No. 425A21-2 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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HOKE COUNTY BOARD OF EDUCATION; et al., Plaintiffs, and CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, Plaintiff-Intervenor, and RAFAEL PENN, CHARLOTTE-MECKLENBURG BRANCH OF THE STATE CONFERENCE OF THE NAACP *et al.*, Plaintiffs-Intervenors, v. STATE OF NORTH CAROLINA and the STATE BOARD OF EDUCATION, Defendants-Appellees, 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 Wake County No. P21-511

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SUPREME COURT OF NORTH CAROLINA

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Intervenor-Defendants.

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PLAINTIFF-INTERVENORS' APPELLEE BRIEF

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INTRODUCTION

This is no ordinary case. It is a case that demands a remedy consistent with the judiciary's duties and powers to right constitutional wrongs. That wrong here is a violation of a constitutional right that this Court has deemed *paramount* and *fundamental*. It is a violation of an *affirmative* constitutional obligation due from the Defendants State of North Carolina and State Board of Education (collectively, "State Defendants") to ensure all children—including Penn-Intervenor children—have the opportunity for a sound basic education. It is a *continuing* violation that has spanned at least 17 years and remains without a remedy, as the harms have mounted with each class passing through the halls in dismal, inadequate learning conditions—conditions even worse for the state's at-risk students. It is a violation identified by the judiciary, but on which the trial court has *deferred again and again* to the executive and legislative branches to present a remedy to no avail, until 2021.

In 2021, the State finally presented to the trial court a comprehensive remedial plan, based on the extensive record in this case, to ensure a sound

basic education and resolve the constitutional violation. The parties consented to that plan and the trial court approved it. But that plan requires appropriate resources from the State for full implementation. When that long-overdue remedy was presented to Intervenor-Defendants House Speaker Tim Moore and Senate President Pro Tempore Philip Berger ("Intervenor-Defendants") along with the General Assembly, they balked—yet again. They passed a half-measure budget that funded just a portion of the costs for implementing State Defendants' own remedial plan intended to resolve the constitutional crisis.

Intervenor-Defendants are not stopping there. As their brief suggests, they are willing to discard altogether the Separation of Powers doctrine and the doctrine of judicial review—no matter how thin the basis therefor—to avoid fulfilling their constitutional duty and responsibility to the children of North Carolina. Such extraordinary facts demand an extraordinary measure.

Under these unique circumstances, the judiciary is well within its authority—in fact, it is its duty—to ensure a remedy reaches the students of North Carolina. Facts such as these do not frequently present themselves before the Court, and action to resolve the unique harm presented in this case will not open the floodgates for such regular relief in other cases. On the other hand, if this Court fails to affirm the trial court's action, the General Assembly will be emboldened to repeat its failure to fulfill its constitutional duty, in stark contrast to the will of the people expressed in the Constitution. This Court thus

must affirm the trial court's 10 November 2021 Order transferring the funds necessary to fund the plan and its 26 April 2022 Order adjusting the transfer amount in the light of the subsequently passed budget act.

STATEMENT OF FACTS[1]

This case commenced in 1994. For over two decades, the plaintiff parties presented substantial evidence to the trial court demonstrating serious, constitutional deprivations of a sound basic education in schools located across the state. That evidence was built upon years of the State's unfunded, broken promises and discreet, partial programs that were highly ineffective in remedying the wrongs that this Court and the trial court identified. The Comprehensive Remedial Plan (the "CRP"), which the State Defendants designed and proposed in 2021, potentially signaled a final turn of events. But that, too, remains aspirational at best without the resources needed to fully implement it. Accordingly, left with no other option to protect the constitutional rights of North Carolina's school children, the trial court ordered state authorities to transfer the funds necessary to fund the CRP.

[1] Penn-Intervenors incorporate by reference the facts stated in their Opening Brief, ECF No. 20, and further state the following facts.

I. The State's Duty to Provide the Opportunity for a Sound Basic Education

The North Carolina Constitution provides, "The people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right." N.C. CONST. art. I, § 15. In *Leandro I*, this Court unanimously decreed that the right "to receive a sound basic education in our public schools" is a "qualitative" right. *Leandro v. State*, 346 N.C. 336, 345, 347, 488 S.E.2d 249, 254, 255 (1997) ("*Leandro I*"). It defined a "sound basic education" as

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

Id. at 347, 488 S.E.2d at 255. It remanded this case to the trial court to determine whether the State was upholding its constitutional duty to provide such an education. *Id.* at 357, 488 S.E.2d at 261. The Chief Justice also designated this case as "exceptional" in remanding the case. *Hoke Cnty. Bd. of Educ. v. State*, 358 N.C. 605, 612, 599 S.E.2d 365, 375 (2004) ("*Leandro II*").

II. The Trial Court Finds At-Risk Children Are Being Denied a Sound Basic Education Statewide

Following *Leandro I*, the trial court dutifully undertook its mandate to "make[] findings and conclusions from competent evidence to the effect that defendants in this case are denying children of the state a sound basic education." *Leandro I*, 346 N.C. at 357, 488 S.E.2d at 261. The trial took place over the course of fourteen months, with over fifty boxes of exhibits and transcripts, and a decision exceeding 400 pages. *Leandro II*, 358 N.C. at 610, 599 S.E.2d at 373.

Ultimately, in 2002, the trial court concluded, in part, "that the at-risk children in North Carolina were not obtaining a sound basic education and that the reason appeared to be the lack of a coordinated, effective educational strategy for at-risk children *statewide*."[2] (R p 575 (emphasis added)). Moreover, it found that "children . . . throughout North Carolina . . . are at-risk of academic failure and not receiving an equal opportunity to a sound basic education because the State . . . is not providing the minimum necessary education resources." (R p 673). These children, "whose constitutional rights

[2] An "at-risk" student is one who holds or demonstrates at least one of the following characteristics: "(1) member of a low-income family; (2) participate[s] in free or reduced-cost lunch programs; (3) [has] parents with a low-level education; (4) show[s] limited proficiency in English; (5) [is] a member of a racial or ethnic minority group; (6) live[s] in a home headed by a single parent or guardian." *Leandro II*, 358 N.C. at 636 n.16, 599 S.E.2d at 389 n.16.

[were] being violated," were "scattered throughout the State." (R pp 673–74). State Defendants did not challenge the trial court's findings as to the statewide nature of the violation. Rather, State Defendants, through the Governor, voluntarily established a task force to examine its statewide delivery of the opportunity for a sound basic education. (R p 591).

With regard to the evidence at trial, "[b]ecause of the sheer size and complexity of dealing with evidence relating" to the multiple named plaintiff school districts, the trial court received evidence primarily but not exclusively from one low-wealth school district. The trial court stated that it was "clear that the same issues affecting each small district [were] similar. . . ." (R p 245). All parties agreed that the representative low-wealth district would be Hoke County. (R p 245).

On appeal, the Supreme Court focused on the findings and orders relating to Hoke County students, and ultimately affirmed, in part, in *Leandro II,* 358 N.C. at 613, 599 S.E.2d at 375. With respect to other named plaintiffs, in *Leandro II*, the Supreme Court ordered that their cases "should proceed, as necessary, in a fashion that is consistent with the tenets outlined in this opinion." *Id.* at 648, 599 S.E.2d at 397.

III. *Leandro II* and Its Broad Remand

In *Leandro II*, the Supreme Court affirmed that "there has been a clear showing of a denial of the established right of Hoke County students to gain

their opportunity for a sound basic education." *Id.* at 638, 599 S.E.2d at 391. But it also recognized "the necessity that the State step forward, boldly and decisively, to see that *all children*, without regard to their socio-economic circumstances, have an educational opportunity and experience that not only meet the constitutional mandates set forth in *Leandro*, but fulfill the dreams and aspirations of the founders of our state and nation." *Id.* at 649, 599 S.E.2d at 397 (emphasis added).

The Court warned that the legislative and executive branches' "authority to establish and maintain a public school system that ensures all the state's children will be given their chance" to obtain a constitutionally compliant education would not go unchecked by the judicial branch. *Id.* at 645, 599 S.E.2d at 395.

> Certainly, when the State fails to live up to its constitutional duties, a court is empowered to order the deficiency remedied, and if the offending branch of government or its agents either fail to do so or have consistently shown an inability to do so, a court is empowered to provide relief by imposing a specific remedy and instructing the recalcitrant state actors to implement it.

Id. at 642, 599 S.E.2d at 393.

In the end, this Court remanded the case "to the trial court for further proceedings that include, *but are not necessarily limited to*, presentation of relevant evidence by the parties, and findings and conclusions of law by the trial court." *Id.* at 613 n.5, 599 S.E.2d at 375 n.5 (emphasis added).

IV. The Trial Court Uncovers the Full Extent of the Statewide Constitutional Violations and the State's Remedial Failures

On remand, the trial court diligently assumed this responsibility. It received evidence and arguments from the parties on the extent of the State's unconstitutional deprivation of the right to a sound basic education in Hoke County and beyond.

Over the next decade, the trial court considered the evidence before it and gradually uncovered the devastating extent of statewide constitutional violations and the State's failure to implement proposed remedies. For example, the trial court drew the following conclusions in the record:

- In 2005, after reopening the record on the statewide violations due to the State's failure to implement its previously agreed plan, the court acknowledged the State's intention to again provide additional resources, including: expanding teacher supply for hard-to-staff schools, providing full supplemental funding for low-wealth school districts, increasing funding for at-risk students, and assisting low-performing schools with turnaround support. (R p 994–1003). That plan was not fulfilled.

- "[T]he 'high school problem' . . . exists in a great number of high schools throughout North Carolina" and relates "to poor academic performance in those schools." (R p 982 (Order Re: Hearing (Mar. 3, 2005))).

- "[T]here are <u>way too many</u> children coming into high school without having obtained a sound basic education in math and/or reading." (R p 1048 (Memorandum Re: The Middle School Problem (Jun. 19, 2007)) (emphasis in original)).

- "[A]fter focusing on these issues for over a year and talking to multiple educators and groups of educators, it appears to the Court that there are great gaps and disconnects all over the state and in

> our schools and colleges of education with respect to formative assessments and their importance, especially in mathematics instruction throughout all grade levels to an[d] including high school." (R p 1061 (Notice of Hearing and Order Re: Hearing (Jul. 2, 2008))).

- "[P]oor academic performance remains a problem in a host of elementary, middle and high schools throughout North Carolina and as a result, the children in those schools who are blessed with the right to the equal opportunity to obtain a sound basic education as guaranteed by the Constitution and as set out in *Leandro* are being deprived of their constitutional right to that opportunity on a daily basis." (R p 1089 (Notice of Hearing and Order Re: Hearing (Aug. 3, 2009))).

- "The academic results of North Carolina's school children . . . show that there are way too many thousands of school children from kindergarten through the 11th grade in high school who have not obtained the sound basic education mandated and defined above and reaffirmed by the North Carolina Supreme Court[.]" (R p 1232 (Report from the Court Re: The Reading Problem (May 5, 2014))).

The State's failure to address these statewide constitutional violations continued. In its 17 March 2015 order, the court warned State Defendants about their arbitrary efforts to reduce and redefine academic performance requirements that would, in turn, mask academic failures, concluding that the "new" standard was "less than the constitutional standard for grade level achievement . . . as defined in *Leandro*." (R p 1247). The court urged the State actors to instead "face the fact of academic weakness of thousands of children and attack the problem head on to provide the children with an equal opportunity to obtain a sound basic education." (R p 1248). Applying this constitutionally mandated standard, the trial court found that "across the

state, thousands of children in the public schools have failed to obtain, and are not now obtaining a sound basic education as defined by and required by the *Leandro* decisions." (R pp 1244–45). Indeed, statewide standardized test results showed that over half of students in grades three and eight were below grade level in reading, math, and biology. (R p 1245). And, in 348 public schools, fewer than 50% of the students' test scores were at the constitutionally required level. (R pp 1245–46).

As the court stated:

> No matter how many times the [trial court] has issued Notices of Hearings and Orders regarding unacceptable academic performance, and even after the North Carolina Supreme Court plainly stated that the mandates of *Leandro* remain 'in full force and effect' many adults involved in education . . . still seem unable to understand that **the constitutional right to have an equal opportunity to obtain a sound basic education is a right vested in <u>each and every child</u> in North Carolina regardless of their respective age or educational needs.**

(R p 1248 (emphasis in original)).

Accordingly, the trial court ordered the State to "propose a definite plan of action as to how [it] intends to correct the educational deficiencies in the student population." (R p 1246). No party appealed this order.

V. The State Finally Presents a Qualitative Plan to Remedy the Statewide Constitutional Violation

Over the next three years, the trial court received evidence in multiple evidentiary hearings concerning the State's plans and initiatives to uphold its

constitutional duty to provide its students with the opportunity for a sound basic education. In 2017, the Governor established the Governor's Commission on Access to Sound Basic Education, "to gather information and evidence to assist in the development of a comprehensive plan to address compliance with the constitutional mandates that have been articulated in this case." (R p 1295).

Later that year, Defendant State Board of Education ("SBE") moved for relief from judgment, attaching a plethora of documents, including "legislative changes," in support of its contention that the circumstances of the educational system had changed such that "there is no longer a justiciable controversy before the court." (R pp 1280–86, 1302). The trial court denied the motion on 7 March 2018, finding that "the SBE has failed to present convincing evidence that either the *impact or effect* of" its claimed "changes and reforms have moved the State nearer to providing children the fundamental right guaranteed by our State Constitution." (R p 1302 (emphasis in original)).

In declining to dismiss the case, the court found "an ongoing constitutional violation of every child's right to receive the opportunity for a sound basic education. This court not only has the *power* to hear and enter appropriate orders declaratory and remedial in nature, but also has a *duty* to address this violation." (R p 1305 (relying on low test scores, unmet demand for teachers, school employee turnover, and loss of critical funding to conclude

that "at no time" did the evidence "demonstrate[] even remote compliance with the [tenets] of *Leandro*") (emphasis in original); *see also* N.C. Gen. Stat. § 7A-245(a)(4)). It further warned, "The time is drawing nigh . . . when due deference to both the legislative and executive branches of government must yield to the court's duty to adequately safeguard and actively enforce the constitutional mandate on which this case is premised." (R p 1306 n.1). No party appealed this order.

Consequently, the trial court ordered the parties to identify an independent, third-party consultant to assist the court in evaluating the State's public education system and making detailed recommendations for specific actions necessary to achieve compliance. (R p 1826). The parties agreed to recommend WestEd as this consultant (R p 1826), and the court approved. (R p 1299). In support of its work, WestEd also engaged the Friday Institute for Educational Innovation at North Carolina State University and the Learning Policy Institute (LPI), a national education policy and research organization with extensive experience in North Carolina. (R p 1826). No party appealed this order.[3]

[3] On 25 June 2018, the trial court clarified that its intent was for "each party [to] be provided an equal and meaningful opportunity to review, comment on, and be fully heard on WestEd's Final Report" and, "upon such hearing, each party may offer such other or further evidence as that party deems appropriate."(R p 1325).

WestEd's ultimate "findings and recommendations [were] rooted in an unprecedented body of research and analysis[.]" (R p 1634). Among its methods employed, it engaged 1270 educators (*i.e.*, superintendents, assistant superintendents, principals, teachers, school support staff, and central office staff) and over 60 other education stakeholders (including community leaders, elected officials, DPI staff, members of local education associations, parents, state commission members, philanthropists, representatives of higher education, and SBE members). (R p 1349).

In December 2019, WestEd presented its findings in a report that underscored the abysmal educational opportunities provided to school children, and to at-risk students in particular (the "WestEd Report"). The WestEd Report "confirm[ed] what this Court ha[d] previously made clear: that State Defendants have not yet ensured the provision of education that meets the required constitutional standard to all school children in North Carolina." (R p 1634).

Based on the WestEd Report, the Governor's Commission, and an extensive review of the record of the case, the Court declared in its 21 January 2020 Order:

> A definite plan of action for the provision of the constitutional *Leandro* rights must ensure a system of education that at its base includes seven components as described below. The Parties stipulate that the following components are required to implement the *Leandro* tenants as set forth in prior holdings of the Supreme

Court and this Court's prior orders. The Parties further stipulate that these components are necessary to address critical needs in public education and to ensure that the State is providing the opportunity for a sound basic education to ***each*** North Carolina child, and further holds itself accountable for doing so:

1. A system of teacher development and recruitment that ensures each classroom is staffed with a high-quality teacher who is supported with early and ongoing professional learning and provided competitive pay;

2. A system of principal development and recruitment that ensures each school is led by a high-quality principal who is supported with early and ongoing professional learning and provided competitive pay;

3. A finance system that provides adequate, equitable, and predictable funding to school districts and, importantly, adequate resources to address the needs of all North Carolina schools and students, especially at-risk-students as defined by the *Leandro* decisions;

4. An assessment and accountability system that reliably assesses multiple measures of student performance against the *Leandro* standard and provides accountability consistent with the *Leandro* standard;

5. An assistance and turnaround function that provides necessary support to low-performing schools and districts;

6. A system of early education that provides access to high-quality prekindergarten and other early childhood learning opportunities to ensure that all students at-risk of educational failure, regardless of where they live in the State, enter kindergarten on track for school success; and

> 7. An alignment of high school to postsecondary and career expectations, as well as the provision of early postsecondary and workforce learning opportunities, to ensure student readiness to all students in the State.

(R pp 1635–36).

In another display of deference, the trial court allowed State Defendants to draft a proposed plan that addressed each of the aforementioned components that would finally resolve the constitutional crisis. (R p 1827). On 15 June 2020, the State submitted its Year One Plan for Fiscal Year 2021, recognizing also that the COVID-19 pandemic had exacerbated many of the inequities and challenges that are the focus of this case, particularly for at-risk students. (R pp 1669, 1827–28). On 11 September 2020, the trial court ordered State Defendants to implement the Year One Plan and, further, to develop and present a comprehensive remedial plan with the objective of fully satisfying the State's *Leandro* obligations. (R p 1828). The Year One Plan, however, was never fully implemented due to the continuing failure of the General Assembly to provide the necessary resources and the impact of COVID-19. (R p 1828). As a result, "[m]any of those actions that were designated for completion in Fiscal Year 2021 [were] incorporated into the CRP for completion in future fiscal years." (R p 1773).

VI. Constitutional Necessity of the Comprehensive Remedial Plan

In conformity with the 21 January 2020 Order and the 11 September 2020 Order, on 15 March 2021, State Defendants submitted their eight-year CRP to the trial court. State Defendants averred that the CRP was "necessary" to resolve the ongoing deprivation of the constitutional right to a sound basic education that has plagued generations of North Carolina students. (R p 1682). In particular, the CRP addressed each of the seven "critical needs" to provide the opportunity for a *Leandro*-conforming education. The trial court concurred with State Defendants' opinion and "independently reache[d] this conclusion based on the entire record in this case." (R p 1830; *see also* R p 1684). The State further assured the trial court that sufficient funds were available to execute the CRP, including $8 billion in the State's reserve balance and $5 billion in forecasted revenues that exceeded the State's existing base budget. (R p 1831).

The CRP was the only viable plan that the State presented in response to the trial court's numerous orders and that would finally remedy its denial of a sound basic education. (R p 1831). As the court noted, "[there is] no alternative remedial plan" and "time is of the essence," as hundreds of thousands of North Carolina students continue to pass, unacceptably, through a constitutionally deficient education system. (R pp 1832, 1840). As such, on 11 June 2021, the trial court ordered that "the [CRP] shall be implemented in full and in accordance with the timelines set forth therein." (R p 1684).

Intervenor-Defendants conceded during the 13 April 2022 hearing on remand that they were aware of the 11 June 2021 Order when it was entered. (Tr. 93:11-14, *Hoke Cnty. Bd. of Educ. et al. v. State et al.*, No. 95-CVS-1158 (Apr. 13, 2022)). Indeed, they had issued press releases throughout the spring and summer of 2021 criticizing the trial court's attempts to obtain a remedy to ongoing constitutional violations. *See* Argument Part III.B. (discussing news articles and public press releases in which Intervenor-Defendants acknowledged the 11 June 2021 Order upon its entry). Nonetheless, the Intervenor-Defendants chose not to intervene at that time, just as they had elected not to do so in response to previous court orders. No party appealed the trial court's order.

VII. The Trial Court's Enforcement of the Comprehensive Remedial Plan and This Court's Subsequent Limited Remand

The trial court held two status conferences, in September and October 2021, urging State Defendants to begin implementing the CRP. (R p 1831). However, the General Assembly failed to pass a budget that would fund the CRP "despite significant unspent funds and known constitutional violations." (R p 1833). Thus, as part of its duties and pursuant to its inherent, equitable, and constitutional powers, the judiciary stepped in to uphold the State Constitution. Having granted the legislative and executive branches "every reasonable deference" over the preceding seventeen years, the trial court

concluded that it must act to prevent the constitutional rights of North Carolina's students from being rendered "meaningless." (R pp 1832, 1838). On 10 November 2021, it ordered the Office of State Budget and Management ("OSBM"), the State Treasurer, and the State Controller to transfer $1.75 billion, "the total amount of funds necessary to effectuate Years 2 & 3 [of] the [CRP], from the unappropriated balance within the General Fund to the state agents and . . . actors with fiscal responsibility for implementing" the CRP (the "November Order"). (R p 1841).

Rather than ordering the immediate transfer of the funds, the trial court again deferred to the other branches of government. It stayed the November Order for 30 days "to permit the other branches of government to take further action consistent with the findings and conclusions" of its Order. (R p 1842). But instead of taking action to live up to its constitutional duty while the November Order was stayed, the General Assembly enacted a half measure: it passed the 2021 Appropriations Act (the "Budget Act" or "State Budget"), which only funded a fraction of Years 2 and 3 of the CRP. *See* 2021 N.C. Sess. Laws 180; (R p 2630).

The State Controller then petitioned the Court of Appeals to resolve her purported conflicting obligations pursuant to the November Order and the State Budget. (R p 1888). Following unusual proceedings at the Court of Appeals—from which one judge dissented—the Court granted the writ of

prohibition.[4] (R p 2008). And, in contrast to the rigorous process undertaken in formulating the CRP, there is no evidence that the General Assembly held any public hearings during the budget process in which it heard from educators, experts, parents, school boards, or other stakeholders.

On 7 December 2021, the State Defendants appealed the November Order. (*See* R p 1847). The next day, Intervenor-Defendants intervened and appealed *only* the November Order. (R p 1852). On 14 February 2022, the State petitioned the Supreme Court for discretionary review of the November Order prior to determination by the Court of Appeals. (Order, No. 425A21-2 (N.C. Mar. 21, 2022)).

The Supreme Court granted the State's Petition for Discretionary Review and, alternatively, Petition for Writ of Certiorari on 21 March 2022. *Id.* It also issued a limited remand order, directing 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." *Id.* at 2.

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[4] Judge Arrowood dissented from the majority's order as "incorrect for several reasons." (R p 2009). Specifically, Judge Arrowood wrote that the majority lacked "good cause" to shorten the time for a response, leaving Plaintiff Parties "one day to respond," "without a full briefing schedule, no public calendaring of the case, and no opportunity for arguments on the last day this panel is constituted. This is a classic case of deciding a matter on the merits using a shadow docket of the courts." *Id.*

On remand, in its 26 April 2022 Order (the "April Order"), the trial court concluded that the Budget Act "fails to provide nearly one-half of . . . the total necessary funds. Specifically, the Budget Act funds approximately 63% of the total cost of the programs to be conducted during year 2 and approximately 50% of the total cost of the programs to be conducted during year 3." (R p 2630 ¶ 34). Unfortunately, the trial court did not stop there. Instead, it improperly waded outside of its limited jurisdiction to strike the transfer provisions of the November Order, the constitutional propriety of which was already before the Supreme Court on this appeal. (R pp 2627–28 ¶ 26, 2641 ¶ 58).

VIII. Ongoing Statewide Constitutional Violations[5]

Meanwhile, the deprivation of schoolchildren's constitutional right to the opportunity for a sound basic education persists unabated—especially for at-risk students. As noted below, at-risk students across the state continue to perform at low levels of proficiency on state achievement tests. *See Leandro I*, 346 N.C. at 355, 488 S.E.2d at 259 (noting a sound basic education can be determined, in part, by the level of performance on state standardized tests); *Leandro II*, 358 N.C. at 627, 599 S.E.2d at 384 (noting other pertinent outputs for determining a sound basic education including graduation rates). Many North Carolina students are also not prepared academically "to enable the

[5] The extent of ongoing, statewide, constitutional violations is discussed in more detail in Penn-Intervenors Opening Brief, ECF No. 20.

student to successfully engage in post-secondary education" as required under *Leandro I*, 346 N.C. at 347, 488 S.E.2d at 255.

For example, on State standardized tests, in the 2013–14 school year, 47% of third graders and 42% of eighth graders tested at or above proficiency on reading assessments, and 48% of third graders and 35% of eighth graders tested at or above proficiency in math assessments. (R p 1245). Yet, the most recent assessment results are even grimmer: in the 2020-21 school year, just 34% of third graders and 27% of eighth graders tested at or above proficiency in reading, and only 27% of third graders and 17% of eighth graders scored at or above proficiency in math. NORTH CAROLINA DEPARTMENT OF PUBLIC INSTRUCTION, 2020-21 PERFORMANCE OF NORTH CAROLINA PUBLIC SCHOOLS, ANNUAL TESTING REPORT (SEPTEMBER 1, 2021), STATISTICAL SUMMARY OF RESULTS at 6 (2021), ("DPI Report").[6]

Alarmingly, students identified by the state as "at-risk" are performing even worse: fewer than 5% of Black students in grades three through eight met proficiency in both reading and math; Hispanic students met the proficiency standard at a low rate of only 8.2%. THE NORTH CAROLINA STATE TESTING RESULTS, ALL STUDENT AND SUBGROUP PERFORMANCE 2020-21 at 2 (2021).[7]

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[6] *Available at* https://www.dpi.nc.gov/media/12854/download?attachment.
[7] *Available at* https://www.dpi.nc.gov/media/14611/open

These racial disparities continued into high school, where the percentage of Black and Hispanic students who met proficiency in math assessments was so low that it was not reportable (both < 5%).[8] DPI Report at 24.

Economically disadvantaged students also scored significantly lower on reading and math assessments than their non-economically disadvantaged peers. *See, e.g.*, *id.* at 12. But the widest achievement gap in North Carolina's testing data is the performance of the state's English-language learners. Only 10% of the state's third-grade English learners met proficiency in reading and math, with proficiency rates decreasing as grade levels increased. *Id.* at 12–13. From the fifth grade through high school, fewer than 5.5% of English learners met proficiency on all English and math assessments. *Id.* at 12–14.

Students' scores on the ACT[9] mirrored the racial, socioeconomic, and language-based disparities in state-mandated testing. In order to be eligible for admission into the University of North Carolina ("UNC") system, for example, students must achieve a composite score of at least seventeen. *Id.* For example, fewer than one in three Black students received the qualifying score for UNC admission; the percentage of relatively wealthy students who received

[8] DPI does not report statistics below 5%.
[9] According to the State, ACT results reflect a measure of college readiness. DPI Report at 26.

qualifying scores was 63%, nearly doubling that of economically disadvantaged students (34%); and only 6% of English learners received a qualifying score. *Id.*

These stark results are simply the most recent evidence of a nearly two decades-long, statewide deprivation of school children's constitutional rights. The State of North Carolina cannot afford to keep failing its "most valuable resource": its students. "We cannot similarly imperil even one more class[.]" *Leandro II*, 358 N.C. at 616, 599 S.E.2d at 377. Yet, that cycle continues through Intervenor-Defendants' defiance of court orders.

STANDARD OF REVIEW

Conclusions of law, including on constitutional issues, are reviewed de novo. *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011); *Reg'l Water Auth. v. Sumner Hills Inc.*, 353 N.C. 343, 348, 543 S.E.2d 844, 848 (2001). When reviewing findings of fact, this Court is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982); *see also Sisk v. Transylvania Cmty. Hosp., Inc.*, 364 N.C. 172, 179, 695 S.E.2d 429, 434 (2010) ("'[F]indings of fact made by the trial judge are conclusive on appeal if supported by competent evidence, even if . . . there is evidence to the contrary.'" (quoting *Tillman v. Commercial Credit Loans, Inc.*, 362 N.C. 93, 100–01, 655 S.E.2d 362, 369 (2008))).

"Whether a trial court has subject-matter jurisdiction is a question of law" and is therefore subject to de novo review on appeal. *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010). "A jurisdictional default . . . precludes the appellate court from acting in any manner other than to dismiss the appeal." *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 197, 657 S.E.2d 361, 365 (2008).

"[D]efault under the appellate rules arises primarily from the existence of one or more of the following circumstances: (1) waiver occurring in the trial court; (2) defects in appellate jurisdiction; and (3) violation of nonjurisdictional requirements." *Id.* at 194, 657 S.E.2d at 363. "[W]aiver . . . arises out of a party's failure to properly preserve an issue for appellate review." *Id.* at 194–95, 657 S.E.2d at 363. "[A] party's failure to properly preserve an issue for appellate review ordinarily justifies the appellate court's refusal to consider the issue on appeal." *Id.* at 195–96, 657 S.E.2d at 364.

Parties may not "raise a completely new claim for the first time on appeal." *New Hanover Cnty. Bd. of Educ. v. Stein*, 380 N.C. 94, 114, 868 S.E.2d 5, 19 (2022). "[I]ssues and theories of a case not raised below will not be considered on appeal." *Westminster Homes, Inc. v. Town of Cary Zoning Bd. of Adjustment*, 354 N.C. 298, 309, 554 S.E.2d 634, 641 (2001); *see State v. Hunter,* 305 N.C. 106, 112, 286 S.E.2d 535, 539 (1982) ("[A] constitutional question which is not raised and passed upon in the trial court will not ordinarily be considered on appeal.").

SUMMARY OF THE ARGUMENT

The State has failed to uphold its constitutional duty to provide all school children with the opportunity for a sound basic education. For at least 17 years—since this Court identified this violation in *Leandro II*—the judiciary has deferred to the executive and legislative branches in crafting a remedy for

this failure. Once the State finally submitted a constitutionally adequate plan based on the record, the Comprehensive Remedial Plan ("CRP"), the court merely ordered it implemented. But when the General Assembly failed to provide the resources necessary to implement the CRP, the judiciary ordered the other branches of government to fund the CRP in full, as was its duty.

The trial court had the authority to issue the November Order directing the transfer of funds pursuant to its inherent, equitable, and constitutional powers. It did not violate the Separation of Powers doctrine in doing so. Indeed, after nearly two decades, the judiciary was obligated to check the other branches' ongoing violations of the fundamental constitutional rights of the state's children. The General Assembly, on the other hand, is barred from blocking this necessary remedy after years of politicized recalcitrance.

On narrow remand from this Court to determine the effect of the Budget Act on the November Order, the trial court correctly concluded in the April Order that the Act underfunded the constitutionally necessary CRP. But as discussed in Penn-Intervenors' Opening Brief, ECF No. 20, it waded outside of its jurisdiction to strike the transfer provision. The Court should reject that portion of the April Order. The Court, however, should affirm the November Order's transfer provisions and the portions of the April Order amending the amounts now due in light of the Budget Act.

As for the litany of other issues the Intervenor-Defendants seek to relitigate on this appeal, this Court lacks jurisdiction to review them. Specifically, this Court lacks jurisdiction to review the trial court's orders prior to the November Order. Intervenor-Defendants appealed only the November and April Orders; as such, their notices of appeal confer this Court with jurisdiction to consider only whether the trial court's transfer order was constitutional, which it was. Intervenor-Defendants elected not to intervene and appeal previous orders dating as far back as 2015, finding a statewide constitutional violation, establishing the seven factors necessary to remedy that violation, and holding that the CRP is constitutionally required. They are jurisdictionally barred from raising those claims now.

Even if this Court entertains Intervenor-Defendants' untimely arguments, they fail. The parties consented to litigate the statewide nature of the constitutional violation, and the trial court plainly has jurisdiction to enforce the State's only proposed remedy. That constitutional remedy, and the trial court's attempts to enforce it, are neither political questions nor advisory opinions. And, the only relevancy of the Budget Act is whether it fully funds the *Leandro*-compliant CRP—which by all accounts it does not. This remedy is not the product of a "friendly suit." Rather, it is the culmination of years of adversarial efforts to determine liability and, once that was settled, to confer and reach an agreement to ensure the right to a sound basic education.

ARGUMENT

I. The Trial Court Had Authority to Issue the November Order Directing the Transfer of Funds

The trial court possessed the authority to remedy the ongoing constitutional violations by directing the transfer of funds necessary to implement the CRP. In fact, courts have broad powers to effectuate relief for constitutional injuries. The Separation of Powers Clause in the North Carolina Constitution does not prevent the courts from taking such action; to the contrary, the Constitution expressly forbids the legislative and executive branches from interfering with the judiciary's authority to do so. Throughout the course of this litigation, the judiciary has repeatedly deferred to the other branches of government, while also warning that their violations of the constitutional rights of the state's children would not go unchecked or unimpeded. After over a decade of futile deference, the trial court correctly, and in accordance with binding North Carolina Supreme Court precedent, ordered the State to fund the constitutionally necessary CRP.

A. The Trial Court Has Broad Power to Order the Transfer of Funds to Effectuate the Constitutional Right to a Sound Basic Education

Remedying constitutional violations is an essential function of the judiciary; that duty is heightened where the right is fundamental and the violation is persistent and widespread, as in this case. As such, the judiciary has broad power to fashion appropriate remedies based on the right violated

and the facts of the particular case. Here, the trial court's authority to protect the fundamental right to a sound basic education is three-fold: it has inherent, equitable, and constitutional authority to effectuate that right. As a coequal branch of government, the other branches of government cannot preclude the judiciary from exercising this critical role.

At this point, after years of inaction by its coordinate branches of government, the judiciary "cannot permit the State to continue failing to effectuate the right to a sound basic education guaranteed to the people of North Carolina, nor can it indefinitely wait for the State to act." (R p 1837). "[I]f left unattended," North Carolina will not "meet its vast potential." (R p 1831). Indeed, if this Court absolves itself of the responsibility to uphold this right, "[t]he cost to . . . students individually, and to the State are considerable." (R p 1831). In the twenty-five years since this Court defined the right to a sound basic education in *Leandro I*, the State has continued to come up short. The Court now has the power to order the transfer of funds necessary to implement the singular constitutional remedy.

1. The Judiciary Has Inherent and Equitable Power to Remedy a Constitutional Violation

The trial court possessed the inherent and equitable power to enter the November Order to remedy the constitutional violations that have plagued generations of North Carolina schoolchildren. As one of three separate,

coordinate branches of government, courts possess the inherent power and "authority to do all things that are reasonably necessary for the proper administration of justice." *State v. Buckner*, 351 N.C. 401, 411, 527 S.E.2d 307, 313 (2000); *see also Ex Parte McCown*, 139 N.C. 95, 105–06, 51 S.E. 957, 967–68 (1905) (citing N.C. CONST. art. I, § 4); *In re Alamance Cnty. Court Facilities*, 329 N.C. 84, 94, 405 S.E.2d 125, 129 (1991) (citing *Ex Parte Schenck*, 65 N.C. 353, 355, 1871 N.C. LEXIS 104, 106 (1871)) ("Inherent powers are critical to the court's autonomy and to its functional existence[.]")). "For over a century this Court has recognized such powers as being plenary within the judicial branch—neither limited by our constitution nor subject to abridgement by the legislature." *Alamance*, 329 N.C. at 93, 405 S.E.2d at 129. "In fact, the inherent power of the judicial department is expressly protected by the constitution." *Id.* at 93 (citing N.C. CONST. art. IV § 1 ("The General Assembly shall have no power to deprive the judicial department of any power or jurisdiction that rightfully pertains to it as a co-ordinate department of the government.")); *see Beard v. N. Carolina State Bar,* 320 N.C. 126, 129, 357 S.E.2d 694, 697 (1987) ("The inherent power of the Court has not been limited by our constitution; to the contrary, the constitution protects such power.").

Throughout American jurisprudence, courts have invoked their inherent judicial powers when necessary to protect both constitutional and statutory rights. In *Marbury v. Madison*, the United States Supreme Court famously

held that it is the province of the court to say what is the law, and "that every right, when withheld, must have a remedy, and every injury its proper redress." 5 U.S. 137, 163 (1803).

In accordance with that foundational principle articulated in *Marbury*, the North Carolina Supreme Court has previously recognized that, while appropriations and related actions are generally reserved for the legislative branch, the Court will step in when the "sacred" constitutional rights to a general and uniform education are at stake. In *Hickory v. Catawba Cnty.*, this Court found mandamus proper where county commissioners failed to provide for the maintenance of public schools. 206 N.C. 165, 174, 173 S.E. 56, 17 (1934). Similarly, a few years later, this Court upheld a writ of mandamus compelling the defendant counties, which acted as administrative agencies of the legislature in providing funding for the schools, to assume the indebtedness of a school district within its jurisdiction. *Mebane Graded Sch. Dist. v. Alamance Cnty.*, 211 N.C. 213, 223, 189 S.E. 873, 880 (1937). The Court recognized the State's constitutional duty to provide a general and uniform education as a "*sacred duty* [that] was neglected by the state for long years, for various reasons, chiefly on account of the lack of means." *Id.* at 222, 189 S.E. at 880 (emphasis added). The Court concluded: "Under the facts in this case and the findings of the jury, it would be inequitable and unconscionable for defendants to assume part and not all of the indebtedness of the school districts of

Alamance and not assume the plaintiffs' indebtedness and give them the relief demanded." *Id.*

Similarly, this Court has ordered the State to transfer funds when necessary to protect a *statutory* right. In *White v. Worth*, this Court addressed whether the lower court could order the state auditor and treasurer to pay the state's chief inspector for the oyster industry, whose request for payment of salary and travel expenses was denied. 126 N.C. 570, 36 S.E. 132 (1900). Pursuant to a state law passed in 1897, the plaintiff was appointed chief inspector for a term of four years. *Id.* at 570, 36 S.E. at 132. When the plaintiff requested payment, the state auditor and state treasurer denied the request. *Id.* The plaintiff sought a writ of mandamus against the state auditor and state treasurer, "requiring and compelling" them to pay him. *Id.*

The Court determined that the record and precedent validated the chief inspector's title and found that the plaintiff was "to be paid by the treasurer of the state out of the oyster fund . . . ." *Id.* at 584, 36 S.E. at 136. The Court found the amount of "money in the hands of the treasurer more than sufficient to pay the plaintiff." *Id.* at 584, 36 S.E. at 136. In affirming the issuance of the writ to the state auditor and treasurer, this Court held that "[t]he legislature having general powers of legislation, all these acts must be observed and enforced, unless they conflict with the vested constitutional rights of the plaintiff." *Id.* at 577, 36 S.E. at 133.

More recently, as discussed in further detail below, this Court in *Alamance* addressed whether the Alamance Superior Court's *ex parte* order requiring the Alamance County Commissioners to immediately provide adequate court facilities exceeded judicial authority and violated the Separation of Powers Clause. *Alamance*, 329 N.C. at 91, 405 S.E.2d at 128. Although the Court found that the *ex parte* order failed to provide proper notice to the Commissioners, the Court recognized that an appropriately noticed order to the Commissioners would have sufficed. *Id.* at 91, 405 S.E.2d at 128. The Court recognized that "when inaction by those exercising legislative authority threatens fiscally to undermine the integrity of the judiciary, a court may invoke its inherent power to do what is reasonably necessary for the orderly and efficient exercise of the administration of justice." *Id.* at 99, 405 S.E.2d at 132.

Trial courts have broad discretion to fashion equitable remedies to protect innocent parties when injustice would otherwise result. *See Lankford v. Wright*, 347 N.C. 115, 120, 489 S.E.2d 604, 607 (1997) ("[I]t is the unique role of the courts to fashion equitable remedies to protect and promote the principles of equity . . . ."). This discretion includes the power to "grant, deny, limit, or shape" relief as necessary to achieve equitable results. *Sara Lee Corp. v. Carter,* 351 N.C. 27, 36, 519 S.E.2d 308, 314 (1999) (citation omitted) (holding that the trial court properly exercised its discretion in ordering that

the defendant's workers' compensation benefits be placed in a constructive trust for the benefit of the plaintiff).

For example, the judiciary's broad equitable powers were instrumental as a tool of the federal courts in striking down unconstitutional segregated school systems and, in the process, effectuating orders on issues that ordinarily warranted deference to the judgment of local school and state officials. Indeed, in the second *Brown v. Board of Education* decision, the United States Supreme Court directed the federal district courts to be "guided by equitable principles" in effectuating relief, stating:

> Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. . . . Courts of equity may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner. But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them.

349 U.S. 294, 300 (1955) (emphasis added).

Ten years later, faced with a defiant Virginia legislature that refused to open schools and comply with *Brown*'s desegregation mandates, the Supreme Court authorized the district court to order local officials to not only "reopen, operate and maintain without racial discrimination a public school system" but also to, if necessary, *direct local taxing authorities* to "exercise the power that is theirs to levy taxes to raise funds" to pay for the appropriate operation of the

schools. *Griffin v. County School Board*, 377 U.S. 218, 233 (1964). And closer to home, the U.S. Supreme Court held in the desegregation case of *Swann v. Charlotte-Mecklenburg Board of Education* that, "[o]nce a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." 402 U.S. 1, 15 (1971).

Relatedly, courts have the recognized authority to issue a "legislative injunction" requiring new legislation where there has been persistent and long-standing refusal to comply with a court's remedial order. *See* Robert A. Schapiro, Note, *The Legislative Injunction: A Remedy for Unconstitutional Legislative Inaction*, 99 YALE L.J. 231 (1989) (discussing, *inter alia*, a court-ordered tax increase to fund schools in *Jenkins v. Missouri*, 672 F. Supp. 400, 411 (W.D. Mo. 1987), *aff'd in part, rev'd in part*, 855 F.2d 1295 (8th Cir. 1988), *aff'd in part, rev'd in part*, 495 U.S. 33, 110 S. Ct. 1651 (1990)); *see also* Karla Grossenbacher, Note, *Implementing Structural Injections: Getting a Remedy When Local Officials Resist*, 80 GEO. L.J. 2227 (1992) (discussing, *inter alia*, *Spallone v. United States*, 493 U.S. 265 (1990)). The North Carolina Supreme Court acknowledged this authority in its discussion of the separation of powers doctrine in *Alamance*, recognizing that "incidental powers" (when one branch exercises some activities customarily assigned to another branch) may become necessary "in order to fully and properly discharge its duties." *Alamance*, 329

N.C. at 97, 405 S.E.2d at 131 (citing C. Baar, *Separate But Subservient—Court Budgeting in the American States* 155 (1975)).

As noted above, in *Leandro I* and *II*, the North Carolina Supreme Court repeatedly stated that, if the State failed to meet its constitutional obligations, the judiciary should be prepared to ensure that constitutional violations are addressed. Such remedies pursuant to the above-enumerated powers are not without precedent in North Carolina. In *Stephenson v. Bartlett*, the North Carolina Supreme Court addressed a question of first impression related to a constitutional challenge to state legislative redistricting plans adopted in 2001. Although the Court did not specifically enumerate its holding as based on the courts' equitable power, it recognized a similar principle when determining how to fashion a remedial measure. Having determined that the redistricting plans violated certain provisions of the North Carolina Constitution, the Court remanded with directions for the trial court to ensure that redistricting plans complied with certain legal requirements. 355 N.C. 354, 383, 562 S.E.2d 377, 397 (2002). It acknowledged that the General Assembly should be afforded the first opportunity to enact new redistricting plans in accordance with those principles, as well as the fact that insufficient time may have remained before the 2002 general election. In the event the General Assembly could not act in time, this Court authorized and directed the trial court to seek, review, and adopt an interim remedial plan for use in the 2002 election cycle. *Id.* at 385,

562 S.E.2d at 398. The Court noted, "[B]oth reason and experience argue that courts empowered to invalidate an apportionment statute which transgresses constitutional mandates cannot be left without the means to order appropriate relief." *Id.* at 376, 562 S.E.2d at 392 (quoting *Terrazas v. Ramirez*, 829 S.W.2d 712, 718 (Tex. 1991)) (internal quotation marks omitted); *see also id.* (recognizing that the Court "cannot abdicate [its] duty of redressing the demonstrated constitutional violation which occurred in the present case").

More recently, this Court rejected the proposition that the General Assembly possesses unlimited power to draw electoral maps. In *Harper v. Hall*, 380 N.C. 317, 868 S.E.2d 499 (2022), the Court acknowledged the General Assembly's authority to proceed first in the effort to draw electoral maps that would meet constitutional standards. If, however, the General Assembly failed to produce maps that protect the constitutional rights of the people, the trial court was empowered to select maps by the process it deemed best, subject to the Supreme Court's review.

2. The Judiciary Has Constitutional Power to Remedy a Constitutional Violation

In addition to the Court's inherent and equitable powers, the North Carolina Constitution grants the courts the power to effectuate the constitutional right to a sound basic education. Article I, section 18 of the North Carolina Constitution's Declaration of Rights states that "every person for an

injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay." N.C. CONST. art. I, § 18; *see Lynch v. N.C. Dept. of Justice*, 93 N.C. App. 57, 61, 376 S.E.2d 247, 250 (1989) (explaining that Article I, section 18 "guarantees a remedy for legally cognizable claims"); *cf. Craig ex rel. Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 342, 678 S.E.2d 351, 356–57 (2009) (noting the Supreme Court of North Carolina's "long-standing emphasis on ensuring redress for every constitutional injury").

Article I, section 18 recognizes that the core judicial function is to ensure that rights and justice—including the constitutional right to the opportunity to a sound basic education—are not delayed or denied. To do otherwise would violate the Court's core duty to interpret the Constitution, allowing the State to render enshrined constitutional rights merely aspirational. *See State v. Berger*, 368 N.C. 633, 638, 781 S.E.2d 248, 252 (2016) ("This Court construes and applies the provisions of the Constitution of North Carolina with finality."); *see also Corum v. Univ. of North Carolina*, 330 N.C. 761, 783, 413 S.E.2d 276, 290 (1992) ("It is the state judiciary that has the responsibility to protect the state constitutional rights of the citizens."); *Deminski v. State Bd. of Educ.*, 377 N.C. 406, 414, 858 S.E.2d 788, 794 (2021) (holding a plaintiff had alleged a colorable constitutional claim where the facts alleged supported the

contention that the government did not guard and maintain the right to a sound basic education).

It is true, of course, that the Appropriations Clause ensures "that the people, through their elected representatives in the General Assembly, ha[ve] full and exclusive control over the allocation of the state's expenditures." *Cooper v. Berger*, 376 N.C. 22, 37, 852 S.E.2d 46, 58 (2020). However, that authority is tethered to its concurring responsibility to fulfill its constitutional obligations. If the General Assembly could willfully fail to meet the minimum standards for effectuating a constitutional right—such as the right to a sound basic education—by endlessly failing to appropriate funds necessary to carry out that right, then constitutional rights would be rendered meaningless and not subject to judicial enforcement. Such a contention has been previously considered—and rejected—by this Court. *See Leandro I*, 346 N.C. at 345, 488 S.E.2d at 254. The General Assembly cannot hide behind the Appropriations Clause, asserting that it overrides the people's right to a sound basic education and the courts' ability to fashion an appropriate remedy to the State's constitutional violation. "It is axiomatic that the terms or requirements of a constitution cannot be in violation of the same constitution—a constitution cannot violate itself." *Leandro I*, 346 N.C. at 352, 488 S.E.2d at 258; *accord Stephenson*, 355 N.C. at 397, 562 S.E.2d at 406.

3. Under the Narrow Circumstances in This Case, the Trial Court Properly Exercised its Inherent, Equitable, and Constitutional Authority to Order the Transfer of Funds

In the present litigation, the trial court properly issued an order to the relevant state authorities to transfer unappropriated funds from the State Treasury to fully implement the CRP. This was a proper exercise of the trial court's inherent, equitable, and constitutional powers for several reasons.

First, the State has an affirmative constitutional duty to provide the opportunity for a sound basic education. *Leandro I*, 346 N.C. at 348, 488 S.E.2d at 255; N.C. CONST. art. I, § 15, art. IX, § 2 (1). Second, the Constitution also requires the State to pay certain proceeds into the State Treasury, and together with other revenue from the State, the State is required to "faithfully appropriate[] and use[]" those collective funds "exclusively for establishing and maintaining a uniform system of free public schools." N.C. CONST. art. IX, § 6. Third, the State has failed to uphold its obligations under each of the aforementioned constitutional provisions, flouting the Court's directives to remedy this adjudicated and acknowledged ongoing constitutional violation, thereby denying North Carolina school children a "remedy by due course of law." N.C. CONST. art. I, § 18. Fourth, to be clear, the CRP is State Defendants' proposed remedy for their constitutional violation, and its attending costs were calculated by the State as well—it is not the result of the judiciary crafting an

order from whole cloth. Fifth, the trial court has concluded that the State has more than enough funds in unappropriated surplus revenue to cover the cost of Years 2 and 3 of the CRP. (R p 2640). Yet, the State has continued to fail to use such unappropriated revenue to fully fund its own proposed remedy.

Finally, the trial court has minimized its encroachment on legislative authority by implementing the least intrusive remedy, carefully balancing the competing interests and affording every opportunity for the State to otherwise act, as evidenced by:

- Giving the State 17 years to arrive at a proper remedy (17 classes of students have since gone through schooling without a sound basic education, continuing through the present day, with no end in sight but for the CRP.);
- In early 2018, deferring to State Defendants and the parties to recommend to the Court an independent, third-party consultant to provide analysis of North Carolina education data and present comprehensive, specific recommendations to remedy the existing constitutional violations (R p 1826);
- In January 2020, deferring to State Defendants and the parties to create and implement a remedial plan and the proposed duration of the plan, including recommendations from the Governor's Commission on Access to Sound Basic Education (R pp 1664–65);
- In June 2020, deferring to State Defendants to propose an action plan and remedy for the first year and then allowing State Defendants additional latitude in implementing their actions in light of the pandemic's effect on education (R pp 1669, 1773, 1827–28);
- Deferring to the legislative and executive branches yet again during the status conferences held in September and October 2021 to implement a full remedy, to no avail (R p 1831); at which point, the trial court put State Defendants on notice of forthcoming

consequences if they continued to violate students' fundamental rights to a sound basic education (R pp 1832–38); and

- Deferring to State Defendants in the November Order by staying the Order for 30 days to allow the State to take any additional action to satisfy its constitutional duty (R p 1842).

Under these limited circumstances, after years of deference met with State inaction, the trial court possessed the inherent, equitable and constitutional powers to order the transfer necessary to fund the CRP and effectuate the constitutional right to a sound basic education.

Under the trial court's inherent powers, such an order was "reasonably necessary for the orderly and efficient exercise of the administration of justice" to remedy the General Assembly's inaction in failing to fund the CRP. *Alamance*, 329 N.C. at 99, 405 S.E.2d at 132. That inaction threatened "to undermine the integrity of the judiciary" by rendering null the trial court's orders finding a statewide violation of the right to a sound basic education and requiring the CRP's implementation to remedy that violation. *Id*. Similarly, the constitutional right and the State's violation thereof having been established, the trial court had broad and flexible equitable powers to craft the CRP as the necessary remedy and require its implementation. *See Swann*, 402 U.S. at 15. To hold that the judiciary lacked such inherent and equitable powers would permit the General Assembly to usurp its power to ensure

compliance with the Constitution. The Constitution, however, forbids the General Assembly from doing so. *See* N.C. CONST. art. IV § 1.

The trial court's authority to order the transfer of unappropriated funds is further grounded in its constitutional authority. To be sure, the Appropriations Clause generally confers control over the state's coffers on the General Assembly. *See Cooper*, 376 N.C. at 37, 852 S.E.2d at 58. However, that clause does not relieve the General Assembly of its obligation to carry out its constitutional duty, and that clause is tempered by the judiciary's authority to enforce constitutional rights. If the General Assembly could willfully fail to effectuate the constitutional right to a sound basic education through a refusal to appropriate necessary funding, then that constitutional right would be reduced to a political question not subject to judicial enforcement—a contention previously rejected by this Court. *See Leandro I*, 346 N.C. at 345, 488 S.E.2d at 254. The General Assembly cannot hide behind the Appropriations Clause to avoid its responsibility to provide the constitutionally required sound basic education. Nor can it rely on that clause to deprive the judiciary of its power to "construe[] and appl[y] the provisions of the Constitution of North Carolina with finality." *Berger*, 368 N.C. at 638, 781 S.E.2d at 252. Thus, competing constitutional provisions necessarily limit the General Assembly's power under the Appropriations Clause when it comes to

funding for the educational system that is necessary to fulfill the fundamental right to a sound basic education.

In that regard, the trial court correctly held that the North Carolina Constitution's provisions regarding education limit the General Assembly's appropriations power. The North Carolina Constitution repeatedly makes education, including school funding, a matter of constitutional—not merely statutory—law, devoting an entire article to the State's education system. Regardless of the General Assembly's general authority over appropriations of State funds, article IX specifically directs that certain state funds be used to maintain the public education system, and it requires the General Assembly to provide that system with adequate funds. *See* N.C. CONST. art. IX, §§ 2, 6, 7. Thus, the trial court held that Article I, § 15, which sets forth the right to a sound basic education, represents a "constitutional appropriation," and that the people themselves, through the Constitution, may be considered to have made that appropriation. (R p 1836); *see also Cooper*, 376 N.C. at 37, 852 S.E.2d at 29. Given that constitutional appropriation, and in light of the legislature's ongoing violation of the Constitution, the trial court—especially after deferring time and again to the legislative branch—had the authority to enforce that constitutional appropriation by ordering fiscal resources to be drawn from the State Treasury's unappropriated funds. (R p 1841).

The Court of Appeals, when it issued the writ of prohibition, reasoned that interpreting Article I, § 15 as a constitutional appropriation rendered other sections of the Constitution unnecessary and meaningless. (R p 2008). Specifically, it cited Article IX, §§ 6 and 7, which respectively set forth "specific means of raising funds for public education" and permit the General Assembly to supplement that funding with "so much of the revenue of the State as may be set apart for that purpose." (R p 2008). This argument fails. These provisions are not rendered meaningless by the constitutional appropriation in Article I, § 15, but rather describe the General Assembly's duty to "faithfully appropriate[]" funds to effectuate the right to a sound basic education. N.C. CONST. art. IX, §§ 6, 7. Similarly, Article IX, § 2 provides that "[t]he General Assembly *shall provide by taxation and otherwise* for a general and uniform system of free public schools." (emphasis added). These provisions, as recognized by the trial court, work *in concert* to effectuate the constitutional appropriation, not at odds with that constitutional mandate, as the Court of Appeals suggested. (R p 1838). When the General Assembly neglects to provide the funds required by the Constitution using the means specified therein, as it has repeatedly failed to do so here, it remains the duty of the judiciary to step in and enforce this constitutional appropriation.

In the years since *Leandro II*, an entire generation of children have been denied this fundamental constitutional right. As shown above, the trial court

has more than satisfied this Court's previous direction to provide "every reasonable deference to the legislative and executive branches," *Leandro I*, 346 N.C. at 357, 488 S.E.2d at 261, and allow them the "unimpeded chance, 'initially at least,' to correct constitutional deficiencies revealed at trial," *Leandro II*, 358 N.C. at 638, 599 S.E.2d at 391 (citation omitted). Per its inherent, equitable, and constitutional powers, the trial court had the authority to order the transfer of funds from the State Treasury necessary to enforce the right to a sound basic education.

B. The Trial Court's Order to Transfer the Funds Did Not Violate the Separation of Powers Clause

The North Carolina Constitution explicitly states: "The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." N.C. CONST. art. I, § 4. However, as this Court has found, "[t]he perception of the separation of the three branches of government as inviolable, however, is an ideal not only unattainable but undesirable. An overlap of powers constitutes a check and preserves the tripartite balance . . . ." *Alamance*, 329 N.C. at 96, 405 S.E.2d at 131. Where, as here, the legislative and executive branches have failed to uphold their constitutional duty, the judiciary may use its inherent, equitable and constitutional powers to order relief sufficient to remedy the harm without violating the Separation of Powers Clause.

1. Under Binding North Carolina Supreme Court Precedent in this Case, the Court Had Authority to Act

In its opinion in *Leandro I*, this Court held that the legislative and executive branches of government were owed "every *reasonable* deference" from the judiciary when evaluating whether those branches were upholding their constitutional mandate to establish and administer a system that provides the children of North Carolina with a sound basic education. *See Leandro I*, 346 N.C. at 357, 488 S.E.2d at 261 (emphasis added). However, the Court also recognized that the judiciary will not retreat from exercising its own powers upon a "clear showing to the contrary." *Id.* In remanding the case to the trial court for a determination of the remaining claims on the merits, the Court further emphasized its intentions:

> [L]ike the other branches of government, the judicial branch has its duty under the North Carolina Constitution. If on remand of this case to the trial court, that court makes findings and conclusions from competent evidence to the effect that defendants in this case are denying children of the state a sound basic education, a denial of a fundamental right will have been established. It will then become incumbent upon defendants to establish that their actions denying this fundamental right are necessary to promote a compelling governmental interest. . . . *If defendants are unable to do so, it will then be the duty of the court to enter a judgment granting declaratory relief and such other relief as needed to correct the wrong while minimizing the encroachment upon the other branches of government.*

Id. at 357, 488 S.E.2d at 261 (internal citations and quotations omitted) (emphasis added).

Following remand, the trial court made precisely the kinds of findings and conclusions from competent evidence contemplated by this Court with respect to Hoke County. In *Leandro II*, after affirming the trial court's finding of the constitutional violation in Hoke County based on that evidence, the Court again remanded the case back to the trial court to consider the evidence with respect to the remaining counties at issue. *See Leandro II*, 358 N.C. at 628, 638, 640, 642, 599 S.E.2d at 385, 391, 392, 393 (listing findings and conclusions by the trial court clearly supported by the evidence at trial). Importantly, the Supreme Court admonished in *Leandro II* that, while the judicial branch should initially defer to state actors on remand, it alone retains the power to ensure that the legislative and executive branches' constitutional deficiencies are remedied:

> Certainly, when the State fails to live up to its constitutional duties, a court is empowered to order the deficiency remedied, and if the offending branch of government or its agents either fail to do so or have consistently shown an inability to do so, a court is empowered to provide relief by imposing a specific remedy and instructing the recalcitrant state actors to implement it.

Id. at 642–43, 599 S.E.2d at 393. The Court further recognized that the courts "remain the ultimate arbiters of our state's Constitution, and vigorously attend to our duty of protecting the citizenry from abridgments and infringements of its provisions." *Id.* at 645, 559 S.E.2d at 395.

These opinions from this Court clearly affirm the judiciary's remedial and enforcement powers to stop the State from continuing to violate students' fundamental rights to a sound basic education. *Leandro II* specifically held that the Court could impose a remedial plan if the State failed to do so. Although *Leandro II* determined that court-imposed remedies were inappropriate at that time, it did so based on findings that (1) the court needed to first defer to the legislative and executive branches on remedy; and (2) the trial court's findings and conclusions, at that point, did not support the "imposition of a narrow remedy that would effectively undermine the authority and autonomy of the government's other branches." *Leandro II*, 358 N.C. at 643, 599 S.E.2d at 393.

In the years since *Leandro II*, however, the trial court has more than reached the bounds of "reasonable deference." Indeed, after discovering statewide constitutional violations as early as 2002 and continuing forward, the court spent nearly two decades hearing evidence from the State, allowed the State to work with WestEd to diagnose the status of its public education system, and deferred to the State's wisdom in developing the CRP. Continued deference in the face of the General Assembly's long-delayed objection would constitute an abdication of the trial court's *own* duty to uphold the Constitution. Accordingly, pursuant to the binding authority in this case, the trial court's order did not violate the Separation of Powers Clause, as it was

necessary to effectuate the constitutional right to a sound basic education, after seventeen years of legislative and executive inaction.

2. Other Binding Supreme Court Precedent Authorized the Trial Court to Act

Intervenor-Defendants seek to bind the Supreme Court to the Court of Appeals' conclusion that the transfer provision of the November Order was unconstitutional. But in granting the State Comptroller's writ of prohibition of enforcement of the November Order, the Court of Appeals impermissibly issued a decision on the merits that was both erroneous and cannot bind this Court.

Ignoring the precedents of *Leandro I* and *II*, the Court of Appeals relied on *Richmond County Board of Education v. Cowell*, 254 N.C. App. 422, 803 S.E.2d 27 (2017), another Court of Appeals decision, to conclude that the trial court's order to transfer the funds violated the Separation of Powers Clause. (R pp 2009). The Intervenor-Defendants likewise rely on *Richmond*, adopting the Court of Appeals' reasoning. (Intervenor-Defendants' Opening Br. at 70–74). But *Richmond* does not control here. To the contrary, this Court has recognized the judiciary's authority to direct the State to expend funds where the circumstances dictate such relief is necessary. Given the duration, extent, gravity, and sheer willfulness of the State's failure to remedy ongoing constitutional violations, the Separation of Powers Clause authorized the trial

court's transfer of funds here. *See, e.g.*, *Corum*, 330 N.C. at 785, 413 S.E.2d at 291 ("When a person has been deprived of his private property for public use nothing short of actual payment, or its equivalent, constitutes just compensation. The entry of a judgment is not sufficient." (internal quotation marks omitted) (quoting *Sale v. State Highway & Public Works Com.*, 242 N.C. 612, 618, 89 S.E.2d 290, 296 (1955)); *Alamance*, 329 N.C. at 100–01, 405 S.E.2d at 133 (1991) (recognizing court's "inherent power to reach towards the public purse" to protect the "integrity of the judiciary").

As this Court has held, the nature and scale of the constitutional violation matter in determining the appropriate balance of powers between the three branches. *See Corum*, 330 N.C. at 761, 413 S.E.2d at 276. "Various rights that are protected by our Declaration of Rights may require greater or lesser relief to rectify the violation of such rights, depending upon the right violated and the facts of the particular case." *Id.* Of course, "[w]hen called upon to exercise its inherent constitutional power to fashion a common law remedy for a violation of a particular constitutional right . . . , the judiciary must recognize two critical limitations." *Id.* "First, it must bow to established claims and remedies where those provide an alternative to the extraordinary exercise of its inherent constitutional power." *Id.* "Second, in exercising that power, the judiciary 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.*

In *Alamance*, the Supreme Court reaffirmed a long line of cases holding that the judiciary has the authority to order such relief when necessary to operate the constitutionally protected school system. *Alamance* addressed the local commissioner's failure to provide adequate court facilities. 329 N.C. at 88, 405 S.E.2d at 126. In resolving that case, the Supreme Court undertook a broad examination of the Separation of Powers Clause. *Id.* at 96, 405 S.E.2d at 130. The Court specifically recognized that "two constitutional provisions that define the scope of the court's inherent power are particularly notable—the prohibition against drawing public money from state and local treasuries except by statutory authority and the exclusive power of taxation to the legislative branch." *Id.* (citations omitted). The Court, however, stated that "the scope of the inherent power of a court does not, in reality, always stop neatly short of explicit, exclusive powers granted to the legislature, but occasionally must be exercised in the area of overlap between the branches." *Id.* Termed "incidental powers," one branch may "exercise some activities usually belonging to one of the other two branches in order to fully and properly discharge its duties." *Id.* at 97, 405 S.E.2d at 131. The Court recognized that the "very genius of our tripartite Government is based upon the proper exercise of their respective powers together with harmonious cooperation between the

three independent Branches." *Id.* at 99–100, 405 S.E.2d at 133. When this "cooperation breaks down," however, the judiciary has authority to reasonably exercise its powers to protect constitutional rights. *Id.*

In illustrating this point, the Court cited to a number of cases at the turn of last century that "presented the dilemma of challenges to commissioners in whose counties public facilities were in need of construction or repair." *Id.* Repeatedly, the Supreme Court had held that it was powerless to remedy these violations, concluding that only remedies available for the "commissioner recalcitrance" were "the ballot box" and the commissioners' indictment for neglecting their statutory duties. The Court noted that the erroneous decisions in these cases "sprang from an impracticable perception of the absoluteness of the separation of powers." *Id.*

This dated reasoning, however, had been rejected in later cases related to the constitutional duty to maintain a public school system. Citing *Hickory*, the *Alamance* Court noted that the Supreme Court had previously rejected the argument that remedy by indictment was sufficient for such a violation. Instead, "a party must not only have an adequate legal remedy but one competent to afford relief on the particular subject-matter of his complaint." *Alamance*, 329 N.C. at 102, 405 S.E.2d at 134 (quoting *Hickory*, 206 N.C. at 174, 173 S.E. at 61). Notably, in *Hickory*, the Supreme Court affirmed a lower court order directing State defendants to assume the debt that the city and

school district had incurred to properly fund the schools and to levy taxes necessary to pay that debt. *Hickory*, 206 N.C. at 173, 173 S.E. at 61. The *Alamance* Court likewise cited *Mebane*, which rejected indictment as an adequate remedy, instead holding "mandamus would lie to compel the county, acting as an administrative agency of the legislature, to assume the indebtedness of a school district within its jurisdiction." *Alamance*, 329 N.C. at 102, 405 S.E.2d at 134 (citing *Mebane*, 211 N.C. 213, 189 S.E. 873). Importantly, in addition to ordering this assumption of debt, the Supreme Court stated that the "county commissioners could have been compelled to have provided the school buildings . . . as a county-wide charge, and could have been compelled to have provided the money therefor by the issue of county-wide bonds." *Mebane*, 211 N.C. at 223–24, 189 S.E. at 880 (quoting *Reeves v. Board of Education*, 204 N.C. 74, 77, 167 S.E. 454, 455 (1933)). Relying on *Hickory* and *Mebane*, the *Alamance* Court concluded: "These school district cases implicitly overruled holdings in the earlier cases that restricted remedies under similar circumstances to elections and indictments; we now reverse those earlier holdings explicitly." *Alamance*, 329 N.C. at 102, 405 S.E.2d at 134.

Thus, nearly a century ago, the Supreme Court rejected *Richmond*'s conclusion that the only remedy for recalcitrant state officials lies "at the ballot box," 254 N.C. at 429, 803 S.E.2d at 32. And, it reaffirmed that principle in

Alamance, by endorsing *Hickory* and *Mebane*, cases in which the Supreme Court affirmed orders directing the State to expend funds necessary to maintain the constitutionally required school system. While the ballot box may have been the only remedy available under the narrow circumstances present in *Richmond*, here, the balance is different, given the magnitude of the constitutional violation and years of judicial deference to the other branches.

In any event, *Richmond* is a narrow case that deals with a distinct constitutional violation, nowhere near the magnitude of that involved here. *Richmond* addressed the question of whether the State violated the North Carolina Constitution when it used certain fees collected from criminal offenses to fund county jails, rather than the schools. *Id.* at 423, 803 S.E.2d at 29. In particular, the Richmond County school system contended that it was entitled to $273,000 of fee revenue back from the State under Article IX, Section 7 of the Constitution, which mandates that the revenue from such fines be spent on the schools. *Id.* The trial court agreed that the State had violated the Constitution, and it entered a money judgment, but it concluded that it was powerless under the Constitution's Separation of Powers Clause to enforce that judgment. As the Court of Appeals stated, "If the other branches of government still ignore it, the remedy lies not with the courts, but at the ballot box." *Id.* at 427–29, 803 S.E.2d at 31–32. The Court of Appeals determined that this was the appropriate balance of powers to strike for the relatively minor

constitutional violation at issue in that case. But that same balance does not apply here, where a court is not simply granting a party a money judgment against the State, but rather is attempting to redress the State's nearly two decades-long, widespread denial of the constitutional right to a sound basic education for its students.

Intervenor-Defendants also erroneously claim that *Cooper v. Berger*, 376 N.C. 22, 852 S.E.2d 46 (2020), adopted *Richmond*, to support their claim that the trial court violated the Separation of Powers Clause in ordering the transfer of funds. (Intervenor-Defendants' Opening Br. at 70–72). In *Cooper*, the Court was tasked with resolving a dispute between the executive and legislative branches about whether certain federal funds had ever entered the State Treasury and, therefore, which Branch had the authority to direct disbursement of those funds. 376 N.C. at 25, 852 S.E.2d at 51. Judicial authority to remedy State violations of North Carolina citizens' constitutional rights was neither implicated nor discussed. As the *Cooper* Court noted, "[W]hen analyzing a claim that the legislative branch has attempted to usurp the executive branch's constitutional authority, we examine whether the legislature has unreasonably disrupt[ed] a core power of the executive." *Id.* at 44, 852 S.E.2d at 63. That is not the inquiry here.

To allow the legislative branch to thumb its nose at the November Order would contravene the Supreme Court's decisions in *Leandro I* and *II*, the plain

language and intent of North Carolina Constitution, and the checks and balances function of the separation of powers doctrine. Simply put, it would render the judicial branch subservient to the General Assembly's total disregard of its constitutional obligations to North Carolina's children.

II. On Remand, the Trial Court Correctly Determined the Budget Act Underfunded the Comprehensive Remedial Plan

Intervenor-Defendants incorrectly argue that, on remand, the trial court should have considered additional COVID-19 federal funds provided to school districts. (Intervenor-Defendants' Opening Br. at 65–68). They further aver that the court incorrectly determined that unappropriated funds were available. *Id.* Consistent with this Court's order remanding this case to the trial court in March 2022, the trial court examined both the impact of the Budget Act on the CRP and the availability of funds to satisfy any costs for the CRP unaccounted for in the Budget Act. The court correctly concluded that the Budget Act failed to cover the costs of fully implementing the CRP and that the State had available funds, including funds in the Savings Reserve that permit allocations by court order. (R pp 2618–43).

A. The Trial Court Did Consider Certain Federal Funding

On remand from this Court's 18 March 2022 Order, the trial court held three hearings and received evidence on the impact of the Budget Act on the CRP's outstanding obligations and costs. In the April Order, based on the evidence received and on the arguments presented, the trial court correctly

determined that the Budget Act, signed into law on 18 November 2021 "fails to provide nearly one-half of . . . total necessary funds" to fully implement the CRP. (R p 2630, ¶ 34). More specifically, the court found that "of a total cost of $1,753,153,000 necessary to fund the programs called for in the CRP during the two years in question, the Budget Act, when combined with other funds properly considered and included, provides funding for CRP programs during years 2 and 3 in the amount of $968,046,752." (R p 2638–39, ¶ 50).

Contrary to Intervenor-Defendants' claim, the trial court did carefully consider federal funds in calculating the extent to which the Budget Act funded specific provisions of the CRP. In the court's assessment, it examined the funding amounts and sources of each from the Budget Act and compared those amounts against the CRP's provisions to determine whether they were fully funded, or underfunded.[10] (*See* R pp 2633–34, ¶¶ 41–42). The trial court clearly gave the State credit for funding a CRP item where federal dollars were used to meet those specified needs: "Where the Budget Act has appropriated federal funding, via ARPA or ESSER III,[11] for an item in year 2 and/or year 3, the Court considers such funding to be available to the responsible party during

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[10] The trial court's appendix includes a sheet explaining its assessment. (R pp 2644–47).

[11] ARPA is the American Rescue Plan Act and ESSER is the Elementary and Secondary Schools Emergency Relief fund. These funds will also be referred to as CARES Act funds, which are Coronavirus Aid, Relief, and Economic Security funds.

either year 2 or year 3. For instance, the trial court gave full credit for the funding of the CRP program for professional development, (CRP program III.C.iii.1.), even though this item was funded with federal ESSER III funds. (R p 2635, ¶ 42b).

The trial court's decision to not include other undesignated COVID-19 funds in its November 2021 Order, and to apply those funds on an ad hoc basis to the provisions of the CRP is consistent with the relevant holding in *Leandro II*. While *Leandro II* permitted the State to account for certain federal funds as part of their calculation in determining whether a sound basic education is provided, nothing *requires* the State to consider such funds. *See Leandro II*, 358 N.C. at 646, 599 S.E.2d at 395-96. And for good reason. Sources of federal funds run the gamut with many different purposes and periods of funding. Consequently, the courts may consider but are not compelled to weigh the State's own consideration of the type of federal funds at issue.

In the November Order, over no objection from the State, the trial court did exactly that. It found that one-time CARES Act funds could not be relied upon given the magnitude of COVID-19. It also pointed out that such funds are "nonrecurring and cannot be relied upon to sustain ongoing programs that are necessary to fulfill the State's constitutional obligation to provide a sound basic education to all North Carolina children." (R p 1828, ¶ 2, n.2).

Intervenor-Defendants give short shrift to the educational needs and inequities that were exacerbated by COVID-19, especially for at-risk students. Student achievement had already significantly declined statewide and the achievement gap between Black and white students had grown during the 2010s. (R p 1358). COVID-19 made the situation even worse. The Department of Public Instruction ("DPI") detailed the extent to which COVID-19 exacerbated those harms in a March 2022 report. DPI's key findings included:

- "On average, students made less progress during the pandemic than they did in previous years."
- "[T]here was a negative impact for all students, for all grades, for almost every subject (except English II)," and especially for Math (5th–9th) and Science (8th).
- "Gaps widened between economically-disadvantaged students and the general population of students, especially in reading grade 4, math grade 5, and the sciences."[12]

Local school district administrators, educators, parents, and school boards are much better situated than Intervenor-Defendants to assess how the nonrecurring CARES Act funds can be best used to remediate COVID-related

[12] N.C. State Bd. of Educ & Dep't of Pub. Instruction, NCDPI Releases "COVID-19 Impact Analysis of Lost Instructional Time," (press release Mar. 2, 2022), https://tinyurl.com/mrycdc962, full report, N.C. State Bd. of Educ & Dep't of Pub. Instruction, *Report to the North Carolina General Assembly: An Impact Analysis of Student Learning During the COVID-19 Pandemic* (preliminary report Mar. 15, 2022), available at: https://tinyurl.com/2p9cmwxn.

issues experienced by students and schools, like "learning loss," ventilation and other potentially long-term issues that are the direct consequences of the pandemic. These issues are compounded by several factors ignored by Intervenor-Defendants in their claim that districts are sitting on surpluses, including the depleted national and international supply chains, rising inflationary costs, and the reduced number of competitor bidders and contractors.[13] Directing school districts to neglect their pressing needs and apply these CARES Act funds to CRP items, as Intervenor-Defendants propose, would detract schools from meeting the additional and unanticipated demands placed upon them by COVID-19. Such "recalcitrant" actions proposed by Intervenor-Defendants are inconsistent with good-faith efforts to ensure a sound basic education, which requires the full implementation of the CRP *and* the continuing use of CARES Act funds.

B. The Trial Court Correctly Concluded That Funds in the Savings Reserve Are Available

On remand, the trial court determined that it was required to examine the amount of funds available to satisfy the outstanding costs needed to fully implement the CRP for Years 2 and 3. After analyzing the record and briefing,

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[13] *See, e.g.*, NC Watchdog Reporting Network, *NC schools awash in billions of COVID-relief dollars, with most cash still unspent*, NORTH CAROLINA PUBLIC RADIO (Nov. 4, 2021), https://www.wunc.org/education/2021-11-04/nc-schools-awash-in-billions-of-covid-relief-dollars-with-most-cash-still-unspent.

the court correctly found that, "[a]s a matter of mathematical calculation, the funds transferred on a discretionary basis to the State's Savings Reserve and the State's Capital and Infrastructure Reserve during the two-year budget cycle is substantially in excess of the amount necessary to fully fund the CRP during years 2 and 3 of the CRP." (R p 2637 ¶ 46).

The OSBM analysis shows that, as of 1 July 2022, the total funds in the Savings Reserve[14] will equal approximately $4.25 billion. (R p 2038). In addition, as of March 25, 2022, the Office of the State Controller reports that the State has a net unreserved cash balance of $4.79 billion. (R p 2038). As of 1 April 2022, that figure was $1.44 billion. (R pp 2036–38). These amounts far exceed the amounts due under the CRP, estimated at $785 million.

Intervenor-Defendants argue that, regardless of how much money is in the Savings Reserve, those funds are statutorily intended only for "economic downturns and to respond to natural disasters." (Intervenor-Defendants' Opening Br. at 69). The limitations are not so narrow. The Savings Reserve statute explicitly authorizes expenditures for use when ordered by a court:

> (1) To cover a decline in General Fund revenue from one fiscal year to another.

[14] The Savings Reserve "is established as a reserve in the General Fund and is a component of the unappropriated General Fund balance." N.C. Gen. Stat. § 143C-4-2.

> (2) To cover the difference between that fiscal year's General Fund operating budget appropriations, excluding departmental receipts, and projected revenue.
>
> (3) *To pay costs imposed by a court or administrative order.*
>
> (4) To provide relief and assistance from the effects of an emergency, as that term is defined in G.S. 166A-19.3.

N.C. Gen. Stat. § 143C-4-2(b) (emphasis added). In addition, funds may be allocated "[f]or a purpose *not set forth in subdivisions (1) through (4)* of subsection (b) of this section *in any amount*." N.C. Gen. Stat. § 143C-4-2(b1)(2) (emphasis added).[15] Thus, the only barrier to expending funds to ensure a sound basic education for North Carolina schoolchildren is the General Assembly's own refusal to fulfill its constitutional duty.

Lastly, Intervenor-Defendants have again wrongly invoked *Richmond County*, arguing that they are the sole arbiters of deciding whether funds in the State's Saving Reserve can be used to fulfill the denial of a fundamental right. (Intervenor-Defendants' Opening Br. at 69–70). As noted in Part I of the Argument, the courts are authorized—under the unique circumstances of this case—to order funds to be transferred from the State Treasury, including

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[15] Intervenor-Defendants note that, "since 2016, the General Assembly has had to expend $1.12 billion from the Savings Reserve to fund ten separate disaster relief packages." (Intervenor-Defendants' Opening Br. at 69, n. 14). The amount in the Savings Reserve after discounting the outstanding cost of the CRP would still provide the State with more than three times those resources to meet future disaster needs.

unreserved funds and funds from the Savings Reserve, under their inherent, equitable and constitutional powers. Thus, *Richmond* is inapplicable here.

III. This Court Lacks Jurisdiction to Review Intervenor-Defendants' Challenges to the Trial Court's Orders Prior to the November Order

In their brief, Intervenor-Defendants improperly seek to relitigate issues already fully litigated and decided in this case, specifically, the trial court's orders (1) finding a statewide violation of the constitutional right to a sound basic education, (R pp 1232 (Report from the Court Re: The Reading Problem (May 5, 2014)), 1248 (Notice of Hearing and Order Re: Hearing (March 17, 2015)), 1305 (Order Denying SBE Motion for Relief (March 13, 2018))); (2) finding that each of the seven factors addressed in the CRP is necessary to remedy constitutional violations, (R pp 1632 (Consent Order Regarding Need for Remedial, Systemic Actions for the Achievement of Leandro Compliance (January 21, 2020)), 1666 (Consent Order on Leandro Remedial Action Plan for Fiscal Year 2021 (September 11, 2020))); and (3) holding that the CRP is constitutionally required, (R p 1684 (Order on Comprehensive Remedial Plan (Jun. 11, 2021))).[16] (*See* Intervenor-Defendants' Opening Br. at 3). This Court should not permit Intervenor-Defendants to do so at this late stage of the litigation.

[16] The descriptions of the aforementioned orders are for brevity purposes only. Each order addressed several issues.

The Court lacks jurisdiction over Intervenor-Defendants' appeals of these previous orders for two reasons. First, Intervenor-Defendants' request disregards the limited scope of their own notices of appeal. Intervenor-Defendants appealed only the November Order and April Order, and their attempts to broaden their notice of appeal following the April Order were improper. Thus, their only appeal properly before this Court is from the order to transfer the funds necessary to implement the CRP. This Court lacks jurisdiction to review any other trial court order. Second, Intervenor-Defendants failed to timely intervene and appeal prior orders. They could have intervened at several earlier junctures but chose not to do so. Intervenor-Defendants fail to cite any case in which a third-party has waited years to intervene—despite clear notice of litigation affecting its rights—only to intervene at the last minute, seeking to relitigate long-settled issues; in effect, a do-over of the entire case. Established principles of North Carolina law prevent such unprecedented gamesmanship. For this reason, they waived these challenges, and the Court lacks jurisdiction over them.

A. Intervenor-Defendants Appealed Only the November and April Orders

Rule 3(d) of the North Carolina Rules of Appellate Procedure requires that a notice of appeal "shall designate the judgment or order from which appeal is taken[.]" N.C. R. App. P. 3(d). "[T]he appellant must appeal from each

part of the judgment or order appealed from which appellant desires the appellate court to consider[.]" *Gause v. New Hanover Reg'l Med. Ctr.*, 251 N.C. App. 413, 424, 795 S.E.2d 411, 419 (2016) (internal quotations omitted). "A court may not waive [such] jurisdictional requirements . . . , even for good cause shown . . . , if it finds that they have not been met." *Von Ramm v. Von Ramm*, 99 N.C. App. 153, 156, 392 S.E.2d 422, 424 (1990) (quoting *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 317 (1988)) (internal quotation marks omitted)); *see also Am. Mech., Inc. v. Bostic*, 245 N.C. App. 133, 142, 782 S.E.2d 344, 350 (2016) ("[A] jurisdictional rule violation . . . precludes the appellate court from acting in any manner other than to dismiss the appeal. . . . Rule 3 is a jurisdictional rule" (internal quotations omitted)). Here, Intervenor-Defendants failed to comply with this jurisdictional requirement for all trial court orders prior to the November Order, and this jurisdictional defect is fatal to their claims regarding those previous orders.

1. Intervenor-Defendants' Notice of Appeal of the November Order Did Not Designate Any Other Order

In their notice of appeal dated 8 December 2021, Intervenor-Defendants only designated the trial court's November Order, which set forth the trial court's directive to transfer funds from the State Treasury to implement the CRP. (R p 1852 ("Intervenor-Defendants . . . hereby give notice of appeal to the Courts of Appeals of North Carolina from the Order entered in this action on

November 10, 20[2]1 by the Honorable W. David Lee.")). Intervenor-Defendants identified no other order. Specifically, in their notice of appeal, they failed to identify the 5 May 2014, 17 March 2015, and 13 March 2018 Orders finding a statewide violation of the constitutional right to a sound basic education; the 21 January 2020 and 11 September 2020 Orders establishing the *Leandro*-based factors necessary to address to remedy the constitutional violation; and the 11 June 2021 Order concluding the CRP was a necessary remedy. Nor had they previously challenged any of those decisions.

This Court should not allow Intervenor-Defendants to challenge any conclusions reached prior to the November Order. "On its face," Intervenor-Defendants' "notice of appeal fails to specify any . . . judgment or order" other than the November Order. *Von Ramm*, 99 N.C. App. at 157, 392 S.E.2d at 425. Where "there is no notice of appeal from [a] trial court's order, . . . assignment of error relating to the" order is "not properly" before the reviewing court. *Chaparral Supply v. Bell*, 76 N.C. App. 119, 120, 331 S.E.2d 735, 736 (1985).

Intervenor-Defendants also fail to meet the exceptions to this rule. "[A] notice of appeal should be deemed sufficient to confer jurisdiction on the appellate court on any issue if, from the content of the notice, it is likely to put an opposing party on guard the issue will be raised[.]" *Gause*, 251 N.C. App. at 424, 795 S.E.2d at 419 (quoting *Smith v. Indep. Life Ins. Co.*, 43 N.C. App. 269, 274, 258 S.E.2d 864, 867 (1979)). The Court may construe a notice of appeal as

providing jurisdiction over an unspecified order or portion of a judgment if either (1) the appellant has made a mistake in its designation, but appellant's intent can otherwise be "fairly inferred" from the notice of appeal and the appellee would not be "misled by the mistake," or (2) the appellant "technically fails to comply with procedural requirements in filing papers with the court," but accomplishes the "functional equivalent" of meeting the requirements. *Von Ramm*, 99 N.C. App. at 156-57, 392 S.E.2d at 424.

But Intervenor-Defendants cannot meet either requirement for review notwithstanding a lack of designation in their notice of appeal. First, a reviewing court cannot "fairly infer" an intent to appeal an undesignated order by mistake where the appellant "clearly identifie[s] the order from which he [is] appealing." *Ochsner v. N.C. Dep't of Revenue*, 268 N.C. App. 391, 399, 835 S.E.2d 491, 497 (2019). Nor can a reviewing court "fairly infer" intent to appeal an undesignated order where, as here, previous, unappealed orders address multiple issues. *Von Ramm*, 99 N.C. App. at 157, 392 S.E.2d at 425. Moreover, a reviewing court cannot fairly infer that an appellant intended to appeal an undesignated order, even where the proposed issues on appeal mention issues relating to the undesignated order. *Barfield v. Matos*, 215 N.C. App. 24, 36-37, 714 S.E.2d 812, 821 (2011); *Von Ramm*, 99 N.C. App. at 157, 392 S.E.2d at 425.

Appellate courts only reach the inquiry of whether an appellee was misled by a mistaken notice of appeal if it can infer that the appellant

"intended to appeal from an order not specifically designated." *Id.* This is not the case here. Intervenor-Defendants plainly designated only the November Order and did not identify any specific issues in their notice of appeal of the November Order. In doing so, Intervenor-Defendants signaled that they were only appealing the trial court's transfer order.

Second, Intervenor-Defendants did not "functionally" appeal the undesignated orders, while only "technically fail[ing] to comply with procedural requirements in filing [their] notice of appeal." *Ochsner*, 268 N.C. App. at 399, 835 S.E.2d at 497 (concluding that the Court of Appeals lacked jurisdiction to review any arguments relating to an order not designated in a notice of appeal, which designated a different order and was properly filed). Their notice of appeal was technically a proper appeal—of the November and Order *only*—and was not excusably deficient. Therefore, the Court lacks jurisdiction to review any challenges to the finding of the existence of statewide constitutional violations, the seven necessary factors to address these violations, and the constitutional necessity of the CRP.

2. The Notice of Appeal of the April Order is an Impermissible Amendment of the Notice of Appeal of the November Order

In their notice of appeal from the April Order, Intervenor-Defendants purported to "amend" their notice of appeal of the November Order "to include . . . all findings, conclusions, directives, and prior related orders incorporated

into the [November Order] as amended by the [26 April 2022] Order." (R p 2649). This purported amendment is untimely and, therefore, invalid.

An amended appeal is not timely if filed more than thirty days after the order being appealed, pursuant to Rule 3 of the North Carolina Rules of Appellate Procedure. *See In re X.G.M.*, 243 N.C. App. 209, 779 S.E.2d 192 (2015); *Putman v. Alexander*, 194 N.C. App. 578, 670 S.E.2d 610 (2009) (same).

"The time for taking an appeal may not be enlarged by the appellate courts." *O'Neill v. S. Nat'l Bank*, 40 N.C. App. 227, 230, 252 S.E.2d 231, 234 (1979) (citing *Giannitrapani v. Duke Univ.*, 30 N.C. App. 667, 228 S.E.2d 46 (1976)). A reviewing court has no discretion to cure a jurisdictionally defective notice of appeal by allowing it to be amended; even if the defect was inadvertent, failure to follow the provisions of Rule 3 mandates dismissal. *Justice v. Mission Hosp., Inc.*, 2019 NCBC LEXIS 37, at *2 (N.C. Super. Ct. Jun. 5, 2019) (citing *Zloop, Inc. v. Parker Poe Adams & Bernstein, LLP*, 2018 NCBC LEXIS 40 (N.C. Super. Ct. Apr. 30, 2018)).

Intervenor-Defendants' purported amendment to their notice of appeal of the November Order was filed on 26 May 2022. That far exceeds thirty days after the November Order was entered, and it is up to seven years after the 2015 order. This Court should not entertain Intervenor-Defendants' attempts to retroactively preserve issues that they have waived. *See* Argument Part III.B.2 (discussing waiver).

In arguing that its notices of appeal encompass the trial court's orders prior to the November Order, Intervenor-Defendants rely on *Nelson v. Hartford Underwriters Ins. Co.*, 177 N.C. App. 595, 604, 630 S.E.2d 221, 227–28 (2006). Citing that case, they argue that the Court can review all trial court intermediate orders imposing the CRP, on the grounds that they "were expressly incorporated into the Order of 10 November by reference." (Intervenor-Defendants' Opening Br. at 34). *Nelson* is inapposite. *Nelson* did not address the jurisdictional requirements for a notice of appeal under Rule 3(d), which foreclose Intervenor-Defendants' belated appeal on these issues. Rather, *Nelson* held that, in reviewing a motion for summary judgment, the court could not "refrain from reviewing" the underlying conclusions from an earlier motion to dismiss, because it "involve[d] essentially the same question of law." Here, whether the trial court has the judicial authority to order the transfer of funds in the November Order is not the same question of law posed in the other orders. *Nelson* holds no weight here.

B. Intervenor-Defendants Waived Their Appeal of the Previous Orders

Intervenor-Defendants' attempt to shoehorn their challenges to the trial court's previous orders into their present appeal of the November and April Orders is untimely and thus waived. This Court should not entertain the Intervenor-Defendants' belated efforts to relitigate long-settled questions.

1. Intervenor-Defendants Could Have Intervened and Appealed the Trial Court's Conclusions at Several Earlier Junctures

"In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(a)(1). "[W]here a theory argued on appeal was not raised before the trial court, the law does not permit parties to swap horses between courts in order to get a better mount in the reviewing court." *State v. Spence*, 237 N.C. App. 367, 369–70, 764 S.E.2d 670, 674 (2014) (citing *State v. Ellis*, 205 N.C. App. 650, 654, 696 S.E.2d 536, 539 (2010)). "This general rule applies to constitutional questions, as constitutional issues not raised before the trial court will not be considered for the first time on appeal." *Id.* (internal quotations omitted).

Intervenor-Defendants assert that, because the State Budget was not passed until 18 November 2021, they were unable to intervene as of right pursuant to N.C. Gen. Stat. § 1-72.2(a). (Intervenor-Defendants' Opening Br. at 34). Until that point, when "the validity or constitutionality of an act of the General Assembly . . . [was] challenged,"[17] they claim they had no right to

[17] N.C. Gen. Stat. § 1-72.2 was first enacted in 2013. N.C. SB 473 (2013) (enacted).

intervene. (Intervenor-Defendants' Opening Br. at 34 n.8). This claim is meritless.

To begin, this entire case centers on the failure of the executive and legislative branches to live up to their constitutional duty to provide the schoolchildren of North Carolina with a sound basic education. The General Assembly's passage of a budget, including the Budget Act, is not being directly challenged on constitutional grounds by any party. Thus, Intervenor-Defendants do not have a right to intervene under N.C. Gen. Stat. § 1-72.2 and their appeal should be dismissed.

Even assuming Intervenor-Defendants do have a right to intervene, they certainly waived their right to appeal the other orders by failing to intervene on the same grounds that they do now: the passage of a budget. Since *Leandro II* in 2004, the General Assembly has passed several budgets. At least since 2013, when the right to intervene statute (§ 1-72.2(a)) was enacted, the State has passed several budgets, including after the 2015 and 2018 orders. According to Intervenor-Defendants, the passage of such budgets would have arguably triggered Intervenor-Defendants' right to intervene. Yet, Intervenor-Defendants elected not to seek to intervene as of right to defend the legislature's actions with respect to the educational system and, thus, have waived their right to assert those grounds anew.

Regardless of whether Intervenor-Defendants could have intervened as of right, though, there was, ample opportunity for them to seek *permissive* intervention pursuant to N.C. Gen. Stat. § 1A-1, Rule 24(b)(2). "Upon timely application *anyone* may be permitted to intervene in an action . . . [w]hen an applicant's claim or defense and the main action have a question of law or fact in common." N.C. Gen. Stat. § 1A-1, R. 24(b)(2) (emphasis added). In this case, numerous questions of law and fact that Intervenor-Defendants assert in their Opening Brief could have been raised much earlier in the case under the permissive-intervention rule, if Intervenor-Defendants had desired to challenge those rulings on appeal. But they did not.

Intervenor-Defendants should not now be allowed to argue that the orders and their accompanying findings and conclusions, entered prior to the November Order from which they appealed, are erroneous. The time to intervene and appeal these orders has passed. *See State ex rel. Easley v. Philip Morris, Inc.*, 144 N.C. App. 329, 548 S.E.2d 781 (2001) (affirming denial of intervention ten months after an original consent decree and seventy-seven days after a second consent order, even where the trial court retained jurisdiction to interpret, implement, administer, and enforce the resulting trust agreement for the next twenty-five years).

2. Intervenor-Defendants Waived Their Challenges to the Previous Orders by Failing to Intervene

Because Intervenor-Defendants did not seek to intervene earlier in this case, despite the ability to do so, they waived their appeal of the trial court's previous interlocutory orders. Thus, the Court lacks jurisdiction to hear their challenges to these orders on appeal.

"Any party entitled by law to appeal from a[n] . . . order rendered by a judge in superior or district court . . . may take appeal by giving notice of appeal within the time . . . provided in the rules of appellate procedure." N.C. Gen. Stat. § 1-279.1. Pursuant to Rule 3(c), "in civil actions and special proceedings, a party must file and serve a notice of appeal: (1) within thirty days after entry of judgment if the party has been served with a copy of the judgment within" three days; "or (2) within thirty days after service upon the party of a copy of the judgment if service was not made within that three-day period." N.C. R. App. P. 3(c). "Failure to give timely notice of appeal in compliance with . . . Rule 3 of the North Carolina Rules of Appellate Procedure is jurisdictional, and an untimely attempt to appeal must be dismissed." *In re Lynette H.*, 323 N.C. 598, 602, 374 S.E.2d 272, 274 (1988) (quoting *Booth v. Utica Mutual Ins. Co.*, 308 N.C. 187, 189, 301 S.E.2d 98, 99–100 (1983)). There is no dispute that Intervenor-Defendants failed to comply with these jurisdictional requirements with respect to the trial court's orders prior to the November Order.

Nonetheless, Intervenor-Defendants claim that they can appeal these earlier orders because they were interlocutory orders. (Intervenor-Defendants' Opening Br. at 34 n.8). Their argument, however, misunderstands the law. "Upon an appeal from a judgment, the court may review any intermediate order involving the merits and necessarily affecting the judgment." N.C. Gen. Stat. § 1-278. But "that statute applies only to interlocutory orders that are not appealable." *Gualtieri v. Burleson*, 84 N.C. App. 650, 655, 353 S.E.2d 652, 656 (1987), *disc. rev. denied*, 320 N.C. 168, 358 S.E.2d 50 (1987); *accord Charles Vernon Floyd, Jr. & Sons, Inc. v. Cape Fear Farm Credit, ACA*, 350 N.C. 47, 51, 510 S.E.2d 156, 159 (1999), *abrogated on other grounds by Dep't of Transp. v. Rowe*, 351 N.C. 172, 521 S.E.2d 707 (1999). Here, the court's previous orders that Intervenor-Defendants now seek to challenge were immediately appealable interlocutory orders. Intervenor-Defendants thus cannot challenge them on this appeal.

This Court has adopted a three-part test for whether an interlocutory order not designated in a party's notice of appeal is reviewable pursuant to § 1-278: (1) the appellant must have timely objected to the order, (2) the order must be interlocutory and not immediately appealable, and (3) the order must have involved the merits and necessarily affected the judgment. *Floyd & Sons, Inc.*, 350 N.C. at 51–52, 510 S.E.2d at 159; *accord Gaunt v. Pittaway*, 135 N.C. App. 442, 445, 520 S.E.2d 603, 606 (1999); *Brooks v. Wal-Mart Stores, Inc.*, 139 N.C.

App. 637, 641, 535 S.E.2d 55, 59 (2000); *Yorke v. Novant Health, Inc.*, 192 N.C. App. 340, 348, 666 S.E.2d 127, 133 (2008).

First, Intervenor-Defendants did not timely object to the earlier orders. They had actual notice of the orders, yet they failed to intervene and challenge them. Intervenor-Defendants received actual notice of the 11 June 2021 Order holding that the CRP was constitutionally required and directing the State to "seek[] and secur[e] such funding and resources as are needed and required to implement . . . the [CRP]," (R p 1684), well over thirty days before filing their notice of appeal of the November Order on 8 December 2021. Indeed, on remand from this Court, Intervenor-Defendants acknowledged before the trial court that they were aware of the 11 June 2021 Order when it was issued. (Tr. 93:11–14, *Hoke County Bd. of Educ. et al. v. State et al.*, No. 95-CVS-1158 (Apr. 13, 2022) ("THE COURT: Was the legislature aware of Judge Lee's ruling in June of 2021? MR. TILLEY: I would expect that they were, Your Honor.")). Furthermore, lawmakers discussed the CRP during State budget negotiations in June 2021.[18] Intervenor-Defendants also have openly commented on this

[18] *See* Alex Granados, *Democrats Try and Fail to Amend Education Provisions in Senate Budget*, EDNC.ORG (Jun. 24, 2021), https://www.ednc.org/2021-06-24-democrats-try-and-fail-to-amend-education-provisions-in-senate-budget.
In September and October 2021, Intervenor-Defendants publicly discussed the CRP and criticized the Court for allowing the parties to draft a consent order to implement it in accordance with the 11 June 2021 Order. Emily Walkenhorst, *Courts vs. Legislature: A Multibillion-Dollar Education Fund-*

highly publicized case for several years, indicating their awareness of the court's earlier orders in this case.[19] It is thus beyond dispute that the Intervenor-Defendants were aware of, but elected not to challenge, the trial court's previous interlocutory orders. That failure alone bars them from challenging these holdings now.

Second, the earlier orders at issue were immediately appealable. "[A] party is permitted to appeal from an interlocutory order when the order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits." *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994); *see also* N.C.

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ing Dispute is Headed to Standoff, WRAL.COM (Sept. 28, 2021), https://www.wral.com/courts-vs-legislature-a-multibillion-dollar-nc-education-funding-dispute-is-headed-to-standoff/19896277/ ("Berger and Moore wouldn't say whether they'd ever fund the entire Leandro plan. When WRAL asked [Intervenor-Defendants] which line items [of the CRP] they specifically disagree with, they didn't identify any."); Emily Walkenhorst, *Judge Approves $5.6 Billion Leandro Education Equity Plan*, WRAL.COM (Jun. 9, 2021), https://www.wral.com/judge-approves-5-6b-leandro-education-equity-plan/19718699/ ("'While the appropriation of funds is the purview of the legislature rather than the courts, some of the policy suggestions in the report are worthy of consideration,' House Speaker Tim Moore . . . said in a statement to WRAL last month.").

[19] *See* PRESS RELEASE, SENATOR BERGER PRESS SHOP (Oct. 18, 2021) ("Leandro complainers frequently point to data from a report compiled by . . . consultants they claim shows a lack of adequate education funding."); PRESS RELEASE, SENATOR BERGER PRESS SHOP (Oct. 18, 2021) (criticizing the trial court for allowing hearings on implementing the CRP); PRESS RELEASE, SENATOR BERGER PRESS SHOP (Sept. 1, 2020) ("Judge David Lee plans to sign a consent order in the Leandro case[.]").

Gen. Stat. § 7A-27 ("Appeal lies of right directly to the Supreme Court . . . [f]rom any interlocutory order that . . . [a]ffects a substantial right."). "Whether a party may appeal an interlocutory order pursuant to the substantial right exception is determined by a two-step test. The right itself must be substantial and the deprivation of that substantial right must potentially work injury to [appellant] if not corrected before appeal from final judgment." *Anderson v. Seascape at Holden Plantation, LLC*, 232 N.C. App. 1, 7, 753 S.E.2d 691, 696 (2014) (quoting *Wood v. McDonald's Corp.*, 166 N.C. App. 48, 55, 603 S.E.2d 539, 544 (2004)). "[A] 'substantial right is a legal right affecting or involving a matter of substance as distinguished from matters of form: a right materially affecting those interests which [one] is entitled to have preserved and protected by law: a material right.'" *Hanesbrands Inc. v. Fowler*, 369 N.C. 216, 219, 794 S.E.2d 497, 499–500 (2016) (quoting *Gilbert v. N.C. State Bar*, 363 N.C. 70, 75, 678 S.E.2d 602, 605 (2009)) (alteration in original).

Intervenor-Defendants frame their intervention as arising from the legislature's "exclusive prerogative" to enact the state budget and its "full and exclusive control over the allocation of the state's expenditures" with regard to public education under the State Constitution. (Notice of Intervention at 3, *Hoke County Bd. of Educ. et al. v. State et al.*, No. 95-CVS-1158 (N.C. Super. Ct. Dec. 8, 2021)). But this reasoning applies equally to the earlier orders it now seeks to challenge. The finding of a statewide violation of the

constitutional right to a sound basic education and the development and implementation of the CRP implicated legislative appropriations for the educational system. But Intervenor-Defendants did not timely appeal any of the orders directed towards state appropriations. They have thus waived their ability to do so.

Intervenor-Defendants also repeatedly lament the trial court's findings in orders prior to the November Order to be, *inter alia*, violations of the Constitution's Separation of Powers Clause (Intervenor-Defendants' Opening Br. at 59), nonjusticiable political questions committed to the General Assembly (Intervenor-Defendants' Opening Br. at 60), and an impermissible intrusion into political policy questions (Intervenor-Defendants' Opening Br. at 46). If the previous orders implicated these substantial questions, surely those orders would "potentially work injury to [Intervenor-Defendants] if not corrected." *Anderson*, 232 N.C. App. at 7, 753 S.E.2d at 696.

Thus, in addition to their failure to timely object to the orders preceding the November Order, Intervenor-Defendants also fall short of the second element of the three-part test for § 1-278, because these orders were immediately appealable. This Court thus lacks jurisdiction to hear Intervenor-Defendants' challenges to these past orders now.

IV. Even if the Court Considers Intervenor-Defendants' Untimely Challenges to the Trial Court's Earlier Orders, Those Claims Fail

After sitting on the sidelines for over two decades and failing to propose, much less enact, a remedy to the constitutional deprivation of a sound basic education, Intervenor-Defendants come in at the eleventh hour averring that the trial court had no jurisdiction or authority to enact a statewide remedy or to compel compliance with the CRP. (Intervenor-Defendants' Opening Br. at 37–38). Intervenor-Defendants are wrong on both counts.

But before reaching the substance of their arguments, this Court can easily dispose of them. They are premised on a fundamental misunderstanding of the trial court's orders in this case: the CRP is not a *court-created* remedy, but rather *a remedy crafted by the State itself* and approved by the court by Consent Order. That decision and process is wholly consistent with *Leandro II*, which requires first deferring to the executive and legislative branches for a remedy prior to enacting a court-imposed remedy. *Leandro II,* 358 N.C. at 622–23, 599 S.E.2d at 381. In fact, here, the trial court deferred to the State for *17 years* and, even then, allowed the State to propose its own plan for ensuring a sound basic education based on the substantial record in this case. Intervenor-Defendants' arguments that this process did not comply with *Leandro II* are unavailing.

Even if this Court were to set aside that fact and proceed to consider Intervenor-Defendants' arguments that the court does not have the authority to enact a statewide remedy, they fail. To begin with, Intervenor-Defendants have improperly raised this claim for the first time on appeal, and thus it is waived. Assuming the claim is preserved, though, *Leandro II* never restricted the trial court from providing statewide relief. It merely required that any remedy coincide with the evidentiary record on the constitutional denial, which the Court did here when approving the CRP.

And regardless of the pleadings in this case, the record is clear that the issues of statewide violations and statewide relief were tried by the parties by, at the very least, implied consent. Over a course of two decades and counting, no defendant ever objected to the Court's consideration of evidence of a statewide violation. Accordingly, the trial court was well within its authority to approve a statewide remedy.

Finally, the trial court properly held that the CRP is constitutionally required. It is the only remedy proposed by the State *and* based on the evidentiary record of what is needed to ensure a sound basic education. Intervenor-Defendants' last-ditch effort to throw together a highly politicized, piecemeal budget that fails to align with the evidence presented in this case—including the absence of funding for several necessary programs aimed at

ensuring a sound basic education for at-risk students—is the very type of remedy rejected by this Court in *Leandro II*.

A. The Trial Court Plainly Had Jurisdiction to Enforce the State's Proposed Remedy to the Statewide Violations

Contrary to Intervenor-Defendants' argument, *Leandro II* does not prohibit the imposition of a statewide remedy. (Intervenor-Defendants' Opening Br. at 4). Rather, as discussed above, the Court held that before any such remedy is ordered by a court, the State must first have an opportunity to propose a remedy and that any remedy proposed by the court (or the parties) must conform with the evidence. As the Court explained in response to the trial court's order directing the State to extend pre-kindergarten services to all at-risk students:

> [S]uch specific court-imposed remedies are rare, and strike this Court as inappropriate *at this juncture* of the instant case for two related reasons: (1) The subject matter of the instant case—public school education—is clearly designated in our state Constitution as the shared province of the legislative and executive branches; and (2) The evidence and findings of the trial court, while supporting a conclusion that "at-risk" children require additional assistance and that the State is obligated to provide such assistance, do not support the imposition of a narrow remedy that would effectively undermine the authority and autonomy of the government's other branches.

Leandro II, 358 N.C. at 643, 599 S.E.2d at 393 (emphasis added). The Court went on to explain that, at the appropriate time, if the State failed to fulfill its constitutional obligations, a court "is empowered to order the deficiency

remedied" and impose a specific remedy ordering the "recalcitrant actors to implement it." *Id.* at 642, 599 S.E.2d at 393.

This case, *now at a much later juncture*, is plainly distinguishable from the circumstances of *Leandro II*. Seventeen years after *Leandro II*, the court "went to extraordinary lengths in granting [the legislative and executive branches] time, deference, and opportunity to use their informed judgment as to the 'nuts and bolts' of [the CRP]," allowing the State to determine "the specific remedial actions that required implementation, the time frame for such implementation, the resources necessary for the implementation, and the manner in which to obtain those resources." (R p 1832). The State's carefully crafted CRP based on the substantial record showing a denial of a sound basic education is consistent with *Leandro II*'s deferential standard.

Intervenor-Defendants also wrongly argue that the trial court did not have the authority to impose a statewide remedy because statewide violations were not raised in the pleadings. As an initial matter, because this claim was never raised before the trial court, but instead has been raised by the Intervenor-Defendants for the first time on appeal to the Supreme Court, it is waived. *See* N.C. R. App. P. 10(a)(1); *Spence*, 237 N.C. App. at 369–70, 764 S.E.2d at 674; *see also* Argument Part III.B. (discussing Intervenor-Defendants failure to timely intervene and appeal previous orders).

In any event, even if Intervenor-Defendants had properly preserved this claim for review, and even if Plaintiffs and Penn-Intervenors did not directly raise a statewide claim in their pleadings, the extensive record shows that the parties have litigated such a claim by consent.

North Carolina Rule of Civil Procedure 15(b) provides:

> When issues not raised by the pleadings are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, either before or after judgment, but failure so to amend does not affect the result of the trial of these issues.

"[T]he rule of 'litigation by consent' is applied when *no objection is made on the specific ground that the evidence offered is not within the issues raised by the pleadings*." *Roberts v. William N. and Kate B. Reynolds Memorial Park*, 281 N.C. 48, 58, 187 S.E.2d 721, 726 (1972) (emphasis in original). "In such case, the statutory rule, in effect, amends the pleadings to conform to the evidence . . . ." *Id.* To avoid litigating by consent, a party must "specify the grounds of objection and [] satisfy the court that [they would] be prejudiced by . . . litigation of the issues raised by the evidence." *Id.* at 58, 187 S.E.2d at 727. "Even when a timely specific objection is made, the party objecting must show some actual prejudice arising from a proposed amendment . . ." *Mobley v. Hill*, 80 N.C. App. 79, 81, 341 S.E.2d 46, 47–48 (1986) (citing *Roberts*, 281 N.C., 187

S.E.2d; Annot., 20 A.L.R. Fed. 448 (1974) (discussing decisions under identical federal rule language)) (internal citations omitted)).

Here, Rule 15 applies to the facts like few other cases. In *Leandro I*, the Court remanded the case to the trial court so that it could "make[] findings and conclusions from competent evidence to the effect that defendants in this case are denying children of the state a sound basic education. . . ." 346 N.C. at 357, 488 S.E.2d at 261. Following that remand and continuing for over two decades, the trial court considered evidence of State Defendants' failure to provide a sound basic education across the state without objection—until now. *See, e.g.*, Statement of Facts and of the Case ("SOF"), Parts I–IV.

No party objected to the annual statewide reviews or the resulting findings in any of the orders issued in this case on the grounds that the charges exceeded the scope of the issues in the case; and, as discussed above, Intervenor-Defendants never intervened to try and narrow the proceedings, much less preserve its objection. Because no party, much less Intervenor-Defendants, objected for two decades and failed to demonstrate any resulting harm from this contest, the Court should hold that the issue of statewide violations and relief was tried by consent or at the very least, waived.

B. The Trial Court Properly Held that the CRP Is a Constitutionally Required Remedy

Intervenor-Defendants also misconstrue the trial court's reliance on the CRP, arguing that the trial court incorrectly concluded that the CRP is the "only means to provide a *Leandro*-compliant education," when it should have considered the Budget Act as an alternative plan. (Intervenor-Defendants' Opening Br. at 55). But the trial court did not hold that there is no other possible remedy. Rather, the CRP is the only remedy proposed by the State *based on the substantial record in this case* showing demonstrable statewide denials of a sound basic education. In contrast, Intervenor-Defendants' highly-politicized Budget Act[20] is not backed by the record, was not informed by any experts or public input, and fails to meet many of the basic tenets of a sound

[20] North Carolina went three years without an official budget after the 2019 Budget Act was vetoed due to lack of sufficient support for education. Alex Granados, Mebane Rash, Liz Bell & Katie Dukes, *At long last, a budget. What does it mean for K-12 and early childhood education?*, EDNC (Dec. 13, 2021), https://tinyurl.com/2p4msvt8. As economic pressure from the coronavirus pandemic mounted, the governor entered into closed-door negotiations with Republican legislators. Finally, months into the new fiscal year, Governor Cooper agreed to sign the budget but made clear that he did not "consent to the constitutionality of these provisions." *'I will fight to fix its mistakes': N.C. Gov. Cooper says he will sign state budget despite 'missed opportunities*, WBTV (updated Nov. 16, 2021, 5:02 PM EST), https://tinyurl.com/bdkchj6h. Lack of transparency continued with the development of the 2022 Budget Act, where the Act was developed via a closed conference report that "allow[ed] a select few legislators to craft budget changes" without engaging in public debates. Donald Bryson, *Elitist mindset is bad for our budget process*, THE CAROLINA JOURNAL (June 29, 2022), https://tinyurl.com/2w4xs7sz.

basic education, including significant necessary programs for at-risk students. In fact, it is no "remedial plan" at all.

Following the trial court's findings and orders in 2015 and 2018, and the subsequent WestEd Report again evidencing statewide failures, State Defendants entered into the January 2020 Consent Order. (R p 1633). In June 2020, the State submitted its initial one-year remedial plan. (R p 1688). In this plan, the State committed to implement several statewide initiatives to begin resolving its constitutional violations. (*See*, *e.g.*, R pp 1775–85 (describing various programs including teacher preparation programs in high-need rural and urban districts; combining allotments for economically disadvantaged students; providing assistance to low-performing and high poverty schools and districts)).

Yet, by August 2021, things became even worse. The State admitted that it had failed to implement many of the action items in its one-year plan "'[d]ue to the unprecedented and unanticipated impacts of the COVID-19 pandemic'" and that many of the actions in the plan would be postponed. (R p 1773). The State then proposed the CRP in March 2021, and the court approved it in June 2021. In its submissions to the Court, State Defendants acknowledged that the provisions of the CRP "are *necessary* and appropriate actions that *must* be implemented to address the continuing constitutional violations. . . ." (R p 1682 (emphasis added)).

The CRP is based on a strong record evidencing the State's monumental failure to remedy the ongoing constitutional violations. *See* SOF Parts I–IV; (*see also* R pp 1825–26 (court recognizing overwhelming record evidencing statewide violations and need for statewide remedy)). No viable alternative was presented to the Court by any other party.[21]

Indeed, the legislature never presented a remedy to the court nor did Intervenor-Defendants ever attempt to intervene to object to the proposed CRP and its estimated cost, the statewide scope of the CRP, or the Consent Order approving the CRP. As the trial court noted, "the General Assembly has opted to largely ignore this litigation." (R p 1835). Pat Ryan, a spokesperson for Intervenor-Defendant Berger, publicly articulated Senator Berger's defiance of the court's attempts to bring the State into compliance with the Constitution, stating, "I don't know how much clearer we can be. If Judge Lee wants to help decide how to spend state dollars—role that has been the exclusive domain of the legislative branch since the state's founding—then Judge Lee should run for a seat in the House or Senate."[22]

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[21] *See, e.g.*, R p 1840 ("[T]here is no alternative or adequate remedy available to the children of North Carolina that affords them the relief to which they are so entitled."); R p 1831 (noting that the CRP was the only viable plan the State presented in response to the Court's January 2020, September 2020, and June 2021 Orders).

[22] Granados, Alex. *Leandro judge says he is 'very close' to giving up on Republican lawmakers*, EDNC (Sep. 9, 2021), *available at* https://rb.gy/mzscoz.

In the face of such recalcitrance from Intervenor-Defendants, the trial court was not, as Intervenor-Defendants contend, (*see* Intervenor Defendants' Opening Br. at 55–58, 64–65), required to evaluate whether the Budget Act was a constitutionally adequate alternative plan to the CRP, especially considering its facial deficiencies as such. *See* Argument Part II. The November Order was merely an order of enforcement that aimed to ensure the CRP was fully implemented and, in turn, the State satisfied its obligation of ensuring a sound basic education. (*See* R pp 1841–42).

As a result, the State Budget Act is relevant only to the extent that it funded specific items in the CRP. As noted above, on remand, the trial court found that the Budget Act "fails to provide nearly one-half of . . . the total necessary funds" for remedying the constitutional violations. (R p 2630, ¶ 34). This included little-to-no funding for students with disabilities, low-income students, English learners, and critical initiatives for low-property-wealth districts. (*See* Penn-Intervenors Opening Br. at 17-18 (discussing specific, unfunded CRP programs targeting at-risk students)). Intervenor-Defendants cite no authority to support the proposition that a subsequent budget should be reviewed and substituted for the CRP as the appropriate remedy *nun pro tunc* notwithstanding the explicit commands of the November Order.

Thus, the issue is not the constitutionality of the Budget Act, but the demonstrated insufficiency of its appropriations to ensure the constitutional

right to a sound basic education, which the CRP does. After more than two decades of inaction, any assurances by Intervenor-Defendants to fund the CRP in future sessions, (*see* Intervenor-Defendants' Opening Br. at 64), ring hollow. Whether the State might appropriate money at some later date is irrelevant to the existing, decades-long violation. The record before the Court consists only of budgets that have actually passed, not merely proposed. Following this argument logically reveals the absurdity: if the Intervenor-Defendants had their way, they could simply evade judicial review in perpetuity by proposing a new appropriations act, whatever its contents, and continue to delay action by the courts.

These ludicrous results undermine Intervenor-Defendants' related argument that the Budget Act must be treated as "presumptively constitutional." (Intervenor-Defendants' Opening Br. at 31). First, Penn-Intervenors are not directly challenging the constitutionality of the Budget Act, but rather the State's failure to ensure a sound basic education for students, including intervenor children. Consequently, the issue is not whether the State Budget Act is constitutional, but whether the State has sufficiently remedied an ongoing constitutional violation. Intervenor-Defendants cite to no case asserting that the State enjoys a presumption of constitutionality or bears no burden of demonstrating compliance with the Constitution *in the face of an*

established violation. Such a ruling would turn remedies and remedial enforcement on its head.[23]

In *Abbott v. Burke*, the New Jersey Supreme Court decided a similar controversy with its legislative branch, which had sought to avoid fulfilling its constitutional obligation to ensure an adequate education for that state's students. After years of litigation, the court crafted remedies to bring New Jersey schools into constitutional compliance. *See Abbott*, 199 N.J. 140, 149, 971 A.2d 989, 994 (2009) ("The State's inability to devise a [constitutionally adequate] funding formula . . . forced the Court to devise a judicial remedy to fill the void."). The State then forwarded its own proposal, the School Funding Reform Act ("SFRA"), as a remedy for ongoing constitutional violations. *Id.* at 148, 971 A.2d at 993. The court explained, however, that, given this matter's

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[23] Even if the Court were to consider whether a presumption applies, it would not here, because *"the evidence is to the contrary, [and the] facts judicially known or proved, compel otherwise*." *Martin v. N.C. Hous. Corp.*, 277 N.C. 29, 44, 175 S.E.2d 665, 673 (1970) (quoting 16 *C.J.S. Constitutional Law* § 100b, 454–55) (emphasis added). As stated previously, the CRP is the only judicially determined, viable remedy based on the substantial record presented. The facts show that the Budget Act "fails to provide nearly one-half of . . . the total necessary funds" for remedying the constitutional violations. (R p 2630, ¶ 34). These facts provide more than sufficient information to rebut any presumption that the Budget Act is constitutional. *See Moore v. Knightdale Bd. of Elections*, 331 N.C. 1, 4, 413 S.E.2d 541, 543 (1992) ("The presumption of constitutionality is not . . . conclusive.").

procedural history, the SFRA would not enjoy the presumption of constitutionality typically afforded to such legislative acts:

> The State enacted SFRA, however, after decades of school funding litigation that have led to the issuance of numerous remedial orders to enforce the constitutional rights of the pupils in the Abbott districts. The constitutional review, therefore, cannot begin with the familiar presumption. If the State is to replace adherence to those prior remedial orders with the application of SFRA's new funding formula for children in Abbott districts, it must demonstrate that the concerns that compelled the Court to resort to judicially crafted remedies have been overcome.

Id., 971 A.2d at 993–94. Similarly, here, Intervenor-Defendants cannot continuously delay remediation by proposing new, potentially constitutionally inadequate budget plans. As the court in *Abbott* concluded, this new, inadequate budget is not entitled to a presumption of constitutionality.

V. Intervenor-Defendants' Remaining Defenses Fail

Intervenor-Defendant final, futile attempt to avoid meeting its constitutional obligations includes far-fetched theories averring that: the trial court's remedial enforcement constitutes a political question and an advisory opinion; and that State Defendants, Plaintiffs, and Penn-Intervenors colluded as part of a "friendly suit." These arguments are equally unavailing and fail.

A. The Political Question Doctrine Does Not Apply to the *State's* CRP Approved by the Court

Intervenor-Defendants concede that the courts can resolve constitutional challenges to violations of a sound basic education, recognizing that "the judiciary has the power to 'define' the minimum requirements for a 'sound

basic education' under the State Constitution." (Intervenor-Defendants' Opening Br. at 38); *see also Leandro I,* 346 N.C. at 345, 488 S.E.2d at 254 (holding that a challenge to the denial of a sound basic education is not a political question). Nevertheless, they argue that the trial court violated the political question doctrine by exercising "unprecedented judicial intrusion" through its prescriptive CRP, which in its opinion is better left to the General Assembly, not the courts. (Intervenor-Defendants' Opening Br. at 40). That argument fails for several reasons.

In determining whether an issue constitutes a nonjusticiable political question, this Court considers "the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination." *Cooper v. Berger*, 370 N.C. 392, 408, 809 S.E.2d 98, 107 (2018) (quoting *Baker v. Carr*, 369 U.S. 186, 210 (1962)). In *Cooper*, this Court clarified that when a case involves "a conflict between two competing constitutional provisions," a court has "a duty to decide" the outcome. 370 N.C. at 412, 809 S.E.2d at 110. Ultimately, a court can only abdicate its duty to faithfully interpret the Constitution when the issue in question arises from "nothing more than a policy dispute." *Id.*

First and foremost, the implementation of the CRP was not a "judicial determination." As noted above (*see* Argument Part IV), the CRP was

developed and proposed by the executive branch to bring the State into compliance with *Leandro I* and *II*, actions that the General Assembly never assumed. The trial court merely *approved* the plan through a Consent Order agreed to by all parties. (R pp 1678–85). Intervenor-Defendants' fundamental misrepresentation of the court ordering its own specific remedy proves fatal to its political question defense.

Moreover, even if the trial court *had* directly devised remedies to the decades-long constitutional violation, which it did not, this Court has made it perfectly clear that there are situations in which such specific remediation is appropriate. *See* Argument Part I.

Other state supreme courts have similarly emphasized their "authority, indeed their duty, to engage in judicial review and, when necessary, compel the legislative and executive branches to conform their actions to that which the constitution requires." *Montoy v. State*, 279 Kan. 817, 826-27, 112 P.3d 923, 930 (2005) (explaining that, in a school finance case, the court can engage in active remediation after legislative noncompliance). In *Abbott*, the Supreme Court of New Jersey highlighted the "numerous remedial orders to enforce the constitutional rights of the pupils in the Abbott districts" issued after decades of litigation. 199 N.J. at 148, 971 A.2d at 993. Such orders—deemed necessary to effectuate the constitutional rights of New Jersey's schoolchildren—were never voided due to political question concerns. *See, e.g.*, *Abbott v. Burke*, 206

N.J. 332, 363–64, 20 A.3d 1018, 1037–38 (2011) (explaining that even the legislature's power over appropriations is not absolute, and the court need not defer to legislative or executive funding decisions that violate the Constitution).

By approving the State's CRP, the trial court did *not* simply decide "a policy dispute"—it approved a remediation plan forwarded by the State to cure a longstanding constitutional infraction.

B. A Constitutional Remedy, and Attempts to Enforce That Remedy, Are Not Advisory Opinions

Similarly, contrary to Intervenor-Defendants' claim, (*see* Intervenor-Defendants' Opening Br. at 41), the trial court's approval of the CRP does not constitute an advisory opinion. An "advisory opinion" is one that expands the court's jurisdiction to "mere academic inquiry when the questions presented are altogether moot, arising out of no necessity for the protection of any right or the avoidance of any liability, and where the parties have only a hypothetical interest in the decision of the court," which could be "put on ice to be used if and when occasion might arise." *Tryon v. Duke Power Co.*, 222 N.C. 200, 204, 22 S.E.2d 450, 453 (1942). The Court has described advisory opinions as those deciding an issue not "drawn into focus by [the court] proceedings." *Wise v. Harrington Grove Cmty. Ass'n*, 357 N.C. 396, 408, 584 S.E.2d 731, 740 (2003).

Here, the court's endeavor is no "academic inquiry," but rather a concrete effort to remedy a constitutional violation that has plagued North Carolina's schoolchildren for more than two decades. None of Intervenor-Defendants' arguments are availing.

Intervenor-Defendants first contend that the propriety of the State's education system *as a whole* is not before the court and that the approval of the CRP is purely advisory. (Intervenor-Defendants' Opening Br. at 41–48). As extensively briefed above, the judiciary has wound through the statewide issues for decades; first in pursuit of the answer to whether the State was constitutionally required to provide its schoolchildren with a sound basic education; then whether the State was upholding that constitutional duty; next whether the State would resolve any violation found; and finally when and how the judiciary, if necessary, would enforce a remedy to the existing constitutional deficiency. *See* Argument Part IV.A. Thus, there is no "speculation" as to the constitutional infirmity to which the trial court sought to fashion a remedy. To take issue with the scope of this Order now unjustly delays the remediation that North Carolina students have been waiting for nearly two decades to receive.

Intervenor-Defendants also wrongly invoke the advisory opinion doctrine in arguing that the passage of the Budget Act renders the CRP and any enforcement efforts purely advisory. First, as discussed in greater length

above, this argument is premised on the false notion that the trial court, not the State, drafted the CRP. *See* Argument Part IV.A. Second, the violation has been established over and over again, and no evidence was presented to the court demonstrating otherwise. *See* Argument Part IV.B. Third, the CRP—proposed by the State—is the first and only effort by any party to bring North Carolina into full constitutional compliance with *Leandro I* and *II*, and it was judicially determined to be adequate *based on an extensive record*. Lastly, the Budget Act's only relevance is whether it fully funded the CRP; by all admissions, it fell woefully short, including the failure to fund programs for the significant needs of at-risk students, among others. *See* Argument Part II. Such a politicized Act cannot possibly supplant the well-crafted, evidence-based CRP.

C. This Lawsuit has Been Seriously Contested for Decades and the Mere Entry of Consent Orders Following Extensive Liability Findings is Not Reflective of a "Friendly Suit"

Despite a decades-long history of adversarial proceedings, Intervenor-Defendants speciously argue that this decades-old conflict has become a "friendly suit." (Intervenor-Defendants' Opening Br. at 48). This is functionally a recasting of the "advisory opinion" argument, but centered on the fact that the other parties to this litigation are, allegedly, not adverse. They are mistaken, and yet again misapply the doctrine.

A friendly suit is devoid of the "actual controversy" required to "bring to the attention of the court all facets of a legal problem." *City of Greensboro v. Wall*, 247 N.C. 516, 520, 101 S.E.2d 413, 416–17 (1958). Intervenor-Defendants ignore decades of contested hearings and, instead, expound with myopic intensity upon "a series of consent orders" filed from 2018 to the present, (Intervenor-Defendants' Opening Br. at 48)—all of which followed another devastating liability finding of the trial court showing, particularly, at-risk students failing to acquire a sound basic education across the state (R pp 1244–57). However, the mere presence of a consent agreement does not negate a history of actual controversy or suddenly strip the court of its authority to make a constitutional determination. Indeed, such an interpretation would render the utility of consent orders meaningless, discouraging parties from negotiating settlements and forcing courts to prolong litigation and extend attending costs.

The filing of consent orders is common practice in North Carolina courts, allowing the parties to agree on the remedy, rather than have the courts impose a remedy unilaterally, and help preserve judicial resources. *See, e.g.*, *State ex rel. Howes v. Ormond Oil & Gas Co.*, 128 N.C. App. 130, 136, 493 S.E.2d 793, 796 (1997) ("[C]onsent judgment is not valid unless all parties express their unqualified consent . . . ."); *Carcaño v. Cooper*, No. 1:16CV236, 2019 WL 3302208, at *5 (M.D.N.C. July 23, 2019) (noting that approval of the

proposed consent order would "avoid the consumption of a significant additional amount of time and expense by the parties . . . [and] allow for the efficient use of judicial resources" (internal quotation marks and brackets omitted)); *United States v. North Carolina*, 180 F.3d 574, 581 (4th Cir. 1999) ("In considering whether to enter a proposed consent decree, a . . . court should be guided by the general principle that settlements are encouraged.").

In this case, the parties engaged in several contested hearings and trials over the course of nearly three decades before the State began to develop the CRP. *See, e.g.*, SOF, Part IV.

After 17 years of continuous failure to comply with the dictates of *Leandro II*, in 2021, the State deliberated with the parties over the terms of its proposed comprehensive plan—informed by the extensive record—and then presented that plan to the trial court with the expectation of finally resolving the ongoing constitutional violation. (R p 1830–31). As with any valid consent order, Plaintiff parties reviewed and approved the proposed enforcement plan before it was presented to Judge Lee. Judge Lee then signed the final order. (R p 1684).

This adversarial and deliberative process over the course of over two decades and the subsequent entry of various consent orders does not reflect a conspiracy among parties—it merely reflects parties attempting to resolve the compelling, "paramount" issues at stake. Such actions should be encouraged

by the courts, not discouraged, and certainly do not divest the court of jurisdiction as a "friendly lawsuit."

CONCLUSION

Penn-Intervenors respectfully urge the Court to affirm the trial court's 10 November 2022 Order and its transfer provisions, as well the amount of funding determined to be necessary to fully implement the CRP under the trial court's 26 April 2022 Order.

Respectfully submitted this 1st day of August 2022.

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Pursuant to North Carolina Rule of Appellate Procedure 26, I hereby certify that I have this day served a copy of the foregoing by email, addressed to the following counsel:

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This the 1st day of August, 2022.

Electronically Submitted
Christopher A. Brook

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North Carolina Constitution

Article I.

Declaration of Rights.

§ 4. Secession prohibited

This State shall ever remain a member of the American Union; the people thereof are part of the American nation; there is no right on the part of this State to secede; and all attempts, from whatever source or upon whatever pretext, to dissolve this Union or to sever this Nation, shall be resisted with the whole power of the State.

…

§ 15. Education.

The people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right.

North Carolina Constitution

Article IV.

Judicial.

§ 1. Judicial Power

The judicial power of the State shall, except as provided in Section 3 of this Article, be vested in a Court for the Trial of Impeachments and in a General Court of Justice. The General Assembly shall have no power to deprive the judicial department of any power or jurisdiction that rightfully pertains to it as a co-ordinate department of the government, nor shall it establish or authorize any courts other than as permitted by this Article.

North Carolina Constitution

Article IX.

Education.

§ 2. Uniform System of Schools.

(1) General and uniform system: term. The General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools, which shall be maintained at least nine months in every year, and wherein equal opportunities shall be provided for all students.

(2) Local responsibility. The General Assembly may assign to units of local government such responsibility for the financial support of the free public schools as it may deem appropriate. The governing boards of units of local government with financial responsibility for public education may use local revenues to add to or supplement any public school or post-secondary school program.

…

§ 6. State School Fund.

The proceeds of all lands that have been or hereafter may be granted by the United States to this State, and not otherwise appropriated by this State or the United States; all moneys, stocks, bonds, and other property belonging to the State for purposes of public education; the net proceeds of all sales of the swamp lands belonging to the State; and all other grants, gifts, and devises that have been or hereafter may be made to the State, and not otherwise appropriated by the State or by the terms of the grant, gift, or devise, shall be paid into the State Treasury and, together with so much of the revenue of the State as may be set apart for that purpose, shall be faithfully appropriated and used exclusively for establishing and maintaining a uniform system of free public schools.

…

§ 7. County School Fund; State Fund for Certain Moneys.

(a) Except as provided in subsection (b) of this section, all moneys, stocks, bonds, and other property belonging to a county school fund, and the clear proceeds of all penalties and forfeitures and of all fines collected in the several counties for any breach of the penal laws of the State, shall belong to and remain in the several counties, and shall be faithfully appropriated and used exclusively for maintaining free public schools.

(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. (2003-423, s.1.)

North Carolina General Statutes

Chapter 7A-245.

Injunctive and declaratory relief to enforce or invalidate statutes; constitutional rights.

(b) When a case is otherwise properly in the district court division, a prayer for injunctive or declaratory relief by any party not a plaintiff on grounds stated in this section is not ground for transfer. (1965, c. 310, s. 1.)

North Carolina General Statutes

Chapter 1-72.2.

Standing of legislative officers.

(a) It is the public policy of the State of North Carolina that in any action in any North Carolina State court in which the validity or constitutionality of an act of the General Assembly or a provision of the North Carolina Constitution is challenged, the General Assembly, jointly through the Speaker of the House of Representatives and the President Pro Tempore of the Senate, constitutes the legislative branch of the State of North Carolina and the Governor constitutes the executive branch of the State of North Carolina, and when the State of North Carolina is named as a defendant in such cases, both the General Assembly and the Governor constitute the State of North Carolina. It is the public policy of the State of North Carolina that in any action in any federal court in which the validity or constitutionality of an act of the General Assembly or a provision of the North Carolina Constitution is challenged, the General Assembly, jointly through the Speaker of the House of Representatives and the President Pro Tempore of the Senate, constitutes the legislative branch of the State of North Carolina; the Governor constitutes the executive branch of the State of North Carolina; that, when the State of North Carolina is named as a defendant in such cases, both the General Assembly and the Governor constitute the State of North Carolina; and that a federal court presiding over any such action where the State of North Carolina is a named party is requested to allow both the legislative branch and the executive branch of the State of North Carolina to participate in any such action as a party.

(b) The Speaker of the House of Representatives and the President Pro Tempore of the Senate, as agents of the State, by and through counsel of their choice, including private counsel, shall jointly have standing to intervene on behalf of the General Assembly as a party in any judicial proceeding challenging a North Carolina statute or provision of the North Carolina Constitution. Intervention pursuant to this section shall be effected upon the filing of a notice of intervention of right in the trial or appellate court in which the matter is pending regardless of the stage of the proceeding. Notwithstanding any other provision of law to the contrary, the participation of the Speaker of the House of Representatives and the President Pro Tempore of the Senate in any action, State or federal, as a

party or otherwise, shall not constitute a waiver of legislative immunity or legislative privilege of any individual legislator or legislative officer or staff of the General Assembly. (2013-393, s. 3; 2014-115, s. 18; 2017-57, s. 6.7(i).)

Transcript Excerpt

Cover Page.

Page 93, Lines 11-14.

IN THE NORTH CAROLINA GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION.
WAKE COUNTY
* *
HOKE COUNTY BOARD OF EDUCATION, et al, 95 CVS 1158
Plaintiffs,

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 Defendants,
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,
Intervernor-Defendants.

* *

TRANSCRIPT
Wednesday, April 13, 2022

Transcript of proceedings in the General Court of Justice, Superior Court Division, Wake County, 316 Fayetteville Street, 3rd Floor, Raleigh, North Carolina, before the Honorable Michael L. Robinson, Judge Presiding.

Denise St. Clair, RPR, CRR, CRC
Official Court Reporter
N.C. Administrative Office of the Courts
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on the legislature, how would it do it?

MR. TILLEY: Your Honor, I believe that's the way that budget messages and other documents, but legislation for signature to the Governor and the Governor messages back. That would be typically the way those things would happen. Most of the time in legislation when there's a requirement to send something back to the General Assembly, it's sent to the Joint Legislative Oversight Committee that has jurisdiction or to the head of the chambers, the President Pro Tempore of the House.

THE COURT: Was the legislature aware of Judge Lee's ruling in June of 2021?

MR. TILLEY: I would expect that they were, Your Honor.

THE COURT: So the legislature was aware that Judge Lee had put the State on notice that if they didn't come up with a budget that matched, funded the CRP, then the Court would likely take action?

MR. TILLEY: Again, I'm going to have to speak for, you know, 150 members of General Assembly on that one, and I'm not really in position to do so. You know, it was reported in the press that order. I assume the leadership was aware, but can I tell you that that -- you know, how does the General Assembly respond to that? It's got a couple of options, but, you know, what's its alternative plan to bring this to -- any

Legislative Intervenors' Notice of Intervention (Dec. 8, 2021)

STATE OF NORTH CAROLINA COUNTY OF WAKE 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.	FILED 2021 DEC -8 P 4:17 WAKE CO., C.S.C. BY IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 95-CVS-1158 **NOTICE OF INTERVENTION**

Pursuant to N.C. Gen. Stat. § 1-72.2(b), Legislative Intervenor-Defendants 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 (the "Legislative Intervenors") hereby give notice of their intervention, as of right, as agents of the State on behalf of the General Assembly in this matter. In support of this notice, Legislative Intervenors show the Court the following:

1. "It is the public policy of the State of North Carolina that in any action in any North Carolina State court in which the validity or constitutionality of an act of the General Assembly or a provision of the North Carolina Constitution is challenged, the General Assembly, jointly through the Speaker of the House of Representatives and the President Pro Tempore of the Senate, constitutes the legislative branch of the State of North Carolina and the Governor constitutes the executive branch of the State of North Carolina, and when the State of North Carolina is named as a defendant in such cases, both the General Assembly and the Governor constitute the State of North Carolina." N.C. Gen. Stat. § 1-72.2(a).

2. Thus, "[t]he Speaker of the House of Representatives and the President Pro Tempore of the Senate, as agents of the State, by and through counsel of their choice, including private counsel, shall jointly have standing to intervene on behalf of the General Assembly as a party in any judicial proceeding challenging a North Carolina statute or provision of the North Carolina Constitution." N.C. Gen. Stat. § 1-72.2(b). "Intervention pursuant to this section shall be effected upon the filing of a notice of intervention of right in the trial or appellate court in which the matter is pending regardless of the stage of the proceeding." *Id.*

3. At issue here are challenges to both the General Assembly's legislation and provisions of the North Carolina Constitution.

4. The Appropriations Clause of the North Carolina State Constitution provides that "[n]o 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). As a result, the North Carolina Supreme Court has held "the power of the purse is the exclusive prerogative of the General Assembly." *Cooper v. Berger*, 376 N.C. 22, 37 (2020).

5. Further, while the North Carolina Constitution requires the Governor to prepare and recommend a budget to the General Assembly, only the General Assembly can enact the budget. N.C. Const. Art. III, § 5.

6. On November 10, 2021, this Court issued an Order compelling the State Controller and the State Treasurer, along with the Office of State Budget and Management, to transfer funds to certain State agencies to be used for purposes ordered by the Court. *Id.* The Order did so despite acknowledging the North Carolina Supreme Court's recent holding that the Appropriations Clause ensures "that the people, through their elected representatives in the General Assembly, ha[ve] full and exclusive control over the allocation of the state's expenditures." *Id.* at 14 (quoting *Cooper v. Berger*, 376 N.C. at 37). The Court stayed implementation of its Order for 30 days. *Id.*

7. On November 18, 2021, while the Court's Order was stayed, the General Assembly, in accordance with the constitutional powers described above, enacted the Current Operations and Appropriations Act of 2021, N.C. Sess. Law. 2021-180 (the "State Budget"), which the Governor signed into law the same day. Among other things, the State Budget appropriated in Net General Funds over the biennium $21.5 billion for K-12 public education—approximately 41% of the total biennial budget. The State Budget, however, does not contain allocations identical to the Court's Order.

8. The Court's Order seeks to direct State officials to pay money from the State treasury in a manner contrary appropriations made in the State Budget. In doing so, the Order contravenes the doctrine of Separation of Powers reflected in Article I, Section 6 of the State Constitution, which provides that, "The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." As our Courts have held, "[b]ecause 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.'" *Richmond Cty. Bd. of Educ. v. Cowell*, 254 N.C. App. 422, 427 (2017) (quoting *In re Alamance Cty. Court Facilities*, 329 N.C. 84, 99, 405 S.E.2d 125, 132 (1991)). To do otherwise would cause the judiciary to impermissibly "arrogate [to itself] a duty reserved by the constitution exclusively to another body." *Id.*

9. Because the Order now effectively challenges the both the State Budget—which constitutes an act of the General Assembly—as well as the General Assembly's authority under the State Constitution, including the Appropriations Clause as well as the doctrine of Separation of Powers, Legislative Intervenors are entitled to intervene as of right on behalf of pursuant to N.C. Gen. Stat. § 1-72.2(b).

WHEREFORE, Legislative Intervenors, as agents of the state and on behalf of the General Assembly, provide notice of their intervention as of right in this case, through the counsel listed below, pursuant to N.C. Gen. Stat. § 1-72.2(b), for the purposes of responding to the Court's November 10, 2021, Order and associated proceedings challenging act(s) of the General Assembly and provisions of the North Carolina State Constitution.

This the 8th day of December, 2021.

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CONTENTS OF ADDENDUM

Unpublished Opinion **Brief Page**

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United States District Court, M.D. North Carolina.

Joaquín CARCAÑO; Payton Grey McGarry; Hunter Schafer; Madeline Goss; Angela Gilmore; Quinton Harper; and American Civil Liberties Union of North Carolina, Plaintiffs,

v.

Roy A. COOPER, III, in his official capacity as Governor of North Carolina; University of North Carolina; Dr. William Roper, in his official capacity as President of the University of North Carolina; Joshua Stein, in his official capacity as Attorney General of North Carolina; Machelle Sanders, in her official capacity as Secretary of the North Carolina Department of Administration; Mandy K. Cohen, in her official capacity as Secretary of the North Carolina Department of Health and Human Services; and James H. Trogdon, III, in his official capacity as Secretary of the North Carolina Department of Transportation, Defendants,

and

Phil Berger, in his official capacity as President Pro Tempore of the North Carolina Senate; and Tim Moore, in his official capacity as Speaker of the North Carolina House of Representatives, Intervenor-Defendants.

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Signed 07/22/2019
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Filed 07/23/2019

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MEMORANDUM OPINION AND ORDER

Thomas D. Schroeder, United States District Judge

***1** Before the court is the supplemental joint motion of Plaintiffs Joaquín Carcaño, Payton Grey McGarry, Hunter Schafer, Madeline Goss, Angela Gilmore, Quinton Harper, and the American Civil Liberties Union of North Carolina (together, "Plaintiffs"), along with Defendants Governor Roy Cooper, Attorney General Joshua Stein, and Secretaries Machelle Sanders, Mandy Cohen, and James Trogdon (together, "Executive Branch Defendants") for entry of a proposed consent decree to resolve this lawsuit as between them. (Doc. 289.) Intervenor-Defendants Phil Berger, President Pro Tempore of the North Carolina Senate, and Tim Moore, Speaker of the North Carolina House, proceeding in their official capacities as heads of the North Carolina General Assembly's two chambers, oppose the motion.[1] (Doc. 292.) The remaining Defendants, the University of North Carolina ("UNC") and its President, Dr. William Roper[2] (together, "UNC Defendants"), take no position. (Doc. 288 at 3.) For the reasons that follow, the motion will be granted.

I. BACKGROUND

This case has an extensive history that is more completely recounted in the court's earlier decisions. See, e.g., (Doc. 248 at 4–14). The lawsuit originated as a challenge to North Carolina's Public Facilities Privacy & Security Act, 2016 N.C. Sess. Laws 3, known as House Bill 2 ("HB2"), which required, among other things, that public agencies ensure that multiple occupancy restrooms, showers, and other similar facilities be "designated for and only used by" persons based on the "biological sex" listed on their birth certificate. The

court entered a preliminary injunction, granting Plaintiffs' request in part and denying it in part, based on controlling precedent at the time. (Doc. 127.)

During the pendency of the case and following substantial economic and other pressures brought against the State as a result of HB2, the North Carolina legislature enacted — and the newly-elected Governor, Defendant Cooper, signed — 2017 N.C. Sess. Laws 4, known as House Bill 142 ("HB142"). Section 1 of HB142 repealed HB2, Section 2 bars state agencies from "regulati[ng] ... access to multiple occupancy restrooms, showers, or changing facilities, except in accordance with an act of the General Assembly," and Section 3 prohibits local governments from "enact[ing] or amend[ing] an ordinance regulating private employment practices or regulating public accommodations." Section 4 provides that Section 3 "expires on December 1, 2020."

In the wake of the passage of HB142, the court dissolved its preliminary injunction (Doc. 205), and Plaintiffs filed a Fourth Amended Complaint (Doc. 210) claiming that HB142 and its predecessor HB2 violated their rights under the Fourteenth Amendment, Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 et seq. ("Title IX"), and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. ("Title VII").[3] The Fourth Amended Complaint contains over 400 detailed paragraphs recounting the procedural history of the litigation as well as the myriad actions that led to passage of HB142 and the concomitant repeal of HB2.

***2** On October 18, 2017, Plaintiffs and the Executive Branch Defendants moved jointly for entry of a consent decree. (Doc. 216.) A few days later, the UNC Defendants filed a motion to dismiss the lawsuit, as did Intervenor-Defendants. In a September 30, 2018 Memorandum Opinion and Order (Doc. 248), the court dismissed a number of Plaintiffs' claims, leaving only the following: (1) Plaintiffs' Title VII and Title IX nominal-damages claims against UNC for the period in which HB2 was in force, as to which the court reserved ruling pending supplemental briefing; and (2) Plaintiffs' equal protection challenge to HB142 § 3, brought against the Executive Branch Defendants, as to which the court found that Plaintiffs had met their pleading burden.[4] The court also directed the parties to meet and confer as to the effect of its dismissal ruling on the proposed consent decree. (Id. at 63–64.)

As directed, the parties filed supplemental briefing regarding the motions to dismiss Plaintiffs' Title VII and Title IX claims. On December 21, 2018, Plaintiffs and the Executive Branch Defendants filed a second joint motion for entry of consent decree (Doc. 264), again opposed by Intervenor-Defendants. On April 23, 2019, Intervenor-Defendants filed what the court construed as an unopposed motion to stay the Title VII and Title IX proceedings pending the Supreme Court's review of Bostock v. Clayton County Board of Commissioners, 723 F. App'x 964 (11th Cir. 2018), cert. granted, 139 S. Ct. 1599 (2019) (mem.) (whether Title VII prohibits discrimination against an employee on the basis of sexual orientation); Zarda v. Altitude Express, Inc., 883 F.3d 100 (2d Cir. 2018), cert. granted, 139 S. Ct. 1599 (2019) (mem.) (same); and EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560 (6th Cir. 2018), cert. granted, 139 S. Ct. 1599 (2019) (mem.) (whether Title VII prohibits discrimination against an employee on the basis of transgender status). (Doc. 282.)

The court held a hearing on the pending motions on May 17, 2019. During the hearing, the court heard argument by Plaintiffs and the Executive Branch Defendants as to the proposed terms of the consent decree, as well as the objections of Intervenor-Defendants. The court also expressed its concerns as to certain provisions of the proposed consent decree. (Doc. 287.) A few days later, the court stayed all litigation as it pertains to Plaintiffs' remaining Title VII and Title IX claims and ordered the parties to meet and confer in an attempt to resolve the concerns raised at the hearing as to the terms of the proposed consent decree. (Doc. 286.)

On May 31, 2019, Plaintiffs and the Executive Branch Defendants filed the present supplemental joint motion for entry of consent decree (Doc. 289), along with briefing (Docs. 290, 291) and a revised proposed decree (Doc. 289-1). The parties also filed a status report, as directed by the court, setting out the parties' positions. (Doc. 288.) Intervenor-Defendants filed a supplemental brief setting out their continued opposition to the motion. (Doc. 292.) On July 17, 2019, the court held a telephone hearing regarding the revised proposed decree, expressing additional concerns. Two days later, Plaintiffs filed a final version of the proposed consent decree. (Doc. 294-1.) The motion is now ready for decision.

II. ANALYSIS

Plaintiffs and the Executive Branch Defendants move for entry of a consent decree that would resolve all remaining

claims against the Executive Branch Defendants.[5] (Doc. 289.) The proposed consent decree has four decretal paragraphs:

> (1) With respect to public facilities that are subject to Executive Branch Defendants' control or supervision, the Consent Parties[6] agree that nothing in Section 2 of H.B. 142 can be construed by the Executive Branch Defendants to prevent transgender people from lawfully using public facilities in accordance with their gender identity. The Executive Branch Defendants as used in this paragraph shall include their successors, officers, and employees. This Order does not preclude any of the Parties from challenging or acting in accordance with future legislation.
>
> ***3** (2) The Executive Branch Defendants, in their official capacities, and all successors, officers, and employees are hereby permanently enjoined from applying Section 2 of H.B. 142 to bar, prohibit, block, deter, or impede any transgender individuals from using public facilities under any Executive Branch Defendant's control or supervision, in accordance with the transgender individual's gender identity. Under the authority granted by the General Statutes existing as of December 21, 2018, and notwithstanding N.C.G.S. § 114-11.6,[7] the Executive Branch Defendants are enjoined from prosecuting an individual under Section 2 of H.B. 142 for using public facilities under the control or supervision of the Executive Branch, when such otherwise lawful use conforms with the individual's gender identity.
>
> (3) The Consent Parties shall each bear their own fees, expenses, and costs with respect to all claims raised by Plaintiffs against the Executive Branch Defendants.
>
> (4) All remaining claims filed by Plaintiffs against the Executive Branch Defendants in this action are hereby dismissed with prejudice.

(Doc. 294-1.)

"A consent decree is a negotiated agreement that is entered as a judgment of the court." Bragg v. Robertson, 83 F. Supp. 2d 713, 717 (S.D.W. Va. 2000). Thus, while it is consensual, it remains a judicial document. Id. ("Approval of a consent decree is a judicial act, committed to the informed discretion of the trial court."); United States v. Swift & Co., 286 U.S. 106, 114–15 (1932). A federal court only has the power to enter a consent decree that "spring[s] from and serve[s] to resolve a dispute within the court's subject-matter jurisdiction." Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 525 (1986); see also Pac. R.R. v. Ketchum, 101 U.S. 289, 297 (1897) (requiring that a consent decree "comes within the general scope of the case made by the pleadings"). Before the court agrees to enter a consent decree, it must ensure that the proposed decree "is fair, adequate, and reasonable" as well as "not illegal, a product of collusion, or against the public interest." United States v. North Carolina, 180 F.3d 574, 581 (4th Cir. 1999) (quoting United States v. Colorado, 937 F.2d 505, 509 (10th Cir. 1991)). While a federal district court "should not blindly accept the terms of a proposed settlement," it "should be guided by the general principle that settlements are encouraged." Id.

Intervenor-Defendants argue that the terms of the proposed decree exceed the court's subject-matter jurisdiction and raise "federalism and separation-of-powers concerns." (Doc. 292 at 1–2.) These, and Intervenor-Defendants' related contentions, are addressed in turn.

A. Subject-Matter Jurisdiction

Because the court must always assure itself of its subject-matter jurisdiction, it must determine whether the proposed consent decree falls within its power to act. In its September 30, 2018 Memorandum Opinion and Order, the court determined that Plaintiffs lacked standing as to their claims that HB142 created uncertainty about which restrooms they were permitted to use, and the court dismissed those claims for that reason.[8] (Doc. 248 at 21–31.) However, the court determined that Plaintiffs did have standing as to their claims against the Executive Branch Defendants challenging HB142 §§ 2 and 3 on the grounds that the preemption provisions of these sections — which allegedly eliminate the ability of transgender individuals to advocate for anti-discrimination protections in the state agency and municipal policy-making process — constitute a violation of the Equal Protection Clause. (Doc. 248 at 31–39.) Intervenor-Defendants argue that the court's dismissal of Plaintiffs' injury-by-uncertainty claims for lack of standing deprives the court of jurisdiction to enter a consent decree that would alleviate alleged uncertainty about bathroom access, leaving the court with authority only to approve consent decree provisions that directly remediate Plaintiffs' alleged barrier-to-access injury.

***4** The Supreme Court has cautioned that "a federal court is more than a recorder of contracts from whom parties can purchase injunctions; it is an organ of government constituted

to make judicial decisions." Local No. 93, 478 U.S. at 525 (internal quotation marks omitted). "Accordingly, a consent decree must spring from and serve to resolve a dispute within the court's subject-matter jurisdiction." Id. The provisions of a consent decree must fall within "the general scope of the case made by the pleadings" and "further the objectives of the law upon which the complaint was based." Id. (quoting Ketchum, 101 U.S. at 297). "[I]n addition to the law which forms the basis of the claim, the parties' consent animates the legal force of a consent decree." Id.

Here, the court is not persuaded that the relief requested by Plaintiffs and the Executive Branch Defendants falls outside its jurisdiction to approve. "[A] federal court is not necessarily barred from entering a consent decree merely because the decree provides broader relief than the court could have awarded after a trial." Local No. 93, 478 U.S. at 525. Moreover, courts have found that even claims "not expressly set out in the pleadings" can "fall within the [pleadings'] general scope," as long as they are sufficiently related to the pleaded claims. United States v. Charles George Trucking, Inc., 34 F.3d 1081, 1090 (1st Cir. 1994).

Intervenor-Defendants point out that the first two paragraphs of the proposed consent decree directly address potential application of HB142 § 2 as a basis for blocking transgender individuals' use of public facilities matching their gender identity, or prosecuting them for such use, as opposed to the inability to meaningfully advocate for non-discrimination protections at the local government and state agency levels. Intervenor-Defendants therefore trace the lineage of these provisions to Plaintiffs' failed attempt to establish an injury in fact based on alleged uncertainty about which restrooms they were able to use.

As noted above, however, it is sufficient if the provisions of a consent decree relate to the pleaded claims; they need not be tailored to remedy only the pleaded injury in fact.[9] Here, the court found that Plaintiffs established standing to challenge HB142 § 2 on equal protection grounds. Plaintiffs contended that the provision created " 'one rule for transgender individuals and another for non-transgender individuals' because the UNC Defendants are willing to regulate access to restrooms in one sense [i.e., by labeling restrooms as for 'men' or 'women'], but refuse to regulate access to restrooms in the sense of clarifying which restrooms transgender individuals are permitted to use." (Doc. 248 at 43 (quoting Doc. 233 at 40).) In dismissing this claim under Rule 12(b)(6), the court found that Plaintiffs "failed to plausibly plead that the preemption of regulation of access to multiple occupancy restrooms, showers, or changing facilities in Section 2 impacts them disproportionately" in part because "[n]othing in the language of Section 2 can be construed to prevent transgender individuals from using the restrooms that align with their gender identity." (Id. at 47, 49.) It is this precise observation, arising out of a challenge to HB142 § 2 which Plaintiffs had standing to bring, that Plaintiffs and the Executive Branch Defendants now seek to memorialize in the consent decree.

***5** Intervenor-Defendants' response to this argument is that claims ultimately dismissed for failure to state a claim definitionally cannot fall within "the general scope of the case made by the pleadings," Local No. 93, 478 U.S. at 525 (quoting Ketchum, 101 U.S. at 297). Under this reasoning, no proposed consent decree in this case could address HB142 § 2 at all, given the court's Rule 12(b)(6) dismissal of Plaintiffs' equal protection challenge to that provision. But Intervenor-Defendants cite no case applying such a rule, and courts do not consider "the merits of the settled claims" in the consent decree jurisdiction analysis. Bragg, 248 F.3d at 299; see also id. at 299–300 ("As long as [the plaintiff]'s claims were not clearly frivolous from the face of the complaint, jurisdiction was proper, and a challenge to the consent decree may not be made on a jurisdictional basis."). As one court aptly noted, "there may be some value for settlement purposes even to substantive claims that [this court has] rejected, because" — absent a settlement — the plaintiffs could exercise "their rights of appeal and could persuade the [Court of Appeals] that [this court] was wrong." In re New Motor Vehicles Canadian Export Antitrust Litig., 236 F.R.D. 53, 56 (D. Me. 2006).

As a result, neither the court's jurisdictional rejection of Plaintiffs' injury-by-uncertainty claims nor its Rule 12(b)(6) dismissal of Plaintiffs' equal protection challenge to HB142 § 2 vitiates its jurisdiction to enter the proposed consent decree.

B. Propriety of the Proposed Consent Decree

Plaintiffs and the Executive Branch Defendants contend that the proposed consent decree meets the standard of "fair, adequate, and reasonable" and "not illegal, a product of collusion, or against the public interest." North Carolina, 180 F.3d at 581 (quoting Colorado, 937 F.2d at 509). Intervenor-Defendants disagree.

"In considering the fairness and adequacy of a proposed settlement, the court must assess the strength of the plaintiff's

case." Id. "In particular, the court should consider the extent of discovery that has taken place, the stage of the proceedings, the want of collusion in the settlement and the experience of plaintiffs' counsel who negotiated the settlement." Id. (internal quotation marks omitted). "[P]rior to approving a consent decree a court must satisfy itself of the settlement's overall fairness to beneficiaries and consistency with the public interest." Citizens for a Better Env't v. Gorsuch, 718 F.2d 1117, 1126 (D.C. Cir. 1983) (quoting United States v. Trucking Emp'rs, Inc., 561 F.2d 313, 317 (D.C. Cir. 1977)). As noted above: in treating these factors, the court is "guided by the general principle that settlements are encouraged." North Carolina, 180 F.3d at 581.

Here, Plaintiffs' litigation against the Executive Branch Defendants has persisted for over three years and consumed substantial party and public resources. Despite this, the case has not advanced beyond its pre-answer phase as to the Fourth Amended Complaint. Approval of the proposed consent decree would resolve all claims against the Executive Branch Defendants, "avoid the consumption of a significant [additional] amount of time and expense by the parties, including the public fisc, and ... allow for the efficient use of judicial resources." W. Va. Highlands Conservancy v. Pocahontas Land Corp., No. 2:13-cv-12500, 2015 WL 7736645, at *2 (S.D.W. Va. Nov. 30, 2015).[10] By providing a vehicle for resolving the claims between the settling parties as to the remnants of a contentious challenge involving a matter that has consumed significant state and judicial resources — and doing so by adopting the plain meaning of HB142 § 2, which was passed by the State legislature — the proposed consent decree is consistent with the public interest. See Gorsuch, 718 F.2d at 1126 ("Not only the parties, but the general public as well, benefit from the saving of time and money that results from the voluntary settlement of litigation."). The court has carefully tracked the development of the proposed consent decree in its several iterations, required supplemental briefing following dismissal of some of Plaintiffs' claims, and held two hearings to address its propriety. In the court's view, the revised proposed consent decree reflects a genuine effort to address the concerns raised by the prior versions.

***6** The court also observes that the parties have had the benefit of excellent legal counsel. Plaintiffs are well-represented by several major nonprofit legal organizations (the American Civil Liberties Union of North Carolina and Lambda Legal Defense and Education Fund) and large, sophisticated law firms (Jenner & Block LLP and Wiley Rein LLP). The Executive Branch Defendants are well-represented by the North Carolina Department of Justice. While it may appear that Plaintiffs gain little from the proposed consent decree, which affirms the court's reasoning in dismissing their HB142 § 2 equal protection claim, it is a fact that HB2 was repealed during the pendency of the lawsuit, and Plaintiffs do obtain partial resolution of this long-running lawsuit as well as the Executive Branch Defendants' agreement that the parties will pay their own costs and attorneys' fees. The court cannot say that this resolution fails to reflect the relative merit *vel non* of the claims alleged in the Fourth Amended Complaint.

Intervenor-Defendants contend that Plaintiffs and the Executive Branch Defendants are not in reality opposed to each other and, therefore, that any proposed consent decree is necessarily collusive. It is certainly true that, unlike their immediate predecessors, the Executive Branch Defendants have shown little interest in litigating this case. They have not moved to dismiss or attempted to answer the Fourth Amended Complaint in the nearly two years since it was filed, nor did they evince any support for Intervenor-Defendants' attempts to obtain dismissal on their behalf, despite the fact that — as the court's ruling on Intervenor-Defendants' motion to dismiss explains — the majority of Plaintiffs' claims have been found to lack merit. Where there has been little adversarial activity, a federal court must be especially discerning when presented with a proposal in which elected state officials seek to bind their successors as to a matter about which there is substantial political disagreement. See Horne v. Flores, 557 U.S. 433, 449 (2009) (noting that "public officials sometimes consent to, or refrain from vigorously opposing, decrees that ... bind state and local officials to the policy preferences of their predecessors and may thereby improperly deprive future officials of their designated legislative and executive powers" (internal quotation marks omitted)). Along these lines, Intervenor-Defendants also argue that the proposed consent decree unduly circumscribes executive discretion (Doc. 292 at 2–3 & n.2 (citing Michael W. McConnell, Why Hold Elections? — Using Consent Decrees to Insulate Policies from Political Change, 1987 U. Chi. Legal F. 295, 301)), and thus may result in permanent federal supervision of core state processes by subjecting future North Carolina executive branch officials to "a potentially continual round of court proceedings" on charges that they violated the decree (Doc. 287 at 10).

However, the proposed consent decree dismisses the Executive Branch Defendants from the case having ceded

nothing more than an interpretation of HB142 § 2 faithful to its plain terms and agreeable to all parties, including the Intervenor-Defendants. In its first paragraph, the proposed decree provides "that nothing in Section 2 of H.B. 142 can be construed by the Executive Branch Defendants [or their successors] to prevent transgender people from lawfully using public facilities[11] in accordance with their gender identity." (Doc. 294-1 at 5.) In the second paragraph, it provides that — as a natural consequence of the first paragraph — the Executive Branch Defendants will not seek to apply HB142 § 2 to prohibit transgender individuals from using public facilities in accordance with their gender identity or prosecute them for such use, when that use is "otherwise lawful." (Id. at 5–6.) These provisions follow directly from the fact that the sole function of HB142 § 2 is to preempt regulation of access to public facilities "except in accordance with an act of the General Assembly." Thus, as the court previously concluded, there is simply no plausible argument that HB142 § 2 itself serves as an independent basis for regulating individuals at all. See (Doc. 248 at 29 ("HB142 does not regulate restroom access in any fashion ...."), 38 n.20 (noting that "HB142 does not regulate individuals")). Indeed, at the hearing on the present motion, Intervenor-Defendants conceded they do not disagree with that proposition. (Doc. 287 at 7.) In fact, they have previously characterized any contrary argument as "mistaken." See (Doc. 241 at 4 (rejecting an argument that HB142 could be the basis for barring transgender use of a bathroom, because "as a matter of law HB 142 cannot serve as a 'basis' for any school district's restroom access policy")). It is therefore unpersuasive that legitimate executive discretion will be preempted in any way by the proposed consent decree.

***7** Intervenor-Defendants' core concern regarding future executive discretion appears to be that the proposed consent decree might be interpreted to go beyond HB142 to govern "how State officers can apply trespass and other laws" in the future. (Doc. 292 at 2.) But such interpretation is foreclosed for several reasons. As noted, the proposed decree does no more than establish an agreement to be bound by the plain language of HB142 § 2, which the court and all parties accept as correct: that HB142 § 2 is only a preemption of regulation of access to certain public facilities "except in accordance with an act of the General Assembly." Because there is no legitimate interpretation of HB142 § 2 that runs afoul of the terms of the consent decree, future North Carolina executive branch officials should not suffer any cabining of their policymaking authority. The proposed decree by its very terms is limited to HB142 and does not extend to the application of state trespass law or any other law of the General Assembly,[12] and Plaintiffs and the Executive Branch Defendants readily acknowledge that the proposed decree could not be read in such a way. See (Doc. 290 at 6 (Plaintiffs stating that the proposed consent decree "does not affect the application of or enforcement of laws other than H.B. 142")); (Doc. 291 at 4 (Executive Branch Defendants stating that the proposed decree "addresses the Legislative Intervenors' concern about hypothetical interaction of the Consent Decree with ... other penal laws, including that of a criminal trespass," because it only bars prosecution where a transgender individual's bathroom use is "otherwise lawful")). Indeed, the court would lack jurisdiction to enter a consent decree that purported to limit the application of laws other than HB142, because no complaint in this case ever challenged any law other than HB142 or its defunct predecessor, HB2. Cf. (Doc. 248 at 29–30 (noting that the Fourth Amended Complaint did not challenge laws other than HB142, and therefore that relief from potential application of those other laws is unavailable in this case)). The question whether any North Carolina law other than HB142 could be applied to transgender individuals using public facilities in accordance with their gender identity was never at issue in the Fourth Amended Complaint and, under the proposed consent decree, remains open for another day in another forum. Thus, nothing in HB142 § 2 or the proposed consent decree can be construed to authorize or prohibit transgender use of public facilities, nor are the Executive Branch Defendants or their successors prohibited from arguing the application of any other law of the General Assembly to such use.

Intervenor-Defendants' final argument is that the proposed consent decree impinges on the North Carolina General Assembly's exclusive prerogative "to establish the permanent requirements of North Carolina law." (Doc. 292 at 2.) The court finds this contention unpersuasive in the context of this case, where the North Carolina legislature's representatives have agreed that the plain-text interpretation of HB142 § 2 set out by the court and adopted in the proposed consent decree is the right one. In fact, they previously argued in favor of such an interpretation in their motion to dismiss the Fourth Amended Complaint. See, e.g., (Doc. 225 at 2–4 (arguing that "HB142 does not regulate Plaintiffs" because it "enacts no access ... standards, has no enforcement provision, makes no demands on private conduct, and carries no penalties")); (Doc. 241 at 4). Moreover, nothing in the proposed consent decree purports to limit the North Carolina General Assembly's ability to amend HB142 or pass any law

it wishes, including any law that — unlike HB142 — does regulate individuals' access to public facilities.[13]

Considering all of the above, the court is satisfied that the proposed consent decree is "fair, adequate, and reasonable" and not illegal, a product of undue collusion, or against the public interest. North Carolina, 180 F.3d at 581 (quoting Colorado, 937 F.2d at 509). The proposed consent decree, which dismisses all remaining claims against the Executive Branch Defendants with prejudice, will be entered pursuant to Federal Rule of Civil Procedure 54(b), the court finding no just reason for delay.

III. CONCLUSION

For the reasons stated,

IT IS THEREFORE ORDERED that the Supplemental Joint Motion for Entry of Consent Decree (Doc. 289) is GRANTED. The proposed consent decree will be entered contemporaneously with this order.

All Citations

Not Reported in Fed. Supp., 2019 WL 3302208

Footnotes

1 The legislators have been permitted to intervene to defend their enactments pursuant to N.C. Gen. Stat. § 1-72.2.

2 Dr. William Roper has been substituted for former President Margaret Spellings as a Defendant pursuant to Federal Rule of Civil Procedure 25(d). (Doc. 281.)

3 Plaintiffs pleaded two sets of claims involving HB2: (1) nominal damages claims against UNC for alleged Title VII and IX violations committed during the period when HB2 was in force, and (2) constitutional challenges to HB2 pleaded "solely in the event that the Court finds one or more of HB142's provisions unlawful and not severable from HB142's other provisions" (Doc. 233 at 42), in which case Plaintiffs allege that HB142 should be struck down in its entirety, causing HB2 to spring back into effect.

4 Plaintiffs' contingent challenges to HB2, as referenced in footnote 3, also remain.

5 The contingent claims against HB2 would be dismissed as well, leaving only Plaintiffs' Title VII and IX claims against the UNC Defendants, which have been stayed. (Doc. 286.)

6 The "Consent Parties" are defined as Plaintiffs and the Executive Branch Defendants. (Doc. 294-1 at 3.)

7 Section 114-11.6 creates a "Special Prosecution Division" within the North Carolina Attorney General's office.

8 Plaintiffs failed to show injury in fact, traceability, and redressability.

9 Intervenor-Defendants have not offered a single case in which a court found that it lacked subject-matter jurisdiction to enter a proposed consent decree because its terms were not precisely tailored to reach the properly-alleged injury (and only the properly-alleged injury). Although Intervenor-Defendants quote from League of United Latin Am. Citizens, Council No. 4434 v. Clements, 999 F.2d 831 (5th Cir. 1993) (en banc) ("LULAC") to the effect that "any federal decree must be a tailored remedial response to illegality," see id. at 847, the LULAC court did not make its statement in a context analogous to this one. The plaintiffs in LULAC no longer had any claims left after the legal issues on appeal were resolved, leading the court to the obvious conclusion that any sort of "response to illegality" was practically impossible in such a case. Id. ("We could not ... remand [for entry of a consent decree] without correcting the district court's misapprehensions of law ... and when [that task] is done, there is no case."). In the instant case, Plaintiffs still have live claims that Defendants unconstitutionally discriminated against them.

10 While significant discovery can ensure that the court and parties have properly evaluated the claims at issue, see Pocahontas Land Corp., 2015 WL 7736645, at *2, this case is unique in that, as the Fourth Amended Complaint alleges in detail, most of the important facts on which this case is based played out in the public spotlight. Moreover, having already issued multiple merits rulings in this case, the court is very familiar with its background.

11 The proposed consent decree defines "public facilities" as "multiple occupancy restrooms, showers, or changing facilities as referenced in N.C.G.S. § 143-760 and sect. 2 of H.B. 142." (Doc. 294-1 at 2.)

12 Neither does the proposed consent decree extend to the application of federal law.

13 Neither does the court find any issue with "enter[ing] a consent decree on the effect of State law over the objection of Intervenors" merely because Intervenor-Defendants "are independent state actors with their own interest in the integrity of State law." (Doc. 292 at 3). In fact, it is precisely because the Executive Branch Defendants and Intervenor-Defendants are "independent state actors" that Intervenor-Defendants cannot "block the decree merely by withholding [their] consent," Local No. 93, 478 U.S. at 529; see id. at 528–29 ("It has never been supposed that one party — whether an original party, a party that was joined later, or an intervenor — could preclude other parties from settling their own disputes and thereby withdrawing from litigation.").

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Justice v. Mission Hosp., Inc.

North Carolina Superior Court, Buncombe County

June 5, 2019, Decided

18 CVS 1755

Reporter
2019 NCBC LEXIS 37 *; 2019 NCBC 36; 2019 WL 2374915

RANDY JUSTICE, Individually and on behalf of all persons similarly situated; CATHY JUSTICE, Individually and on behalf of all persons similarly situated; and CATHY JUSTICE, Guardian ad Litem for the minor child JULYETTE WILKERSON, Plaintiffs, v. MISSION HOSPITAL, INC. d/b/a "MISSION HOSPITALS" or "MISSION HOSPITAL"; NATIONAL GENERAL INSURANCE COMPANY; and REVCLAIMS, LLC, Defendants.

Subsequent History: Appeal dismissed by *Justice v. Mission Hosp., Inc., 2019 NCBC LEXIS 51 (Aug. 21, 2019)*

Prior History: *Justice v. Mission Hosp., Inc., 2019 NCBC LEXIS 22 (Mar. 27, 2019)*

Core Terms

motion to dismiss, Notice, designate, notice of appeal, Amend

Case Summary

Overview
HOLDINGS: [1]-The trial court lacked jurisdiction to cure a defective notice of appeal by allowing it to be amended to designate the correct court because, even though the jurisdictional defect was clearly inadvertent and the record would allow for no finding that the defendant was surprised as to the matter being appealed from or otherwise suffered prejudice, the provisions of N.C. R. App. P. 3 were jurisdictional, and failure to follow its prerequisites mandated dismissal of the appeal inasmuch as the court found no basis to depart from its earlier holding in *Zloop, Inc. v. Parker Poe Adams & Bernstein, LLP, 818 S.E.2d 636 (N.C. 2018)*, found no significant factual or procedural variation in the underlying case that would avoid applying that holding, and was not aware of any precedent that supported the argument that the trial courts had such discretionary authority.

Outcome
Motion to amend denied and motion to dismiss granted.

LexisNexis® Headnotes

Civil Procedure > Appeals > Appellate Jurisdiction > State Court Review

HN1 **Appellate Jurisdiction, State Court Review**

For a final judgment in a mandatory complex business case filed on or after October 1, 2014, appeal is to be made directly to the North Carolina Supreme Court. *N.C. Gen. Stat. § 7A-27(a)(2)*.

Civil Procedure > Appeals > Dismissal of Appeals > Involuntary Dismissals

HN2 **Dismissal of Appeals, Involuntary Dismissals**

A motion to dismiss an appeal is properly made to the trial court where the record on appeal has not been finalized and filed. N.C. R. App. P. 25(a).

Civil Procedure > Appeals > Dismissal of Appeals > Involuntary Dismissals

Civil Procedure > Appeals > Notice of Appeal

HN3 **Dismissal of Appeals, Involuntary Dismissals**

The form of a Notice of Appeal is governed by N.C. R. App. P. 3(d). The provisions of Rule 3 are jurisdictional, and failure to follow the rule's prerequisites mandates dismissal of an appeal.

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Civil Procedure > Appeals > Notice of Appeal

HN4[] **Judges, Discretionary Powers**

A trial court has no discretion to cure the defective notice of appeal by allowing it to be amended to designate the correct court.

Civil Procedure > Pleading & Practice > Pleadings > Amendment of Pleadings

Evidence > Inferences & Presumptions > Inferences

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

HN5[] **Pleadings, Amendment of Pleadings**

Inferring that the Supreme Court of North Carolina exercised its discretion to avoid a fatal jurisdictional defect does not require a further inference that a trial court has the same discretion.

Counsel: **[*1]** Long, Parker, Payne, Anderson & McClellan P.A., by Robert B. Long, Jr., for Plaintiffs.

Jones Walker LLP, by Joseph L. Adams, for Defendant RevClaims, LLC.

Robinson, Bradshaw & Hinson P.A., by Robert W. Fuller and Mark A. Hiller, and Roberts & Stevens P.A., by Phillip T. Jackson and Eric P. Edgerton, for Defendant Mission Hospital, Inc.

Shumaker, Loop & Kendrick LLP, by Christian H. Staples, J. Bennett Crites, III, and Laura Johnson Evans, for Defendant RevClaims, LLC.

Young Moore & Henderson P.A., by Glenn C. Raynor, Walter E. Brock, Jr., and Angela Farag Craddock, for Defendant National General Insurance Company.

Judges: James L. Gale, Senior Business Court Judge.

Opinion by: James L. Gale

Opinion

ORDER & OPINION ON MOTION TO DISMISS APPEAL AND MOTION FOR LEAVE TO FILE AMENDED NOTICE OF APPEAL

1. THIS MATTER is before the Court on Defendants' Motion to Dismiss Appeal, filed May 1, 2019 ("Motion to Dismiss"), and Plaintiffs' Motion to Amend the Notice of Appeal Filed Herein, filed May 17, 2019 ("Motion to Amend"). For reasons discussed below, the Court DENIES the Motion to Amend and GRANTS the Motion to Dismiss.

Gale, Judge.

I. INTRODUCTION

2. This Court is again faced with a motion to dismiss an appeal which was addressed **[*2]** to the North Carolina Court of Appeals when it should instead have been presented to the North Carolina Supreme Court. On similar facts presented in a similar procedural posture, this Court earlier held that the notice of appeal included a jurisdictional defect which only the appellate courts have the authority to address. *Zloop, Inc. v. Parker, Poe, Adams & Bernstein, 2018 NCBC LEXIS 40 (N.C. Super. Ct. Apr. 30, 2018)*. The Court here again concludes it must dismiss the appeal, even though the jurisdictional defect was clearly inadvertent and the record would allow for no finding that Defendant was surprised as to the matter being appealed from or otherwise suffered prejudice. Absent a future amendment to N.C. R. App. P. 3, Plaintiffs appear confined to a petition for discretionary review to the North Carolina Supreme Court, as was successfully taken by the plaintiff in *Zloop. Zloop, Inc. v. Parker Poe Adams & Bernstein, LLP, 818 S.E.2d 636 (N.C. 2018)*.

II. PROCEDURAL HISTORY

3. Plaintiffs filed their initial complaint on April 20, 2018, asserting claims of breach of contract, interference with contractual relations, and unfair or deceptive trade practices ("UDTP") related to collection practices for services billed for medical treatment at Mission Hospital in Asheville, North Carolina. (Compl., ECF No. 3.) The action was designated as a mandatory complex business case on May **[*3]** 11, 2018. (Designation

Order, ECF No. 1.) Plaintiffs subsequently amended their complaint on May 30, 2018, to add a claim for conversion. (Am. Compl. ¶¶ 45-47, ECF No. 16.) Plaintiffs seek to represent a purported class of similarly situated persons. (Am. Compl. ¶¶ 48-57.)

4. On July 2, 2018, Defendant Mission Hospital, Inc. ("Mission") moved to dismiss the Amended Complaint pursuant to N.C. R. Civ. P. 12(b)(6) ("Rule 12(b)(6)"). (Def. Mission Hospital's Mot. Dismiss Pls.' Compl., ECF No. 21.) On July 13, 2018, Defendant RevClaims, LLC ("RevClaims") filed a similar Rule 12(b)(6) motion. (Def. RevClaims' Mot. Dismiss Am. Compl., ECF No. 27.) On August 8, 2018, Defendant National General Insurance Company ("National General") moved to dismiss under both N.C. R. Civ. P. Rule 12(b)(1) and Rule 12(b)(6). (Def. National General's Mot. Dismiss Am. Compl., ECF No. 30.)

5. The motions to dismiss were fully briefed and heard. On March 27, 2019, the Court denied National General's Rule 12(b)(1) motion, granted the Rule 12(b)(6) motions, and dismissed the Amended Complaint with prejudice. (Order & Opinion Mots. to Dismiss, ECF No. 54.)

6. On April 3, 2019, Mission filed and served a Notice of Entry of Judgment Pursuant to Rule 58. (ECF No. 55.)

7. On April 10, 2019, Plaintiffs timely filed a Notice of Appeal ("Notice") **[*4]** which reads as follows:

> TO THE HONORABLE COURT OF APPEALS OF NORTH CAROLINA:
>
> Plaintiffs, Randy Justice, Individually and on behalf of all persons similarly situated, Cathy Justice, Individually and on behalf of all persons similarly situated, and Cathy Justice, Guardian ad Litem for the minor child Julyette Wilkerson, hereby gives Notice of Appeal to the Court of Appeals of North Carolina from the Notice of Entry of Final Judgment dated 3 April 2019 and the Order & Opinion on Motions to Dismiss dated the 27th day of March, 2019, which Final Judgment as embodied within the Order & Opinion dated 27 March 2017 granted the Defendants' various Motions to Dismiss for failure to state a claim and dismissed Plaintiff's Amended Complaint with prejudice. (ECF No. 56.)

8. On May 1, 2019, Plaintiffs timely served a proposed Record on Appeal, designating the North Carolina Court of Appeals as the court to which the appeal is being taken. (Consent Mot. Enlargement Time Serve Resp. Proposed Rec. Appeal ¶ 3, ECF No. 62.)

9. On May 1, 2019, Defendants filed their Motion to Dismiss, asserting that the Notice was jurisdictionally defective because it was addressed to the North Carolina Court of Appeals rather **[*5]** than to the North Carolina Supreme Court. (ECF No. 57.)

10. On May 14, 2019, the Court granted a consent motion extending the time by which Defendants are required to respond to the proposed Record on Appeal until July 3, 2019. (Order Granting Mot. Ext. Deadline, ECF No. 65.)

11. On May 17, 2019, Plaintiffs filed their Motion to Amend seeking to amend the Notice of Appeal to designate the North Carolina Supreme Court as the court to which the appeal is being taken, (ECF No. 66), as well as their opposition to Defendants' Motion to Dismiss, (ECF No. 67).

III. DISCUSSION

12. The respective motions have been fully briefed. The Court elects to rule on the motions without oral argument pursuant to Business Court Rule 7.4.

13. HN1[↑] For a final judgment in a mandatory complex business case filed on or after October 1, 2014, appeal is to be made directly to the North Carolina Supreme Court. N.C. Gen. Stat. § 7A-27(a)(2).

14. HN2[↑] A motion to dismiss an appeal is properly made to the trial court where the record on appeal has not been finalized and filed. N.C. R. App. P. 25(a); *see also* Carter v. Clements Walker PLLC, 2014 NCBC LEXIS 12, at *6-10 (N.C. Super. Ct. Apr. 30, 2014); Ehrenhaus v. Baker, 2014 NCBC LEXIS 30, at *3-4 (N.C. Super. Ct. July 16, 2014).

15. HN3[↑] The form of a Notice of Appeal is governed by N.C. R. App. P. 3(d) ("Rule 3(d)"). "The provisions of Rule 3 are jurisdictional, and failure to follow the rule's prerequisites mandates dismissal of an appeal." **[*6]** Bailey v. N.C. Dep't of Revenue, 353 N.C. 142, 156, 540 S.E.2d 313, 322 (2000).

16. As noted, this Court was required previously to consider the import of a notice of appeal having designated that the appeal was being taken to the Court of Appeals when the appeal was properly directed to the Supreme Court and concluded that HN4[↑] a trial court has no discretion to cure the defective notice by allowing it to be amended to designate the correct court. Zloop, 2018 NCBC LEXIS 40, at *4. The Court

acknowledged inconsistent precedent that allows for argument that our appellate courts may in their discretion excuse certain jurisdictional defects. *See, e.g.*, *Phelps Staffing, LLC v. S.C. Phelps, Inc., 217 N.C. App. 403, 410, 720 S.E.2d 785, 791 (2011)*; *Guilford Cty. Dep't of Emergency Servs. v. Seaboard Chem. Corp., 114 N.C. App. 1, 9, 441 S.E.2d 177, 181 (1994)*. However, the Court was neither then nor is it now aware of any precedent that supports the argument that the trial courts also have such discretionary authority.

17. Plaintiffs respectfully argue that this Court's decision in *Zloop* incorrectly concluded that the failure properly to designate the proper appellate court to which the appeal is being taken is jurisdictional. (Brief Opp'n. Mot. Dismiss Appeal at 5.) They further contend that the Court's conclusion is inconsistent with the Drafting Committee Notes to Rule 3(d) discussing *Graves v. General Insurance Corp., 381 F.2d 517 (10th Cir. 1967)*, thereby recognizing discretionary authority to allow an appeal to proceed pursuant to a defective notice. (Brief Opp'n. Mot. **[*7]** Dismiss Appeal at 5.)

18. The Court was aware of and considered that argument before issuing its Order & Opinion in *Zloop* dismissing the appeal.[1]

19. In sum, the Court finds no basis to depart from its earlier holding in *Zloop* and finds no significant factual or procedural variation here that would avoid applying that holding. Accordingly, while the Court takes no pleasure in doing so, it concludes that it must dismiss the appeal.

IV. CONCLUSION

20. The Court therefore rules that:

a. Defendants' Motion to Dismiss Appeal is GRANTED;

b. Plaintiff's Motion for Leave to File Amended Notice of Appeal is DENIED; and

c. The appeal is DISMISSED.

IT IS SO ORDERED this the 5th day of June, 2019.

/s/ James L. Gale

James L. Gale

Senior Business Court Judge

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[1] It was also aware of the decision in *State ex rel. Utilities Commission, LLC v. Cooper, 366 N.C. 484, 739 S.E.2d 541 (2013)*, where the Supreme Court proceeded with its review even though the Utilities Commission had allowed the notice of appeal to be amended, without any discussion of a potential jurisdictional defect in the notice. The Court does not believe this decision compels a different result for two reasons. First, the appeal was governed by Appellate Rule 18 rather than Appellate Rule 3(d). Second, *HN5*[↑] inferring that the Supreme Court exercised its discretion to avoid a fatal jurisdictional defect does not require a further inference that a trial court has the same discretion.