No. 425A21-2 District 10

SUPREME COURT OF NORTH CAROLINA

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HOKE COUNTY BOARD OF EDUCATION, *et al.*, Plaintiffs-Appellants, Cross-Appellees, and CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, Plaintiff-Intervenor-Appellant, Cross-Appellee, and RAFAEL PENN; *et al.* Plaintiff-Intervenors-Appellants, Cross-Appellees, v. STATE OF NORTH CAROLINA, Defendant-Appellant, Cross-Appellee, and STATE BOARD OF EDUCATION, Defendant-Appellee, and CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, Realigned Defendant-Appellant, Cross-Appellee, and PHILIP E. BERGER, in his official Capacity as President *Pro Tempore* of the North Carolina	<u>From Wake County</u> No. COA22-86, No. 95-CVS-1158

Senate, and TIMOTHY K. MOORE, in his)
official capacity as Speaker of the North)
Carolina House of Representatives,)
Intervenor Defendants-Appellants,)
Cross-Appellees.)

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RESPONSE BRIEF OF THE
STATE OF NORTH CAROLINA

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TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES iii

ISSUES PRESENTED 1

INTRODUCTION 2

STATEMENT OF THE CASE AND THE FACTS 4

SUMMARY OF THE ARGUMENT.. 12

ARGUMENT.. 15

Standard of Review 15

Discussion of Law 15

I. Legislative Intervenors Improperly and Incorrectly Challenge the Court Order Adopting the Comprehensive Remedial Plan and Other Prior Orders... 15

A. Legislative Intervenors' arguments are untimely. 16

B. Legislative Intervenors' cramped interpretation of *Leandro II* is erroneous. 20

C. Legislative Intervenors' claim of collusion is utterly baseless. 23

II. The Trial Court's Orders Were Proper. 28

A. The trial court afforded proper respect to the 2021 Appropriations Act............................ 28

B. The trial court's order did not rule on a political question. 31

III. The Trial Court's Calculations on Remand Are Correct. 36

A. The trial court correctly concluded that COVID Relief funds should not be included in calculating the amount of funds the State provided to implement the Comprehensive Remedial Plan. 37

B. The State has sufficient unreserved funds to implement the Comprehensive Remedial Plan. 40

IV. The Trial Court Erred by Removing an Order to State Actors to Transfer State Funds. 44

CONCLUSION 49

CERTIFICATE OF SERVICE 51

TABLE OF CASES AND AUTHORITIES

Cases **Page(s)**

Amsterdam Sav. Bank v. City View Mgmt. Corp., 362 N.E.2d 1150 (N.Y. 1978) 18

Beaufort Cnty. Bd. of Educ. v. Beaufort Cnty. Bd. of Comm'rs, 363 N.C. 500 (2009) 21, 22

Builders Supplies Co. of Goldsboro, N.C., Inc. v. Gainey, 282 N.C. 261 (1972) 17

Chappell v. N.C. Dep't of Transp., 374 N.C. 273 (2020) 15

Comm. to Elect Dan Forest v. Emps. Pol. Action Comm., 2021-NCSC-6 27

Cooper v. Berger, 370 N.C. 392 (2018) 31, 32

Cooper v. Berger, 371 N.C. 799 (2018) 41

Cooper v. Berger, 376 N.C. 22 (2020) 39, 45

Corum v. Univ. of N. Carolina, 330 N.C. 761 (1992) 32

Goldston v. Am. Motors Corp., 326 N.C. 723 (1990) 17

Harper v. Hall, 2022-NCSC-17 31

Hoke Cnty. Bd. of Educ. v. State, No. 95 CVS 1158, 2011 WL 11028382 (N.C. Super. Ct. Sept. 2, 2011) 6

Hoke Cnty. Bd. of Educ. v. State,
222 N.C. App. 406 (2012) 7

Hoke Cnty. Bd. of Educ. v. State (*Leandro I*),
346 N.C. 336 (1997) 4, 20, 24, 31

Hoke Cnty. Bd. of Educ. v. State (*Leandro II*),
358 N.C. 605 (2004) .... passim

Hoke Cnty. Bd. of Educ. v. State (Leandro III),
367 N.C. 156 (2013) 7, 22, 24

In re Alamance Cnty. Ct. Facilities,
329 N.C. 84 (1991) 46

In re Martin,
295 N.C. 291 (1978) 44, 45

Jackson v. Beard,
162 N.C. 105 (1913) 49

State ex rel. Att'y Gen. v. Knight,
169 N.C. 333 (1915) 45

Lide v. Mears,
231 N.C. 111 (1949) (vacating 27

McGhee v. Granville County,
860 F.2d 110 (4th Cir. 1988) 25

N.C. League of Conservation Voters v. Hall, Nos. 21 CVS
015426, 21 CVS 500085, 2022 WL 2610499
(N.C. Super. Ct. Feb. 23, 2022) 26

*Neb. Coal. for Educ. Equity & Adequacy (Coalition) v.
Heineman*, 731 N.W.2d 164 (Neb. 2007) 32, 33

News & Observer Publ'g Co v. Easley,
182 N.C. App. 14 (2007) 31

Pulliam v. Smith,
348 N.C. 616 (1998) 15

Richmond Cnty. Bd. of Educ. v. Cowell,
254 N.C. App. 422 (2017) 47

Silver v. Halifax Cnty. Bd. of Comm'rs,
371 N.C. 855 (2018) 21

State ex rel. Edmisten v. Tucker,
312 N.C. 326 (1984) 27

State ex rel. Martin v. Preston,
325 N.C. 438 (1989) 29

Stephenson v. Bartlett,
357 N.C. 301 (2003) 26

Teachey v. Gurley,
214 N.C. 288 (1938) 18

Williams v. Blue Cross Blue Shield of N.C.,
357 N.C. 170 (2003) 18

Williams v. Pilot Life Ins. Co.,
288 N.C. 338 (1975) 15

Zeitinger v. Hargadine-McKittrick Dry Goods Co.,
250 S.W. 913 (Mo. 1923) 18

Statutes

N.C. Gen. Stat. § 1a-1, Rule 24(b) 19

N.C. Gen. Stat. § 143C-4-2 43

Pub. L. 116-136 § 18003(d) 38

Pub. L. 116-136 § 18003(f) 39

Pub. L. 116-260 § 313(d)...38

Pub. L. 116-260 § 313(g) 39

Pub. L. 117-2 § 2001(e)(2) 38

Pub. L. 117-2 § 2001(g) 39

Constitutional Provisions

N.C. Const. art. V, § 7 .... 44, 45, 48

N.C. Const. art. IX, § 2 .... 23, 32

N.C. Const. art. IX, § 6...32

N.C. Const. art. IX, § 7...32

Session Laws

Act of Nov. 18, 2021, S.L. 2021-180, §§ 18.7(a)-(b), 2021 N.C. Sess. Laws (Appropriations Act) 19

Act of July 1, 2022, S.L. 2022-74, § 4.5 41

Other Authorities

Editorial Board, *A Summons to Boost School Funding*, News & Observer, Dec. 15, 2019 10

Fiscal Research Division, *North Carolina General Fund Revenue Consensus Forecast: May 2022 Revision* (May 9, 2022) 41

Off. of State Controller, Cash Watch (Aug. 1, 2022) 41

Senator Berger Press Shop, Response to Leandro Consent Order, Sept. 1, 2020 11

T. Keung Hui, *Report: Educational quality is declining in state's schools*, News & Observer, Jan. 08, 2020 10

T. Keung Hui, *Group calls for action now in Leandro case,* News & Observer, Feb. 19, 2020 10

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T. Keung Hui, *Judge warns NC must fund education plan*, News & Observer, Jun 11, 2021 11

U.S. Dep't of Educ., Frequently Asked Questions: Elementary and Second School Emergency Relief Programs, Governor's Emergency Education Relief Programs at 15 (May 2021) 38

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CHARLOTTE-MECKLENBURG BOARD OF EDUCATION,
Plaintiff-Intervenor-Appellant, Cross-Appellee,

and

RAFAEL PENN; *et al.*
Plaintiff-Intervenors-Appellants, Cross-Appellees,

v.

STATE OF NORTH CAROLINA,
Defendant-Appellant, Cross-Appellee,

and

STATE BOARD OF EDUCATION,
Defendant-Appellee,

and

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

and

PHILIP E. BERGER, in his official Capacity as President *Pro Tempore* of the North Carolina

From Wake County
No. COA22-86,
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Senate, and TIMOTHY K. MOORE, in his)
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Intervenor Defendants-Appellants,)
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RESPONSE BRIEF OF THE STATE OF NORTH CAROLINA

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ISSUES PRESENTED

I. Following two decades of deference to the legislative and executive branches to develop a remedy for an ongoing violation of the State's constitutional duty to provide all students a sound basic education, was the trial court correct to order the relevant state actors to take measures to ensure compliance with our State's Constitution, including ordering them to use available state funds in that effort?

II. If the trial court's order of 10 November 2021 was in error, what specific remedies are appropriate to ensure compliance with the State's constitutional duty to provide all children the opportunity to obtain a sound basic education?

III. Does the trial court's 26 April 2022 Amended Order, which incorporates a writ of prohibition issued by the Court of Appeals in a separate appeal, fall within the scope of this Court's 21 March 2022 Remand Order?

INTRODUCTION

Distilled to its essence, Legislative Intervenors' argument is that after more than a quarter-century of litigation, and more than a decade of evidence and deliberations over issues of statewide scope, we are now finally reaching the point where a remedy *might* be available for a single county, with no application to the rest of the State. This Court plainly held a different view when it admonished the State in 2004 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." *Hoke Cnty. Bd. of Educ. v. State* (*Leandro II*), 358 N.C. 605, 616 (2004) (emphasis added).

This appeal arises from the trial court's 26 April 2022 Order (the "Amended Order") finding that the State must fund the year-two and -three action items of the Comprehensive Remedial Plan ("the Plan"). That Plan—ultimately entered by consent—resulted from an intensive, years-long process, statewide in scope, of fact-finding and negotiation regarding remedies. Legislative Intervenors start their appeal not by contesting the Amended Order, or even the original 10 November 2021 Order (the "Original Order"), but instead by trying to undo many years' worth of proceedings that

occurred *before* those orders were entered.

Strikingly, Legislative Intervenors' sudden desire to actively relitigate this case comes after years of refusing to participate—either in litigation or through legislative enactments. But their arguments and approach, rather than finally showing a true willingness to become constructively involved, provide further evidence that the legislative leaders are either unable—or simply unwilling—to lead their respective chambers to fulfill the State's constitutional duty to provide a sound, basic education for all of its children.

Legislative Intervenors cannot dispute that they were aware of the orders they now belatedly challenge at the time the trial court entered them; indeed, they took some rulings as occasions to publicly cast aspersions on the courts' authority. But they sat on the sidelines for years before attempting to intervene to undo years of litigation. That unreasonable and prejudicial delay is reason enough to reject Legislative Intervenors' arguments.

Even if this Court were to overlook their stalling tactics, Legislative Intervenors' arguments for overturning the trial court's prior orders are wrong on the merits. This Court rejected many of their arguments earlier in

this litigation, and they are squarely foreclosed by precedent.

Turning to the orders before this Court on appeal, Legislative Intervenors argue that the trial court's order failed to afford proper deference to the 2021 Appropriations Act and ruled on a political question. Neither assertion is correct. The trial court afforded great deference to the Appropriations Act, and this Court has repeatedly rejected arguments that this litigation implicates political questions.

The trial court's Amended Order did, however, err by removing the Original Order's instruction to state actors to transfer the state funds necessary to implement the Plan. Contrary to Legislative Intervenors' assertions, the Original Order's instruction is authorized by our Constitution and this Court's precedent.

STATEMENT OF THE CASE AND THE FACTS

In 2004, this Court affirmed the trial court's ruling that the State was failing to provide the State's youth a sound basic public education. *Leandro II*, 358 N.C. at 608. In so doing, this Court emphasized that it "read *Leandro* [*v. State (Leandro I*), 346 N.C. 336 (1997)] and our state Constitution . . . as according the right at issue to *all children of North Carolina*." *Id.* at 620

(emphasis added). The Court also adopted "general guidelines for a *Leandro*-compliant resource allocation system," which included:

> (1) that every classroom be staffed with a competent, certified, well-trained teacher; (2) that every school be led by a well-trained competent principal; and (3) that every school be provided, in the most cost effective manner, the resources necessary to support the effective instructional program within that school so that the educational needs of all children, including at-risk children, to have the equal opportunity to obtain a sound basic education, can be met.

Id. at 636 (simplified). *Leandro II* concluded by challenging the State to "step forward, boldly and decisively, to see that *all children*" receive an education consistent with those guidelines. *Id.* at 649 (emphasis added).

In the years following that ruling, the trial court held frequent hearings to assess the State's compliance with the standard this Court announced in *Leandro II*. In those hearings, the trial court routinely considered evidence that schools *statewide* were failing to provide a sound basic education. (*See, e.g.*, R pp 982-986 (taking evidence on "the problem of poor academic performance in high schools *throughout* North Carolina" in 2005); R p 1043 (noticing an evidentiary hearing concerning over a dozen allegedly constitutionally deficient middle schools across the state); R p 1053 (taking

evidence on statewide deficiencies in math instruction))

The State, meanwhile, attempted to demonstrate that it was satisfying its constitutional obligations, usually by pointing to statewide educational initiatives. For example, in October 2004, the State submitted to the trial court a list of statewide education programs that it believed achieved compliance with *Leandro II*. (*See* R pp 934-945, 991-1006) And throughout 2006 and 2007, the State presented evidence on a so-called "Turnaround Plan," a remedial plan that the State implemented in underperforming high schools statewide. (R pp 1039-1042, 1051-1052)

Despite these efforts, the courts continued to find the State broadly noncompliant. In July 2011, for example, the trial court found that the State had failed to comply with *Leandro II* because it had reduced funding—statewide—for pre-kindergarten programs.[1] (R pp 1144-1167) The Court of

[1] This was the occasion for legislative leaders' only previous attempt to intervene in this litigation. Legislative leaders moved to intervene to have the trial court "clarify" its order in light of proffered testimony about the legislature's understanding of the relevant statute's meaning. *Hoke Cnty. Bd. of Educ. v. State*, No. 95 CVS 1158, 2011 WL 11028382, at *1 (N.C. Super. Ct. Sept. 2, 2011). As the trial court explained, that limited intervention motion was improper because the trial court "is not authorized to enter an Order essentially revising an act of the General Assembly" nor to "consider as

Appeals affirmed that order. *See Hoke Cnty. Bd. of Educ. v. State*, 222 N.C. App. 406, 417-18 (2012). Following oral argument in this Court, the General Assembly restored the funding, and this Court vacated the appeal as moot. *Hoke Cnty. Bd. of Educ. v. State (Leandro III)*, 367 N.C. 156 (2013). In May 2014, the trial court found, based on several hearings examining deficient statewide End-of-Course, End-of-Grade, and ACT scores, that there are "thousands of school children from kindergarten through the 11th grade in high school who have not obtained [a] sound basic education." (R p 1232) In 2016, the trial court considered the State's evidence demonstrating the State's compliance with the *Leandro II* standard, (*see* R pp 1270-1271, 1275-1276), but again found the State's efforts unsatisfactory. And the trial court denied the State Board of Education's 2017 motion for relief from judgment. (R pp 1300-1306; *see* R pp 1280-1292)

After years of repeatedly being unable to demonstrate to the trial court that the State had complied with *Leandro I* and *II*, the State began in 2017 to chart a different path. Guided by their constitutional duty to provide a

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evidence, statements made by members of the General Assembly, under oath or otherwise about what the General Assembly intended a statute to mean." *Id.* at *3.

sound basic education, as well as their obligation to use state resources responsibly, the State executive branch defendants agreed to a court-supervised process. That process entailed extensive statewide fact-finding followed by an attempt to develop a clear plan that would finally achieve compliance with the *Leandro* standard. The benefit to the State and its citizens from this approach was obvious: If the trial court adopted such a plan, the State would finally have a clear, factually-supported roadmap for satisfying its constitutional obligation. In other words, the State would finally have definitive direction as to what specific actions were necessary to bring this litigation to a close. (*See, e.g.*, R p 1293 (noting the parties' desire for "written recommendations for specific actions necessary to *achieve sustained compliance* with the constitutional mandates articulated in this case") (emphasis added))

In 2018, the trial court adopted a case management order setting out a schedule for crafting the proposed remedial plan. (*See* R pp 1293-1297) The court required that the plan include "specific actions the State should take[]" to meet the guidelines for a *Leandro*-compliant system of education. (R p 1294) In March 2018, the trial court appointed WestEd as "*the Court's*

independent, non-party consultant" as the parties worked toward achieving compliance. (R p 1641 (emphasis added); *see also* R pp 1298-1299).

The WestEd report was the product of a detailed and open process in collaboration with the Learning Policy Institute and North Carolina State University's William & Ida Friday Institute for Educational Innovation. (*See* R p 1331) As part of the process, WestEd spoke to 1,270 educators and more than sixty education stakeholders, including elected officials, members of the State Board of Education, and staff at the Department of Public Instruction. (R p 1349) And WestEd examined reports and legislation crafted by the General Assembly. (R p 1354) During WestEd's work, the parties were permitted to communicate with WestEd and "disseminate [any] written deliverables [from WestEd] in such manner and to such persons or entities as any party deems appropriate." (R p 1324) And the trial court ordered that "[c]ounsel for all parties of record shall be provided with a reasonable opportunity to review and respond to WestEd's Final Plan." (R p 1325) Despite the fact that parties to the case were provided the opportunity to respond to WestEd's report, legislative leaders did not intervene.

In 2019, WestEd presented a report summarizing the results of these

proceedings. (R pp 1331-1632) Legislative Intervenors knew of WestEd's report, but again chose not to contribute to or participate in the process other than by criticizing it.[2]

On 21 January 2020, after extensive negotiations between the parties (which Legislative Intervenors made no attempt to participate in), the trial court entered a consent order adopting WestEd's findings and recommendations. (R p 1634; *see also* R p 1667) Legislative Intervenors were aware of that order too, but again did not seek to contribute to the process, whether through intervention or otherwise.[3] WestEd's report became the basis for the proposed Comprehensive Remedial Plan. In September 2020, after receiving status reports from the parties, the trial court ordered the

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[2] *See, e.g.*, Editorial Board, *A Summons to Boost School Funding*, News & Observer, Dec. 15, 2019, at A14, *available at* https://bit.ly/3doAM3y (Senator Berger's spokesperson commenting on the WestEd report); T. Keung Hui, *Report: Educational quality is declining in state's schools*, News & Observer, Jan. 08, 2020 at A5, *available at* https://bit.ly/3Sv66YT (Speaker Moore commenting on the WestEd report).

[3] *See, e.g.*, T. Keung Hui, *Group calls for action now in Leandro case,* News & Observer, Feb. 19, 2020, at A3 (Speaker Moore's spokesperson commenting on the trial court's January 2020 Order), *available at* https://bit.ly/3bhniQR; T. Keung Hui, *COVID-19 might limit school funding available in budget*, News & Observer, May 21, 2020 at A6, *available at* https://bit.ly/3PKHXeV (Senator Berger responding to the January 2020 Order, saying "[o]ur Constitution does not provide for judges to appropriate dollars").

State to implement the action items in year one of the Plan. (R pp 1667-1670) Once again, Legislative Intervenors were aware of this order, but declined to intervene.[4] In June 2021, the trial court ordered the State to implement the Plan. (R p 1684) Yet again, Legislative Intervenors were aware of this order, but did not intervene even as the deadline to appeal the order passed.[5]

In September 2021, the State informed the trial court that it lacked sufficient funds to carry out the year-two and year-three action items in the Plan. (*See* R pp 1814-1818) Later that month, the trial court ordered the parties to appear at an 18 October 2021 hearing, during which the trial court would "consider any proposal for how the Court may use its remedial powers to secure such funding." (R p 1818) Legislative Intervenors had previously made public statements indicating their views on that very topic, *see supra* note 3, yet they chose not to intervene to share those views with the trial court during the October 2021 hearing.

On 10 November 2021, the trial court ordered the State Treasurer, State

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[4] *See* Senator Berger Press Shop, Response to Leandro Consent Order, Sept. 1, 2020, *available at* https://bit.ly/3bf2Uje.

[5] *See* T. Keung Hui, *Judge warns NC must fund education plan*, News & Observer, Jun 11, 2021, at A1, *available at* https://bit.ly/3cMCbL6 (noting that "Republican legislative leaders criticized" the trial court's June 2021 Order).

Controller, and OSBM to transfer the funds necessary to implement years two and three of the Plan. (R pp 1823-1842) The State appealed the Original Order on 7 December 2021. (R pp 1847-1850) Legislative Intervenors finally moved to intervene the following day. (R p 1869)

SUMMARY OF THE ARGUMENT

Legislative Intervenors challenge trial court orders spanning more than a decade in addition to the trial court's Amended and Original Orders actually before this Court on appeal. None of the challenges has merit.

Legislative Intervenors' attacks on prior trial court orders, including the orders adopting the Comprehensive Remedial Plan and the June 2021 Order instructing the State to implement the Plan, are untimely. Legislative Intervenors chose to allow all hearings leading up to those orders, as well as the time to appeal those orders, to pass without moving to intervene in this litigation.

Moreover, Legislative Intervenors' arguments for vacating those prior orders are meritless. First, Legislative Intervenors argue that the Comprehensive Remedial Plan exceeds the scope of *Leandro II*, which they claim is limited to only Hoke County. That argument, however, cannot be

squared with what this Court actually said in *Leandro II*. Second, Legislative Intervenors make the utterly baseless accusation that the consent order resulted from a "friendly suit." The State's decision to participate in a process that would lead to a consent order to attempt to bring a decades-long litigation to an end is a wholly reasonable and responsible approach to addressing a previously open-ended process in the trial court that had led to repeated findings over many years of unremedied constitutional violations. It is also consistent with the State's obligation to defend and uphold the Constitution and use public resources responsibly.

Legislative Intervenors' attacks on the orders that are properly before this Court fare no better. First, Legislative Intervenors complain that the trial court afforded insufficient deference to the State's recently enacted budget. That is incorrect. There was no budget when the trial court issued its Original Order directing the State to transfer funds necessary to comply with the trial court's June 2021 Order to implement the Plan. After a budget was enacted, the trial court afforded it adequate respect. Alternatively, Legislative Intervenors argue that the trial court's orders are barred by the political question doctrine, and that courts cannot review the State's

fulfillment of its duty to provide a sound basic education. This Court has repeatedly rejected that argument in this very litigation.

Next, Legislative Intervenors attack the trial court's financial accounting. But Legislative Intervenors' first claim—that the trial court erred by failing to consider the COVID-19 funds that the federal government provided directly to local school districts—ignores restrictions in the federal statutes prescribing how local school districts may use those funds. And their second claim—that the trial court erred in finding that the State has sufficient funds to cover the cost of implementing years two and three of the Plan in the Savings Reserve Fund—ignores the fact that the State has sufficient funds in the Unreserved Fund Balance.

Finally, Legislative Intervenors argue that the trial court's Original Order violates our Constitution's Appropriations Clause. To support that argument, however, Legislative Intervenors ignore the actual text of the Appropriations Clause and divorce language from this Court's past decisions from those decisions' holdings and context.

Because Legislative Intervenors fail to demonstrate that any of the trial court's orders were in error, this Court should affirm the trial court's Amended

Order directing the State to fund years two and three of the Comprehensive Remedial Plan. This Court should also restore the Original Order instructing the appropriate state actors to transfer the funds necessary to implement the Plan.

ARGUMENT

Standard of Review

"A trial court's conclusions of law are reviewed *de novo*." *Chappell v. N.C. Dep't of Transp.*, 374 N.C. 273, 281 (2020). A trial court's findings of fact, meanwhile, should not be disturbed if "there is evidence to support them." *Pulliam v. Smith*, 348 N.C. 616, 625 (1998) (quoting *Williams v. Pilot Life Ins. Co.*, 288 N.C. 338, 342 (1975)).

Discussion of Law

I. Legislative Intervenors Improperly and Incorrectly Challenge the Court Order Adopting the Comprehensive Remedial Plan and Other Prior Orders.

Legislative Intervenors first argue that nearly a decade's worth of trial court proceedings in this litigation, including the trial court's order adopting the Comprehensive Remedial Plan and instructing the State to implement the Plan, are invalid. As a threshold matter, Legislative Intervenors' arguments are untimely. Legislative Intervenors were indisputably aware of

those earlier orders when they were entered, but took no action. And even if the Court were to excuse this unjustified delay, Legislative Intervenors' arguments are wrong on the merits.

A. Legislative Intervenors' arguments are untimely.

Legislative Intervenors question several prior trial court orders preceding the Amended and Original Orders. These challenges are outside the scope of this appeal—and are far too late.

Legislative Intervenors explicitly—and for the first time—attack the trial court's 13 March 2018 Order directing the State and Plaintiffs to craft a remedial plan and appointing WestEd as the trial court's consultant. *See* Br. at 20-21. They also attack for the first time the trial court's January 2020 Order directing the parties to develop the Comprehensive Remedial Plan. *See* Br. at 22. And they attack for the first time the trial court's June 2021 Order directing the State to implement the Comprehensive Remedial Plan. *See* Br. at 23-24. At times, Legislative Intervenors even appear to challenge every trial court order in this litigation since *Leandro II*. *See, e.g.*, Br. at 43. Whatever the intended scope of Legislative Intervenors' challenge to these earlier orders, it is untimely.

There can be no dispute that Legislative Intervenors were well aware of those earlier orders when they were entered. They remarked on them publicly. *See supra* notes 2-5. Despite that awareness, Legislative Intervenors made no attempt to weigh in on the court's consideration of the matters at issue in those orders before they were entered, or to challenge them afterward, until now. Thus, Legislative Intervenors passed up multiple opportunities to timely present the legal issues they now raise with the prior orders.[6]

The doctrine of laches bars a party from raising arguments that it unreasonably delayed in asserting, especially when that delay prejudices another party. *See Builders Supplies Co. of Goldsboro, N.C., Inc. v. Gainey*,

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[6] Legislative Intervenors claim that the prior orders they now challenge were interlocutory and not immediately appealable. But Legislative Intervenors could have sought to intervene to participate in the trial court proceedings that led to those orders. In any event, even interlocutory orders are appealable when the order "affects some substantial right and will work injury to appellant if not corrected before appeal from final judgment." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 726 (1990) (citations and internal quotation marks omitted). Legislative Intervenors appear to believe the orders impaired a substantial right. After all, they complain that those orders represented an impermissible usurpation of legislative branch prerogatives. So it is unclear why they did not at least intervene to attempt to appeal these orders.

282 N.C. 261, 271 (1972); *cf. Williams v. Blue Cross Blue Shield of N.C.*, 357 N.C. 170, 181 (2003). Courts in other states have held that when an intervenor's unreasonable delay prejudices another party, laches bar the intervenor's arguments. *See, e.g.*, *Amsterdam Sav. Bank v. City View Mgmt. Corp.*, 362 N.E.2d 1150, 1150 (N.Y. 1978) (holding that laches barred an intervenor from challenging a foreclosure three months after it was consummated when the intervenor knew immediately of the error in the foreclosure proceedings and another party had already sold the foreclosed property); *Zeitinger v. Hargadine-McKittrick Dry Goods Co.*, 250 S.W. 913, 916 (Mo. 1923) (holding that an "intervener has been guilty of laches after knowledge of the pendency of the suit" if the intervention will "affect[] injuriously the original litigants"). Whether delay prejudices another party "depends upon the facts and circumstances of each case." *Williams*, 357 N.C. at 181 (quoting *Teachey v. Gurley*, 214 N.C. 288, 294 (1938)).

Here, there is no question that Legislative Intervenors' delay prejudices the parties. Should the Court accept Legislative Intervenors' arguments, many years of proceedings in this case will be undone. Efforts to bring the State into compliance with its constitutional duty to guard and maintain the

right to education will put the State and its students back to *Leandro II*—with an ongoing constitutional violation and no plan or vision to remedy it.

The State would be separately prejudiced. After decades of litigation that, even as of 2004, had already "cost the taxpayers of this state an incalculable sum of money," *Leandro II*, 358 N.C. at 610, and that failed to remedy the ongoing constitutional violation, the parties and the trial court finally identified a pathway that would allow the State to comply fully with its obligations. Undoing the trial court's orders would cause the State to spend untold additional taxpayer funds on this litigation, but with less certainty of eventual finality.

Legislative Intervenors' excuse for their delayed entry into this case is that their right to intervene only arose following the enactment of the 2021 biennial budget. *See* Act of Nov. 18, 2021, S.L. 2021-180, §§ 18.7(a)-(b), 2021 N.C. Sess. Laws (Appropriations Act). This argument is a red herring. Legislative leaders could have sought permissive intervention at any time, budget or no budget. *See, e.g.*, N.C. Gen. Stat. § 1a-1, Rule 24(b)(2). Legislative Intervenors offer no justification for their failure to do so.

In sum, Legislative Leaders' attempt to relitigate trial court orders

before the Amended and Original Orders is untimely. For that reason alone, this Court should reject Legislative Intervenors' challenges to those prior orders.

B. Legislative Intervenors' cramped interpretation of *Leandro II* is erroneous.

Even if this Court were to overlook Legislative Intervenors' delay, their challenges to the trial court's earlier orders should be rejected on the merits. Legislative Intervenors argue that Judge Robinson's Amended Order is unlawful because it improperly extends *Leandro II* beyond Hoke County. Under Legislative Intervenors' theory, this Court's holdings extend only to Hoke County and any remedy that goes beyond addressing the State's constitutional obligation in that county is not authorized by this Court. *See* Br. at 42-47. Legislative Intervenors are mistaken.

Leandro I, II, and *III* make clear that their holdings were *not* limited to a particular county. Rather, they establish that the State is obligated to provide *every child in the State* the opportunity to obtain a sound, basic public education. First, in *Leandro I,* this Court remanded the case to the trial court to, *inter alia*, take evidence on the issue of whether defendants "are denying *the children of the state* a sound basic education." 358 N.C. at

614 (emphasis added) (internal citations omitted). By directing the trial court to take evidence on the education provided to "the children of the state," this Court made clear that the inquiry was not limited to Hoke County.

In *Leandro II*, the Court underscored the statewide breadth of the issues under review, "adopt[ing] and apply[ing] the broadened parameters of a declaratory judgment action" to an inquiry about whether the "*children of North Carolina* . . . are wrongfully being denied their constitutional right to the opportunity for a sound basic education." 358 N.C. at 616 (emphasis added). *Leandro II* further confirmed that this Court views "*Leandro* [*I*] and our state Constitution, as argued by plaintiffs, as according the right at issue to *all children of North Carolina*, regardless of their respective ages or needs." *Id.* at 620 (emphasis added).

This Court confirmed the statewide reach of its holdings in *Leandro I* and *Leandro II* in later cases as well. For example, in *Silver v. Halifax County Board of Commissioners,* 371 N.C. 855, 856-57 (2018), this Court observed that the reach of *Leandro I* and *Leandro II* went to "every child of this state." And in his concurrence in *Beaufort County Board of Education v. Beaufort County*

Board of Commissioners, then-Justice Newby reaffirmed that this Court's opinions in *Leandro I* and *II* demanded that the "minimum definition of sound basic education must be the same throughout the state." 363 N.C. 500, 510 (2009).

Legislative Intervenors' argument is particularly puzzling given that this Court apparently rejected the very the same argument in *Leandro III*. In an amicus brief filed in that case, Justice Orr (who authored *Leandro II*) confirmed his understanding of this Court's teachings that *Leandro II*'s scope extends statewide: "*Leandro II* reaffirmed that all children in the State have a constitutional right to the opportunity for a sound basic education." Brief of Amicus Curiae N.C. Sch. Bds. Ass'n at 6, *Hoke Cnty. Bd. of Educ. v. State (Leandro III)*, 367 N.C. 156 (2013). In particular, he urged that "*Leandro II* unquestionably declares the expanded focus and declaration of rights in the case beyond the provincial boundaries of Hoke County." *Id.* The Court did not take issue with Justice Orr's interpretation, and instead reinforced it by holding that its "mandates in *Leandro* and [*Leandro II*] remain in full force and effect." 367 N.C. at 160.

Given that there are 115 school districts in North Carolina, the Court's

approach in *Leandro II* also makes eminent practical sense. If the State were instead mired in litigation against 115 different school districts, it would lead to evidentiary and procedural chaos that would severely undermine the State's ability to create and maintain a uniform system of public schools. N.C. Const. art IX, § 2. If accepted, Legislative Intervenors' argument would likely replicate versions of this decades-long litigation in multiple trial courts throughout the State.

C. Legislative Intervenors' claim of collusion is utterly baseless.

Legislative Intervenors next argue that the Comprehensive Remedial Plan is the product of "collusion" between the State and Plaintiffs, and that the trial court therefore had no jurisdiction to order the State to implement the Plan. But it is not remotely unusual for defendants, in the context of remedial proceedings coming after repeated findings of legal violations, to attempt to reach agreement on court-supervised processes and requirements to ensure compliance with the court's order. Indeed, it would be more unusual—and decidedly improper—for a defendant, after years of repeatedly being found to have failed to meet its constitutional duties, to pull out all the stops on a strategy of continued obstruction, obfuscation, and delay. Yet

that seems to be what Legislative Intervenors are suggesting the State should have done here.

Legislative Intervenors say that "since 2018 both sides—meaning Plaintiffs and DOJ—have asked the trial court to enter a series of consent orders that purport to require the 'State' to comply with the [Comprehensive Remedial Plan]."[7] Br. at 49. But by 2018, the State had engaged in twenty-three years of adversarial litigation, both over the merits of Plaintiffs' claims and over the adequacy of the State's subsequent efforts to comply with this Court's orders. *See, e.g.*, *see Leandro I*, 346 N.C. at 344 (appealing trial court's denial of State's motion to dismiss Plaintiffs' complaint); *Leandro II*, 358 N.C. at 608 (appealing trial court's finding that the State was not satisfying its constitutional obligations as described in *Leandro I*); *Leandro III*, 367 N.C. 158-59 (appealing trial court's finding that a statewide remedial plan inadequately met the standards outlined in *Leandro I* and *II*).

In 2018, the State remained obligated to conform its educational

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[7] At the outset, Legislative Intervenors' description contains at least two factual errors. For one thing, the North Carolina Department of Justice is not a party or "side" in this litigation, it is counsel for the State. For another, Legislative Intervenors omit the State Board of Education (represented by separate counsel from the Department of Justice) from their list of parties.

policies to the mandate of this Court in *Leandro II* and subject to trial court supervision. The State therefore made the wholly reasonable decision to attempt to work towards a clear roadmap for fulfilling its constitutional duties, under the trial court's direction. Even so, the process remained adversarial. Through a series of hearings, the trial court challenged the State to demonstrate its compliance with either the formulation of the Plan or its execution. During the course of those hearings, Plaintiffs' submissions were frequently at odds with those of the State.

Contrary to Legislative Intervenors' poorly-informed insinuations, there neither is nor should be anything unusual about a defendant seeking to achieve compliance with remedial court orders, including orders requiring the defendant to attempt to negotiate with other parties or even to propose a remedial plan itself. *See, e.g.*, *McGhee v. Granville County*, 860 F.2d 110, 113 (4th Cir. 1988) ("[T]he district court entered a consent order which required the parties to attempt to agree upon a remedial plan, failing which the [defendant] county would submit a proposed remedial plan."). State defendants, including legislative leaders, frequently comply with remedial orders even when they disagree with the court's finding of a violation. *See,*

e.g., *Stephenson v. Bartlett*, 357 N.C. 301, 303-04 (2003) (describing how the State conducted the 2002 general election under the trial court's interim districting plans even as the State appealed that order); *N.C. League of Conservation Voters v. Hall*, Nos. 21 CVS 015426, 21 CVS 500085, 2022 WL 2610499, at *2 (N.C. Super. Ct. Feb. 23, 2022) ("Pursuant to the Supreme Court's directive, the General Assembly enacted Remedial Plans, and through the Legislative Defendants, timely submitted the Remedial Plans to this Court on February 18, 2022.").

Moreover, the State's conduct was consistent with both its duty to defend and uphold the North Carolina Constitution and to efficiently use state resources. As this Court recognized in *Leandro II*, "[t]he time and financial resources devoted to litigating these issues over the past ten years undoubtably have cost the taxpayers of this state an incalculable sum of money" that could have instead been spent on education. 358 N.C. at 610.

Legislative Intervenors offer this Court a string of citations to support their argument that the allegedly "friendly" nature of the remedial proceedings deprived the trial court of jurisdiction. *See* Br. at 48-49. But their cases are inapposite because none of them involve a trial court's order

fashioning a remedy *after* finding that the defendant violated the law. In *State ex rel. Edmisten v. Tucker*, 312 N.C. 326 (1984), for example, this Court held that the State failed to even *allege* a justiciable controversy. *Tucker*, 312 N.C. at 329. Other cases they cite, meanwhile, considered whether a plaintiff had *produced sufficient evidence* of the existence of a legal injury to confer the trial court jurisdiction over the plaintiffs' claims. *Comm. to Elect Dan Forest v. Emps. Pol. Action Comm.*, 2021-NCSC-6, ¶1 (considering the plaintiff's standing when challenged in a motion for summary judgment); *Lide v. Mears*, 231 N.C. 111, 122 (1949) (vacating order for sale of sale of infant beneficiaries' interest in property because "there [was] no suggestion by pleading or evidence that the proposed sale" would benefit the infant beneficiaries).

Courts are understandably reluctant to expound on constitutional principles in non-adversarial litigation. But this Court long ago resolved the central constitutional question in this case. Legislative Intervenors' suggestion that defendants must be resolutely intransigent during remedial proceedings, after they have repeatedly been found in violation of the

constitution, flies in the face not only of effective litigation strategy, but also of responsible leadership and basic, common sense.

II. The Trial Court's Orders Were Proper.

Legislative Intervenors next challenge the Amended and Original Orders, claiming those orders failed to presume the constitutionality of the Appropriations Act and addressed a political question. These arguments are unpersuasive.

A. The trial court afforded proper respect to the 2021 Appropriations Act.

Legislative Intervenors assert that the trial court's Original and Amended Orders failed to afford adequate deference to the constitutionality of the Appropriations Act. *See* Br. at 47-48, 55-58. It is worth noting that the budget that Legislative Intervenors claim the trial court found unconstitutional did not even exist when the trial court ordered the State to implement the Comprehensive Remedial Plan, or when the trial court issued its Original Order. In any event, on remand from this Court, the trial court properly amended its Original Order in light of the Appropriations Act.

As an initial matter, Legislative Intervenors' assertion that the trial court found the budget unconstitutional is misleading. The Appropriations

Act *did not exist* when the trial court issued its Original Order directing state actors to transfer funds to cover the cost of implementing the Plan's year-two and -three action items. Moreover, the "presumption" that the General Assembly's enactments are constitutional merely "temper[s]" courts' duty to exercise judicial review; it does not eliminate it. *State ex rel. Martin v. Preston*, 325 N.C. 438, 448 (1989). The presumption cannot render more than twenty-five years of litigation, including five years of remedial proceedings, meaningless. Legislative Intervenors cite no authority for their contrary suggestion.

In any event, the trial court afforded great deference to the legislative process and, eventually, the enacted Appropriations Act. The trial court, acting on information from the State that budget negotiations were ongoing, stayed its Original Order for thirty days to preserve the status quo. (R p 1842) After the budget was enacted, the trial court scheduled a hearing to amend its order to reflect the portions of the Plan funded by the Appropriations Act. (R pp 1844-1845) And, in April, the trial court held multiple hearings to discern what aspects of the Plan were funded by the Appropriations Act. *See* Amended Order at 6-9. The trial court's 26 April

2022 Order then amended the 10 November 2021 Order to reduce the amount of funds necessary to implement the Plan in light of the funds appropriated by the budget. Thus, far from holding the Appropriations Act unconstitutional, the trial court rightly concluded that the new budget constituted partial *compliance* with the State's constitutional obligation.

As a fallback position, Legislative Intervenors pursue the delay tactic of demanding "additional proceedings . . . to determine which, if any, of the [Comprehensive Remedial Plan's] 146 measures were necessary to provide children with a sound basic education following the Budget." Br. at 57. But the parties already had those proceedings—before the trial court entered the Plan and when the trial court, on remand instructions from this Court, modified the 10 November 2021 Order to account for the Appropriations Act.

In sum, Legislative Intervenors' argument that the trial court did not presume that the budget was constitutional is both wrong and irrelevant. There was no Appropriations Act when the trial court issued its Original Order, and the trial court amended its Original Order in light to the presumptively constitutional Appropriations Act.

B. The trial court's order did not rule on a political question.

Legislative Intervenors also argue that the trial court's orders improperly addressed a political question. Br. at 39. This Court has repeatedly rejected similar arguments *in this case*. *See Leandro I*, 346 N.C. at 344-45 (rejecting argument that Plaintiff's suit presented a political question).

This Court has repeatedly held that the State's compliance with our Constitution's guarantee of the right to education is properly subject to judicial review. *See id.* These holdings were correct. The mere fact that the Constitution assigns primary responsibility for a particular issue to a political branch does not insulate the branch's exercise of that responsibility from judicial review. *Harper v. Hall*, 2022-NCSC-17, ¶ 115; *see also News & Observer Publ'g Co. v. Easley*, 182 N.C. App. 14, 18-19 (2007) (explaining that even though Constitution grants the Governor exclusive authority over clemency, judicial review remained available in a challenge to the Governor's compliance with public records laws in a request for records related to the Governor's exercise of his clemency powers). And it is well established that "questions of Constitutional and statutory interpretation are within the

subject matter jurisdiction" of state courts. *Cooper v. Berger*, 370 N.C. 392, 409 (2018) (quoting *News & Observer*, 182 N.C. App. at 19).

North Carolina's Constitution addresses education in considerable detail. In Legislative Intervenors' view, these provisions are merely hortatory, and essentially unenforceable against state actors. But the plain language of the Constitution strongly counsels otherwise. The right to education is contained in our State's Declaration of Rights, which the State's courts have a special obligation to protect. *See Corum v. Univ. of N. Carolina*, 330 N.C. 761, 783 (1992). The abundance of constitutional provisions governing education funding, *see, e.g.*, N.C. Const. art. IX, §§ 2, 6, and 7, make especially clear that the issues in this case are susceptible to judicial review.

North Carolina's constitutional history sharply distinguishes this case from *Nebraska Coalition for Educational Equity & Adequacy (Coalition) v. Heineman*, 731 N.W.2d 164 (Neb. 2007), which Legislative Intervenors cite. Br. at 38-39. As the Nebraska Supreme Court explained, "Nebraska's constitutional history shows that the people of Nebraska have repeatedly left

school funding decisions to the Legislature's discretion." *Coalition*, 731 N.W. at 183.

North Carolina's constitutional history, however, shows clearly that the people of the State intended to limit the Legislature's discretion, so that it could not abandon public education. As detailed in the State's opening brief, the framers of North Carolina's Constitution were afraid that the Legislature would not provide sufficient resources for public education. Accordingly, they included an express duty, along with detailed provisions about education funding, in our Constitution specifically to ensure that the political branches did not retain the sort of exclusive control over education funding that had previously allowed public education to be defunded. *See* State's Opening Br. at 31-37.

Legislative Intervenors attempt to buttress their argument by selectively quoting *Leandro I* and *II*. In context, however, it is clear that this Court has already held—in those very cases—that the issues presented here are not political questions. For example, Legislative Intervenors offer the following from *Leandro I*: "the 'legislative process provides a better forum than the courts for discussing and determining what educational programs

and resources are most likely to ensure that each child of the state receives a sound basic education.'" Br. at 38 (quoting *Leandro I*, 346 N.C. at 354-55). And, indeed, the Court's observation is correct: it *is* far preferable for the Legislature to do its job, and to satisfy the State's constitutional duty without involvement of the courts. But for decades, our Legislature has failed to do so, and Legislative Intervenors' actions in connection with this case provide no reason to believe that that is about to change.

Moreover, the Court's observation does not obscure its commitment to fulfilling its judicial duty to enforce the rights found in our State's foundational charter. As the Court emphasized, "it is the duty of this Court under the North Carolina Constitution to be the final authority in interpreting that constitution, and the definition we have given of a 'sound basic education' is that which we conclude is the minimum constitutionally permissible." *Leandro I*, 346 N.C. at 354.

Legislative Intervenors' attempt to neutralize *Leandro II* fares no better. They cite *Leandro II* for the proposition that the "nuts and bolts" of education funding constitutes a political question. Br. at 39 (quoting *Leandro II*, 358 N.C. at 636). But *Leandro II* says nothing of the sort. Rather,

it commends the trial court for "provid[ing] general guidelines for a *Leandro*-compliant resources allocation system." *Leandro II*, 358 N.C. at 636. As previously explained, those guidelines form the basis for the Comprehensive Remedial Plan. *See supra* p 8. Thus, the very standards that this Court praised the trial court for applying in *Leandro II* form the basis of the Plan that the trial court ordered the State to implement here.

Even detailed decisions relating to education policy can be susceptible to judicial review when those decisions implicate the right to a sound basic education. For example, it is true that *Leandro II* held that "establishing the proper age parameters for starting and completing school" was a decision best left to the General Assembly. 358 N.C. at 638-39. But, *Leandro II* explains that courts may require the General Assembly to provide education to children outside those parameters when doing so is necessary to ensure those children have the opportunity to obtain a sound basic education. *See id.* at 639-40. Thus, the General Assembly's decisions regarding education policy must yield to the Constitution's requirement that the State provide a sound basic education.

In sum, this Court has repeatedly rejected the political question

argument that Legislative Intervenors advance in an effort to insulate their constitutional failures from judicial review.

III. The Trial Court's Calculations on Remand Are Correct.

Legislative Intervenors also take issue with the trial court's fiscal calculations in two ways. First, Legislative Intervenors contend that the trial court erred by failing to incorporate in its funding calculations the federal dollars that have been distributed to local education authorities as COVID-19 relief funds. This argument ignores federal statutes prescribing how local school districts may use those funds.

Second, Legislative Intervenors contend that the trial court erred in finding that sufficient funds exist to cover the cost of implementing years two and three of the Plan. Specifically, Legislative Intervenors contend that the trial court should not have considered funds in the Savings Reserve Fund because no judicially manageable standards exist to determine when a court can reach into that fund or what amount a court can take from it. This Court need not address that argument because the State will soon have sufficient funds in the Unreserved Fund Balance to cover the cost of implementing years two and three of the Plan. But even if this Court

concludes that it needs to reach the Savings Reserve Fund, Legislative Intervenors are incorrect that no judicially manageable standards exist to guide this Court.

A. The trial court correctly concluded that COVID Relief funds should not be included in calculating the amount of funds the State provided to implement the Comprehensive Remedial Plan.

Although Legislative Intervenors contend that the trial court erred by failing to include federal COVID-19 relief funds in its calculations, they cite no statute or provision that would authorize the trial court to do so. That omission is telling. No legal authority supports including those funds in calculating the State's compliance with its constitutional obligation.

To help address the impact of the COVID-19 pandemic on the education of the nation's children, the federal government has enacted a number of laws that provide financial support to local education: (1) The Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") for the Elementary and Secondary School Emergency Relief Fund ("ESSER Fund"); (2) The Coronavirus Response and Relief Supplemental Appropriations Act ("CRRSA Act") to provide additional funds for the Elementary and Secondary School Emergency Relief Fund ("ESSER II Fund"); and (3) The American

Rescue Plan ("ARP Act"), which included additional funds for elementary and secondary schools ("ARP ESSER Fund"). These funds were provided to local educational authorities ("LEAs") to assist their efforts to safely and sustainably reopen and operate schools in the wake of the pandemic.

Legislative Intervenors do not cite to any authority that requires, or even permits, the use of these federal funds as a substitute for educational funds that must otherwise be provided by the State. In contrast, the CARES Act, the CRRSA Act, and the ARP Act authorized local educational authorities to utilize ESSER funds for "any" of a long list of purposes. *See* CARES Act, 134 Stat. 281, 565-567, Pub. L. 116-136 § 18003(d); CRRSA Act, 134 Stat. 1182, 1930-1931, Pub. L. 116-260 § 313(d); ARP Act, 135 Stat. 4, 20-22, Pub. L. 117-2 § 2001(e)(2). The Department of Education's guidance explains that these provisions prohibit a state legislature from limiting how an LEA uses these funds. *See* U.S. Dep't of Educ., Frequently Asked Questions: Elementary and Second School Emergency Relief Programs, Governor's Emergency Education Relief Programs at 15 (May 2021) (hereinafter "Frequently Asked Questions") ("May a [State Education Authority] or a State legislature limit an LEA's use of ESSER formula funds? No.").

By federal law, therefore, these COVID-19 relief funds are unavailable for use as alternate funding for actions in years two and three of the Plan. *Cf. Cooper v. Berger*, 376 N.C. 22, 43 (2020) (noting that the General Assembly cannot use federal block grant monies for a purpose that Congress did not authorize). This restriction makes sense: the pandemic exacerbated the preexisting, inherent educational deficiencies addressed by the Plan. The federal funds are exclusively designed to mitigate that added burden, and cannot be redirected to other uses by the State, including its courts.

Legislative Intervenors also note that a large sum of these federal funds remains unspent. Br. 73. That the funds are unspent, however, does not mean they may be used to implement the Plan. Public school units have until this September to use any available ESSER funds, the end of September 2023 to use ESSER II funds, and 30 September 2024 to use ARP ESSER funds; after those dates the funds are no longer available. *See* CARES Act, 134 Stat. at 567, Pub. L. 116-136 § 18003(f); CRRSA Act, 134 Stat. at 1932, Pub. L. 116-260 § 313(g); ARP Act, 135 Stat. at 22, Pub. L. 117-2 § 2001(g). Again, the Department of Education has explained that state legislatures may not interfere with when LEAs use the funds. Frequently Asked Questions ("May

a [State Education Authority] or a State legislature limit how long an LEA has to access or spend its ESSER formula funds? No.”). Consequently, any argument that local educational authorities maintain surplus funds that should be used to implement the Plan is mistaken.

B. The State has sufficient unreserved funds to implement the Comprehensive Remedial Plan.

Legislative Intervenors next argue that court should not have considered funds in the Savings Reserve Fund because no judicially manageable standards exist to determine when a court can reach into that fund or what amount a court can take from that fund. But a closer examination of the State’s finances reveals that Legislative Intervenors’ claims are merely attempts to inject confusion about the availability of state funds.

The State has more than enough funds to cover the cost of implementing years two and three of the Plan without reaching the Savings Reserve Fund. First, it is anticipated that by this August, the State’s Unreserved Fund Balance (unappropriated cash on hand) will be

approximately $650 million.[8] That is in part because the State expects revenue to exceed the 2021-2022 certified budget by $6.2 billion. Fiscal Research Division, *North Carolina General Fund Revenue Consensus Forecast: May 2022 Revision* (May 9, 2022), available at https://bit.ly/3QyzEUr. While the State Budget Acts provides statutory restrictions on how the Savings Reserve Funds may be used, it provides no such restrictions for funds in the Unreserved Fund Balance. *Cf. Cooper v. Berger*, 371 N.C. 799, 810 (2018) (explaining that "when a statute lists the situations to which it applies, it implies the exclusion of situations not contained in the list"). Second, in the 2022 Appropriations Act, the General Assembly allocated $227 million to the Public School Contingency Reserve to make up for what is now known to be only a $75 million shortfall at the Department of Public Instruction. *See* Act of July 1, 2022, S.L. 2022-74, § 4.5(a). The remaining amount, approximately

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[8] The Court can observe for itself the amount of funds in the State's various accounts at the end of each week through the Office of the State Controller's weekly Cash Watch. *See, e.g.*, Off. of State Controller, Cash Watch (Aug. 1, 2022), *available at* https://bit.ly/3bkt4Ru. The Court should be aware that, as the State receives and spends money, the amounts reflected in the Cash Watch change.

$152 million, will revert to the Unreserved Fund Balance. *Id.* § 4.5(e).[9]

Because sufficient funds will soon exist in the Unreserved Fund Balance to cover the cost of implementing years and two and three of the Plan, this Court need not decide its authority to direct state actors to transfer funds allocated to the Savings Reserve Fund.

However, even if this Court were to address that hypothetical issue, Legislative Intervenors' arguments that funds allocated to the Savings Reserve Fund cannot be used to satisfy the State's constitutional obligations are unavailing. Legislative Intervenors argue that there are no "judicially manageable standards" to decide how much to transfer to the Savings Reserve or when those funds should be accessed. Br. at 69. The General Assembly itself, however, provided such standards in the 2017 State Budget Act. There, the General Assembly installed an evidence-based formula to

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[9] Excess funds also exist in several other reserves that have different statutory restrictions from the Savings Reserve Fund. For example, the Stabilization and Inflation Reserve fund was allocated $1 billion, *see* S.L. 2022-74, § 2.2(q), and the State Capital and Infrastructure Fund was allocated $3.18 billion, *see id.* § 2.2(r). To the extent the Court determines it is necessary to draw funds beyond those in the Unreserved Fund Balance, the Court could consider drawing from these funds.

determine the required minimum balance for the fund. Specifically, N.C. Gen. Stat. § 143C-4-2(f) requires that the Savings Reserve contain sufficient savings to cover two years of lost revenues in the event of a severe economic downturn. The non-partisan Fiscal Research Division and the Office of State Budget Management ("OSBM") have calculated this figure to be $2.9 billion for FY 2022-23 (or 11.2% of the prior year operating budget).

The 2021 Appropriations Act transfers $1.1 billion to the Savings Reserve each year of the 2021-23 biennium. *See* S.L. 2021-180, § 2.2(c). The $1.1 billion transferred in FY 2021-22 brought the reserve balance to $3.1 billion. The 2022 Appropriations Act then increased the FY 2022-23 transfer another $500 million, bringing the total transfer to $1.63 billion, *see* SL. 2022-74, § 2.2(c), and the Savings Reserve balance to $4.25 billion. Thus, the Savings Reserve was already "overfunded," and the legislature then allocated additional funds to the reserve.

The Savings Reserve is more than solvent, and there remain ample funds from which to fund years two and three of the Plan. The trial court correctly concluded that the State possesses the funds necessary to comply with the trial court's order to implement the Plan.

IV. The Trial Court Erred by Removing an Order to State Actors to Transfer State Funds.

Legislative Intervenors argue that Article V, § 7 of our Constitution, and several appellate decisions interpreting it, required the trial court to remove the Original Order's instruction to state actors to transfer state funds to fund the Plan. Br. at 70-72. As the State explained in its opening brief, this was error. *See* State's Opening Br. at 53-56. The trial court's removal of that instruction exceeded the scope of this Court's remand order and improperly treated the Court of Appeals' Writ of Prohibition as binding.

Legislative Intervenors' arguments in response are unpersuasive. According to Legislative Intervenors, Article V, § 7 allows state actors to transfer state funds only when those funds are appropriated by the General Assembly. But that is not what Article V, § 7 says. It provides that "[n]o money shall be drawn from the State treasury but in consequence of *appropriations made by law*." N.C. Const. art. V, § 7(1) (emphasis added). Our Constitution is "the supreme *law* of the land." *In re Martin*, 295 N.C. 291, 299 (1978). Thus, the plain meaning of Article V, § 7 forecloses Legislative Intervenors' position. *See* State's Opening Br. at 38-43.

Legislative Intervenors turn to decisions of this Court and the Court of Appeals. But those decisions do not support Legislative Intervenors' position either.

First, Legislative Intervenors cite *Cooper v. Berger*, 376 N.C. 22 (2020), for the proposition that only the legislature can appropriate state funds. Br. at 70-71. That case involved a dispute over whether the legislative branch or executive branch should control how the State spends federal block grant funds. *See* 376 N.C. at 23, 37. And in its opinion, the Court explained how the framers sought to give the people, through their elected representatives, control over the state's expenditures. *Id.* at 37 (discussing the intent behind N.C. Const. art. V, § 7).

Fidelity to the framers' desire to give the people ultimate control of the State's finances dictates a different result, however, when the Constitution itself instructs the State to use state funds to provide for a constitutional right. That is because our Constitution *most* directly expresses "the will of the people," while "legislators" are "but agents of the people." *State ex rel. Att'y Gen. v. Knight*, 169 N.C. 333, 352 (1915)*; see also In re Martin*, 295 N.C. at 299 ("The North Carolina Constitution expresses the will of the people of

this State . . . ."). Any other rule, meanwhile, would invert the structure of our constitutional democracy. The people only agreed to be bound to the General Assembly's laws subject to the Constitution's guarantees. Permitting the General Assembly to disregard those guarantees breaks the contract between the State and its citizens.

Second, Legislative Intervenors turn to *In re Alamance County Court Facilities*, 329 N.C. 84 (1991). They claim that *Alamance County* "h[eld] that the Separation of Powers Clause 'prohibits the judiciary from taking public monies without statutory authorization.'" Br. at 71 (quoting *Alamance Cnty.*, 329 N.C. at 94). But *Alamance County* actually stands for the opposite of what Legislative Intervenors claim: it holds that, subject to certain "critical limitations," a court may use "its inherent power to reach towards the public purse." *Alamance Cnty.*, 329 N.C. at 100. Indeed, this Court held that the lower court order in *Alamance County* was improper not because it reached toward the public purse, but because in doing so, the trial court failed to observe one of the critical limitations on its authority: doing no more than "was reasonably necessary" to ensure "the administration of justice under the circumstances of this case." *Id.* at 107. As explained in the State's opening

brief, the trial court's Original Order abided the "critical limitations" identified in *Alamance County*. *See* State's Opening Br. at 43-46.

Finally, Legislative Intervenors cite the Court of Appeals' decision in *Richmond County Board of Education v. Cowell*, 254 N.C. App. 422 (2017). That decision does not support Legislative Intervenors' position.

In *Richmond County*—a case involving several constitutional provisions also at issue here—the Court of Appeals recognized the critical difference between ordering the State to compensate a plaintiff for the State's *previous* misappropriation of state funds and ensuring that state actors *prospectively* comply with the Constitution's directives to support education. There, the Richmond County Board of Education sued the State for the return of court fees that the State had improperly appropriated to county jails. 254 N.C. App. at 423. The Court of Appeals held that it could not order the State to give the Board "*new* money from the State treasury." *Id.* at 428.

But as the Court of Appeals explained, the Board *could* have "secured an injunction to stop" the State from spending the improperly collected money before the General Assembly appropriated the funds. *Id.* at 423, 427-

28. In addition, although *Richmond County* held that courts cannot order the State to raise and spend "*new* money from the State treasury," it did not prohibit courts from ordering individual state actors from spending *available* funds. *See id.* at 428. Therefore, *Richmond County* stands for the proposition that courts may order an injunction that requires compliance through State expenditure of available funds.

The trial court's Original Order comported with these principles. The Order concerned only injunctive relief. The Comprehensive Remedial Plan is a prospective plan, and the Original Order supplying the funds necessary to implement years two and three of the Plan is equally prospective. No party seeks damages for the State's prior non-compliance with *Leandro I*, and no money judgment exists in this case. Nor did the Original Order direct the State to spend "new" funds. Instead, the Original Order explicitly found that funds sufficient to cover the cost of implementing years two and three of the Plan existed in the State's General Fund. (*See* R p 1831)

Ultimately, Legislative Intervenors ask this Court to interpret the Constitution as meaning something other than what it says. They ask this Court to read Article V, § 7's text permitting state actors to spend funds

pursuant to an "appropriation made by law" as only permitting state actors to spend funds pursuant to "an appropriation made by *the General Assembly*." But Courts should not read into the Constitution additional words not included by drafters. *See Jackson v. Beard*, 162 N.C. 105, 112 (1913).

CONCLUSION

The State respectfully asks this Court to affirm the trial court's 26 April 2022 Order directing the State to fund years two and three of the Comprehensive Remedial Plan and to restore the 10 November 2021 Order instructing state actors to transfer the funds necessary to implement the Plan.

Electronically submitted this the 1st day of August, 2022.

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