

SUPREME COURT OF NORTH CAROLINA

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.)

From the Court of Appeals
No. P21-511

PENN-INTERVENORS' RESPONSE TO STATE OF NORTH
CAROLINA'S PETITION FOR DISCRETIONARY REVIEW

Petitioners Charlotte-Mecklenburg Branch of the North Carolina State Conference of the NAACP, Rafael Penn, Clifton Jones, Donna Jenkins Dawson, and Tyler Anthony Hough-Jenkins (“Penn-Intervenors”) file this response in support of the State of North Carolina’s Petition for Discretionary Review Prior to Determination by the North Carolina Court of Appeals, and agree with the State that its petition should be consolidated with the petitions for discretionary review filed by Penn-Intervenors and the plaintiff school boards. Penn-Intervenors further urge the Court to grant the State’s motion to suspend the appellate rules as necessary to facilitate a prompt decision in the appeal.

As further briefed in Penn-Intervenors’ 15 December 2021 Petition for Discretionary Review and 18 January 2022 Response to the motions to dismiss filed by the State Controller, House Speaker Mr. Timothy K. Moore and Senate President Pro Tempore Mr. Philip E. Berger, this case satisfies all criteria for granting review under N.C.G.S. § 7A-31 and N.C.R. App. P. 15. *See* Penn-Intervenors’ Pet. for Discretionary Review at 18-30 (No. 425A21-1). The case involves a matter of significant public interest and legal principles of major significance to the jurisprudence of the State.

It is difficult to think of even a handful of other matters with as great of a public interest at stake, and that implicate significant legal principles, as the State’s obligation to provide a sound basic education to all schoolchildren and

the judiciary's attending powers and obligations to ensure the State fulfills that constitutional duty. Twenty-five years ago, this Court held that a sound basic education required the State to ensure the following:

(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.

Leandro v. State, 346 N.C. 336, 347, 488 S.E.2d 249, 255 (1997).

Following a lengthy trial, the State was found to have violated students' fundamental right to a sound basic education and this Court affirmed that ruling. *Hoke County Board of Education v. State*, 358 N.C. 605, 599 S.E.2d 365 (2004) ("*Leandro II*"). The State has failed to remedy these outstanding constitutional violations for *eighteen years and counting*. Meanwhile, hundreds of thousands of at-risk students have been deprived of a sufficient education and continue to be deprived each time they enter a school building.

Now that a remedy has finally arrived, House Speaker Mr. Timothy K. Moore and Senate President Pro Tempore Mr. Philip E. Berger (represented by their private counsel) want to further delay justice owed to at-risk children.

They had many opportunities to implement their own remedy or to intervene earlier in this case but failed to do so. As late as 2018, they did not intervene or take action on their own to enact a remedy when the trial court again examined the record and found the State was still failing to provide a sound basic education to at-risk children; or when the trial court enlisted the services of third-party experts to examine potential remedies to address the continuing denial of a sound basic education in 2018-19, App. 4;¹ or when the State proposed its first-year remedial plan in 2020, App. 5; or when the trial court approved the State's proposed Comprehensive Remedial Plan (consented to by the parties) in June 2021 and ordered the State to ensure the Plan was fully supported and implemented, App. 11; or when the trial court held status conferences in the fall of 2021 and found the General Assembly had more than enough funds but had still failed to support the full implementation of the Plan, App. 9-10; or when the trial court held a final conference to determine its authority to enforce the remedial plan on 10 November 2021, App. 10.

And now, after noticing their intervention in December 2021, Mr. Moore and Mr. Berger want to further delay justice. They invoke the separation of powers doctrine both as a sword to strike down the remedial order and as a

¹ References to the appendix (App.) are to the appendix attached to Penn-Intervenors' Petition for Discretionary Review pending before this Court in *Hoke Cty. Bd. of Edu. v. State of N. Carolina*, No. 425A21-1 (Dec. 15, 2021).

shield to defend the General Assembly's decades-long neglect and failure to ensure a sound basic education for all school children. As the State asserts in its Petition for Discretionary Review, "[i]n light of this Court's holdings in *Leandro I* and *II*, only this Court can definitively and finally determine whether the trial court's conclusions were correct regarding the Constitution's requirements for educating children in this State, what the obligations of the State and State actors are to meet these requirements, and how those requirements may be enforced." State Pet. at 7. This Court should decide these significant constitutional issues without further delay.

Judicial economy also warrants bypassing the Court of Appeals. A panel of the Court of Appeals already concluded in its order granting the Writ of Prohibition requested by Ms. Linda Combs, State Controller, that the trial court's 10 November 2021 Order was beyond the court's constitutional powers and that "the remedy lies not with the courts, but at the ballot box." App. 84. As the dissenting judge noted:

the majority's order shows shortening the time for a response was a mechanism to permit the majority to hastily decide this matter on the merits, with only one day for a response, without a full briefing schedule, no public calendaring of the case, and no opportunity for arguments and 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. The Writ of Prohibition arguably has precedential effect in the Court of Appeals as to the merits. At best, judicial economy is not served by giving

another panel of the same court an opportunity to rule on the merits; at worst, doing so imposes unjust delay on the plaintiffs' and Penn-Intervenors' efforts to finally obtain the remedy for which they have waited nearly two decades, because there is little doubt about how a second panel of the Court of Appeals will rule given the analysis contained in the Writ of Prohibition.

Furthermore, bypassing the Court of Appeals in this appeal serves the Court's interest in the fair administration of justice, as the appellee Penn-Intervenors are represented by nonprofit legal entities whose legal fees are not likely recoverable. *See Hoke Cty. Bd. of Educ. v. State*, 198 N.C. App. 274, 280, 679 S.E.2d 512, 517 (2009) (declining to award attorney fees to plaintiffs' counsel under grounds asserted, including common fund, substantial benefit and private attorney general doctrines). The State's resources also would be best served in one appeal. And combining this appeal with the appeals and petitions filed by Penn-Intervenors and Plaintiffs further supports granting the petitions to better serve judicial economic interests. This Court may rarely grant bypass petitions but this is that rare case. *See Scherer & Leerberg, N.C. Appellate Practice & Procedure* § 19.04[2] (2018) (noting that bypass petitions are rare and granting of such petitions is even more rare). Not since the Jim Crow era have State actors steadfastly and across decades refused to remedy a fundamental right guaranteed under the Constitution and then sought to strike down a remedy that, without question, would resolve the

ongoing, irreparable harm caused to schoolchildren. *See Swann v. Charlotte-Mecklenburg Br. of Educ.*, 402 U.S. 1 (1970)(noting that “a school desegregation case does not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial of a constitutional right”).

Accordingly, Penn-Intervenors respectfully urge this Court to grant the State’s Petition for Discretionary Review and Motion to Suspend the Appellate Rules to Expedite Decision in the Public Interest.

Respectfully submitted this 28th day of February 2022.

LAWYERS’ COMMITTEE FOR CIVIL
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Electronically submitted

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N.C. R. App. P. 33(b) Certification:
I certify that all the attorneys listed
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CERTIFICATE OF SERVICE

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
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This the 28th day of February, 2022.

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