STATE OF NORTH CAROLINA

WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
No. 95 CVS 1158

HOKE COUNTY BOARD OF EDUCATION, et al.,

Plaintiffs,

and

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION

Plaintiff-Intervenor,

and

RAFAEL PENN, et al.,

Plaintiff-Intervenors,

v.

STATE OF NORTH CAROLINA and the STATE BOARD OF EDUCATION,

Defendants,

and

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION

Realigned Defendant,

and

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

Intervenor-Defendants.

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STATE OF NORTH CAROLINA'S REPLY BRIEF

The Legislative-Intervenors argue that the Appropriations Act ("Act") of 18 November 2021 "superseded and nullified the November Order in its entirety." (Brief at 2)

This Court should reject the Legislative-Intervenors' invitation to review *de novo* the 10 November 2021 order ("10 November order") —not only because the Supreme Court has not directed or authorized such review, but also because the Legislative-Intervenors' arguments are mistaken.

Instead, as the Supreme Court instructed, this Court should amend the order simply to reflect the "effect, if any" of the Act on the "nature and extent of the relief" granted, and then certify the amended order for Supreme Court review. *Hoke Cnty. Bd. of Educ. v. State*, 869 S.E.2d 321, 322 (N.C. 2022) (order granting State's petition for discretionary review and remanding to Superior Court).

I. THE SUPREME COURT SHOULD RESOLVE WHETHER THE 10 NOVEMBER ORDER IS CORRECT, AND HAS INDICATED ITS INTENT TO DO SO.

A. The Legislative-Intervenors Ignore This Court's Prior Holdings That the CRP Details the Necessary Actions to Meet Constitutional Obligations.

The law of the case, established by this Court's June 2021 order, is that each provision of the Comprehensive Remedial Plan ("CRP") is "necessary to remedy the continuing constitutional violations and to provide the opportunity for a sound basic education to all public school children in North Carolina[.]" No party challenged or appealed that order. *See, e.g.*, *Boje v. D.W.I.T., L.L.C.*, 195 N.C. App. 118, 122, (2009). Therefore, contrary to the Legislative-Intervenors' contentions (Brief at 5), this Court has already found that the Constitution requires the State to take all the action items identified in the CRP. That includes items not funded in the budget.

B. This Court's 10 November Order Was Not Predicated on the Absence of a Budget.

The Legislative-Intervenors also assert that the Court intended to enforce the 10 November order only if no budget was passed. The Court's orders suggest otherwise.

First, by its terms, the June 2021 order requires the State to fund each element of the CRP to satisfy its minimal constitutional obligations. As noted in the State's primary brief, the Act included only 63% of CRP Year 2 funding and 49% of Year 3. [*See* D.E. 12.3] Absent full funding, the Court's 10 November order remains operative.

Second, the 10 November order clarifies that it may be subject to some modifications "in light of the Appropriations Act." Thus, far from depending on the absence of the budget, the Order clearly contemplates that it would survive the adoption of a budget.

Third, this Court's 30 November 2021 order, issued after the Act was passed, establishes that the only terms of the 10 November order the Court intended to alter were the specific amounts ordered by drawn from the Treasury. Specifically, this Court set a hearing for:

> the State, acting through its executive and legislative branches – to inform the Court of the specific components of the Comprehensive Remedial Plan for years 2 & 3 that are funded by the Appropriations Act and those that are not.

[*See* D.E. 23.6]

Taken together, these actions establish that the Court intended to address the budget exactly according to the Supreme Court's 21 March 2021 directives: determine, as a matter of accounting, what actions the Act specifically funded and what amounts still need to be transferred to meet the CRP's recommendations for Years 2 and 3.[1]

[1] The Legislative-Intervenors' mootness argument is curious in light of their attempt to obtain appellate review before the Court of Appeals. The General Assembly enacted the Act on

C. The Legislative-Intervenors Misunderstand' the Fiscal Impact of the Act.

The Supreme Court's remand order asks this Court for an assessment of the impact of the Act on the 10 November order. There remain ample funds from which to fund Years 2 and 3 of the CRP.

The Supreme Court's remand order does not ask this Court to reconsider whether it possesses the authority to make determinations about how much to fund and how that funding mechanism works if the legislative branch refuses to do its part. After the Supreme Court makes this determination, on remand, this Court will have the opportunity to assess the state of fiscal affairs as it considers future enforcement of the June 2021 order beyond Years 2 and 3. In the meantime, contrary to the Legislative-Intervenors' assertions, it is apparent that the Act has not caused the invalidation of the Court's 10 November order.

The Legislative-Intervenors claim that the Budget Act leaves only approximately $104,638 at the end of the biennium. (Brief at 3) But that is because the budget reserves billions in unappropriated cash available for expenditure. (Brief at 3) The Legislative-Intervenors leave out this important context, which makes clear that there ample unappropriated funds to cover the remaining programs for Years 2 and 3.

The Act reserves $2.268 billion to the Savings Reserve, which is unappropriated cash available for expenditure. Moreover, the Act reserves $800 million to the State Emergency Response and Disaster Relief Fund, of which $388 million remains unappropriated and available for expenditure. Additionally, the Act contemplates more than $3 billion in reduced revenue and tax cuts over the course of the next two fiscal years.

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18 November 2021. However, on 8 December 2021, instead of moving to intervene in this Court and arguing the mootness theory they now press, the Legislative-Intervenors noticed an appeal of the November 10 order, and their appeal remains pending.

Similarly, although the amount of available, unreserved cash varies from week to week and is therefore an unreliable basis of determining future needs. (Brief at 17-18). However, the cash on hand at this time is much higher than was anticipated in the Budget, and revenue is increasing at a rate higher than contemplated by the Act. For instance, publicly available Department of Revenue data provides that through February:

- Total General Fund revenues are more than $1.5 billion (8.4%) above OSBM/FRD consensus monthly targets.
- Individual income tax revenues are $854 million (9.3%) above target.
- Collections on withholding, paid mostly from workers' paychecks, are $406 million (5.0%) above target.
- Quarterly payments, mostly on business earnings and capital gains, are $285 million (30%) above target. Extension and final payments are $136 million (21%) above.
- Sales and use tax collections are roughly $341 million (5.2%) above target.
- Corporate income and franchise tax collections are $190 million (23%) above target.
- Tax collections on the sale of alcoholic beverages and real estate are also well above target at $53 million (18%) and $36 million (52%), respectively.

The above figures can be viewed at the State Controller's website, February 2022 General Fund Monthly Report (osc.nc.gov/media/7147/open). Indeed, at no point during the current fiscal year has the State lacked the cash required to meet the $2.36 billion anticipated in the Act for FY 2022-23. Those figures may also be tracked through the State Controller's website. *See, e.g. February 2022 General Fund Report*, p. 6.

Next, the Legislative-Intervenors argue that there are no "'judicially manageable standards' to decide how much to transfer to the reserve or when to access it," because "[d]oing so would

require the Court to weigh the State's current needs against the risk of future emergencies." (Brief at 19-20) The General Assembly, however, already made this determination by adding to the State Budget Act in 2017 an evidence-based formula to determine how much savings is "enough." N.C.G.S. § 143C-4-2 (requiring the Savings Reserve to contain savings sufficient to cover two years of lost revenues in the event of a severe economic downturn).

The non-partisan Fiscal Research Division and OSM calculated that amount to be $2.9 billion for FY 2022-23 (or 11.2% of the prior year's operating budget). Fortunately, the current $3.1 billion balance in the Savings Reserve exceeds that amount. Given the funds that the State currently maintains in the Savings Reserve, there is no statutorily required contribution for next year. Stated another way, according to N.C.G.S. § 143C-4-2, the Savings Reserve was already "overfunded," and the Act directs another $1.13 billion to the Savings Reserve on July 1, 2022. Even without that transfer, the Savings Reserve is more than solvent.

D. The Legislative-Intervenors Misstate the Scope of This Court's Authority.

Rather than authorizing this Court to review *de novo* of its previous orders, the Supreme Court has already granted the discretionary review of the 10 November order. In urging this Court to upend that order, and obviate the need for Supreme Court review, the Legislative-Intervenors' advance an erroneous analysis of state law.

1. *Richmond County Board of Education v. Cowell.*

The Richmond County Board of Education claimed that the State impermissibly used "fees collected for certain criminal offenses" to "fund county jail programs," rather than returning those fees to the Board as required by Article IX, § 7 of the N.C. Constitution. 254 N.C. App. 422, 423 (2017). The funds accorded to the county jail program were expended, and the General Assembly did not appropriate additional funds to the Board. *Id*. at 424. The Superior Court therefore ordered

State officials to transfer funds from the State Treasury to the Board. *Id*. at 425.

The Court of Appeals reversed. *Id*. at 425. Although it observed that "it is well within the judicial branch's power to order" the State to return the money the Constitution committed to the Board, *id*. at 427-28, the Court explained that courts could not order the State to give the Board "*new money* from the State Treasury." *Id*. at 427-28 (emphasis added). The Court further articulated that Article V, Section 7 of the N.C. Constitution permits state officials to draw money from the State Treasury only when an appropriation has been "made by law." *Id*.

Richmond County, therefore, requires only that the court identify available funds that are tied to an appropriation "made by law." This Court's 10 November order addresses these requirements by holding that Article I, § 15 is an appropriation made by law of sufficient funds to provide a sound, basic education, and that there are sufficient unspent funds already in the State Treasury to meet this requirement. *Hoke Cnty. Bd. of Educ. v. State*, No. 95-CVS-1158, Order at 9, 16 (Wake Cnty. Super. Ct. Nov. 10, 2021). Whether the Court correctly held that Article I, § 15 is an "appropriation made by law" is a question for the Supreme Court.

2. *Cooper v. Berger*.

In *Cooper v. Berger*, the Supreme Court analyzed whether the General Assembly could appropriate federal block grant money "in a manner that differs from the Governor's preferred method for distributing the funds." 376 N.C. 22, 23 (2020).

After concluding that the use of Federal Block Grants "'is largely left to the discretion of the recipient state' as long as that use falls within the broad statutory requirements of each grant," *Cooper*, 376 N.C. at 33–34 (quoting *Legis. Rsch. Comm'n ex rel. Prather v. Brown*, 664 S.W. 907, 928 (Ky. 1984)), the Supreme Court held that the appropriations clause gives the General Assembly the authority to decide how to appropriate funds in the State Treasury in accordance

with the framers' intent "to ensure that the people, through their elected representatives in the General Assembly, had full and exclusive control over the allocation of the state's expenditures." *Id*. at 36-38.

The Supreme Court based its analysis on the General Assembly's appropriations power as an exercise of the voice of the people. *See* 376 N.C. at 37. The Court's 10 November order addresses this requirement by concluding that Article I, § 15 represents a constitutional appropriation. Because the Constitution reflects the direct will of the people, the Court's 10 November order holds that Article I, § 15's constitutional appropriation is fully consistent with the framers' desire to give the people ultimate control over the state's expenditures. *Cooper*, 376 N.C. at 37; *see also In re Martin*, 295 N.C. 291, 299 (1978) (the Constitution itself "expresses the will of the people of this State and is, therefore, the supreme law of the land."). Once again, the Supreme Court will determine whether the Court's holding is consistent with North Carolina constitutional law.

3. *In re Alamance County Court Facilities.*

In *Alamance County*, the Supreme Court held that although the judicial branch may invoke its inherent power and "seize purse strings otherwise held exclusively by the legislative branch" where the integrity of the judiciary is threatened, the employment of that inherent power is subject to certain limitations. 329 N.C. 84, 98 (1991). Namely, the judiciary may infringe on the legislature's traditional authority to appropriate state funds "no more than reasonably necessary" and in a way that is "no more forceful or invasive than the exigency of the circumstances requires." *Id.* at 99–100. In addition, the Supreme Court held that a court exercising "its inherent power to reach toward the public purse," must both "bow to established procedural methods where these provide an alternative to the extraordinary exercise of its inherent power," and "minimize the

encroachment upon those with legislative authority in appearance and in fact." *Id*. at 100–01.

Alamance County is directly applicable to the instant matter. In 1997, the Supreme Court determined that the State was failing to provide a constitutionally guaranteed opportunity to "receive a sound basic education in our public schools." *Leandro v. State*, 346 N.C. 336, 347 (1997). With *Leandro II*, the Court affirmed that opinion, and warned that defiance by recalcitrant State actors would be met by a court empowered to order the necessary remediation. *Hoke Cnty. Bd. of Educ. v. State*, 358 N.C. 605, 642 (2004). That warning echoes the paradigm expressed in *Alamance County*.

During the fifteen years that followed *Leandro II*, this Court repeatedly found that the State failed to meet its constitutional obligations. Those failures culminated with the 10 November order, which highlights the unique and important role education was given in our Constitution. 10 November 2021 order at 16.

The Legislative-Intervenors disagree, even though the Constitution's Declaration of Rights—which the State Supreme Court has recognized as having "primacy ... in the minds of the framers," *Corum v. Univ. of N.C.*, 330 N.C. 761, 782 (1992)—includes the "right to the privilege of education." N.C. Const. art. I, § 15. The inherent power of the trial courts, as described in *Alamance County*, is precisely the authority relied upon by this Court in its 10 November order.

The Supreme Court has elected to consider that decision. This Court should not now subvert the Supreme Court's intentions by adopting the twice-rejected contention that the Act has mooted the 10 November order.

CONCLUSION

The Supreme Court's Remand Order directs this Court to enter the State's proposed supplemental order to the 10 November order, as it reflects the changed fiscal circumstances in

light of the Appropriations Act.

Respectfully submitted, this the 11th day of April, 2021.

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CERTIFICATE OF COMPLIANCE

Pursuant to BCR 7.8, this brief contains no more than 2,500 words (exclusive of case caption, any index, table of contents, table of authorities, signature blocks, or any required certificates) as reported by the word processing software used to prepare this brief.

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CERTIFICATE OF SERVICE

I do hereby certify that in accordance with BCR 3 the foregoing document has been electronically filed using the Court's electronic filing system, which will automatically send notification of such filing to the following counsel of record:

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