

No. _____

TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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

and)

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

and)

RAFAEL PENN, *et al.*,)
Plaintiff Intervenors-Appellees,)

v.)

STATE OF NORTH CAROLINA,)
Defendant-Appellant,)

and)

STATE BOARD OF EDUCATION,)
Defendant-Appellee,)

and)

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

and)

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

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

PETITION FOR DISCRETIONARY REVIEW PRIOR TO A
DETERMINATION BY THE NORTH CAROLINA COURT OF APPEALS
(Filed 14 February 2022)

INDEX

TABLE OF AUTHORITIES..... iii

INTRODUCTION 4

BACKGROUND 8

 A. *Leandro I* and *Leandro II* Establish
 the State’s Constitutional Obligations
 to Educate North Carolina’s Children..... 8

 B. The Trial Court Continues to Find
 that the State Is Not Complying with
 Leandro I..... 11

 C. The State Attempts to Comply with
 Leandro I..... 11

 D. The Trial Court Orders State Actors
 to Transfer State Funds Necessary to
 Implement Years Two and Three of
 the Remedial Plan..... 14

REASONS WHY CERTIFICATION SHOULD ISSUE... 18

 I. The Subject Matter of This Appeal Has
 Significant Public Interest..... 18

 II. This Appeal Involves Legal Principles of
 Major Significance. 20

 A. The Court should grant discretionary
 review to determine whether Article I,
 § 15 appropriates funds necessary to
 ensure all children can obtain a sound
 basic education.20

B. Whether, under what circumstances, and by what means a court can remedy the State’s failure to satisfy its constitutional obligation to provide all children the opportunity to obtain a sound basic education.....	21
III. A Failure to Certify This Case for Immediate Review Will Likely Cause Substantial Harm.....	24
IV. Granting Discretionary Review Serves Judicial Economy.....	25
V. The Subject Matter of the Appeal Is Important in Overseeing the Jurisdiction and Integrity of the Court System.....	27
ISSUES TO BE BRIEFED	28
MOTION TO SUSPEND APPELLATE RULES TO EXPEDITE DECISION IN THE PUBLIC INTEREST....	29
CONCLUSION.....	31
CERTIFICATE OF SERVICE.....	32

TABLE OF AUTHORITIES

Cases

<i>City of Hickory v. Catawba County</i> , 206 N.C. 165 (1934)	22
<i>Corum v. Univ. of N.C.</i> , 330 N.C. 761, 782 (1992).....	18, 21
<i>Hoke Cnty. Bd. of Educ. v. State</i> , 579 S.E.2d 275 (N.C. 2003)	9
<i>Hoke Cnty. Bd. of Educ. v. State</i> , 358 N.C. 605 (2004).....	passim
<i>Hoke Cnty. Bd. of Educ. v. State</i> , 367 N.C. 156 (2013).....	10
<i>In re 10 Nov. 2021 Ord.</i> , No. P21-511 (N.C. Ct. App. Nov. 30, 2021)	23
<i>In re Alamance Cnty. Ct. Facilities</i> , 329 N.C. 84 (1991)	22, 23
<i>Leandro v. State</i> , 346 N.C. 336 (1997).....	4, 8, 27
<i>Richmond Cnty. Bd of Educ. v. Cowell</i> , 254 N.C. App. 422 (2017)	22
<i>Sale v. State Highway & Pub. Works Comm'n</i> , 242 N.C. 612 (1955).....	21
<i>Virmani v. Presbyterian Health Srvs. Corp.</i> , 350 N.C. 449 (1999)	24, 28

Constitutional Provisions

N.C. Const. art. I, § 15 6, 16, 17, 20

N.C. Const. art. I, § 18..... 21

N.C. Const. art. V, § 7 16, 20

N.C. Const. art. IX, § 2..... 16

N.C. Const. art. IX, § 6..... 16

N.C. Const. art. IX, § 7..... 16

Statutes

N.C.G.S. § 7A-31(b) 2, 3, 18

N.C.G.S. § 7A-31(b)(1) 18

N.C.G.S. § 7A-31(b)(2)..... 19

N.C.G.S. § 7A-31(b)(3)..... 24

N.C.G.S. § 7A-31(b)(4)25

N.C.G.S. § 7A-31(b)(5).....27

Rules

N.C. R. App. P. 2.....2, 28

N.C. R. App. P. 15 2, 17

N.C. R. App. P. 37.....2, 28

Other Authorities

Pls.’ Notice of Appeal, Pet. for Discretionary
Review and, Alternatively, Pet. for Writ of Cert.,
Hoke Cnty. Bd. of Educ. v. State, No. 425A21
(Dec. 15, 2021).....3, 26

No. _____

TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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

and)

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

and)

RAFAEL PENN, *et al.*,)
Plaintiff Intervenors-Appellees,)

v.)

STATE OF NORTH CAROLINA,)
Defendant-Appellant,)

and)

STATE BOARD OF EDUCATION,)
Defendant-Appellee,)

and)

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

and)

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

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

PETITION FOR DISCRETIONARY REVIEW PRIOR TO A
 DETERMINATION BY THE NORTH CAROLINA COURT OF APPEALS
 (Filed 14 February 2022)

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Defendant State of North Carolina respectfully petitions this Court to certify for discretionary review the 10 November 2021 order of Superior Court, Wake County, (the “trial court order” or “November 10 order”), prior to determination by the North Carolina Court of Appeals. *See* N.C.G.S. § 7A-31(b); N.C. R. App. P. 15(a). Additionally, the State respectfully requests that this Court suspend the appellate rules as necessary to facilitate a prompt decision in the appeal. *See* N.C. R. App. P. 2, 37(a). The trial court order was entered by the Honorable W. David Lee, who this Court appointed to preside over this case in 2016.

The Plaintiffs and Plaintiff-Intervenors (collectively, “Plaintiffs”) have noticed an appeal and requested discretionary review of a related Court of

Appeals decision. *See* Plaintiffs' Notice of Appeal, Petition for Discretionary Review, and, Alternatively, Petition for Writ of Certiorari, *Hoke Cnty. Bd. of Educ. v. State*, No. 425A21 (Dec. 15, 2021) ("Plaintiffs' appeal"). Several of the factual and legal issues raised in Plaintiffs' appeal are also raised in the appeal by the State. Accordingly, this Court should grant the State's request for discretionary review and consolidate the two appeals under North Carolina Rule of Appellate Procedure 40.

Even if this Court does not grant discretionary review as part of Plaintiffs' appeal, discretionary review is independently warranted here. The trial court order concerns the State's compliance with decisions of this Court that interpret the North Carolina Constitution. Additionally, the trial court order recognizes certain constitutional provisions that form the basis for its authority to order compliance from State actors.

Review of the trial court order is urgently needed to resolve these important constitutional questions. Indeed, this case satisfies all five of the statutory criteria for certification prior to determination by the Court of Appeals. *See* N.C.G.S. § 7A-31(b).

INTRODUCTION

In *Leandro v. State*, 346 N.C. 336, 345 (1997) (*Leandro I*), this Court held that the North Carolina Constitution requires the State to provide all children an opportunity to obtain a sound basic public education. Seven years later, this Court found that the State was still failing to meet that constitutional obligation. *Hoke Cnty. Bd. of Educ. v. State*, 358 N.C. 605 (2004) (*Leandro II*).

At that time, this Court warned that if the State consistently proved unable to satisfy its obligations, “a court is empowered to provide relief by imposing a specific remedy and instructing the recalcitrant state actors to implement it.” *Id.* at 642. Since *Leandro II*, the trial court has found that the State is still failing to meet its constitutional obligation, ultimately resulting in the order at issue. This case, and the scope of judicial authority to remedy its finding of a longstanding constitutional violation, are ripe for this Court’s scrutiny. The State’s Petition seeks to have the Court expeditiously, and finally resolve this phase of the twenty-seven-year-old litigation.

The trial court order that is the subject of this appeal requires implementation of a comprehensive remedial plan that, the court found, provides a pathway for the State to meet its education-related constitutional

obligations by 2030 (the “Remedial Plan,” or “Plan”). During January of 2020, the trial court entered an order compelling the State to submit a proposed Remedial Plan for review and consideration. Experts functioning like special masters performed a detailed study over the course of a year to help create the Remedial Plan. The Remedial Plan additionally incorporated the input of the parties and identified specific actions and implementation timelines designed to ensure that every child receives a sound basic education by 2030.

In September 2020, the State promised to implement Year One (2020-2021) of the Remedial Plan. Thereafter, in June of 2021, the trial court entered an order requiring the State to implement the Remedial Plan’s remaining years. The General Assembly, however, has failed to appropriate the funds necessary to fully implement the Remedial Plan. As a result, the State has only partially implemented Year One of the Remedial Plan, and has implemented none of Year Two (2021-2022). The State, therefore, has not allocated sufficient funding to comply with *Leandro I* from 2020 to 2023.

On 10 November 2021, the trial court convened a hearing during which it confirmed the State’s failure to fund the Remedial Plan. Although at the time the General Assembly had yet to enact a State budget, R. at 1833, the

trial court noted that the State nevertheless maintained sufficient unallocated funds to cover the costs associated with Years Two and Three of the Remedial Plan. R. at 1331.

While making that assessment, the trial court acknowledged the restrictions of Article V, § 7 of the North Carolina Constitution that prohibit state actors from spending State funds absent an “appropriation[] made by law.” R. at 1836. However, and as discussed more fully below, the trial court recognized that when read together, Article I, § 15 and Article IX, §§ 2, 6, and 7 constituted such an “appropriation by law” through the Constitution itself.

According to the trial court, the employment of the constitutional appropriation provisions followed decades of deference accorded by the courts to the State’s legislative and executive branches, during which time the State continued its ongoing violation of the constitutional right of children to receive a sound, basic education. Given the General Assembly’s refusal to fund the Remedial Plan, and in light of this Court’s mandate in *Leandro II*, the trial concluded that it was consequently authorized to order the relevant State actors to dispense the available funds as needed to “effectuate the people’s right to a sound basic education.” R. at 1838.

As such, on 10 November 2021, the trial court entered an order directing the State Treasurer, State Controller, and State Budget Director to “take the necessary actions to transfer the total amount of funds necessary to effectuate years 2 & 3 of the Comprehensive Remedial Plan, from the unappropriated balance within the General Fund to the state agents and state actors with fiscal responsibility for implementing the Comprehensive Remedial Plan.” R. at 1841.

The State has appealed the trial court order, which is the first to conclude that certain education-related provisions of our Constitution constitute an appropriation of State funds by virtue of the Constitution itself. In 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. *See Leandro II*, 358 N.C. at 642 (holding that the courts may require additional actions by “recalcitrant” State actors to remedy this constitutional violation).

The State therefore asks this Court to decide this appeal prior to determination by the Court of Appeals, and to consolidate this appeal with

Plaintiffs' related pending appeal. Both appeals involve urgent issues that are vitally significant to the public, the jurisprudence of this state, and the jurisdiction and integrity of the State judiciary. And, because both appeals arise from the same trial court order, consolidating the appeals best serves the interests of judicial economy and uniformity. This Court should grant discretionary review, consolidate the appeals, and resolve these critically important, longstanding issues in this litigation.

BACKGROUND

A. Leandro I and Leandro II Establish the State's Constitutional Obligations to Educate North Carolina's Children.

In May 1994, students, guardians, and school boards from five of North Carolina's lowest-wealth counties sued the State and the State Board of Education (collectively "State Defendants"), alleging that the State Defendants failed to provide students in those counties with an education that met the minimal standards promised by our Constitution.¹ The State moved to dismiss Plaintiffs' complaint. This Court affirmed the denial of the State's motion, holding that "the right to education provided in the state

¹ Later, students, guardians, and school boards from six urban school districts, and some students who attended high school in the Charlotte-Mecklenburg School System, intervened.

constitution is a right to a sound basic education.” *Leandro I*, 346 N.C. at 345.

This Court then remanded the case to the trial court to determine whether the State had denied the children of North Carolina that opportunity. *Id.* at 357. In doing so, this Court explained that if the State Defendants failed to meet their constitutional obligations, the trial court must “enter a judgment granting declaratory relief and such other relief as needed to correct the wrong while minimizing the encroachment upon the other branches.” *Id.*

On remand, the trial court found that State Defendants had, in fact, denied students the opportunity to receive a sound basic education, and ordered the State Defendants to correct those deficiencies. With respect to “at-risk” children in Hoke County, the trial court further ordered the State to specifically supply the resources necessary to ensure that “at-risk” children had an equal opportunity to obtain a sound basic education.

The State appealed that order, and upon petition for discretionary review by Plaintiffs and the State, this Court agreed to review the case prior to any determination by the Court of Appeals. *Hoke Cnty. Bd. of Educ. v. State*, 579 S.E.2d 275 (mem) (N.C. 2003).

Upon review, this Court affirmed the trial court's conclusion "that the State had failed in its constitutional duty to provide certain students with the opportunity to attain a sound basic education." *Leandro II*, 358 N.C. at 608. The Court also affirmed the trial court's conclusion that the State was not providing at-risk children in Hoke County an equal opportunity to obtain a sound basic education. *Id.* at 642.

However, this Court disapproved the trial court's order to the extent it required the State to supply the resources necessary to remedy the constitutional violation. *Id.* Although this Court believed that the judiciary possesses the authority to order such relief, this Court explained that such a remedy was warranted only after "the offending branch of government or its agents either fail to [satisfy their constitutional obligation] or have consistently shown an inability to do so." *Id.* The Court again remanded the case to the trial court, this time to supervise the remedial phase of the litigation. *Id.* at 649.

In 2013, this Court reminded the parties that its "mandates in *Leandro [I]* and *Hoke County [Leandro II]* remain in full force and effect." *Hoke Cnty. Bd. of Educ. v. State*, 367 N.C. 156, 160 (2013).

B. The Trial Court Continues to Find that the State Is Not Complying with *Leandro I*.

In the seventeen years since *Leandro II*, the trial court has held more than twenty compliance hearings. *See, e.g.*, R. at 1306 n.1 (“This trial court has held status conference after status conference and continues to exercise tremendous judicial restraint.”). During these hearings, the trial court has reviewed data about teachers and principals, the academic performance of each school, and the resources available to at-risk students. The trial court has never found that the State has fully complied with *Leandro I*.

In fact, before the November 10 order, the trial court last examined State Defendants’ compliance in 2018, when the State Board of Education moved to be released “from the remedial jurisdiction” of the trial court. R. at 1300. The trial court denied that motion after finding that “[t]here is an ongoing constitutional violation of every child’s right to receive the opportunity for a sound basic education.” R. at 1305. The State Defendants declined to appeal that order.

C. The State Attempts to Comply with *Leandro I*.

After the trial court had repeatedly found that the State Defendants continued to fall short of their constitutional obligation, the State agreed to work with the various stakeholders in order to ensure compliance with

Leandro I. See, e.g., R. at 1634 (“The Court is encouraged that the parties to this case . . . are in agreement that the time has come to take decisive and concrete action . . . to bring North Carolina into constitutional compliance so that all students have access to the opportunity to . . . obtain a sound basic education.”).

In January 2018, the State and Plaintiffs filed a joint motion for a case management and scheduling order to engage a court-ordered independent expert to outline a plan that would finally bring the State into compliance with *Leandro I.* R. at 1641. On 13 March 2018, the trial court appointed WestEd, “a non-profit, non-partisan, educational research, development, and service organization” to serve as the court’s consultant, and to assist the parties’ endeavor to ensure compliance with *Leandro I.* See R. at 1641-42.

WestEd worked with the Friday Institute for Educational Innovation at North Carolina State University, the Learning Policy Institute (a non-profit research institute focused on education policy), and other stakeholders, including the parties, to develop a proposed plan that the State could follow to comply with *Leandro I.* *Id.* at 1642. On 21 January 2020, the trial court entered a consent order based on “the detailed findings, research, and recommendations of” the WestEd Report. R. at 1634.

The WestEd Report identified certain benchmarks that the State should meet to satisfy its constitutional obligation related to development of teachers and principals, predictable and sufficient funding and resources, an assessment and accountability system to measure student performance, a system to specifically target assisting low-performing schools and districts, a system to provide access to high-quality early education, and a plan to provide postsecondary and workforce learning. R. at 1635-36.

On the basis of WestEd's findings, the trial court ordered State Defendants "to work expeditiously and without delay to" fully implement the WestEd Report's recommendations. R. at 1664.

On 15 June 2020, the Parties submitted a joint report identifying specific actions that "the State can and will take in" the 2020-2021 school year "to begin to address [the] constitutional deficiencies previously identified by [the] Court," based on the findings of the WestEd Report. R. at 1681. In September 2020, the Court ordered State Defendants to take those actions. *Id.* State Defendants, however, were only able to implement some of the actions it intended to achieve for the 2020-2021 school year because they were not provided specific appropriations to cover fully fund all of the necessary actions. R. at 1681-82

On 21 March 2021, based on the findings of the WestEd Report, which the Court adopted in its earlier findings and ordered the State to incorporate, the State developed the Remedial Plan, which was adopted by the trial court. The Remedial Plan identified “discrete, individual action steps to be taken to achieve the overarching constitutional obligation to provide all children the opportunity to obtain a sound basic education in a public school” over an eight-year period, from 2021 to 2028. R. at 1688. The Remedial Plan “includes implementation timelines for each action step, as well as the estimated additional state investment necessary for each of the actions.” R. at 1690. After 26 years of trial court findings that the State had fallen short of its constitutional obligations, the Remedial Plan represented the first effort by any party since the beginning of this litigation that offered a comprehensive remedial effort.² R. at 1831.

D. The Trial Court Orders State Actors to Transfer State Funds Necessary to Implement Years Two and Three of the Remedial Plan.

² While the parties crafted the plan, “the COVID-19 pandemic struck and dramatically altered the landscape for” students. R. at 1690. The Remedial Plan thus recognizes that “the pandemic has exacerbated many of the inequities and challenges that are the focus of the *Leandro* case.” *Id.*

The trial court continued to hold periodic hearings to oversee State Defendants' compliance with the Remedial Plan. Echoing *Leandro II*, on 7 June 2021, the trial court warned that if the State "fails to implement the actions described in the Comprehensive Remedial Plan . . . it will then be the duty of [the trial court] to enter a judgment granting declaratory relief and such other relief as needed to correct the wrong." R. at 1683. On 28 September 2021, the trial court ordered the parties to update it on the State's compliance with the Remedial Plan, and specifically, the State's efforts to secure the funding necessary to implement Years Two and Three. R. at 1817.

During a hearing on 18 October 2021, the State reported that because the General Assembly had not yet enacted a budget, the State had not secured the resources necessary to implement Years Two and Three of the Remedial Plan. R. at 1820. The Court then directed Plaintiffs "to submit proposed order(s) and supporting legal authorities" regarding the State's compliance, or lack thereof. R. at 1820-21.

On 1 November 2021, Plaintiffs submitted a proposed order to the trial court that recognized "as a matter of constitutional law" an ongoing appropriation to ensure that the State met its constitutional obligation to provide students with a sound basic education. Pls.' Proposed Order at 15,

Hoke Cnty. Bd. of Educ. v. State (N.C. Superior Ct. Nov. 1, 2021) (No. 95 CVS 1158). The State reviewed Plaintiffs' proposed order and advised the trial court on the relevant precedent of this Court and the Court of Appeals. State's Mem. of Law at 4, *Hoke Cnty. Bd. of Educ. v. State* (N.C. Superior Ct. Nov. 8, 2021) (No. 95 CVS 1158).

On 10 November 2021, the trial court entered an order directing the State Treasurer, State Controller, and State Budget Director to "take the necessary actions to transfer the total amount of funds necessary to effectuate years 2 & 3 of the Comprehensive Remedial Plan, from the unappropriated balance within the General Fund to the state agents and state actors with fiscal responsibility for implementing the Comprehensive Remedial Plan." R. at 1841. The trial court observed that the General Assembly had not enacted a budget, R. at 1833, but that the State had unspent funds in an amount sufficient to cover the cost of implementing Years Two and Three. R. at 1331.

The trial court acknowledged that Article V, § 7 of the North Carolina Constitution prohibited any state actors from spending State funds absent an "appropriation[] made by law." R. at 1836. However, the trial court found that, taken together, Article I, § 15 and Article IX, §§ 2, 6, and 7 constituted

such an appropriation made by law – *i.e.*, by the Constitution itself. The court further found that the legislative branch, despite years of deference from the courts after repeated findings of ongoing constitutional violations, had failed to take steps to remedy those violations. Therefore, the court ruled that the constitutional appropriation found in those provisions permitted the trial court to order the relevant State actors to dispense the available funds as needed to “effectuate the people’s right to a sound basic education.” R. at 1838.

The trial court further explained that because the implementation of Years Two and Three was necessary to ensure that children receive a sound basic education, Article I, § 15 authorized the appropriation of funds required to implement those years of the Remedial Plan. *Id.* The trial court stayed its order for thirty days “to permit the other branches of government to take further action consistent with the findings and conclusions of this Order.” R. at 1842.

On 8 December 2021, the State filed a notice of appeal from the trial court order.

REASONS WHY CERTIFICATION SHOULD ISSUE

Section 7A-31 of the General Statutes and Appellate Rule 15 allow this Court to certify causes before determination by the Court of Appeals when a case satisfies any of the following five criteria: “[t]he subject matter of the appeal has significant public interest”; “[t]he cause involves legal principles of major significance to the jurisprudence of the State”; “[d]elay in final adjudication is likely to result from failure to certify and thereby cause substantial harm”; “[t]he work load of the courts of the appellate division is such that the expeditious administration of justice requires certification”; or, “[t]he subject matter of the appeal is important in overseeing the jurisdiction and integrity of the court system.” N.C.G.S. § 7A-31(b). This case satisfies all five of these criteria.

I. The Subject Matter of This Appeal Has Significant Public Interest.

This Court should grant discretionary review because the subject matter of this appeal carries significant public interest. See N.C.G.S. § 7A-31(b)(1). Building on this Court’s teachings in *Leandro I* and *II*, this appeal poses the question of the judicial branch’s authority to provide remedies after it has determined that the State has not complied with its constitutional obligation to provide all children an opportunity to obtain a

sound basic education. The right to a sound basic education was especially emphasized in the Constitution's Declaration of Rights, which held "primacy . . . in the minds of the framers" and guarantees rights that are "individual and personal" to each North Carolinian. *Corum v. Univ. of N.C.*, 330 N.C. 761, 782 (1992)

Additionally, this right has repeatedly been underscored by this Court. *Leandro I*, which announced that right, is a seminal, "landmark decision." *Leandro II*, 358 N.C. at 609. As this Court has explained, the "school-aged children's rights concerning a public education" represent "an issue of significant, if not paramount, public interest." *Id.* at 615.

The importance of public education in North Carolina is made clear by the specific findings made in this case, which are undisputed. The trial court's November 10 order includes factual findings that "North Carolina has 807 high-poverty district schools and 36 high-poverty charter schools, attended by over 400,000 students," R. at 1827; and "hundreds of thousands of North Carolina children continue to be denied the opportunity for a sound basic education." R. at 1826-27.

Moreover, the COVID-19 pandemic has further exacerbated the harm to children, particularly as “the State faces greater challenges than ever before in meeting its constitutional obligations.” R. at 1827.

II. This Appeal Involves Legal Principles of Major Significance.

The legal principles at issue in this case are significant and warrant this Court’s immediate review. *See* N.C.G.S. § 7A-31(b)(2). The trial court order poses significant legal questions that only this Court can definitively answer, including: (1) whether Article I, § 15 constitutes an appropriation made by law of sufficient funds to ensure that all children can obtain a sound basic education; and (2) whether, under what circumstances, and by what means the judicial branch can remedy the State’s failure to satisfy its constitutional obligation to provide all children with the opportunity to obtain a sound basic education. This Court should grant discretionary review to answer these questions.

A. The Court should grant discretionary review to determine whether Article I, § 15 appropriates funds necessary to ensure all children can obtain a sound basic education.

Whether Article I, § 15 appropriates funds for public education is a legal question of major significance. Article V, § 7 of our Constitution declares that “[n]o money shall be drawn from the State treasury but in

consequence of appropriations made by law.” The trial court held that Article I, § 15, when read with other provisions of the North Carolina Constitution that address education, represents an “appropriation made by law” that satisfies Article V, § 7. *See R. at 1838.*

The Court should grant discretionary review to determine whether the trial court’s conclusion is correct. This is especially true given that the trial court order is the first to find that this provision of the North Carolina Constitution is an appropriation made by law.

B. Whether, under what circumstances, and by what means a court can remedy the State’s failure to satisfy its constitutional obligation to provide all children the opportunity to obtain a sound basic education.

As this Court has often repeated—including in this litigation—courts have a duty to remedy constitutional violations. Thus, this appeal raises a critical constitutional question of whether and how courts can compel the State to satisfy its constitutional obligation to provide all children the opportunity to obtain a sound basic education.

The North Carolina Constitution guarantees that “every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law.” N.C. Const. art. I, § 18. The judicial branch bears special responsibility for remedying constitutional violations. *See Corum,*

330 N.C. at 783 (“It is the state judiciary that has the responsibility to protect the state constitutional rights of the citizens . . .”).

When the constitution guarantees a right, but “points out no remedy, and no statute affords one . . . the provision is self-executing, and the common law, which provides a remedy for every wrong, will furnish the appropriate action for the redress of such grievance.” *Sale v. State Highway & Pub. Works Comm’n*, 242 N.C. 612, 618 (1955). Any such remedy must be “competent to afford relief on the particular subject-matter of [the plaintiff’s] complaint.” *In re Alamance Cnty. Ct. Facilities*, 329 N.C. 84, 102 (1991) (quoting *City of Hickory v. Catawba County*, 206 N.C. 165, 174 (1934)). This Court has held that where the State violates a constitutional right, a court must do more than merely enter judgment, *see Sale*, 242 N.C. at 618, or punish the violator, *see In re Alamance County Court Facilities*, 329 N.C. at 102.

In this litigation, this Court explained that “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.” *Leandro II*, 358 N.C. at 642.

This Court should grant discretionary review to clarify how these principles are to be applied, including what “specific remedy” a court can impose on State actors when it finds that the State consistently fails to satisfy a constitutional obligation.

Additionally, this Court should grant the petition to determine whether and how it “may invoke its inherent power to do what is reasonably necessary” to remedy certain actors’ inaction that threatens a constitutional obligation. *Alamance Cnty. Ct. Facilities*, 329 N.C. at 99. Review by this Court is also necessary to determine what actions are sufficient to “do[] no more than is reasonably necessary” to remedy such a violation and “minimize the encroachment upon those with legislative authority.” *Id.* at 99, 100–01.

The lower courts are taking sharply different views of courts’ inherent authority to remedy constitutional violations. Relying on its decision in *Richmond County Board of Education v. Cowell*, 254 N.C. App. 422 (2017), the Court of Appeals suggested that courts can never order a State actor to spend state funds that are not appropriated by the General Assembly. *See In re 10 Nov. 2021 Ord.*, No. P21-511 (N.C. Ct. App. Nov. 30, 2021) (order granting

writ of prohibition). In contrast, the trial court held that *In re Alamance County Court Facilities*, 329 N.C. 84 (1992) had explicitly rejected the argument that when the State violates a right guaranteed by our Constitution, a court can do no more than enter judgment. R. at 1839.

Only this Court can settle the important questions raised by this appeal pertaining to the constitutionally permissible scope of the judiciary's inherent authority. *Virmani v. Presbyterian Health Svcs. Corp.*, 350 N.C. 449, 474 (1999) ("This Court is the only entity which can answer with finality questions concerning the proper construction and application of the North Carolina Constitution."). This Court should therefore grant discretionary review.

III. A Failure to Certify This Case for Immediate Review Will Likely Cause Substantial Harm.

A failure to certify this case for immediate Supreme Court review will cause substantial and irreparable harm. *See* N.C.G.S. § 7A-31(b)(3). The trial court order directed State officials to transfer the funds necessary to implement Years Two and Three of the Remedial Plan to the agencies responsible for implementing the Plan. The Court of Appeals's writ of prohibition has halted the transfer of these funds. The result is that the State could not fully implement Year One and has not been able to

implement any part of Year Two—with the 2021-2022 school year more than halfway complete. A delayed final ruling will keep the State and its students in limbo—prohibited from transferring the ordered funds, but also constrained from taking other action that would remedy the constitutional violation. This delay will continue to have significant negative consequences for the State’s students.

In *Leandro II*, this Court observed that “ten classes of students . . . have already passed through our state’s school system without benefit of relief. We cannot similarly imperil even one more class unnecessarily.” 358 N.C. at 616. Since that ruling, many more classes have since passed through our schools. Continued uncertainty about how to come into compliance with the State’s constitutional obligations will only serve to imperil additional classes of students. To avoid this uncertainty, this Court should grant discretionary review prior to determination by the Court of Appeals.

IV. Granting Discretionary Review Serves Judicial Economy.

Granting discretionary review and consolidating this case with Plaintiffs’ appeal will also serve judicial economy. *See* N.C.G.S. § 7A-31(b)(4). Because Plaintiffs’ appeal involves issues that are raised in the trial court

order, the issues raised in this appeal are already before the Court.³ Granting discretionary review and consolidating the appeals will allow the Court to resolve all issues arising from the trial court order.

Moreover, this case warrants discretionary review even if the Court denies Plaintiffs' petitions. Any opinion by the Court of Appeals will certainly cause a further appeal to this Court by the non-prevailing party. Thus, this case will likely return to this Court even if the Court denies discretionary review.

Therefore, declining discretionary review of the State's appeal will not only further delay the implementation of the Remedial Plan, but will also likely result in a duplication of appellate efforts. Given the posture of this and Plaintiffs' appeal, this Court should grant the State's Petition and immediately resolve both appeals.

³ Plaintiffs appeal from the Court of Appeals's order raises several constitutional questions, including: (1) "Whether the 'right to the privilege of education' and the 'duty of the State to guard and maintain that right' set forth in Article I, Section 15 of the North Carolina Constitution, which is the express will of the people of this State, is an appropriation 'made by law'"; and (2) "Whether courts, under Article I, Section 18 of the North Carolina Constitution, have the express and inherent authority to order a remedy for established constitutional violations that have persisted for over seventeen (17) years, where the State has failed to act." Pls.' Notice of Appeal, Pet. for Discretionary Review and, Alternatively, Pet. for Writ of Cert. at 3, *Hoke Cnty. Bd. of Educ. v. State*, No. 425A21 (Dec. 15, 2021).

V. The Subject Matter of the Appeal Is Important in Overseeing the Jurisdiction and Integrity of the Court System.

Finally, this Court should grant discretionary review because the subject matter of this appeal is important in overseeing the jurisdiction and integrity of the Court system. N.C.G.S. § 7A-31(b)(5). As explained above, although this litigation concerns the constitutional right of North Carolinians to a sound basic education, resolving this appeal requires a court to examine the judiciary's authority to remedy ongoing constitutional violations. This Court is the proper body to carry out that task.

This Court has previously recognized that this litigation implicates significant questions about the judiciary's inherent authority. *See Leandro I*, 346 N.C. at 357 (holding that while the judiciary should grant reasonable deference to the coordinate branches of government, it must also grant any relief necessary to correct the failure to provide a sound basic education); *Leandro II*, 358 N.C. at 642-43 (reiterating the judiciary's right to impose specific remedies and instruct recalcitrant state actors to implement it).

Moreover, the Court of Appeals has already spoken about its views on the trial court's interpretation of the judiciary's inherent authority to rectify constitutional wrongs in the area of education—and has taken a diametrically opposite view from that of the trial court. *See supra* p. 22.

Finality on the legal issues posed is necessary for the lower courts to apply North Carolina constitutional law consistently.

This appeal seeks the final, dispositive treatment of these issues that only this Court can provide. Because “[t]his Court is the only entity which can answer with finality questions concerning the proper construction and application of the North Carolina Constitution,” *Virmani*, 350 N.C. at 474, this Court should grant discretionary review to answer these important questions about the scope of the judiciary’s authority to remedy constitutional violations.

ISSUES TO BE BRIEFED

If this Court certifies discretionary review of this appeal, the appeal will present the following issues:

1. Under the particular circumstances of this case and the deference provided to the other branches of government to develop a remedy, did the trial court correctly hold that there is a constitutional appropriation to satisfy the State’s obligation to provide a sound basic education and was the trial court correct to order the relevant state actors to comply?
2. If the trial court’s order of 10 November 2021 was in error, what specific remedies may the trial court order to ensure compliance with *Leandro I* and *Leandro II* and ensure that the State provide all children the opportunity to obtain a sound basic education?

**MOTION TO SUSPEND APPELLATE RULES
TO EXPEDITE DECISION IN THE PUBLIC INTEREST**

Under Rules 2 and 37(a) of the North Carolina Rules of Appellate Procedure, the State respectfully moves that the Court suspend the appellate rules as necessary to facilitate a prompt decision on this filing and appeal.

Rule 2 authorizes this Court to “suspend or vary the requirements or provisions” of the Rules of Appellate Procedure “[t]o prevent manifest injustice to a party, or to expedite decision in the public interest.” As explained above, both this Court and the trial court have found that the State currently is not complying with this Court’s holding in *Leandro I*. The Remedial Plan represents the efforts of the trial court to require the State to take the “necessary and appropriate actions [to] . . . provide the opportunity for a sound basic education to all children in North Carolina.” R. at 1689. The State, however, is already behind in implementing the Remedial Plan. Neither Year 1, 2, nor 3 are adequately funded. For the State to implement the Year 3 plan, the appropriate parties, which include public school units and early childhood service providers, must know whether the Year 3 funding will be disbursed by the start of their fiscal year on July 1, 2022.

The State thus respectfully requests that this Court grant this petition and set an expedited schedule that will allow for review of the trial court’s

order by June 30, 2022. Accordingly, the State proposes the following briefing schedule:

Opening Brief:	Noon on April 8, 2022
Response Brief:	Noon on May 6, 2022
Reply Brief:	Noon on May 27, 2022
Argument:	At the Court's convenience.

CONCLUSION

For the foregoing reasons, the State requests that this Court grant discretionary review of the Superior Court's 10 November 2021 Order, consolidate this appeal with Plaintiffs' appeal in case number 425A21, and suspend the appellate rules as necessary to facilitate a prompt decision on this filing and appeal.

This 14th day of February, 2022.

JOSHUA H. STEIN
Attorney General

Amar Majmundar
Senior Deputy Attorney General
N.C. State Bar No. 24668
North Carolina Department of Justice
P.O. Box 629
Raleigh, NC 27602
Phone: (919) 716-6820
Email: amajmundar@ncdoj.gov

CERTIFICATE OF SERVICE

I do hereby certify that on this day a copy of the foregoing Petition for Discretionary Review was filed and served upon the following parties by email to the addresses shown below:

Melanie Black Dubis
Scott E. Bayzle
Jaelyn D. Miller
PARKER POE ADAMS & BERNSTEIN LLP
301 Fayetteville Street, Suite 1400 (27601)
P.O. Box 389
Raleigh, North Carolina 27602-0389
melaniedubis@parkerpoe.com
scottbayzle@parkerpoe.com
jaelynmilller@parkerpoe.com

H. Lawrence Armstrong, Jr.
ARMSTRONG LAW, PLLC
119 Whitfield Street
Enfield, North Carolina 27823
hla@hlalaw.net

Neal Ramee
David Nolan
Tharrington Smith, LLP
P.O. Box 1151
Raleigh, North Carolina 27602
nramee@tharringtonsmith.com
dnolan@tharringtonsmith.com

Elizabeth Haddix
David Hinojosa
LAWYERS COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1500 K. Street NW, Suite 900
Washington, DC 20005
ehaddix@lawyerscommittee.org
dhinojosa@lawyerscommittee.org

Matthew Tulchin
Tiffany Lucas
NORTH CAROLINA DEPARTMENT OF JUSTICE
114 W. Edenton Street
Raleigh, North Carolina 27603
MTulchin@ncdoj.gov
TLucas@ncdoj.gov

Matthew F. Tilley
Russ Ferguson
W. Clark Goodman
WOMBLE BOND DICKINSON (US) LLP
One Wells Fargo Center, Suite 3500
301 S. College Street
Charlotte, North Carolina 28202-6037
Matthew.tilley@wbd-us.com
Russ.ferguson@wbd-us.com
Clark.goodman@wbd-us.com

This the 14th day of February, 2022.

/s/ Amar Majmudar
Amar Majmudar
Senior Deputy Attorney General