 N.C. 518, 525, 681 S.E.2d 759, 765 (2009) (citing *Stephenson v. Bartlett,* 355 N.C. 354, 378, 562 S.E.2d 377, 394 (2002)). "[A] constitution cannot be in violation of itself . . . ." *Stephenson v. Bartlett,* 355 N.C. 354, 378, 562 S.E.2d 377, 394 (2002) (internal citations omitted). The resolution of these

conflicts is clearly a political and not a judicial one, and therefore, the province of the Legislature, which has the "power of the purse" under Article V, Section 7 of the North Carolina Constitution.

This novel theory is of course not supported by established precedent in this State. Clearly, unless the State has waived sovereign immunity, execution is not authorized. *Smith v. State*, 289 N.C. 303, 310—311, 222 S.E.2d 412, 417—418 (1976). This Court has traditionally taken the position the courts can adjudicate a liability and recommend its payment to the legislature. In doing so they rely on the good will of the legislature to fund court judgments. *See, Id.* All parties recognize the plaintiffs have a direct constitutional claim for a sound basic education under Article I, Section 15 of the state Constitution, which includes an "adequate" remedy. The constitutional minimum for an adequate remedy as heretofore defined is the right to present a claim in court. *See Deminski v. State Bd. of Educ.*, 377 N.C. 406, 414, 858 S.E.2d 788, 794 (2021) ("[T]o be considered adequate in redressing a constitutional wrong, a plaintiff must have at least the opportunity to enter the courthouse doors and present his claim."). A declaratory judgment uninhibited by defenses of sovereign immunity provide this remedy.

These Plaintiffs follow in the footsteps of other Plaintiffs who have obtained a declaratory ruling and monetary relief, but failed to obtain

execution of the money judgment against the State. This Court explained the limits of its power to enforce a monetary judgment in *State vs Smith* as follows: "The legislature has the ability to avoid payment of the obligations of the state by a failure or refusal to make the necessary appropriation." 289 N.C. 303, 311, 222 S.E.2d 412, 418 (1976).

The Plaintiffs must at the end of litigation rely on the Legislative appropriation to fulfill its judgment on educational funding claims. This was the result in *North Carolina Association of School Boards v. Moore*, 359 N.C. 474, 614 S.E.2d 504 (2005). In this case, the North Carolina Association of Schools Boards (NCASB) brought an action for declaratory judgment and claim for monetary damages against individual state officials who retained the "clear" proceeds of civil fines and spent them on agency needs rather than place them in with school boards pursuant to Article IX, Section 7 of the State Constitution. *N.C. Sch. Bds. Ass'n v. Moore*, 359 N.C. 474, 480-81, 614 S.E.2d 504, 508 (2005). This Court affirmed the declaratory judgment of the trial court that these funds were the property of the school boards and remanded the matter to the Superior Court for determination of the amount due. *Id.* After determination of this amount, the School Boards then desired assistance of the Wake County Superior Court in executing various the amounts. *See* Memorandum of Decision and Judgment, *N.C. Sch. Bds. Ass'n v. Moore*, (Wake

County File 98CVS14158) (Aug. 8, 2008) *See* Addendum. Citing *State v. Smith*, the Wake County Superior Court refused to order execution. *Id.* at 9—10.

Assuming *arguendo* had the 10 November 2021 Order not been appealed or set aside by a Writ of Prohibition and had the state officials refused to comply with the transfer of funds, the Plaintiffs and the Court would still be without a practical remedy. Normally, a party who fails to comply with a court order is subject to contempt. However the contempt statute does not provide a remedy for executive branch officials to be held in contempt. *See* N.C.G.S. § 5A-11 and 5A-21. This Court's precedent holds state officials are not subject to contempt of court proceedings if they are acting in their official capacity. *See, e.g., N.C. Dep't of Transp. v. Davenport*, 334 N.C. 428, 432 S.E.2d 303 (1993) (concluding that, because the sovereign State of North Carolina has not consented to be subject to the contempt power of the court, and therefore and agency of the State is not subject to contempt). Indeed, we are convinced that none exists. the State of North Carolina had not waived sovereign immunity Under *Davenport,* the Controller cannot be found in contempt for failing to pay the amounts ordered. Were this court to reinstate the November Order, it would call into question this bedrock principle protecting state employees from judicial overreach.

E. <u>The statutes cited by 10 November 2021 Order do not supply a remedy to the Plaintiffs</u>.

To require the collection of this judgment the trial court, at the urging of the Plaintiffs, based its legal reasoning decision on two statutes to create a structure where court orders could be directly funded without an appropriation. Assuming *arguendo*, the statutes created a waiver of sovereign immunity, the mechanics of their operation are very different than the trial court or parties imagined.

In enacting N.C. Gen. Stat. § 143C-6-4(b)(2)(a) and N.C. Gen. Stat. § 143C-6-4(b1), the Legislature created a structure to comply with court orders and other extraordinary events where funds from appropriations could be expended. The 10 November order misapplied these statutes in violation of the State Constitution, and the statutes and administrative procedures implementing these statutes which provide for shifting already appropriated agency funds to pay for court ordered payments by a state agency.

The operation of the statute can be described as follows. "In the event plaintiff is successful in establishing his claim against the State, he cannot, of course, obtain execution to enforce the judgment." *Smith v. State*, 289 N.C. 303, 321, 222 S.E.2d 412, 424 (1976). The statutory exception occurs within the context of an appropriation act. The statute recognizes court ordered

judgments are normally paid by appropriation; however, state agency funding sources may be adjusted to revise authorized budget levels to comply with "extraordinary events" such as to comply with a court's order. N.C.G.S. § 143C-6-4. In doing so existing funds of an agency can be moved from one line item to another within a certified budget under very limited conditions. *Id.* These conditions are set forth in the statute, and the size and the scope of the funds ordered here would clearly not apply.

However, the precise language of the manner in which the funds may be authorized in an emergency did not speak to the manner in which the Budget Director and the Office of State Controller work under normal circumstances. For example, Judge Robinson had at his disposal information which changed the circumstances within which Judge Lee's order was made. Specifically, the Controller, (R p 2055), the State Budget Officer, (R p 2014), and the Director of Fiscal Research, (R p 2331), explained the process by which an appropriation act is implemented in these offices in the Record. This information was not available to Judge Lee because the 2021 Appropriations Act had not been passed as of 10 November. For example, based upon the procedures cited in the statute the "consultation" required to be undertaken by the Controller and Budget Director would have required them to consult with an agency receiving money from the Order to ask from which of their existing other programs it

would want this money withdrawn. The order itself was nonsensical based upon the language of the statute.

Should the offending section of the 11 November Order be reinstated, the problems it would create for those in charge of implementing the Budget Act would multiply. For example from which appropriated fund should the funds be withdrawn? The Courts, the Legislative Budget, the Medicaid Budget? All of these state institutions and programs retain budget balances and the Order was never clear nor was the recourse to which other beneficiaries of the original certified. Budget could appeal for relief. In plain terms money is fungible and limited. Creating a windfall for the education agencies would create a commensurate shortage for other state agencies, institutions and programs. The 11 November Order gave the Office of State Controller no manageable standards under which to make these adjustments with respect to the funds appropriated.

CONCLUSION

For the reasons discussed supra, this Court should affirm the 28 April 2022 decision of the trial court.

Respectfully submitted this 1st day of August, 2022.

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CERTIFICATE OF SERVICE

The undersigned certifies that on August 1, 2022, a copy of the foregoing was served electronically and U.S. Mail on the following:

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ADDENDUM

NORTH CAROLINA: IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

WAKE COUNTY: NO. 98-CVS-14158

NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, et al., Plaintiffs,	)
v.	)
RICHARD H. MOORE, State Treasurer; et al., Defendants.	)

MEMORANDUM OF DECISION AND JUDGMENT

THIS MATTER came on for hearing before the undersigned Judge of Superior Court on December 12, 2007, and February 29, 2008, in the Wake County Superior Court, upon plaintiffs' Motion for Entry of Judgment. Plaintiffs were represented by Michael Crowell, of counsel to the firm Tharrington Smith, LLP, and the defendants were represented by Grayson Kelley, Senior Deputy Attorney General, and W. Dale Talbert, Special Deputy Attorney General, of the Attorney General's office. After considering the briefs submitted by both sides and hearing and considering the arguments of counsel, the Court determines that the time has come to enter judgment in this matter.

Factual and Procedural Background

This case is before the Superior Court upon remand from the North Carolina Supreme Court to enter judgment consistent with its decision of July 1, 2005, *N.C. Schools Bds. Ass'n v. Moore*, 359 N.C. 474 (2005). In that decision the Supreme Court held that under

Article IX, Section 7 of the North Carolina Constitution the public schools are entitled to the clear proceeds of specific civil penalties collected by various state agencies, including the Department of Revenue, Department of Transportation, the campuses of the University of North Carolina, the Department of Commerce, the Employment Security Commission, state-owned mental institutions in the Department of Health and Human Services, and the Department of Environment and Natural Resources. Following the Supreme Court decision, the affected agencies began paying the proceeds of such penalties into the Civil Penalties and Forfeitures Fund, leaving for consideration of this Court the disposition of the clear proceeds of civil penalties collected, but not paid, to the public schools before that date.

This civil action was initially filed in December 1998 and, as decided by the Supreme Court, is subject to a three-year statute of limitations. Consequently, only the penalties collected from December 1995 to June 30, 2005, are at issue on remand. To simplify matters, the parties have agreed that any calculations and the judgment should be based on civil penalties collected between January 1, 1996, and June 30, 2005.

Pursuant to prior order of this Court, the defendants have estimated the amounts of the civil penalties collected by them from January 1, 1996, to June 30, 2005, subject to the Supreme Court's decision and not paid to the public schools. While the exact dollar amount cannot be known because the agencies' records do not always distinguish between penalties and other collections, the parties have agreed to proceed on the basis that slightly less than $768 million in civil penalties were collected by the affected agencies and not paid to the public schools. Of that total, an estimated $585,741,703 was collected by the Department of Revenue, $114,881,690 by the Department of Transportation, $47,076,647 by the campuses of the University of North Carolina, $20,019,408 by the Employment Security Commission, $11,560 by the Department of Commerce, $59,950 by state-owned mental institutions within the Department of Health and Human Services, and $23,090 by the Department of Environment and Natural Resources (these being penalties assessed against school systems that should have gone to the Civil Penalty and Forfeiture Fund rather than to DENR).

The Civil Penalty and Forfeiture Fund – G.S. 115C- 457.1

Following the Supreme Court's 1996 decision in *Craven Cty. Bd. of Educ. v. Boyles*, 343 N.C. 87 (1996), that certain civil penalties collected by state agencies should go to the public schools, the General Assembly created the Civil Penalty and Forfeiture Fund in G.S. 115C-457.1 *et seq.* and provided that the clear proceeds of all civil penalties collected by state agencies should be paid into the fund and then appropriated to the individual public school units on a per pupil basis. The legislature also declared that such funds should be used exclusively for technology. The same legislation provided that the agencies could withhold the actual costs of collection of the penalties but only up to a maximum of ten percent of the amount collected. The fund took effect September 1, 1997. Accordingly, had the defendant agencies in this lawsuit complied with Article IX, Section 7 of the Constitution the civil penalties collected by them from September 1, 1997, through June 30, 2005, would have been paid into the Civil Penalty and Forfeiture Fund and, pursuant to the mandate of G.S. 115C-457.1, been provided to the public schools to be used for technology.

The $768 million used above represents the total dollar amount of civil penalties collected by the affected agencies from January 1, 1996, through June 30, 2005. Under Article IX, Section 7 the public schools were entitled not to the full amount of the penalties collected but only to the clear proceeds. During that time, the costs of collection which could be retained by the agencies were capped at ten percent. The defendant agencies do not have records to establish the actual costs of collection for the years in question. In the last two years, however, the agencies, under instruction of the Office of State Budget Management have prepared estimates of their actual costs of collection and they argue that the costs for earlier years likely were about the same. In most instances the current actual costs of collection exceed ten percent of the penalties. The Department of Transportation, however, estimates its costs at 9.41 percent and the Department of Revenue estimates that its actual costs of collection are no more than .04 percent. (The actual cost of collecting penalties is certainly lower in that the .04 percent estimate includes the costs for collection of all unpaid taxes and interest as well as penalties.

Plaintiffs nevertheless have consented to the use of the .04 percent figure.) No estimates of the costs of collection were provided by the Employment Security Commission or the Department of Commerce.

Based on the best information available, and with the agreement of the parties, the Court finds that the amounts that should have been paid by the affected agencies to the public schools from January 1, 1996, through June 30, 2005, are ten percent less than the agencies' total collections for all agencies other than the Department of Transportation and Department of Revenue. The Court further finds that the amount that should have been paid by the Department of Transportation is 9.41 percent less than the total civil penalties collected by the department, and that the amount that should have been paid by the Department of Revenue is .04 percent less than the total civil penalties collected by the department. The plaintiffs and the Court, thus, have accepted the highest estimates provided by the agencies for the costs of collection, and for the Employment Security Commission and Department of Commerce the Court has allowed the retention of ten percent of the total amounts collected even though those agencies provided no information about their actual costs.

After the costs of collection are subtracted, the amounts of civil penalties collected by the affected agencies that should have been paid to the Civil Penalty and Forfeiture Fund but were not, are as follows: Department of Revenue $583,340,162; Department of Transportation $104,071,323; UNC campuses $42,368,982; Employment Security Commission $18,017,467; state-owned mental institutions $53,955; Department of Commerce $10,404; Department of Environment and Natural Resources $20,781. The total amount of the clear proceeds due from all the agencies is $747,883,074.

There is no question that civil penalties collected by the affected agencies from September 1, 1997, through June 30, 2005, should have been paid to the Civil Penalty and Forfeiture Fund and that the appropriate remedy for this Court to order is that the penalties improperly retained by the agencies, minus the costs of collection as described above, be paid into the fund. The defendants argue, however, that civil penalties collected by the agencies between January 1, 1996, and August 31, 1997, should go directly to the boards

of education for the counties in which the penalties were collected, and further that only boards which are named plaintiffs in this action may share in those proceeds. It appears that approximately $91.5 million of the total $768 million in civil penalties collected from January 1996 through June 2005 was collected during the period of January 1, 1996, to August 31, 1997.

In making their argument about the pre-September 1, 1997, civil penalties the defendants misconstrue the Supreme Court's decision in the *Craven County* case in 1996 as having affirmatively decided that all penalties collected before the enactment of G.S. 115C-457.1 *et seq.* were to go to the individual counties. As the decision of July 1, 2005, in this case shows, though, the Supreme Court did not view Article IX, Section 7 in that manner. In upholding the General Assembly's authority to create the Civil Penalty and Forfeiture Fund the Court rejected the argument that civil penalties had to go to counties where collected, an argument based on the constitutional language that penalties "shall belong to and remain in the several counties . . . ."

The Supreme Court decided instead that "the use of the phrase 'several counties' suggests that the drafters intended that the funds not stay in one particular county, but rather in the 'several counties' of the State of North Carolina." This Court is bound by the Supreme Court's construction of Article IX, Section 7 and therefore concludes as a matter of law that the civil penalties collected before September 1, 1997, and not paid according to the law existing before September 1, 1997 (the effective date of the Civil Penalty and Forfeiture Fund) are to be shared among the several counties of the state rather than be paid only to the counties of collection. Reduced to essentials, those monies that were not paid according to then existing law, are to be paid into the Civil Penalty and Forfeiture Fund and distributed according to G.S. 115C-457.1. The Court, in making this determination, does so with the full knowledge that Article IX, Section 7 of the North Carolina Constitution was amended effective January 1, 2005, which amendment provided in pertinent part as follows:

(b) The General Assembly may place in a State fund the clear proceeds of all civil penalties, forfeitures and fines which are collected by State agencies and which

belong to the public schools pursuant to subsection (a) of this section. Moneys in such State fund shall be faithfully appropriated by the General Assembly on a per pupil basis, to the counties, to be used exclusively for maintaining free public schools.

As a practical matter, directing the pre-September 1, 1997, civil penalties to the Civil Penalty and Forfeiture Fund be shared by all the school systems in the state is the only reasonable alternative and is in line with the procedure authorized by the Constitutional Amendment to Article IX, Section 7 effective January 1, 2005. Since this case was remanded a number of additional local boards of education have intervened so that the named plaintiffs now include almost all the larger school systems in the state and almost all the school districts which have UNC campuses or have Department of Transportation vehicle weigh stations. Moreover, defendants have acknowledged the difficulty and expense of trying to determine in 2008 where penalties were collected in 1996. The administrative costs of such a venture would be a waste of time and money and the Court fails to see where the end result would be a precise and accurate one, if undertaken. When difficulties arise in determining where penalties are collected the most common sense and equitable solution is for the penalties to go to a central fund and be shared based on student enrollment (ADM), as directed by the General Assembly in its wisdom when it created the Civil Penalty and Forfeiture Fund in 1996.

Having determined the foregoing issues, it now is appropriate for this Court to enter judgment on remand as directed by the Supreme Court. The Court wishes this case had not reached this point. The Court has encouraged negotiations between the plaintiffs and the Legislative and Executive branches because in the end the issue is whether the legislature will appropriate funds to make up for the resources which were required to go to the public schools under Article IX, Section 7 of the Constitution but which were diverted to other purposes by the defendants. In these proceedings the plaintiffs often have expressed their willingness to settle on a lesser amount than the total which was improperly withheld from the schools from 1996 to 2005. The plaintiffs have been exceptionally patient in pressing their claim for relief for moneys that clearly were owed to

them over a long period of time. Indeed, the issue of whether the constitution requires civil penalties to go to the public schools was decided in the *Craven County* case in 1996 and most of the present lawsuit should not have been necessary. To date, however, it appears that the parties have not been willing to reach a mutually agreeable resolution. That being the case, the Court has no remaining option other than to enter judgment in favor of the plaintiffs pursuant to the decision of the North Carolina Supreme Court. At this point, the plaintiffs have been successful in establishing their claim against the State defendants for diverting funds that were required to be paid to them under the Constitution, Article IX, Section 7; and the Court and the parties have determined the amount of funds that had been diverted/withheld from the Civil Penalty and Forfeiture Fund within the applicable period of the statute of limitations, less the clear proceeds. Accordingly, judgment should now be entered for the reasons and in the amounts hereafter set forth:

DECISION

Determination of the Amount of "Clear Proceeds"

Pursuant to the Supreme Court's decision of July 1, 2005, the public schools are entitled to the clear proceeds of the civil penalties identified in that opinion and collected by defendants Department of Revenue, Department of Transportation, University of North Carolina campuses, Department of Commerce, Employment Security Commission, state-owned mental institutions of the Department of Health and Human Services, and Department of Natural and Economic Resources from January 1, 1996, through June 30, 2005.

The total of such penalties is $767,814,048. The total per agency is $585,741,703 from the Department of Revenue; $114,881,690 from the Department of Transportation; $47,076,647 from the campuses of the University of North Carolina; $20,019,408 from the Employment Security Commission; $59,950 from the state-owned mental institutions; $11,560 from the Department of Commerce; and $23,090 from the Department of Environment and Natural Resources. Defendants are entitled to retain from such civil penalties the actual costs of collection up to a maximum of ten percent of the penalties. The amounts then remaining after the actual costs of collection are the "clear proceeds"

referred to in Article IX, Section 7 of the North Carolina Constitution.

For the Department of Revenue, the actual cost of collection of the civil penalties is .04 percent of the penalties. For the Department of Transportation, the actual cost of collection is 9.41 percent of the penalties. For all the remaining agencies, the actual cost of collection is ten percent or more of the penalties and, therefore, the costs of collection to be retained by the agencies are limited to ten percent. After the costs of collection are subtracted, the clear proceeds of the civil penalties collected by the defendant agencies from January 1, 1996, through June 30, 2005, are **$747,883,074**. The amounts per individual agencies are as follows: Department of Revenue $583,340,162; Department of Transportation $104,071,323; UNC campuses $42,368,982; Employment Security Commission $18,017,467; state-owned mental institutions $53,955; Department of Commerce $10,404; Department of Environment and Natural Resources $20,781.

The Court concludes as a matter of law, based upon the decision of the North Carolina Supreme Court in this case on July 1, 2005 and Article IX, Section 7 of the Constitution of North Carolina and the $747,883,074 in clear proceeds of civil penalties collected by the defendant state agencies from January 1, 1996, through June 30, 2005, belong to and should be paid to the public schools of the state by payment to the Civil Penalty and Forfeiture Fund established by the General Assembly in G.S. 115C-457.1 and that judgment should be entered against the defendants reflecting this determination.

A judgment is the final determination of the rights of the parties and in formulating its judgment "the Court is required to recognize both the legal and equitable rights of the parties, and to frame *the judgment* so as to determine all of the rights of the parties, as well equitable as legal." *Hutchinson v. Smith*, 68 N.C. 354 (1873). The Court's inherent constitutional power includes the authority to craft an appropriate remedy for a constitutional violation. *In re Alamance County Court Facilities*, 329 N.C. 84 (1991). The remedy for a constitutional violation depends on the facts of each case, but the trial court at a minimum should attempt to reinstate the plaintiffs to their prior status or a comparable status so that they are made whole. *Corum v. University of North Carolina*, 330 N.C. 761, 784, *cert. denied*, 506 U.S. 985 (1992). In doing so, the trial court "must minimize the

encroachment upon other branches of government — in appearance and in fact — by seeking the least intrusive remedy available and necessary to right the wrong." *Id.*; *Leandro v. State*, 346 N.C. 336, 357 (1997). However, "when the State fails to live up to its constitutional duties, a court is empowered to order the deficiency remedied; and if the offending branch of government or its agents either fail to do so or have consistently shown an inability to do so, a court is empowered to provide relief by imposing a specific remedy and instructing the recalcitrant state actors to implement it." *Hoke Cty. Bd. of Educ. v. State*, 358 N.C. 605, 642 (2004).

Notwithstanding the foregoing, the ultimate remedy in this case boils down simply to money and the Court has no authority to appropriate money from the State Treasury despite the constitutional violation which has occurred and been judicially determined by the Supreme Court of North Carolina in this case. The Supreme Court, in *Smith v. State, 289 N.C. 303 (1976)* stated:

> ***In the event plaintiff (a state employee whose contract with the State had been allegedly breached) is successful in establishing his claim against the State, he cannot, of course, obtain execution to enforce the judgment. (citations omitted) 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 General Assembly discharges its constitutional duties. 321, supra. (emphasis added).***

As of this time, the validity of the plaintiffs' claims has been judicially ascertained and the amount of funds that should have been paid to the public schools pursuant to Article IX, Section 7 of the North Carolina Constitution has been judicially determined.

A monetary Judgment in those amounts against the defendants is the appropriate remedy in this case. However, as the Supreme Court held in *Smith v. State, supra.* the satisfaction of the monetary judgment will depend "upon the manner in which the General Assembly discharges its constitutional duties." *Smith, 321.* This Court and the North Carolina Supreme Court have performed their function to the limit of their constitutional powers.

As a result, the ultimate responsibility for the satisfaction of this judgment will depend on the manner in which the General Assembly discharges its constitutional duties. Because of this constitutional separation of power, this Court can do no more than enter the judgment. The remaining chapter in this case, at least at this point, is in the hands of the General Assembly. Here's why.

The Court recognizes that although the defendants are the parties who must be ordered to pay into the Civil Penalty and Forfeiture Fund the moneys that should have been paid to the public schools but were improperly retained by the agencies for their own use, ultimately it is the General Assembly that will decide whether to appropriate sufficient funds to those agencies to allow them to make the required payments without disrupting their ongoing operations. The Court also recognizes that the General Assembly has final responsibility for state appropriations to the public schools and can use that power to determine the net benefit the schools derive from this judgment.

However, because of the constitutional limitations and the separation of power between the judicial, legislative and executive branches of government, the Court does not have the authority to direct the manner and means by which the judgment is to be satisfied or the amount of time in which it is done. Satisfaction will depend on the manner in which the General Assembly elects to carry out is constitutional duty. On a final point, the Court concludes as a matter of law that the plaintiffs are not entitled to receive interest on the amounts of the clear proceeds which should have been but were not paid to the Civil Penalty and Forfeiture Fund from January 1, 1996, to June 30, 2005.

IT IS, THEREFORE, ORDERED ADJUDGED AND DECREED that:

1. Defendant Department of Health and Human Services owes $53,955.00, which amount should have been paid into the Civil Penalty and Forfeiture Fund for distribution to the public schools pursuant to G.S. 115C- 457.1 and Article IX, Section 7 of the North Carolina Constitution, and judgment is hereby entered against the Defendant Department of Health and Human Services in the amount of $53,955.00.

2. Defendant Department of Commerce owes $11,560.00, which amount

should have been paid into the Civil Penalty and Forfeiture Fund for distribution to the public schools pursuant to G.S. 115C-457.1 and Article IX, Section 7 of the North Carolina Constitution, and judgment is hereby entered against the Defendant Department of Commerce in the amount of $11,560.00.

3. Defendant Department of Environment and Natural Resources owes $20,781.00, which amount should have been paid into the Civil Penalty and Forfeiture Fund for distribution to the public schools pursuant to G.S. 115C-457.1 and Article IX, Section 7 of the North Carolina Constitution, and judgment is hereby entered against the Defendant Department of Environment and Natural Services in the amount of $20,781.00.

4. Defendant Department of Revenue owes $583,340,162.00, which amount should have been paid into the Civil Penalty and Forfeiture Fund for distribution to the public schools pursuant to G.S. 115C-457.1 and Article IX, Section 7 of the North Carolina Constitution, and judgment is hereby entered against the Defendant Department of Revenue in the amount of $583,340,162.00.

5. Defendant Department of Transportation owes $104,071,323.00, which amount should have been paid into the Civil Penalty and Forfeiture Fund for distribution to the public schools pursuant to G.S. 115C-457.1 and Article IX, Section 7 of the North Carolina Constitution, and judgment is hereby entered against the Defendant Department of Transportation in the amount of $104,071,323.00.

6. Defendant University of North Carolina owes $42,368,982.00, which amount should have been paid into the Civil Penalty and Forfeiture Fund for distribution to the public schools pursuant to G.S. 115C-457.1 and Article IX, Section 7 of the North Carolina Constitution, and judgment is hereby entered against the Defendant University of North Carolina in the amount of $42,368,982.00.

7. Defendant Employment Security Commission owes $20,019,408.00, which amount should have been paid into the Civil Penalty and Forfeiture Fund for distribution to the public schools pursuant to G.S. 115C-457.1 and Article IX, Section

7 of the North Carolina Constitution, and judgment is hereby entered against the Defendant Employment Security Commission in the amount of $20,019,408.00.

8. Moneys paid into the Civil Penalty and Forfeiture Fund pursuant to this judgment shall be treated as the General Assembly mandated in G.S. 115C- 457.3 before its amendment in 2007 and before the amendment to Article IX, Section 7 of the North Carolina Constitution, effective January 1, 2005.

9. This Court retains jurisdiction over this matter, including, but not limited to, any pending issues relating to plaintiffs' motion for attorney's fees

This 8th day of August, 2008.

Howard E. Manning, Jr.
Superior Court Judge