STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
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.

LEGISLATIVE-INTERVENORS' BRIEF RESPONDING TO THE EXECUTIVE BRANCH'S "ACCOUNTING"

Intervenor-Defendants Philip E. Berger, in his official capacity as President *Pro Tempore* of the North Carolina Senate, and Timothy K. Moore, in his official capacity as Speaker of the North Carolina House of Representatives (collectively, the "Legislative Intervenors"), submit this brief in accordance with the Court's Scheduling Order and Notice of Hearing entered on March 13, 2023.

INTRODUCTION

As this Court is aware, the issue it seeks to address has already been made the subject of two trial court orders. The first is a November 10, 2021, Order entered by Judge W. David Lee, in which he purported to direct various State officials to transfer over $1.7 billion to fund Years 2 and 3 of the "Comprehensive Remedial Plan" ("CRP") proposed by Plaintiffs and the Executive Branch, without a legislative appropriation. (**Tab 3**). That order was enjoined by the Court of Appeals through the issuance of a writ of prohibition. The second order is an April 26, 2022, Order entered by Judge Michael Robinson following a limited remand to assess the effect of the subsequently enacted State Budget had on the nature and extent of the relief granted in Judge Lee's order. (T**ab 4**).

In November, the Supreme Court issued its decision in *Hoke County Board of Education, et al. v. State, et al.,* 382 N.C. 386, 879 S.E.2d 193 (2022) ("*Hoke County III*")[1] and remanded this

[1] The caption of and parties have changed several times over the course of this case's 28-year history. In that time, the case has resulted in four decisions by our Supreme Court: *Leandro v. State*, 346 N.C. 336, 488 S.E.2d 249 (1997) ("*Leandro I*"); *Hoke Cnty. Bd. of Educ. v. State,* 358 N.C. 605, 599 S.E.2d 365 (2004) ("*Hoke County I*"); *Hoke Cnty. Bd. of Educ. v. North Carolina*, 367 N.C. 156, 749 S.E.2d 451 (2013) ("*Hoke County II*"); and *See Hoke Cnty. Bd. of Educ. v. State*, 382 N.C. 386, 879 S.E.2d 193 (2022) ("*Hoke County III*"). Although the case is commonly referred to as *"Leandro*" Robert Leandro was dropped from the case after the Supreme Court's first decision in 1997. Since that time, the lead Plaintiff has been the Hoke County Board of

case to, among other things, "recalculate[e] the appropriate transfer amounts" required for Years 2 and 3 of the CRP, in light of the 2022 State Budget, which was amended once again while the parties' appeal from Judge Lee's Order were pending. 382 N.C. at 468, 879 S.E.2d at 244. While the Supreme Court initially directed the court to reinstate the transfer provisions of Judge Lee's order as well, it issued an order on March 3, 2023, reviving the writ of prohibition and enjoining the Court from ordering a transfer until it can decide the issues in another appeal filed by the Plaintiffs that remains pending.

In light of the Supreme Court's order and Plaintiffs' pending appeal, the Court has indicated it will limit its inquiry to recalculating the amounts that would be necessary to fully fund the action items called for in Years 2 and 3 of the CRP. It has accordingly asked the parties to respond to the calculations prepared by the Executive Branch's Office of State Budget and Management ("OSBM") that were submitted by the Attorney General's office[2] on December 19, 2022.

Although Legislative Intervenors maintain that the orders requiring the State to implement and fund the CRP were issued in error, it has reviewed OSBM's calculations and determined that, even as a purely mathematical exercise, those calculations are wrong for at least two reasons. First, OSBM has failed to include various categories of money that were appropriated for items listed in the CRP as part of the State Budget. Second, and more fundamentally, OSBM has incorrectly "double counted" many of the items, by continuing to include recurring appropriations for Year 2

Education. Thus, this brief will refer to the Supreme Court's subsequent decisions as *Hoke County I*, etc.

[2] As explained at the hearing, Legislative Intervenors use this labeling not out of disrespect but precision with respect to the representation of the parties, which is discussed more fully below.

of the CRP (*i.e.*, FY 2021-22) that are no longer necessary now that that year has ended and since those appropriations have been included again in Year 3.

In addition to addressing these issues involving "the math," Legislative Intervenors also submit this brief to address the scope of the Court's review now that the writ of prohibition has been reinstated. As explained below, the writ prohibits this Court from ordering a transfer, even if were to immediately stay its order pending appeal. Even if that were not the case, the pendency of Plaintiffs' second appeal means that this Court lacks jurisdiction to issue such an order. Thus, the Court must limit its inquiry to just a recalculation of the remaining amounts allegedly necessary to fund Years 2 and 3 of the CRP.

STATUS OF THE PARTIES

During its March 10, 2023, scheduling conference, the Court inquired about the status of the parties, including the means by which Legislative Intervenors joined the case. Legislative Intervenors therefore offer the following to clarify their role as well as those of the respective government defendants in this matter.

First, there is no dispute that Legislative Intervenors are parties to this case. Legislative Intervenors joined this case on December 8, 2021, by filing a notice of intervention as of right pursuant to N.C. Gen. Stat. § 1-72.2, which permits them to intervene "in any action in any North Carolina State Court in which the validity or constitutionality of an act of the General Assembly is challenged." *See* N.C. Gen. Stat. § 1-72.2(a). (A copy of the notice filed with the trial court is attached hereto at **Tab 5**)[3]

[3] As the Court noted during the March 10 scheduling conference, Legislative Intervenors filed a motion to intervene on a permissive basis in 2011, which Judge Manning denied. *Hoke County III*, 382 N.C. 386, 479, 879 S.E.2d 193, 251 (2022). Section 1-72.2 was later amended to

Legislative Intervenors' notice of intervention was effective the moment it was filed—it did not require a motion or further order of the Court. *See* N.C. Gen. Stat. § 1-72.2(b) ("Intervention pursuant to [Section 1-72.2] shall be effected upon the filing of a notice of intervention of right in the trial or appellate court in which the matter is pending regardless of the stage of the proceeding."). Immediately after they filed their notice of intervention, Legislative Intervenors appealed Judge Lee's November 10, 2021, Order and participated in the proceedings before the Supreme Court that led to its decision in *Hoke County III* (Case No. 425A21-2) and subsequent remand to this court.[4] Those proceedings are separate from Plaintiffs' appeals from the writ of prohibition, which have proceeded in the Supreme Court under a different case number (Case No. 425A21-1) and resulted in the Court's order of March 3, 2023, reinstating the writ of prohibition.[5] (*See* Order (Case No. 425A21-1) dated Mar. 3, 2022 (**Tab 10**)). Legislative Intervenors have now separately noticed their intervention as of right in that case, which is not relevant to their status as a party here.

As reflected in their notice of intervention filed in the trial court well over a year ago—not to mention the extensive litigation that has occurred since—this case constitutes "an action in which an act of the General Assembly is challenged" for a multiple reasons: (1) Plaintiffs and DOJ are seeking the issuance of orders would require the State to fund the CRP based on

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give Legislative Intervenors the ability to intervene as a matter of right. Thus, Judge Manning's decision has no effect on Legislative Intervenor's current ability to intervene in this matter.

[4] Both the majority and dissenting opinions in *Hoke County III* acknowledge Legislative Intervenors' intervention as of right and its status as a party to this proceeding. *See Hoke County III*, 382 N.C. 386, 425, 879 S.E.2d 193, 218 (2022) (majority opinion); *see also id.* 382 N.C. at 509, 879 S.E.2d at 268 (Berger, J., dissenting).

[5] As part of its March 3, 2023, order, the Supreme Court concluded that, because Plaintiffs' appeals from the writ of prohibition (*i.e.*, Case No. 425A21-1) constitute a separate case, Legislative Intervenors must file a separate notice of intervention before they are allowed to participate. Legislative Intervenors filed a separate notice of intervention in that case later the same day.

allegations that the current State Budget—which is the product of multiple appropriations acts[6] passed by the General Assembly—is somehow insufficient to provide children with their constitutionally guaranteed right to an opportunity for sound basic education. (2) In seeking such orders, Plaintiffs and the DOJ are asking the Court to disburse money from the State Treasury in a manner contrary to both the State Budget and Budget Act.[7] (3) In seeking orders judicially imposing the CRP, Plaintiffs and the Attorney General have sought to overturn or amend numerous statutes, including those governing teacher compensation, academic performance and accountability measures, school calendars, and funding distribution formulas. (*See, e.g.*, CRP Items I.H.ii.1; III.B.ii.1; III.B.iii.1; III.F.ii.2; III.F.ii.3; III.F.ii.4; and IV.D.iii.1)

Second, because Legislative Intervenors have intervened in this case, the Attorney General's office no longer represents (or has authority to speak on behalf of) "the State" as a whole. Instead, it represents at most the interests of certain Executive Branch agencies,[8] while Legislative Intervenors, in turn, represent the Legislative Branch. Section 1-72.2 makes this point clear:

> It is the public policy of the State of North Carolina that in any action in any North Carolina State court in which the validity or constitutionality of an act of the General Assembly or a provision of the North Carolina Constitution is challenged, the General Assembly, jointly through the Speaker of the House of Representatives and the President Pro Tempore of the Senate, constitutes the legislative branch of the State of North Carolina and the Governor constitutes the executive branch of the State of North Carolina, and **when the State of North Carolina is named as a defendant in such cases, both the General Assembly and the Governor constitute the State of North Carolina**.

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[6] The current State Budget for the FY 2021-22 and 22-23 biennium is the product of at least four separate appropriations acts. (*See* 2d Trogdon Aff. ¶ 4 n. 1 (**Tab 2**) (citing 2021 N.C. Sess. L. 180; 2021 N.C. Sess. L. 189; 2022 N.C. Sess. L. 6; 2022 N.C. Sess. L. 74).

[7] N.C. Gen. Stat. § 143C-1-1, *et seq*.

[8] In fact, the Attorney General does not even represent the entire Executive Branch. The State Board of Education is represented by different lawyers from the Department of Justice than those representing the other Executive Branch defendants, and the State Controller has been represented by separate counsel since November 2021.

N.C. Gen. Stat. § 1-72.2(a) (emphasis added); *see also*, *Berger v. N. Carolina State Conf. of the NAACP*, 546 U.S. ___, 142 S. Ct. 2191, 2022-03 (2022) (requiring district court to honor N.C. Gen. Stat. § 1-72.2 after concluding there is nothing in the North Carolina Constitution "to support the suggestion that the State's executive branch holds a constitutional monopoly on representing North Carolina's practical interests in court").[9]

This point has critical implications for this case. The Executive Branch stands to gain from these proceedings since a ruling for the Plaintiffs would result in billions in additional funding for Executive Branch agencies without the need for legislative approval.[10] It therefore is important to recognize that, while the Attorney General has taken the extraordinary step of siding *with the Plaintiffs* in seeking the entry of orders *against* the State (and thus its own clients), it does not speak for, or have the power to bind, "the State" as a whole. Further, Plaintiffs and the Attorney General cannot circumvent the Separation of Powers—or eliminate the need to secure legislative approval before changing statutes or drawing money from the Treasury—merely by "consenting" to measures that can only be accomplished by a vote of the people's popularly elected representatives in the General Assembly.

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[9] Judge Robinson and the Supreme Court both recognized that, at least as part of these current proceedings, the Attorney General has been representing only the interests of the Executive Branch. (*See* Order Following Remand, dated April 26, 2022, at p. 2 n. 1 (**Tab 4**) ("The record before this Court demonstrates that, until very recently, the "State Defendants" actively participating in this action were comprised of the executive branch . . . but not the Legislative Branch."))); *see also Hoke County III*, 382 N.C. at 479, 879 S.E.2d at 251 (2022) (noting the General Assembly was not represented in the proceedings before Judge Lee concerning the CRP).

[10] *See Hoke County III*, 382 N.C. at 513, 879 S.E.2d at 271 (Berger, J., dissenting) (explaining that the consent orders establishing the CRP and requiring its implementation were "all done to the exclusion of the one entity that controlled what the parties wanted to accomplish—the General Assembly. Put another way, executive branch bureaucrats and government actors, sanctioned by the court, agreed to a process that called for the expenditure of taxpayer money without consultation from the branch of government to which that duty is constitutionally committed.").

ARGUMENT

I. THE COURT ONLY HAS JURISDICTION TO RECALCULATE THE REMAINING AMOUNTS NECESSARY TO FUND YEARS 2 AND 3 OF THE CRP.

By reinstating the writ of prohibition, the Supreme Court has limited this Court's current inquiry to calculating the extent to which the current State Budget funds the items listed in Years 2 and 3 of the CRP. Going further and ordering the State to transfer those funds—even if the Court immediately stayed the order pending appeal—would violate the writ of prohibition and exceed the Court's jurisdiction.

As this Court explained during the March 10 status conference, the Supreme Court in *Hoke County III* directed this Court to do three things on remand: (1) "to recalculate the funding required for full compliance with years two and three of the CRP in light of the 2022 Budget Act"; (2) "to reinstate the November 2021 Order['s] transfer directive instructing State actors to transfer those recalculated amounts"; and (3) "to retain jurisdiction over the case in order to monitor compliance with its order and with future years of the CRP." *Hoke County III*, 382 N.C. at 468, 879 S.E.2d at 244. We are currently in Year 3 of the CRP, which corresponds to FY 2022-23. Thus, there is no need to address the third directive at this time.

The Court of Appeals' writ of prohibition "restrain[ed] the trial court from enforcing" the portion of Judge Lee's November 10, 2021, order purporting to require State officials to transfer money to fund Years 2 and 3 of the CRP. (*See* Order Granting Writ of Prohibition, dated Nov. 30, 2021, at 2 (**Tab 6**)).

The Court of Appeals issued the writ of prohibition based on its conclusion that the trial court acted in a matter without jurisdiction and in a manner contrary to law. (*See Id.* (citing *State v. Allen*, 24 N.C. 183, 189 (1841))). That conclusion rested on both the text of the Appropriations

Clause[11] and an unbroken line of Supreme Court decisions that had consistently held "appropriating money from the State treasury is a power vested exclusively in the legislative branch" and thus the judicial branch "lack[s] the authority to 'order State officials to draw money from the State treasury.'" *Cooper v. Berger*, 376 N.C. 22, 47, 852 S.E.2d 46, 64 (2020) (quoting *Richmond Cnty. Bd. of Educ. v. Cowell*, 254 N.C. App. 422, 423, 803 S.E.2d 27, 29 (2017)); *see also Richmond Cnty. Bd. of Educ*., 254 N.C. App. at 426, 803 S.E.2d at 31 ("The Separation of Powers clause prevents the judicial branch from reaching into the public purse on its own" even if to remedy the violation of another constitutional provision directing how those funds must be used); *In re Alamance Cnty. Court Facilities*, 329 N.C. 84, 94, 405 S.E.2d 125, 129 (1991) (holding that the Separation of Powers Clause "prohibits the judiciary from taking public monies without statutory authorization"); *State v. Davis*, 270 N.C. 1, 14, 153 S.E.2d 749, 758 (1967) ("[T]he appropriations clause states in language no man can misunderstand that the legislative power is supreme over the public purse").

Although it ordered the opposite result, the majority in *Hoke County III* never addressed the merits of the writ of prohibition or even suggested that the writ was anything but proper. Instead, the Court merely noted that it was "staying" the writ prohibition "[t]o enable the trial court" to reinstate the November 10, 2021 order's transfer provisions. *Hoke County III*, 382 N.C. at 468, 879 S.E.2d at 244. The Supreme Court then issued a separate order staying (but not overturning) the writ of prohibition "pending any further filings" in Plaintiffs' appeals from the writ of prohibition not addressed in the Court's decision in *Hoke County III*. (*See* Order Staying Writ of Prohibition (Case No. 425A21) dated Nov. 4, 2022 (**Tab 8**)).

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[11] The Appropriations Clause in Article V, Section 7 of the State Constitution provides: "No money shall be drawn from the State treasury but in consequence of appropriations made by law . . . ." N.C. Const. art V, § 7.

The Supreme Court's order on March 3rd reinstated the writ of prohibition and, accordingly, prohibits this Court from restoring the transfer provisions or doing anything other than "recalculating" the remaining amounts allegedly necessary to fund Years 2 and 3 of the CRP. (*See* Order (Case No. 425A21-1) dated Mar. 3, 2023 (**Tab 10**))). This effectively puts the Court in the same position as Judge Robinson after the Supreme Court remanded the case for the limited purpose of determining the effect of the State Budget on Judge Lee's order. In that circumstance, Judge Robinson concluded that so long as the writ remained in place, he could only recalculate the amounts owed and could not order a transfer. (Order Following Remand, dated Apr. 26, 2022, at p. 23 (**Tab 4**) ("The Court of Appeals' [writ of prohibition] has not been overruled or modified and the undersigned concludes that it is binding on the trial court. Accordingly, this court cannot and shall not consider the legal issue of the trial court's authority to order State officers to transfer funds from the State treasury to fund the CRP.")) This Court should follow the same approach.

The Court should refrain from ordering a transfer for another reason as well. Even if it were not bound by the writ of prohibition, the Court would still lack jurisdiction to order a transfer due to Plaintiffs' pending appeals to the Supreme Court. As this Court is aware, Plaintiffs have appealed not only Judge Lee's November 2021 transfer order, but also separately appealed the writ of prohibition issued by the Court of Appeals. Plaintiffs' appeal from the writ of prohibition (Case No. 425A21-1) remains pending, and the pendency of that appeal divests the trial court of jurisdiction to hear any matter embraced by the order or judgment from which the appeal is taken. *Webb v. Webb*, 50 N.C. App. 677, 678, 274 S.E.2d 888, 889 (1981) ("The trial court is likewise without jurisdiction to proceed upon the very matters which were embraced in and which were directly affected by the order from which the appeal is taken."); *cf. SED Holdings, LLC v. 3 Star Properties, LLC*, 250 N.C. App. 215, 220, 791 S.E.2d 914, 919 (2016) (noting that under the

functus officio doctrine, the trial court still retains jurisdiction over issues not embraced by the appeal).[12]

Issuing a directive to transfer funds, even if stayed on appeal, would require the Court to decide issues that are embraced by Plaintiffs' current appeal to the Supreme Court (Case No. 425A21-1). In their notice of appeal, Plaintiffs argued that the Court of Appeals' writ of prohibition operated as a "decision on the merits" regarding Judge Lee's November 10, 2021, Order. Thus, they contend that their (current) appeal embraces a list of broad questions that include whether the trial court had authority to issue the transfer orders in the first place. (*See* Plaintiffs' Notice of Appeal (Case No. 425A21-1) dated Dec. 15, 2021 at pp. 2-3 (**Tab 7**).[13] The Supreme Court's March 3rd order further notes that the Controller has raised "many issues presented in this case that were left unaddressed by the Court's earlier opinion in [*Hoke County III*]." Accordingly,

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[12] *See also Bowen v. Hodge Motor Co.*, 292 N.C. 633, 635, 234 S.E.2d 748, 749 (1977) ("[A]n appeal removes a case from the jurisdiction of the trial court and, pending the appeal, the trial judge is functus officio."); *RPR & Assocs., Inc. v. Univ. of N.C.-Chapel Hill*, 153 N.C. App. 342, 347, 570 S.E.2d 510, 513 (2002) ("[W]hen a court is *functus officio*, it has completed its duties pending the decision of the appellate court."); *Wiggins v. Bunch*, 280 N.C. 106, 110, 184 S.E.2d 879, 881 (1971) (noting the common law functus officio doctrine is based on the concept "that two courts cannot [ordinarily] have jurisdiction of the same case at the same time"); *Plasman v. Decca Furniture (USA), Inc.*, 253 N.C. App. 484, 490–91, 800 S.E.2d 761, 766 (2017) ("Under North Carolina law, the longstanding general rule is that an appeal divests the trial court of jurisdiction over a case until the appellate court returns its mandate." (collecting cases)).

[13] The issues Plaintiffs claim to be embraced by their appeal from the Writ of Prohibition include: (1) whether the education provisions in Article I, Section 15 of the North Carolina Constitution constitute "an appropriation made by law"; (2) whether the judiciary has "the express and inherent authority" to order appropriations as a remedy for violation of the education provisions; (3) "[w]hether the legislative authority to appropriate funds pursuant to Article V, Section 7, of the North Carolina Constitution overrides" the Education Provisions; (4) "[w]hether the writ of prohibition contravenes Article IV, Section I of the North Carolina Constitution by allowing the judgment of the General Assembly to override the power of the judiciary" to order transfers as a remedy for alleged violations of the Education Provisions; and (6) whether the constitutional obligation to provide for a "general and uniform system of free public schools" is rendered "meaningless" as a result of the General Assembly's exclusive authority to exercise the power of the purse. (Plaintiffs' Notice of Appeal (Case No. 425A21-1), dated Dec. 15, 2021, at pp. 2-3 (**Tab 7**)).

the Supreme Court reinstated the writ of prohibition "until [it] has an opportunity to address the remaining issues in this case," meaning that it intends to hear the Controller's questions as well. Those questions likewise include whether the judiciary has the power to order a transfer, and if so, whether it must require the parties to comply with the numerous internal controls and other provisions imposed by the State Budget Act when doing so.[14]

The Court thus cannot order a transfer, even if immediately stayed its order, without deciding issues embraced by Plaintiffs' currently pending appeal an thus exceeding its jurisdiction. As a result, to the extent it issues any ruling in this case, the Court must limit its inquiry to recalculating the amounts allegedly required to fund Years 2 and 3 of the CRP in light of the current State Budget.

II. OSBM'S CALCULATIONS ARE INCORRECT AND INCLUDE AMOUNTS THAT ARE NO LONGER NECESSARY NOW THAT YEAR 2 IS OVER.

The calculations submitted by Attorney General's office were prepared by the Office of State Management and Budget ("OSBM"), an Executive Branch agency under the direction of the Governor. Those calculations do not accurately reflect the amounts that remain to be funded under Years 2 and 3 of the CRP. First, they fail to include various sums of money that have been provided to the agencies in question under the State Budget. Second, OSBM has double counted various categories of funds by purportedly requiring the State to provide recurring appropriations for Year 2 (FY 2021-22), even though that year has now ended and the funds are no longer necessary.

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[14] (*See* Controller's Motion to Dissolve or Lit Stays Regarding the Writ of Prohibition (Case No. 425A21-1), dated Feb. 8, 2023, at pp. 9-13 (**Tab 9**) (identifying additional issues embraced by Plaintiffs' appeal that were left unaddressed by the decision in *Hoke County III*)).

Legislative Intervenors' calculations are set out in Exhibit A to the Second Affidavit of Mark Trogdon, submitted simultaneously with this brief. Mr. Trogdon is the former Director of the General Assembly's *nonpartisan* Fiscal Research Division ("FRD"). He has over 28 years' experience with the division and currently serves with FRD as a Senior Analyst. Mr. Trogdon provided the calculations that Judge Robinson chose to use as the starting point in his Order Following Remand last year. A copy of Mr. Trogdon's original affidavit submitted to Judge Robinson, which provides his qualifications, relevant background regarding the budget process, and the principles that underlie his calculations is attached hereto as **Tab 1**. Mr. Trogon's Second Affidavit, which responds to OSBM's most recent calculations, is attached at **Tab 2**. The calculations in Mr. Trogdon's Second Affidavit follow the same principles and methodology Judge Robinson used when resolving differences between the parties' calculations last April. (2d Trogdon Aff ¶ 6 (**Tab 2**)).

Including the amendments adopted as part of the 2022 Appropriations Act last July,[15] the State Budget provides approximately $20.9 billion in net appropriations for K-12 education over the FY 2021-22 and 2022-23 biennium, which represents more than 40% of the State's current operating budget. This includes approximately $1.73 billion for items listed in Years 2 and 3 of the CRP. Still, the appropriations included in the State Budget—which is the product of at least *four* appropriations acts that were passed by the General Assembly and signed by the Governor—do not necessarily match those in the CRP. This means that some items either have not been funded or have not been funded at to the same extent as the authors of the CRP would require.

As Mr. Trogdon explains in his affidavit, OSBM's calculations leave out various appropriations made to the agencies in question. This includes money for new teacher support

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15 *See* Current Operations Appropriations Act of 2022, 2022 N.C. Sess. L. 74

programs ($2 million); an educator compensation study ($109,000); disadvantaged student funding allotments ($26.1 million); principal and assistant principal salaries ($6.2 million); district support programs ($14 million); the review and adoption of core curricular resources ($260,000); and the establishment of additional cooperative and innovative high schools ($730,000). (2d Trogdon Aff. ¶ 8(a)-(g) (**Tab 2**)).

It is not clear why OSBM omitted these funds. In most cases, the omitted funds consist of money from federal programs that were provided to the State and then appropriated by the General Assembly as part of the State Budget. But this money still counts. The Supreme Court long ago held that courts must include money from federal sources when assessing whether the State has met its constitutional obligation to provide children with an opportunity for a sound basic education. *See Hoke County Bd. of Educ. v. State*, 382 N.C. 386, 404, 879 S.E.2d 193, 206 (2004) ("'While the State has a duty to provide the means for such educational opportunity . . . no statutory or constitutional provisions require that it is concomitantly obliged to be the *exclusive* source of the opportunity's funding'" (emphasis added)). As a result, Judge Robinson made clear that the Court must consider amounts appropriated from federal funds when determining the amount of funding available to fund the items in the CRP. (*See* Order Following Remand at pp. 16-17 (**Tab 4**)).

Including the funds OSBM omitted reduces the amounts required to fund the remaining items in the CRP to $257,629,930 for Year 2, and $376,089,002 for Year 3. (2d Trogodon Aff, Ex. A (**Tab 2**)). However, even these figures overestimate the amount that the Court should include in its recalculation.

In addition to omitting various appropriations, OSBM's calculations fail to account for the fact that roughly 99% of the action items in Year 2 of the CRP call for *recurring* appropriations

for salaries and ongoing programs that are no longer necessary now that we are in Year 3. As Mr. Trogdon explains, recurring appropriations are appropriations that are repeated each fiscal year. (2d Trogdon Aff ¶¶ 9-10 (**Tab 2**)). They are generally used to pay for ongoing expenses, such as salaries or other operating expenses. (*Id.*) By contrast *nonrecurring* appropriations are generally used for one-time projects and will not be repeated in the next budget unless the General Assembly makes another appropriation.

Although the State sets its budgets on a biennial basis, it only appropriates money one fiscal year at a time. Thus, absent certain exceptions, the Budget Act requires that any portion of an appropriation that remains unspent at the end of the fiscal year must revert back to the fund from which the appropriation it was made. *See* N.C. Gen. Stat. § 143C-1-2.

OSBM's calculations disregard these rules, and instead treat every amount listed in the CRP as a cumulative obligation, even if it consists of a recurring appropriation. This creates obvious problems. There is no need for the State to pay recurring appropriations for salaries and other ongoing expenses from Year 2, since money for those same items has been included again in Year 3.[16] OSBM, however, would require the State to pay *all* money included in Years 2 and 3, even though Year 2 has come and gone. In most cases, this would result in the State paying *double* the amount Plaintiffs claim is necessary to fund the programs listed in the CRP.

The Supreme Court's decisions in this case—including *Hoke County III*—require that the Court subtract out recurring appropriation from Year 2 when "recalculating the appropriate transfer amounts" required for Years 2 and 3 of the CRP. 382 N.C. at 468, 879 S.E.2d at 244. The

[16] Without conceding the validity of the CRP, Legislative Intervenors recognize that items which call for nonrecurring appropriations for one-.time projects should, at least arguably, be treated differently. If a nonrecurring appropriation for a one-time project is not included in Year 2, money for that project will not be included unless it is added to the total remaining for Year 3.

Supreme Court has repeatedly admonished that, when in fashioning a remedy, courts must do "*no more than is reasonably necessary*" to correct an alleged constitutional violation. *See Id.; see also Hoke County,* 358 N.C. at 610, 374 S.E.2d at 374 (holding that any relief granted must "correct the failure with minimal encroachment on the other branches of government."); *In re Alamance County Ct. Facilities*, 329 N.C. 84, 99, 405 S.E.2d 125, 132 (1991) (holding that, in remedying an alleged constitutional violation, the court must "do *no more* than is reasonably necessary" (emphasis in original)). Requiring the State to pay recurring appropriations for Year 2 in addition to those called for in Year 3, however, cannot in any way be considered "necessary."

As shown in Mr. Trogdon's affidavit, once recurring appropriations from Year 2 are excluded, the additional amounts called for in the CRP, broken out by agency, are as follows:

- Department of Public Instruction - $277,814,002
- Department of Health and Human Services - $81,850,000
- University of North Carolina System - $18,100,000

(2d Trogdon Aff., Ex. A (**Tab 2**)). Thus, while Legislative Intervenors maintain that the Court lacks the power to order implementation of the CRP, they submit that these figures properly reflect the additional amounts remaining to fund Years 2 and 3 of the CRP after the adoption of the 2022 Appropriations Act.

III. LEGISLATIVE INTERVENORS MAINTAIN THEIR OBJECTIONS TO THE CRP AND THE COURT'S ORDERS REQUIRING ITS IMPLEMENTATION.

Finally, while Legislative Intervenors understand the Court intends to limit its inquiry to updating Judge Lee's November 10, 2021, Order and Judge Robinson's April 26, 2022 Order Following Remand to reflect the remaining amounts necessary to fund the CRP, they reserve all of their previous objections to both the issuance of those orders as well as the Court's orders

requiring the CRP in the first place. In particular, Legislative Intervenors object to the entry of any order purporting to require the State to implement or fund the CRP for the following reasons:

1. The Court lacks subject matter jurisdiction to enter orders purporting to dictate educational policy on a Statewide basis, because, among other things, Plaintiffs' original claims relate only to the conditions in their individual county school districts. Plaintiffs therefore lack standing to assert claims on behalf of students in school districts where they do not reside and that are not subject to their claims.

2. There has been no judgment or order finding a violation anywhere other Hoke County, and, accordingly, the Court has improperly sought to grant relief on a statewide basis despite the fact there has been no finding of a violation. While Plaintiffs will undoubtedly claim that this issue was resolved by *Hoke County III*, the fact remains that they cannot point to any order or judgment, entered in accordance with the rules of civil procedure, showing a violation that would justify the imposition of injunctive relief anywhere other than Hoke County.

3. Plaintiffs have failed to show that the provisions made for the State's education system in the current State Budget—which constitutes an act of the General Assembly and therefore must be treated as presumptively valid—are somehow insufficient to provide North Carolina children with the opportunity to obtain a sound basic education.

4. Plaintiffs have not shown that funding the remaining items under the CRP is necessary to provide children with the opportunity for a sound basic education. Instead, the Court has improperly assumed, without evidence, that the CRP constitutes the one and only constitutionally permissible way to provide for the State's education system, and that each one of its 146 action items must be implemented, despite repeated admonitions from the Supreme Court that there will be multiple constitutionally permissible to meet the State's constitutional

obligations. *See Leandro*, 346 N.C. at 356, 488 S.E.2d at 249 ("[T]he very complexity of the problems of financing and managing a statewide public school system suggests that there will be more than one constitutionally permissible method of solving them.")

5. The consent orders requiring the CRP and directing the State to fund it are the product of a "friendly suit" in which the Executive Branch and Plaintiffs sought to circumvent the Separation of Powers by securing orders that purport to override statutes governing the State's educational program and require appropriations that are not part of the State Budget without securing legislative approval as required under the State Constitution and, in particular, the Appropriations Clause. This means that the Court lacked jurisdiction to issue its orders requiring CRP, which were entered in the absence of any genuine controversy. It has also violated the due process rights of the General Assembly, which was not represented during the proceedings that led to the consent orders requiring the CRP even though it was a necessary party to such proceedings, as well as the voters its members were elected to represent.

6. Finally, before obtaining any judgment, Plaintiffs (who primarily consist of local school districts) should first be required to exhaust all funds available to them, including the unprecedented amounts that have been provided to local school districts in the form of COVID-relief grants, to fund items for the CRP. Most of these funds have been provided to districts with subject only to the restrict that they be used to address "learning loss" and thus are available to fund the items called for in the CRP. As of today, nearly $2.2 billion of the money provided directly to local school districts through COVID-relief programs (approximately 37%) remains unspent.[17] Hoke County Public Schools, alone, has been received more than $40 million, with $14

[17] *See* COVID Funds, North Carolina Department of Public Instruction, Financial and Business Services, available at https://tinyurl.com/35tb83ns (last visited, March 15, 2023).

million still unspent.[18] If Plaintiffs truly believe that the measures in the CRP are constitutionally necessary, they should first be required to apply the funds that have been made available to them for those purposes before requiring additional appropriations from the State.

Following the Supreme Court's March 3, 2023, Order in Plaintiffs appeal from the writ of prohibition, Legislative Intervenors have filed a *renewed* motion and petition for *certiorari* asking the Court to take up many of these issues. (*See* Legislative Intervenors' Renewed Motion for Leave to Brief Additional Issues and Conditional Petition for *Certiorari* (Case No. 425A21-1) dated Mar. 3, 2023 (**Tab 11**)). Nevertheless, they raise these objections here to preserve their rights

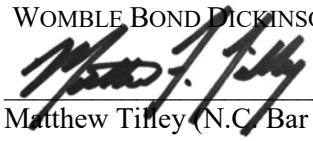
CONCLUSION

While they do not concede that the Court can has authority to enter the CRP or enter an order requiring the State to fund it, Legislative Intervenors object to the calculations submitted by the Attorney General and instead submit that the Court should adopt the calculations provided above when recalculating the amounts remaining to fund the items in the CRP following the adoption of the 2022 State Budget.

This, the 15th day of March, 2023.

[18] *Id.*

WOMBLE BOND DICKINSON (US) LLP



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CERTIFICATE OF SERVICE

The undersigned certifies that on March 15, 2023 he caused a true and correct copy of the foregoing document to be served via e-mail upon the following:

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ATTACHMENTS

Tab	Item
1	Affidavit of Mark Trogdon (filed Apr. 8, 2022)
2	Second Affidavit of Mark Trogdon (dated Mar. 14, 2023)
3	Transfer Order (filed Nov. 10, 2021)
4	Order Following Remand (filed Apr. 26, 2022)
5	Notice of Intervention (95 CVS 1158) (filed Dec. 8, 2021)
6	Order Granting Writ of Prohibition (entered Nov. 30, 2021)
7	Plaintiffs' Notice of Appeal to Supreme Court (Case No. 425A21-1) (filed Dec. 15, 2021)
8	Order Staying Writ of Prohibition (Case No. 425A21-1 and 425A21-2) (entered Nov. 4, 2022)
9	Controller's Motion to Dissolve or Lift Stay (Case No. 425A21-1) (filed Feb. 8, 2023)
10	Order Reinstating Writ of Prohibition (Case No. 425A21-1) (entered Mar. 3, 2023)
11	Legislative Intervenors' Renewed Motion for Leave to Brief Additional Issues and Conditional Petition for Writ of *Certioari* (Case No. 425A21-1) (filed Mar. 3, 2023)
12	*Hoke County Board of Education, et al. v. State et al.*, 382 N.C. 386, 879 S.E.2d 193 (2022)

TAB 1

STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
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.

AFFIDAVIT OF MARK TROGDON

STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
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.

AFFIDAVIT OF MARK TROGDON

I, Mark Trogdon, after being duly sworn, aver as follows:

1. I am the Director of Fiscal Research for the Fiscal Research Division ("FRD"), a nonpartisan staff division of the North Carolina General Assembly.

2. I am over 18 years of age and of sound mind and am competent to testify to the matters discussed in this Affidavit, and the statements contained in this Affidavit are based upon my personal knowledge.

3. I hold a Masters of Public Administration, Public Policy Analysis, from the University of North Carolina at Chapel Hill and a Bachelor of Arts in Economics from Guilford College.

4. I have over 27 years of experience serving with FRD. I joined FRD in 1995 as a Fiscal Analyst, and was later promoted to Senior, and then Principal, Fiscal Analyst. In August 2011, I was appointed Acting Director of FRD, and then Director in June 2012. Prior to joining FRD, I served as a fiscal analyst with the Maryland legislature.

The Fiscal Research Division

5. FRD was established in 1971 to provide nonpartisan fiscal expertise and analysis concerning the State's finances and budget to the General Assembly's elected members. FRD serves as part of the General Assembly's nonpartisan, central staff and, in such capacity, provides neutral, fact-based research and analysis to all members of the General Assembly regardless of the party to which they belong. As director, I am responsible for overseeing and directing the more than 30 analysts and staff that serve within FRD.

6. FRD's powers and duties are set forth in Article 7A, Chapter 120, of the General Statutes. *See* N.C. Gen. Stat. § 120-36.1, *et seq.* These include (i) analyzing the receipts and

expenditures of State departments, agencies, and institutions; (ii) evaluating requests and recommendations for appropriations to those departments, agencies, and institutions through the State budget; and (iii) reviewing and evaluating the compliance of State departments, agencies, and institutions with the legislative directions contained in the State budget. *See* N.C. Gen. Stat 120-36.3.

7. During the legislative session, FRD's fiscal staff primarily serves as staff to the House and Senate Finance and Appropriations Committees as well as their subcommittees. This includes assisting the committees' elected members in (i) developing a balanced State budget; (ii) evaluating the fiscal impact of proposed legislation; (iii) projecting State revenue through economic analysis; and (iv) developing legislation (with the assistance of central staff legal divisions in the Legislative Drafting (Bill Drafting) and Legislative Analysis Divisions) to enact members' desired budget and tax directives into law.

8. When the General Assembly is out of session, fiscal staff monitor the Executive Branch's compliance with the enacted budget and other legislative initiatives; track State spending throughout the fiscal year; follow major federal policy issues that may affect the future fiscal condition of the State; and provide staff support to non-session, interim, and other oversight and study committees that prepare recommendations for the General Assembly's future consideration.

The Legislative Budget Process

9. In North Carolina, the budget process normally occurs on a two-year cycle that corresponds with the two-year term of each General Assembly. In odd-numbered years, when the General Assembly holds its long session, it typically develops and adopts a current operations

appropriations act[1] that establishes a budget for the next two fiscal years, known as a biennium. In even-numbered years, when the General Assembly holds its short session, it typically passes one or more appropriations bills that make revisions to the budget for the second year. In addition to these primary appropriations acts, the General Assembly may also adopt other acts that make or modify appropriations covering only a portion of the State budget.

10. North Carolina's fiscal year starts on July 1 and ends on the following June 30.

11. The process for adopting the State budget and making appropriations from the State treasury are set out in the State Constitution as well as the State Budget Act. N.C. Gen. Stat. §143C-1-1, *et seq.*

12. The State Constitution provides that the Governor "shall prepare and recommend to the General Assembly a comprehensive budget of the anticipated revenue and proposed expenditures of the State" for the ensuing fiscal year, *see* N.C. CONST. art. III, § 5(3). The Constitution also provides that "[t]he budget as enacted by the General Assembly shall be administered by the Governor." *Id.*

13. Article V, section 7, of the State Constitution provides that "No money shall be drawn from the State treasury but in consequence of appropriations made by law . . . ." Thus, while the Governor has responsibility for preparing a proposed budget and administering the budget enacted by the General Assembly, no money can be drawn from the State treasury until it has been appropriated by the General Assembly through a duly enacted appropriations bill.

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[1] The State Budget Act defines a "Current Operations Appropriations Act" as "[a]n act of the General Assembly estimating revenue availability for and appropriating money for the current operations and capital improvement needs of the State government during one or more budget years." N.C. Gen. Stat. § 143C-1-1(d)(9). The act defines the "Budget" as "a plan to provide and spend money for specified programs, functions, activities, or objects during a fiscal year." *Id.* § 143C-1-1(d)(3).

14. The House and Senate alternate which chamber initiates the budget process each cycle. For the FY 2021-22 and 2022-23 biennium, the budget process began with the Senate.

15. Pursuant to General Statute § 143C-3-5(a), the General Assembly passes a joint resolution at the beginning of each budget cycle inviting the Governor to present a recommended budget. The Chairs of the Appropriations Committees for each chamber then introduce an appropriations bill reflecting the Governor's proposed budget in their respective chamber.

16. In addition to the Governor's proposed budget, members from the chamber initiating the budget typically introduce their own budget proposal in the form of an appropriations bill, which sets out the available revenues and appropriations to each State agency and department. That appropriations bill typically serves as the legislative vehicle for the adoption of a comprehensive State budget.

17. Although the General Assembly typically adopts a comprehensive budget on a biennial basis, appropriations are made for specific fiscal years. Accordingly, unless otherwise provided by law, an appropriation serves only as authorization for an agency or department to spend money in a single fiscal year.

18. When the fiscal year ends, unspent appropriations revert to the fund from which the appropriation is made, and the unspent net General Fund appropriations remain available for appropriation in the next year's budget. The primary exceptions to this rule are moneys that have been appropriated for capital improvement or information technology projects, *see* N.C. Gen. Stat. § 143C-1-2(b).

Revenue Forecasts and Availability Statements

19. The State Constitution requires the State to maintain a balanced budget, N.C. CONST. art. III, § 5(3), and prohibits the State from engaging in deficit spending during any fiscal

year. *Id.* ("The total expenditures of the State for the fiscal period covered by the budget shall not exceed the total of receipts during that fiscal period and the surplus remaining in the State treasury at the beginning of the period.")

20. Because the State must have a balanced budget, the budget process typically begins each year with the Consensus Revenue Forecast, which is an estimate of the anticipated taxes, fees and other money the State is expected to receive in the General Fund and thus will be available to be appropriated during the fiscal year. The Consensus Revenue Forecast is prepared jointly by economists from the Office of State Budget and Management ("OSBM"), which is an Executive Branch agency, and FRD, which is an agency of the Legislative Branch. The Consensus Revenue Forecast provides a common starting point for the Governor and General Assembly as they prepare their respective budget proposals.

21. In order to prepare the Consensus Revenue Forecast, economists with FRD and OSBM must analyze the economic conditions in the State to project the amount of tax and other revenue the State is anticipated to receive during the fiscal year. As with any economic forecast, this requires consideration of numerous variables, including economic conditions and trends in the State, historical relationships between the State and the national economy, the projected impact of recent changes to the State tax code, changes to federal law and regulation, and changes to other laws that may affect other revenue the State receives over the course of the year. Because the forecast is only a projection, the actual revenues the State receives during the year may vary significantly from the figures provided in the forecast.

22. During the legislative biennium, FRD and OSBM typically publish a minimum of three Consensus Revenue Forecasts—one at the outset of the legislative budget process, a second after the April tax filing deadline to account for actual revenue collections, and a third typically

issued in May of the short session, to be used when making revisions to the budget in the second year of the biennium. Additional Consensus Revenue Forecasts may be issued depending on further changes in economic conditions and the length of the legislative session.

23. The State Budget Act requires that the General Assembly include an availability statement for the General Fund, Highway Fund, and Highway Trust Fund, as part of each appropriations act that it adopts. *See* N.C. Gen. Stat. § 143C-5-3. The purpose of the availability statement is to inform the General Assembly of the total amount of money available within a fund for appropriation in a given fiscal year, including the unreserved fund balance and all revenue and receipts. *See* N.C. Gen. Stat. § 143C-1-1(d)(1b). The Consensus Revenue Forecast is a primary component of the availability statement. The Governor's proposed budget is also required to contain an availability statement. *See* N.C. Gen. Stat. § 143C-3-5(e).

24. FRD updates the availability statement to ensure that legislators have up-to-date figures regarding the amount of revenue that is available for further appropriations. These updates may occur as a result of an updated Consensus Revenue Forecast, legislative changes to tax and non-tax revenue, and other enacted legislation affecting the budget. These updates are typically reflected in FRD reports as well as availability statements that are incorporated into appropriations acts and which show the balance of unappropriated, unreserved moneys that the State is anticipated to have at the end of the fiscal year.

25. FRD also publishes other briefs and reports on a periodic basis, including summaries of major budget and fiscal developments. **Exhibit A**, attached hereto, is an example of one such Fiscal Brief, dated January 20, 2022. It provides a high-level summary of major Budget and Fiscal Policy Developments during the course of the 2021 Legislative Session.

2021 Appropriations Act

26. On November 18, 2021, Governor Cooper signed into law the Current Operations Appropriations Act of 2021, 2021 N.C. Sess. L. 180 (the "2021 Appropriations Act"). The act was the product of months of negotiations between the House, Senate, and Executive Branch.

27. The 2021 Appropriations Act was first filed in the General Assembly on February 17, 2021, as Senate Bill 105. After proceeding through the Senate Appropriations Committee and subcommittees, the bill was approved by the Senate on June 25, 2021. It then proceeded to the House and went through the committee process in that chamber. On August 12, 2021, the House approved its version of the budget, and the bill was referred to a Conference Committee to resolve the differences between the House and Senate versions. On November 15, 2021, the Conference Committee reported a Conference Report reflecting its compromise budget. The Senate approved the Conference Report on November 17, 2021, and the House approved it on November 18, 2021. Governor Cooper then signed the 2021 Appropriations Act into law on November 18, 2021.

28. The 2021 Appropriations Act established a comprehensive, balanced budget for FY 2021-22 and 2022-23. The act included a total net General Fund appropriation of $25.9 billion for FY 2021-22 and approximately $27 billion for FY 2022-23. *See* 2021 N.C. Sess. L. 180, § 2.1(a). The 2021 Appropriations Act was subsequently modified though the enactment of two technical corrections bills, one of which appropriated additional funding. *See* 2021 N.C. Sess. L. 189; 2022 N.C. Sess. L. 6.

Determining Available, Unappropriated, and Unreserved Revenue in the General Fund

29. I have been advised that the Court's November 10, 2021, order directed OSBM, the Treasurer, and Controller, to transfer the funds at issue from the "unappropriated balance within the General Fund." (November 10 Order at p. 19.) I understand that the Court has requested that

the parties provide information regarding the "amount of funds remaining in the General Fund currently, both in gross and net of appropriations in the 2021 Appropriations Act." (March 25 Order at p. 2). In order to properly address that question, it is important to first explain several concepts.

30. First, the General Fund is defined by statute. The State Budget Act requires the Controller to account for moneys in one of several types of funds listed in the act. N.C. Gen. Stat. § 143C-1-3(a). These include, among other things, (i) *Capital Project Funds*, which account for moneys to be used for capital projects, as well as capital outlays financed through the issuance of public bonds; (ii) *Special Revenue Funds*, which account for moneys that come from specific revenue sources, other than debt service or major capital projects, and are legally restricted such that they can only be spent for specified purposes (such as the Highway Fund or the Highway Trust Fund); (iii) *Enterprise Funds*, which account for activities funded by fees paid by external users for goods or services (such as public utilities or the North Carolina State Lottery Fund); (iv) *Custodial Funds*, which are used to account for moneys the State holds purely in a custodial capacity on behalf of others; (v) *Investment Trust Funds*; (vi) *Pension and Employee Benefit Funds*; and (vii) the *General Fund*, which is used to account for revenues used to fund the State's general operating expenses. *Id.*

31. The moneys in the General Fund are used to support the State's general, day-to-day operating expenses. The General Fund includes all cash inflows and outflows that are not otherwise associated with a special purpose fund. *See* N.C. Gen. Stat. § 143C-1-3(3)(a).

32. The moneys in the General Fund comprise tax and non-tax revenues and departmental receipts. The General Fund also includes interest earned on moneys held by the

State, unless otherwise directed by law to accrue to a different fund. *See* N.C. Gen. Stat. § 143C-1-4.

33. In addition to making appropriations for the State's current operating expenses, the General Assembly may also transfer and appropriate net General Fund revenue to a number of reserves that have been established under the State Budget Act. These include the Savings Reserve, N.C. Gen. Stat. § 143C-4-2; the State Capital and Infrastructure Fund, N.C. Gen. Stat. § 143C-4-3.1; the Contingency and Emergency Fund, N.C. Gen. Stat. § 143C-4-4; and the Pay Plan Reserve, N.C. Gen. Stat. § 143C-4-9, among others.

34. In the case of several of these reserves, the General Assembly has authorized transfers to occur automatically each year by operation of statute. For instance, the State Budget Act requires that the Governor's proposed budget, and each current operations appropriations act passed by the General Assembly, appropriate fifteen percent (15%) of the estimated growth in State tax revenues for the fiscal year to the Savings Reserve until the balance of the reserve reaches a statutorily-reflected level. *See* N.C. Gen. Stat. §§ 143C-3-5(b)(6); 143C-4-2(d).[2] At the end of the fiscal year, the Controller is required to reconcile the amount to be transferred to the Savings Reserve based on actual tax-revenue growth. *See* N.C. Gen. Stat. § 143C-4-2(e).

35. Pursuant to the State Budget Act, moneys that the General Assembly appropriates into a reserve "may be expended only for the purpose or purposes for which the reserve was established." *See* N.C. Gen. Stat. § 143C-4-8. (Use of funds appropriated to a reserve).

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[2] Tax law changes enacted during the 2021 legislative session are projected to reduce State tax revenue each year of the biennium such that there is not forecasted growth in net General Fund tax revenues year over year. As a result, there are not expected to be any statutorily-required transfers to the Savings Reserve during the FY 2021-22, 2022-23 biennium under G.S 143C-4-2. Recognizing this situation, the General Assembly directed the additional transfers of $1.1 billion from the General Fund to the Savings Reserve each year.

36. The General Fund includes both appropriated and unappropriated moneys. Moneys are "appropriated" when the General Assembly enacts a law authorizing a withdrawal of money from the State treasury. Moneys that have been appropriated or transferred to a reserve are referred to as "reserved" funds. Moneys that have not been appropriated or reserved are referred to as the "unappropriated balance remaining" on the availability statement and remain available for future appropriation.

Available Unappropriated, Unreserved Revenues Following Passage of the 2021 Appropriations Act

37. The availability statement in the 2021 Appropriations Act indicates an anticipated unappropriated, unreserved fund balance of $2,487,245,242 at the conclusion of FY 2021-22. That does not imply, however, that this money can be spent without causing a budget shortfall in the next fiscal year. *See* 2021 N.C. Sess. L. 180, § 2.2(a). The 2021 Appropriations Act anticipates that the unappropriated balance remaining at the conclusion of FY 2021-22 will remain available to fund appropriations and reservations in FY 2022-23. The act thus shows an unappropriated fund balance of $128,208,446 would remain in the General Fund at the end of FY 2022-23 once all appropriations have been made. *Id.* Subsequently, 2021 N.C. Sess. L. 189 appropriated an additional $106,750,000 in FY 2021-22 to support a high-yield economic development project, reducing the unappropriated fund balance to $21,458,446 at that time. *See* 2021 N.C. Sess. L. 189 § 4.4A.

38. In order to provide the Court with the most up-to-date figures, I have also attached an availability statement showing current figures as of March 28, 2022, to this affidavit as **Exhibit B**. The availability statement updates the amount stated in line 3 to reflect the actual amount of FY 2020-21 overcollections reported by OSBM and the Controller. It also incorporates the modifications to the State budget made as part of the two subsequent technical corrections bills.

39. As shown in the updated availability statement, the State is currently projected to have an unappropriated, unreserved balance of $2,359,141,444 remaining at the conclusion of FY 2021-22. Once again, this does not imply that this money can be spent without causing a budget shortfall in the next fiscal year. The biennial budget uses the unappropriated fund balance remaining at the end of FY 2021-22 to support appropriations in FY 2022-23 and serves as the starting point to fund appropriations for that year. The State is currently projected to have an unappropriated balance of $104,638 at the end of FY 2022-23.

40. I have reviewed Kristin Walker's affidavit filed on April 4, 2022, by the Department of Justice. I concur that the fiscal amounts cited in Sections 8 and 9 of Exhibit A are factual. However, due to subsequently enacted legislation, the numbers cited in Section 8 of Exhibit A would not currently be accurate for determining the amount of funds available for future appropriations.

41. First, Ms. Walker states that the 2021 Appropriations Act "anticipates a net of $2.38 billion unappropriated and unreserved [funds] at the end of Fiscal Year 2021-22." (Walker Aff. ¶ 8). I concur that this is an accurate statement about the budget. However, the 2021 Appropriations Act anticipates that the fund balance left at the end of FY 2021-22 will remain available to fund FY 2022-23 appropriations. As a result, there is not available unreserved General Fund moneys to make the transfer anticipated by the Court's November 10, 2021, Order. Ms. Walker also states that the State is projected to have an unappropriated, unreserved balance of approximately $22 million for FY 2022-23. That figure appears to come from the availability statement published in 2021 N.C. Sess. L. 189, which was adopted on December 6, 2021. The updated availability statement I have provided with this affidavit, which is current as of March 28, 2022, accounts for all legislation impacting the budget (2021 N.C. Sess. L. 180, 2021 N.C. Sess.

L.189, and 2022 N.C. Sess. L. 6), and projects that the State will have an unappropriated, unreserved balance of $104,638 at the conclusion of FY 2022-23. Based on the current availability, this does not leave enough available, unappropriated, unreserved revenue to transfer the amounts equivalent to those specified in the November 10, 2021, Order.

42. Second, Ms. Walker states that "in each fiscal year the Budget reserves $1.134 billion to the State's Savings Reserve, which would bring the total of unappropriated funds in the Savings Reserve to $4.25 billion." (Walker Aff. ¶ 8). I concur in the amounts noted in Ms. Walker's affidavit. However, I would clarify that there will be $4.25 billion in the Savings Reserve after the FY 2022-23 legislatively-mandated transfer and absent other legislative action. The amount of money held in reserve, however, is not available for transfer without an act of the General Assembly.

43. The statute that establishes the Savings Reserve provides that money in that reserve can only be appropriated for specific purposes and only by a vote of a majority (or, in certain cases super-majority) of the membership of the Senate and House of Representatives present. N.C. Gen. Stat. §§ 143C-4-2(b) and (b1).

44. Finally, Ms. Walker cites the Controller's cash reports to state that "[a]s of March 25, 2022, the [State's] gross cash balance was $9.84 billion and the net unreserved cash balance was $4.79 billion." (Walker Aff. ¶ 9). I concur in the amounts stated in Section 9 of Ms. Walker's affidavit. However, the State's daily cash balance does not reflect the amount of funds available for appropriation.

45. The Cash Reports issued by the Controller provide a snapshot of the State's accounts on a given day. The State's daily cash balance can fluctuate significantly over even a short period of time based on, among other things, when the State pays certain expenses (such as

payroll) and variations in the tax revenues the State receives from month-to-month. For instance, while the Cash Report attached to Ms. Walker's affidavit shows that the State had an unreserved cash balance of approximately $4.8 billion on Friday, March 25, 2022, the next weekly cash report shows that the State had an unreserved cash balance of $3.8 billion on Friday, April 1, 2022. (*See* Cash Report for week ended April 1, 2022, attached hereto as **Exhibit C**).

46. Moreover, the numbers provided in the Cash Reports do not take into account whether money has been appropriated. Ms. Walker cites two figures in her affidavit. The first is what she refers to as the "gross cash balance." (Walker Aff. ¶ 9). That figure, however, includes cash that is reserved and therefore is not available to support appropriations for general expenditures.[3] Second, Ms. Walker states that the State had a "net unreserved cash balance of $4.79 billion" as of March 25, 2022. (*Id.*) That figure, however, does not show how much money has or has not been appropriated under the budget. Instead, the "unreserved cash balance" reflects the amount of cash the State has on hand to pay appropriated expenses.[4]

47. For all of these reasons, the Controller's Cash Reports are not used to determine the amount available for further appropriation during the fiscal year.

Items Funded in the Comprehensive Remedial Plan

48. In addition to the items discussed above, I understand that the Court has requested the parties provide information regarding, "[t]he amount of funds appropriated in the 2021

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[3] The "Glossary" to the Controller's Cash Reports, states that "Reserved Cash" "[d]esignates the portion of cash which has been set aside by the legislature for a specific purpose and is generally *unavailable* to finance appropriation expenditures." *See* "Glossary for Cash Watch", available at, https://www.osc.nc.gov/news/press-releases/glossary-cash-watch (last visited April 6, 2022).

[4] The Glossary defines "unreserved cash" as "cash available to finance appropriation expenditures." *Id.*

Appropriations Act . . . that directly fund the various programs and initiatives called for in the Comprehensive Remedial Plan." (March 25 Order, p. 2).

49. In accordance with the Court's request, I, with the assistance of FRD's nonpartisan fiscal staff under my supervision, prepared the chart attached hereto as **Exhibit D**, which compares the funding appropriated for FY 2021-22 and 2022-23 for each action item to the amounts requested for Years 2 and 3 in the Comprehensive Remedial Plan ("CRP") submitted by the Plaintiffs and the Executive Branch.

50. Based, on our analysis, we agree with OSBM's conclusions regarding the amounts of funding provided for many of the CRP's action items. However, there are several instances where our numbers differ because (i) OSBM did not take into account funding that was made available for certain action items, (ii) it recorded revenue that has been made available on a multi-year basis in years other than when appropriated, and (iii) it included items that we did not consider within the scope of the programs or initiatives contemplated in the CRP and/or effected in this budget. The places where our analysis differs from OSBM's submission are follows:

a. ESSER III Funds. The enacted State budget appropriates $65,442,000 from the federal Elementary and Secondary School Emergency Relief (ESSER) III Fund for items included in the CRP. ESSER III was part of the federal government's COVID-relief program under the American Rescue Plan Act.[5] As this money has been made available through a federal grant, and appropriated by the General Assembly, the full $65,442,000 is available to the NC Department of Public Instruction ("NCDPI") starting in FY 2021-22, and will remain available to the department through September

[5] American Rescue Plan Act of 2021 ("ARPA"), Public Law 117-2, 50 Stat. 664 (March 11, 2021).

30, 2024. For this reason, we listed the full amount of the appropriations ($65,442,000) in FY 2021-22. OSBM, however, has split the appropriation, listing $32,721,000 in each fiscal year, even though the full amount is available immediately. This difference appears in the following lines of Exhibit D:

i. Line 18 – National Board Certification

ii. Line 27 – Professional Development (Science of Reading)

iii. Line 30 – Instructional Support (school psychologist recruitment program)

iv. Line 39 – District and Regional Support

v. Line 61 – College Advising Corps

b. Items Whose Timing Differs from the CRP. The enacted State budget appropriates recurring General Fund money in the amount of $59,750,575 in FY 2021-22 and $174,701,150 in FY 2022-23 on items that appear in the CRP but are not funded until Year 4 of that plan, the FY 2023-24 fiscal year. This difference appears in the following lines of Exhibit D:

i. Line 35 – Noninstructional Support

ii. Line 36 – Classroom Supplies

iii. Line 37 – Central Office Staff

c. Items Included by FRD but not Included by OSBM. OSBM's calculations assume no money was appropriated to fund three CRP action items that were funded in the enacted budget.

i. Line 44 (Child Care Subsidy). The request in the CRP for this item was $10 million in recurring funds for each fiscal year. OSBM's analysis shows a deficit. However, the General Assembly appropriated money from the federal Child

Care and Development Block Grant under ARPA to the NC Department of Health and Human Services (NCDHHS) to provide for child care subsidies, which covers this item. *See* 2021 N.C. Sess. L. 180, § 9L.2.(b)(1)(a). The appropriation requires NCDHHS to spend a minimum of $206 million from this block grant for this purpose, although it is authorized to spend more, up to a maximum of $215 million. *Id.* Funds are available to NCDHHS in full starting in FY 2021-22 and will remain available through September 30, 2024.

ii. Line 52 (Workforce Data System) This item corresponds with section VI.G.ii.1 of the CRP, which calls for the implementation of "a real-time early childhood workforce data system." However, while not required to use the ARPA Child Care and Development Block Grant for this purpose, the General Assembly appropriated $50 million of this block grant to NCDHHS in FY 2021-22 to modernize and improve early childhood technology infrastructure. *See* 2021 N.C. Sess. L. 180, § 9L.2.(b)(1)(b). The enacted budget requires that NCDHHS spend at least $50 million of this block grant for this technology modernization, but they may spend up to a maximum of $59 million. *Id.* Like with the child care subsidy appropriation discussed above, for accuracy, FRD included only the minimum appropriation required to be spent by NCDHHS and included that amount in FY 2021-22's calculations since that is when these federal block grant funds are made available.

iii. Line 59 (CTE Credentials). The enacted State budget appropriates $400,000 from ESSER for students to receive credentials in the hospitality industry, as contemplated by Section VII.B.iii.2 of the CRP, "[e]xpand funds for credentials

and certifications for Career and Technical Education students." OSBM has not included these funds in their analysis.

d. Items Included by OSBM but not Included by FRD. OSBM included four items in their analysis that do not appear in FRD's analysis.

   i. Line 27 – Professional development. The enacted budget appropriates $2.5 million in nonrecurring funds for computer science in FY 2021-22 for several purposes, including for providing training to K-12 teachers. However, the budget does not clearly state which funds are specifically earmarked for training. OSBM has included the entire $2.5 million in professional development. OSBM has also included in their estimate of professional development funds $1,411,256 that were appropriated in FY 2021-22 to the North Carolina Center for the Advancement of Teaching (NCCAT). While NCCAT's mission is to provide professional development, the appropriation does not outline a specific use for these funds.

   ii. Line 33 – Teacher salaries. OSBM has included an additional $305,000 that the enacted budget appropriated in FY 2021-22 and FY 2022-23 for salary increases for teachers at the three residential schools for students who are deaf or blind. As these schools are not referenced in the CRP, we do not include these funds.

   iii. Program Enhancement Teachers. Section III.C.ii.1 of the CRP calls for the completion of the "final two years of funding of the enhancement teacher allotment." The General Assembly appropriated these funds in 2018 N.C. Sess.

L. 2, § 5.(d). As our analysis focuses on funds newly appropriated in the 2021-23 Fiscal Biennium, we did not include these funds.

Total Education Spending

51. The CRP-related appropriations discussed above do not provide the full context with respect to the total amount of education spending appropriated by the enacted budget. **Exhibit E** to this Affidavit lists all K-12 and early education changes the General Assembly made to appropriations to NCDPI and NCDHHS as part of the State budget for the FY 2021-22 and 2022-23 biennium.

52. To highlight just a few of these items, in addition to General Fund net appropriations made for the purposes of funding K-12 education, the State budget includes the following additional appropriations to NCDPI:

a. $48,748,522 in FY 2021-22 and $37,850,910 in FY 2022-23 for school business systems modernization, appropriated from the information technology reserve;

b. $70,252,612 in FY 2021-22 and $78,232,612 in FY 2022-23 for needs-based public school capital projects, appropriated from net revenue generated by the North Carolina Education Lottery, *see* 2021 N.C. Sess. L. 180, § 4.3(a); *see also* N.C. Gen. Stat. § 115C-546.10; and

c. $30,000,000 in FY 2021-22 and $50,000,000 in FY 2022-23 for the Public School Building Repair and Renovations Fund, also derived from the Lottery, *see* 2021 N.C. Sess. L. 180, § 4.3(a); *see also* N.C. Gen. Stat. § 115C–546.15 and .16.

53. An additional $235,000,000 was transferred from surplus net Lottery revenue to needs-based public school capital projects in accordance with Section 5.3(c) of 2017 N.C. Sess. L. 57.

54. In addition to General Fund revenues, the General Assembly has also appropriated additional funds from federal grants to support early childhood education. These include:

a. $247 million from the ARPA Child Care and Development Block Grant in addition to the $256 million shown in **Exhibit D** and

b. $170 million in State Fiscal Recovery Funds:

   i. $150 million in lead and asbestos remediation for public school units and child care facilities and

   ii. $20 million for start-up and capital grants for NC Pre-K classrooms and child care centers.

Effects of Implementing the November 10, 2021, Order

55. In my experience, there is no precedent for how to implement the November 10, 2021, Order instructing the Treasurer, OSBM, and the Controller to transfer approximately $1.75 billion from unappropriated revenues in the General Fund to NCDPI, NCDHHS, and the University of North Carolina System to fund Years 2 and 3 of the CRP without an appropriation by the General Assembly and a process to ensure that the budget remains in balance. Even if the amounts in the Order were reduced to reflect those items that have already been funded, implementing the order would still be problematic for some fiscal-related reasons.

56. First, as discussed above, based on the current Consensus Revenue Forecast, as reflected in the most recent availability statement, the State is not anticipated to have sufficient unappropriated, unreserved revenue to fund the items in the November 10, 2021 Order. While the State is currently projected to have an unappropriated fund balance of $2.39 billion at the end of the FY 2021-22, that money is necessary to fund appropriations in FY 2022-23.

57. Second, the Order directs treasury and budget officials to transfer two years' worth of funding to the specified agencies in one allotment. In the usual process of implementing the State budget, OSBM makes periodic allotments to each department or agency, which the department or agency uses to pay current expenses. Typically, these allotments are made on a quarterly basis. However, they can be made on a monthly, or even shorter, basis if doing so is necessary. This allows OSBM to spread out cash allotments to support appropriations in order to ensure that there is sufficient cash on hand to meet current expenses without causing a possible or potential deficit. Moreover, allotments for appropriations for general operations are normally made only one year at time—not transferred to departments or agencies for multiple years at once.

FURTHER AFFIANT SAYETH NOT.

This the 8th day of April, 2022.

Mark Trogdon

Sworn to and subscribed before
me this 8th day of April, 2022.

Notary Public
My Commission Expires: 12/16/2024

TOMMIE M. PURYEAR NOTARY PUBLIC WAKE COUNTY, NC

CERTIFICATE OF SERVICE

The undersigned certifies that on April 8, 2022, he 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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/s/ Matthew F. Tilley
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EXHIBIT A

NCGA 2021 Legislative Session
Budget and Fiscal Policy Highlights

Fiscal Brief January 20, 2022

Executive Summary

In the 2021 Regular Session, the General Assembly enacted a comprehensive State budget for the FY 2021-23 biennium that provides $26.0 billion in net FY 2021-22 General Fund appropriations. The FY 2021-22 budget represents a 4.3% increase over the comparable FY 2020-21 base operating budget, after adjusting the base operating budget for recurring items funded with nonrecurring receipts, the use of other one-time federal funds, and net General Fund support of debt service. The FY 2022-23 net General Fund appropriation totals $27.0 billion, an increase of 4.1% over the FY 2021-22 total.

Session Law 2021-180 (S.B. 105), 2021 Current Operations Appropriations Act (2021 Appropriations Act), is the first comprehensive State budget bill signed into law since 2018. It provides salary increases and bonuses for educators and State employees, directs the use of billions of dollars in federal support provided through the American Rescue Plan Act (ARPA), reserves billions of dollars for significant Statewide purposes, and substantially revises North Carolina's revenue and tax laws. More specifically, the major components of the Act include:

- **Compensation increases of 5% for most State employees** over the biennium totaling $516.1 million in FY 2021-22 and $899.9 million in FY 2022-23. These totals include $32.1 million to implement an experience-based salary schedule for Correctional Officers and $18.1 million to implement an experience-based salary schedule for Probation Parole Officers in Adult Correction.
- A new $100 million **public school funding allotment** to counties with fewer resources **to increase pay for teachers and instructional support personnel.**
- A guaranteed **$13 per hour minimum wage in FY 2021-22 and a $15 per hour minimum wage in FY 2022-23** for State-funded local employees of public schools and community colleges.
- **A bonus of $1,000 for all State employees and local education employees** and an **additional $500 bonus for certain employees** totaling $545 million from federal State Fiscal Recovery Funds.
- **Reduction of the personal income tax rate from 5.25% to 3.99%** over 6 years and as well as other changes to deductions to further reduce taxes on individuals.
- **Simplification and reduction of the franchise tax base** for corporations that have significant real and personal property investments in the State and **phase out of the corporate income tax over 6 years**, beginning in 2025.
- $900 million for capital **repairs and renovations for State agencies and the UNC System**.
- $878 million in authorized **capital projects for State agencies**, $1.0 billion in **capital projects for the UNC System,** and $400 million in **capital funding for Community Colleges.**
- $5.7 billion in **federal State Fiscal Recovery Funds** for priorities such as **broadband expansion, housing, and water/sewer projects.**
- An $800 million transfer to the **State Emergency Response and Disaster Relief Fund**, from which $411.8 million is appropriated for **disaster recovery** for previous events and for mitigation efforts to prepare for future natural disasters. This appropriation includes $124.4 million for **Tropical Storm Fred relief.**
- A $2.3 billion transfer to the **Savings Reserve Account**, which will bring its total anticipated balance to $4.25 billion in 2023.

Appropriations by Area

The FY 2021-22 State Budget includes $26.0 billion in net General Fund appropriations to State agencies, and the FY 2022-23 State Budget includes $27.0 billion in net General Fund appropriations to State agencies. The following table summarizes all net General Fund appropriations by area:

Table 1: FY 2021-23 Net General Fund Appropriations

Area Committee & Reserves	FY 2021-22		FY 2022-23	
	$	%	$	%
Education	15,447,205,362	59.3%	15,907,737,115	59.0%
Health & Human Services	5,769,608,993	22.2%	6,321,703,715	23.4%
Agriculture, Natural & Economic Resources	861,519,482	3.3%	734,456,308	2.7%
Justice & Public Safety	3,342,604,705	12.8%	3,388,091,287	12.6%
General Government	517,803,580	2.0%	494,113,913	1.8%
Information Technology	89,434,160	0.3%	69,925,602	0.3%
Statewide Reserves	-	0.0%	64,646,670	0.2%
Net General Fund Appropriations	**$26,028,176,282**	**100.0%**	**$26,980,674,610**	**100.0%**

Note: Net General Fund appropriations include S.L. 2021-180 and S.L. 2021-189. Does not include funds provided to the State Capital and Infrastructure Fund, nor other appropriations made in non-General Fund budget codes.

In addition to these net General Fund appropriations, the 2021 Appropriations Act also appropriates all other State Funds, which includes federal funds, fees, tuition, and other departmental receipts. The following table summarizes all State Fund appropriations by area:

Table 2: All FY 2021-23 State Fund Appropriations

Area Committee & Reserves	FY 2021-22		FY 2022-23	
	$	%	$	%
Education	21,119,400,133	35.2%	20,501,299,865	39.4%
Health & Human Services	27,773,097,694	46.3%	25,103,539,865	48.3%
Agriculture, Natural & Economic Resources	3,591,897,508	6.0%	1,170,370,962	2.3%
Justice & Public Safety	3,836,480,712	6.4%	3,712,973,734	7.1%
General Government	1,711,030,895	2.9%	667,067,510	1.3%
Information Technology	1,060,618,295	1.8%	86,621,172	0.2%
Statewide Reserves	849,624,208	1.4%	738,912,381	1.4%
Total General Fund Budget	**$59,942,149,445**	**100.0%**	**$51,980,785,489**	**100.0%**

Note: All State Funds appropriations include S.L. 2021-180 and S.L. 2021-189. Does not include funds provided to the State Capital and Infrastructure Fund, nor other appropriations made in non-General Fund budget codes.

Revenue Picture and General Fund Availability

The Fiscal Research Division and the Office of State Budget and Management estimate General Fund revenue through a consensus revenue forecasting process. Actual FY 2020-21 General Fund revenue exceeded budgeted revenue by an unprecedented $6.2 billion. FY 2020-21 budgeted revenue was based on the consensus revenue forecast released in May 2020, in the initial months of the Covid-19 pandemic amid tremendous uncertainty. At that time, most economic forecasts projected a prolonged and widespread economic downturn that would presumably significantly reduce revenue collections. The actual recession that ensued in the wake of the pandemic was highly unusual and had limited impacts on tax revenue. FY 2020-21 revenue was also boosted by significant federal stimulus and delays in anticipated FY 2019-20 taxpayer payments as the result of extended tax filing deadlines.

The consensus forecast for the FY 2021-2023 biennium was produced in February 2021 and revised upwards in May 2021. The May 2021 forecast anticipates total General Fund revenue of $29.7 billion in FY 2021-22 and $30.7 billion in FY 2022-23. After adjusting for $1.1 billion in delayed taxpayer payments received in FY 2020-21, the consensus forecast expects revenue growth of 3.8% in the first year and 3.4% in the second year, respectively.

The tax law changes enacted during the 2021 Legislative Session and described below are expected to reduce General Fund revenue by $1.3 billion in FY 2021-22 and $2.0 billion in FY 2022-23. Non-tax adjustments are expected to add $33.7 million in FY 2021-22 and $34.7 million in FY 2022-23. After incorporating these changes, General Fund revenue is projected to be $28.4 billion in FY 2021-2022 and $28.8 billion in FY 2022-23.

Finance Overview and Changes

The 2021 Appropriations Act changes several of the State's tax laws:

Personal Income Tax
The Act reduces the Personal Income tax rate from 5.25% to 3.99% over 6 years and increases the standard deduction to $25,500 for tax returns that are filed Married Filing Jointly; the Standard Deduction for other tax return statuses is also increased by varying amounts. The Act also increases the child deduction by $500 and expands eligibility for the deduction to more families. It exempts most military retirement income from taxation effective January 1, 2021. It also conforms to the permanent 7.5% federal medical expense deduction threshold. Except as noted, these changes all are effective for taxable years beginning on or after January 1, 2022. Combined, they will reduce General Fund revenue by $650 million in FY 2021-22 and by $1.7 billion in FY 2022-23; however, the full fiscal impact will not be realized until the changes are fully implemented in 2027, when the Personal Income tax rate drops to 3.99%.

Corporate Income Tax
The Act phases out the Corporate Income tax over 6 years beginning in 2025. This change is projected to reduce General Fund revenue by $60 million in its first year of implementation, but the full fiscal impact will not be realized until the changes are fully implemented in 2030, when the tax is eliminated.

Franchise Tax
The Act simplifies the franchise tax base calculation and, for some taxpayers, reduces the amount of franchise tax due by eliminating the two tax bases calculated using property values. This change is effective for taxable years beginning on or after January 1, 2023 and is applicable to the calculation of franchise tax reported on the 2022 and later corporate income tax returns. This change will reduce FY 2022-23 General Fund revenue by approximately $173 million in its first full year of implementation.

Excise Tax
The Act subjects all cigar sales, whether sold online or in-person, to the existing rate of excise tax, which is 12.8% of the cost price per cigar; it also places a cap on the excise tax in the amount of 30¢ per cigar. This section is effective July 1, 2022 and applies to sales or purchases occurring on or after that date. These changes are expected to increase General Fund revenue by $25 million annually beginning in FY 2022-23, the first year of implementation.

Historic Rehabilitation Tax Credits
The Act both reenacts the Mill Rehabilitation/Railroad Tax Credit and extends the deadline to complete previously eligible mill rehabilitation projects and rehabilitation railroad station projects. Also, it expands the Historic Rehabilitation Tax Credit to include historic schools and extends the tax credit through 2030. The fiscal impact of these changes varies by year. In FY 2021-22, they are expected to increase State revenue by $5 million and in FY 2022-23 are expected to reduce revenue by $16 million.

IRC Conformity
The Act updates the State's adopted reference date to the federal Internal Revenue Code to April 1, 2021, and conforms to:

- The permanent 7.5% federal medical expense deduction threshold.
- The deductibility of expenses using funds from forgiven Pandemic Protection Program (PPP) loans and from similar pandemic-related loan and grant programs.

The cost of conforming to the medical expense threshold is included in the previously-discussed costs of the overall personal income tax changes. The cost of allowing PPP and similar loans to be deducted is limited to the two years of the FY 2021-2023 biennium. The deduction is expected to reduce General Fund revenue by $610 million in FY 2021-22 and by $50 million in FY 2022-23.

Other Tax Changes
Other tax law changes effective for taxable years beginning on or after January 1, 2022 with no estimated State fiscal impact or relatively minor impacts include:

- Limiting the gross premiums tax on surety bonds for bail bonds to the amount remitted by the surety bondsman to the bond insurer. This change will reduce General Fund revenue by up to $1 million annually.
- Allowing pass-through entities to elect to pay State income taxes at the entity level, and thereby not be subject to the federal state and local tax (SALT) cap of $10,000.
- Creating a separate North Carolina Net Operating Loss (NOL) calculation to more closely align to the calculation of North Carolina taxable income for individual income tax purposes.

Reserves and General Fund Availability

After accounting for the tax changes described above, North Carolina's statutes require reservations of General Fund tax revenue for the Savings Reserve and State Capital and Infrastructure Fund (SCIF). In addition to these required reservations, the 2021 Appropriations Act includes other discretionary reservations into these reserves/funds.

Savings Reserve
The 2021 Appropriations Act makes significant deposits into the State's Savings Reserve. At the start of the 2021 legislative session, the Savings Reserve's balance was approximately $1.1 billion. Per statute, the State Controller must adjust the transfer to the Savings Reserve at the end of each fiscal year to achieve an amount equivalent to 15% of the actual growth in State tax revenues deposited in the General Fund. This statutory requirement resulted in a one-time transfer of $877.7 million from the General Fund unreserved fund balance at the end of FY 2020-21 fiscal year, which brought the Savings Reserve's balance close to $2 billion to start FY 2021-22.

The tax law changes enacted during the 2021 legislative session are projected to reduce State tax revenue each year of the biennium such that there is not forecasted growth in net General Fund tax revenues year over year. As a result, there will be no statutorily-required transfers to the Savings Reserve in this biennium, per G.S 143C-4-2. Recognizing this situation, the General Assembly directed the additional transfers of $1.1 billion from the General Fund to the Savings Reserve in each year of the 2021-23 biennium to bring the anticipated total balance to a record $4.25 billion by June 30, 2023, assuming no withdrawals are authorized before then. This anticipated balance would exceed the 2021 recommended Savings Reserve target amount of $2.67 billion by nearly $1.6 billion.

State Capital and Infrastructure Fund (SCIF) Revenues
The SCIF was first authorized in the 2017 Appropriations Act, S.L. 2017-257. It was intended to modify the State's approach to funding capital projects by annually reserving General Fund revenue to pay down existing State debt service and transition to funding State capital projects on a cash-flow basis as opposed to the historical practice of using debt and large lump-sum net General Fund appropriations to support major projects. Although the 2017 Appropriations Act anticipated that the SCIF would first become operational in FY 2019-2020, the lack of a comprehensive budget in the FY 2019-2020 biennium prevented full SCIF implementation.

The 2021 Appropriations Act fully implements the SCIF for the first time by reserving the following General Fund revenue for use in the SCIF:

Table 3: SCIF Revenue Reservations ($ in Millions)

Fiscal Year	Required Reservation	Additional Reservation	Total Revenue
2021-22	1,315.0	2,349.3	3,664.3
2022-23	1,360.5	1,039.5	2,400.0
Total, SCIF Revenues	**$2,675.5**	**$3,388.8**	**$6,064.3**

It also modifies the statutorily-required reservations of revenue for the SCIF by changing the funding requirement from 25% of the year-end fund balance and 4% of annual tax revenue to a new method. Initially, it specifies annual reservations as follows:

Table 4: Annual SCIF Revenue Reservations ($ in Millions)

FY 2021-22	FY 2022-23	FY 2023-24	FY 2024-25	FY 2025-26
$1,300.0	$1,345.5	$1,392.6	$1,441.3	$1,100.0

In future years, the SCIF reservation will increase annually by 3.5% over the prior year's amount. A later section of this brief summarizes the use of SCIF revenues in the 2021 Appropriations Act to fund debt service, capital projects, and repairs and renovations of State-owned buildings.

All Other Reserves

In addition to reserving $8.3 billion for the Savings Reserve and SCIF, the 2021 Appropriations Act reserves the following additional amounts:

Table 5: All Other Reserves ($ in Millions)

Reserve Name	FY 2021-22	FY 2022-23	Purpose of Reserve
Medicaid Contingency	125.0	-	Set-aside to offset Medicaid costs that exceed budgeted estimates
Medicaid Transformation	215.8	246.0	Support for the one-time costs associated with transitioning Medicaid from a fee for service to a managed care model
Information Technology	110.0	165.0	Fund major information technology projects at four State agencies
State Emergency and Disaster Response	425.0	375.0	Support disaster relief, recovery, mitigation and resiliency efforts
Economic Development Project	338.0	-	Fund expenditures associated with economic development projects meeting or exceeding high-yield project metrics
Unfunded Liability Solvency	40.0	10.0	Dedicate additional funds to offset long-term liabilities for employee benefits
Wilmington Harbor Enhancements	283.8	-	Set-aside to fund cost of State match for an anticipated federal grant to improve capacity at Port of Wilmington

In all, the 2021 Appropriations Act reserves approximately $10.6 billion in total, with more than $6.3 billion reserved in FY 2021-22 and over $4.3 billion in FY 2022-23.

The enacted State Budget provides net General Fund appropriations of $26.0 billion in FY 2021-22 and $27.0 billion in FY 2022-23. The remainder of this Brief will review major funding actions taken in the 2021 Appropriations Act and related legislation. Appendix A provides an Availability Statement that reflects the availability of revenues prior to the beginning of FY 2021-22 and details the actions taken by the General Assembly, including tax changes, reservations of revenues, and appropriations.

Salaries and Benefits

Salary Adjustments for State Employees and Community College Employees

The 2021 Appropriations Act provides net General Fund appropriations of $516.1 million in FY 2021-22 and $899.9 million in FY 2022-23 to support salary increases for State employees and State-funded local employees. The following list summarizes notable funding items in this category:

- $171.4 million in FY 2021-22 and $362.0 million in FY 2022-23 to fund a 2.5% across-the-board increase in each year of the biennium for most State employees, University employees, and Community College employees.
- $8.7 million in FY 2021-22 and $12.3 million FY 2022-23 to establish a Community College Faculty Recruitment/Retention Fund.
- $5 million to increase funding for the UNC Faculty Recruitment/Retention Fund.
- An enhanced minimum wage for all State-funded Public School and Community College employees to $13/hour in FY 2021-22 and $15/hour in FY 2022-23
- $32.1 million to implement an experience-based salary schedule for Correctional Officers in the Department of Adult Correction (DAC), which will increase salaries by an average of 7% (see Appendix B for a Corrections Officer Salary Schedule); also, $5.2 million to alleviate salary compression for other DAC certified staff. This increase is partially offset in FY 2022-23 by a $15 million reduction resulting from the elimination of the High Needs Facility Salary Supplements program, which had provided salary supplements to correctional personnel in prisons with high vacancy rates.
- $18.1 million to implement an experience-based salary schedule for Probation/Parole Officers (see Appendix C for a Probation/Parole Officer Salary Schedule), which will increase salaries by approximately 17%, on average.

Salary Adjustments for Teachers and Instructional Support Personnel

The 2021 Appropriations Act increases each experience level of the base teacher salary schedule by 1.3% in FY 2021-22 and appropriates funds to provide an additional 1.3% increase to each step in FY 2022-23 (see Appendix D for a Teacher Salary Schedule Comparison). Including step increases, the average teacher salary increase is approximately 2.5% in each year of the biennium. Other major actions for this category include:

- $100 million to increase salary supplements provided to teachers and instructional support personnel employed in counties with less ability to provide local salary supplements. The funding for each LEA varies depending on the county's tax base, median household income, and effective tax rate. Counties with a property tax base greater than $40 billion are not eligible for this allotment. The estimated allocations from this allotment may be found in Appendix E.
- $4.3 million for a matching recruitment bonus (1:1, State/Local) for teachers accepting employment in school systems that receive funding from the small county or low-wealth allotments. The maximum State-funded bonus is $1,000.
- A $1,000 bonus in FY 2021-22 from federal Elementary and Secondary School Emergency Relief Fund (ESSER III) funds for teachers receiving training related to COVID-19.
- An additional $350 per month to the salary schedule for school psychologists, audiologists, and speech pathologists (Equates to $3,500 annually, as these employees are hired on 10-month contracts).
- An additional $100 per month to the salary schedule for school counselors (Equates to $1,000 annually, as these employees are hired on 10-month contracts).
- A revision to the teacher personal leave requirements to allow teachers an option to avoid paying for substitutes when using personal leave.
- An across-the-board bonus of $300 in FY 2021-22 from repurposed funds previously appropriated for performance bonuses that cannot be paid due to COVID-19 related data issues.

Salary Adjustments for Other Public School Personnel
As with public school teachers and instructional support personnel, other public school personnel are also local employees but many of these staff are paid with State funds. In addition to the compensation increases specified above, the 2021 Appropriations Act appropriates funds to support compensation increases for other State-funded local employees of public schools:

- **Noncertified Personnel** - A pay increase that is the greater of 2.5% or increase to $13/hour in FY 2021-22 and another increase in FY 2022-23 that is the greater of 2.5% or increase to $15/hour.
- **Central Office** - A 2.5% across-the-board salary increase in each year of the biennium.
- **Principals** - A 2.5% increase to the salary schedule in each year of the biennium and an across-the-board $1,800 bonus from funding for performance bonuses that can't be paid due to COVID-caused data quality issues.
- **Assistant Principals** - Pay for these personnel remains 19% greater than the commensurate base teacher salary schedule level.

American Rescue Plan – Premium Pay Bonuses
The 2021 Appropriations Act appropriates $545 million in FY 2021-22 from the federal State Fiscal Recovery Fund (SFRF) to provide premium pay bonuses to State employees and local education employees, regardless of funding source. The maximum bonus an employee could receive is $1,500, which is determined as follows:

- $1,000 for State employees and local education employees.
- An additional $500 for the same employees if they meet any of the following criteria:
    - Annual salary is less than $75,000,
    - Is a law enforcement officer,
    - Works in the Division of Adult Correction and Juvenile Justice and has frequent in-person contact, or
    - Works in a position at a 24-hour residential or treatment facility operated by DHHS.

The 2021 Appropriations Act also allocates $133 million from the SFRF for bonuses to direct care workers employed by providers that participate in certain Medicaid programs and who worked at least 1,000 hours in a direct care setting since the beginning of the pandemic. It is estimated that these funds will be sufficient to support a bonus of approximately $2,000 per eligible worker.

Benefits Adjustments and Related Items of Interest
The 2021 Appropriations Act provides net appropriations of $308.3 million in FY 2021-22 and $521.9 million in FY 2022-23 to support increasing costs associated with benefits provided to State-funded employees and provide a 2.0% retiree supplement in FY 2021-22 and a 3.0% retiree supplement in FY 2022-23. The specifics of these additional appropriations are as follows:

- $174.9 million in FY 2021-22 and $270.7 million in FY 2022-23 to increase employer premiums to the State Health Plan for active employees.
- $60.7 million in FY 2021-22 and $142.1 million in FY 2022-23 to increase contributions to State retirement systems and the Retiree Health Benefit Fund for retiree medical benefits.
- $72.8 million in FY 2021-22 and $109.1 million in FY 2022-23 to provide a 2.0% one-time supplement (bonus) in December 2021 and another 3.0% supplement in the fall of 2022 to State retirees.
- Up to $101 million from the State Fiscal Recovery Fund and up to $114 million from remaining funds in the Coronavirus Relief Fund to reimburse the State Health Plan for COVID-19 testing, treatment, and vaccination administration.

The Act also transfers $40.0 million in FY 2021-22 and $10.0 million in FY 2022-23 to the Unfunded Liability Solvency Reserve to increase contributions to State retirement systems and the Retiree Health Benefit Fund.

State Fiscal Recovery Fund Program

The federal American Rescue Plan Act of 2021 (ARPA) provided flexible funding to states through its newly established State Fiscal Recovery Fund (SFRF) program. SFRF funds may be used for the following purposes:

1. **Public Health and Economic Impacts**. Support urgent COVID-19 response efforts to continue to decrease spread of the virus and respond to the economic challenges caused by the pandemic.
2. **Premium Pay**. Compensate essential workers for heightened risk due to COVID-19.
3. **Revenue Loss**. Offset lost revenue for eligible state, local, territorial, and Tribal governments to strengthen support for vital public services and to help retain jobs.
4. **Investments in Infrastructure**. Make necessary investments in water, sewer, and broadband infrastructure.

North Carolina is allocated $5.4 billion in SFRF funding; the State has already received half of these funds, with the other half to be received in May 2022. Additionally, ARPA allocated to North Carolina $277 million in Coronavirus Capital Projects funding. These two federal funding sources provided the State a combined total of $5.7 billion.

The 2021 Appropriations Act appropriates nearly all of this $5.7 billion for a multitude of purposes; however, almost 70% of the funding is targeted to these 4 areas:

- Water/Sewer/Stormwater - $1.7 billion (31%).
- Broadband - $960 million (17%).
- Bonus Pay for State and local employees and certain direct care workers - $678 million (12%).
- Business Recovery Grants - $500 million (9%).

State Fiscal Recovery Funds appropriated in the budget do not revert at the end of each fiscal year but remain available to be expended until the date set by federal law or guidance. For a complete listing of programs and projects funded from the State Fiscal Recovery fund, please see Appendix F.

Other American Recovery Plan Act Funding

In addition to State Fiscal Recovery Fund support, ARPA provided billions of dollars to North Carolina through a number of other federal grants. These include funds for education, homeowner and rental assistance, food and other income assistance, child care, and transportation. Approximately $6.4 billion of these funds were appropriated in S.L. 2021-25, Additional COVID Response and Relief. The 2021 Appropriations Act appropriates an additional $1.4 billion in non-SFRF ARPA grant funds not previously appropriated in S.L. 2021-25. Additional detail on these grants is available in Appendix G.

State Emergency Response and Disaster Relief Fund (SERDRF) and Related Activities

The 2021 Appropriations Act transfers $800 million into the SERDRF, of which $411.8 million is appropriated for various disaster recovery, flood mitigation, and emergency preparedness purposes, such as:

- $287.4 million for projects across the State aimed at recovery from previous hurricanes and flooding events and enhanced preparation for future disasters.
- $124.4 million is dedicated specifically to recovery from 2021's Tropical Storm Fred.

Disaster recovery and flood mitigation funds are distributed across several agencies, including but not limited to:

- $60 million to the Division of Emergency Management (NCEM) at the Department of Public Safety (DPS). These funds are distributed into three new Special Funds:
    - A State Match fund to house the State's share of costs for FEMA projects ($30 million).
    - The Disaster Relief and Mitigation Fund, which will support a new competitive grant program for disaster and flood preparedness projects across the State ($15 million).
    - The Transportation Infrastructure Resiliency Fund, which will provide competitive grants for transportation-related preparedness and mitigation projects ($15 million).

- $70.4 million to the Department of Environmental Quality (DEQ) for various projects, including support for the Coastal Storm Damage Mitigation Fund ($40 million) and the creation of a Flood Resiliency Blueprint to guide long-term planning and best practices for flood mitigation statewide ($20 million).
- $39.5 million to the Department of Agriculture and Consumer Services (DACS), primarily for the new Streamflow Rehabilitation Assistance Program that will provide competitive grants for stream debris removal, stabilization and restoration of streams and streambanks, and rehabilitation/improvement of small watersheds.
- $124.4 million for Tropical Storm Fred recovery, including $72 million to NCEM for needs unmet by federal aid related to housing reconstruction and repairs, local government projects, privately owned roads and bridges, and emergency response equipment, and $50 million to DACS for Crop Loss Assistance Grants.

Major Budget Issues of Interest

Given the breadth and scope of new funding provided in the 2021 Appropriations Act, the remainder of this Budget Brief will provide additional detail on certain major topic areas. These sections will not provide an exhaustive review for each area, but instead will provide highlights of significant funding actions.

Education

This Budget Brief previously detailed increased appropriations for the salaries and benefits of education personnel, which is the largest investment within the education section of the 2021 Appropriations Act. However, the Act also provides significant funding to other education priorities.

Elementary and Secondary Education

The 2021 Appropriations Act includes targeted funding increases in the Department of Public Instruction and University of North Carolina (UNC) budgets to support students in grades kindergarten through twelfth (K-12) and responds to the COVID-19 pandemic using multiple approaches, such as:

- A "hold harmless" for K-12 public school units to address enrollment decreases below anticipated FY 2021-22 Average Daily Membership (ADM).
- $35.0 million to fund the impact of additional children with disabilities and other students if actual enrollment exceeds projected levels.
- $338.7 million in federal Elementary and Secondary School Emergency Relief Fund (ESSER III) funds from the American Rescue Plan Act to multiple statewide programs, which are largely focused on addressing learning loss and the particular needs of students especially impacted by the pandemic, such as economically disadvantaged students, students with disabilities, and English language learners.

Another major priority of the 2021 Appropriations Act is continued support for K-12 students' school choice options. The North Carolina State Education Assistance Authority (NCSEAA) is part of the UNC system and administers all K-12 school choice programs. The State's largest K-12 school choice program is the Opportunity Scholarship Program (OSP), which provides private school scholarships to K-12 students based on household income eligibility. In this regard, the 2021 Appropriations Act:

- Increases the income level a household may have for a student to be eligible for an Opportunity Scholarship, raising it from 150% to 175% of the income level needed to qualify for the National School Lunch Program's reduced-price meals.
- Increases the maximum OSP award from $4,200 to 90% of the prior year State-funded per pupil allocation for public schools (the maximum amount in FY 2022-23 will be $6,168).
- Provides NCSEAA $19.0 million nonrecurring for the Opportunity Scholarship Grant Reserve in FY 2021-22 and an additional $30.0 million recurring in FY 2022-23 to support additional OSP awards.
- Expands the scheduled OSP statutory appropriations increases beyond the biennium. The revised appropriation to the Opportunity Scholarship Grant Reserve totals $120.5M in FY 2023-24 and increases by $15.0M in each subsequent year until FY 2032-33.
- Creates a consolidated K-12 scholarship program for children with disabilities called Personal Education Student Accounts, which streamlines two existing programs with that purpose. It provides an additional $5.0 million in FY 2021-22 and $15.6 million recurring in FY 2022-23 for the newly consolidated program.

In addition to salaries and benefits enhancements for public school personnel, COVID-19 response, and School Choice expansion, the 2021 Appropriations Act also supports other initiatives intended to benefit K-12 students. It creates a new funding allotment for school psychologists that will provide support for 115 new school psychologist positions, one for every local school administrative unit (LEA) in the State. It also provides $13.2 million in additional recurring funds to serve a greater percentage of school-age children with disabilities. School districts will receive $4,600 for each child identified with disabilities up to 13% of the school district's ADM. Previously the funding was capped at 12.75% of ADM. These funds enable school districts to address the individual needs of students with disabilities.

Higher Education

In addition to compensation increases for higher education personnel, the 2021 Appropriations Act directs federal and State funds to several significant higher education priorities, including $80.0 million from federal State Fiscal Recovery Fund (SFRF) to community colleges that experienced enrollment declines due to the COVID-19 pandemic. In addition, $31.5 million of SFRF proceeds is directed to expand the Longleaf Commitment Grant program to include Class of 2022 high school graduates with an expected family contribution below $15,000. This program provides scholarship support to North Carolina community college students.

The 2021 Appropriations Act also supports affordable access to the UNC system. It provides an additional $15.0 million in FY 2021-22 and $31.5 million recurring in FY 2022-23 for the NC Promise Tuition Plan. This program reduces tuition costs to $500 per semester for resident students and $2,500 per semester for nonresident students at four participating UNC institutions (Elizabeth City State University, Fayetteville State University, the University of North Carolina at Pembroke, and Western Carolina University). The additional funds support the costs associated with underlying program growth as well as the addition of Fayetteville State University to the program in FY 2022-23.

Health and Human Services

The 2021 Appropriations Act provides major allocations of federal and State funds to the Department of Health and Human Services (DHHS) to respond to COVID-19 impacts. The two most significant focus areas are in child care and Medicaid.

Child Care

During the 2021 Session, the General Assembly appropriated over $1.6 billion in one-time federal funds that were specifically designated to support child care and early education. In addition, the General Assembly provided $170 million from the State Fiscal Recovery Fund (SFRF) towards child care and early education-related initiatives. The details are as follows:

- S.L. 2021-3, 2021 COVID-19 Response & Relief, appropriates $336 million from federal Child Care and Development Fund (CCDF) block grant funds provided in December 2020. This law stipulated that these funds may be spent on copayment assistance for families receiving subsidized child care, cleaning needs, operational grants for providers, learning loss, and summer enrichment activities.
- S.L. 2021-25, Additional COVID Response and Relief, allocates $806 million in federal Child Care Stabilization Grants, which directly support child care providers; providers can spend these funds on a variety of key operating expenses, including wages and benefits, rent and utilities, cleaning and sanitization supplies and services, and many other goods and services necessary to maintain or resume child care services.
- The 2021 Appropriations Act allocates another $507 million from the federal CCDF block grant, provided to the State through the American Rescue Plan Act (ARPA). The Act stipulates that these funds may be spent on subsidized child care services, copayment assistance for families receiving subsidized child care, improving early childhood technology infrastructure, and workforce initiatives meant to build the State's supply of qualified child care teachers.
- The Act also provides $150 million from the SFRF for lead and asbestos remediation in public schools and child care facilities, as well as $20 million from the SFRF for start-up and capital grants for NC Pre-K classrooms and child care facilities.

Medicaid

In addition to fully funding the projected costs of the State share of Medicaid services over the FY 2021-23 biennium, the 2021 Appropriations Act also supports an enhancement of Medicaid Home and Community-Based Services (HCBS). HCBS services and supports help Medicaid beneficiaries avoid institutionalization and remain in their homes or other community settings. The HCBS enhancements are funded through March 31, 2024, initially from funds made available in the ARPA and subsequently with funds to be collected from hospitals. ARPA provides a 10 percentage-point increase in the federal match for Medicaid HCBS claims paid between April 1, 2021 and March 31, 2022 for states that agree to use the savings to strengthen, expand, and enhance HCBS.

The 2021 Appropriations Act deposits an estimated $275 million in State savings from this enhanced federal match into a new HCBS Fund, which will be used this biennium to fund the State share of:

- Enhanced Medicaid HCBS reimbursement rates that will be used to increase HCBS direct care worker wages, as well as an enhanced private duty nursing rate.
- Greater participation in Medicaid waiver programs, including at least 1,000 additional Innovations waiver slots.
- Increases to the State-County Special Assistance (SA) In-Home program income eligibility that bring it into parity with the SA Adult Care Home program, effectively merging the two programs.
- Other HCBS enhancements.

The HCBS Fund will retain an estimated $98 million at the end of the biennium that is expected to be used to continue funding the State share of the enhancements into FY 2023-24. Beginning April 1, 2024, approximately $142 million in recurring HCBS costs from these enhancements will be supported with an increase in hospital assessments and intergovernmental transfers.

The 2021 Appropriations Act also creates a Joint Legislative Committee on Access to Healthcare and Medicaid Expansion (Committee) to consider ways to improve access to health care and health insurance. The Committee may submit proposed legislation before its termination following final adjournment of the 2021 General Assembly. Although the Act does not authorize broad Medicaid expansion, it does support the following new initiatives that increase the State's Medicaid program eligibility and are expected to increase monthly Medicaid enrollment by nearly 35,000 participants:

- Beginning April 1, 2022, Medicaid benefits for new mothers are extended from 60 days postpartum to 12 months postpartum for a 5-year period authorized by the ARPA. The State cost for the additional enrollment (approximately $50 million annually) is funded by an increase in hospital assessments and transfers.
- DHHS is directed to seek federal approval to allow the parents of children temporarily placed in the foster care system to retain Medicaid benefits if they are making reasonable efforts to comply with court-ordered reunification plans. The Act provides $8.1 million in FY 2021-22 and $18 million recurring in FY 2022-23 to fund the impact of this anticipated change.
- The previously discussed SA program changes that merge the In-Home and Adult Care Home programs will increase Medicaid enrollment because all SA participants, including those who qualify for the expanded SA In-Home program, automatically qualify for Medicaid.

Capital Investments

State Capital and Infrastructure Fund (SCIF) Allocations
The 2021 Appropriations Act provides $6.1 billion from General Fund revenues to the State Capital and Infrastructure Fund and appropriates $5.8 billion of these funds over the FY 2021-23 biennium. As discussed earlier in this Budget Brief, it also modifies the statutorily-required revenue reservations to the SCIF.

From the $6.1 billion made available to the SCIF this biennium, the 2021 Appropriations Act makes a variety of authorizations to begin new capital projects at State-owned facilities as well as appropriations for all manner of capital-related activities. Of particular note, the Act authorizes a total of $878.3 million in capital projects for State Agencies and a total of $1.0 billion in capital projects for the UNC system. SCIF project authorizations allow projects to commence that will take more than the length of the biennium to complete. Appropriations of SCIF revenues for those projects may only be made for the FY 2021-23 budget, in keeping with the duration of the 2021 Appropriations Act; projects with a projected life cycle beyond FY 2022-23 will require additional appropriations in future years from projected SCIF revenues. Total SCIF authorizations in the Appropriations Act represent the full estimated cost of the projects, including funds the General Assembly intends to appropriate in future biennia to complete the projects. The following chart summarizes all SCIF-funded appropriations in the 2021 Appropriations Act for the FY 2021-2023 biennium.

Table 6: SCIF Budget Appropriations by Area ($ millions)

Area	FY 2021-22	FY 2022-23
State Debt Service	661.6	637.8
State Debt Elimination/Avoidance	229.7	58.0
State Agency Repairs & Renovations	200.0	200.0
UNC System Repairs & Renovations	250.0	250.0
State Agency Capital Projects	313.6	244.4
UNC System Capital Projects	279.8	302.5
Water Resources Development Projects	44.5	35.2
Land and Water Trust Fund	37.5	37.5
Parks and Recreation Trust Fund	37.5	37.5
Airports	115.1	11.5
Stream Debris Removal	96.1	-
Community Colleges	317.2	177.8
Courthouses	133.9	15.5
Dams	63.1	-
Historic Sites	20.8	-
Hospitals	53.0	-
K-12 Athletic Facilities	44.0	-
Local Government Infrastructure	119.0	-
Parks and Recreation	87.4	-
Other Non-State Entities	533.2	136.7
Total, Net SCIF Appropriations	**$3,652.0**	**$2,159.5**

Lottery Funding Support for Public School Capital
The 2021 Appropriations Act also provides a total of $510.3 million in FY 2021-22 and $303.3 million in FY 2022-23 from the Education Lottery Fund to support K-12 public school capital. The notable additional funding available in FY 2021-22 is driven by actual Lottery revenue that exceeded FY 2020-21 budgeted Lottery revenue by $235.1 million. Pursuant to G.S. 18C-164(b3), these surplus funds are statutorily appropriated to the Needs-Based Capital Fund. Furthering investment of Lottery revenues for school capital purposes, the 2021 Appropriations Act also creates a new Public School Repairs and Renovations (Public School R&R Fund) program. Funding by program for public school capital is summarized as follows:

Table 7: Public School Capital Funding ($ millions)

Program	FY 2020-21 Surplus	FY 2021-22	FY 2022-23
Public School Building Capital Fund	N/A	100.0	100.0
Needs-Based Capital Fund	235.1	145.3	153.3
Public School R&R Fund	N/A	30.0	50.0

The 2021 Appropriations Act makes several notable programmatic changes to the Needs-Based Capital Fund, including:

- Increasing the maximum grant award from $15 million to $50 million.
- Increasing the number of counties eligible to receive a grant from 80 to 95 in FY 2021-22 by repealing the use of the Tier system and replacing it with an evaluation based on the size of the county tax base.
- Reducing the county funding match requirement in most cases by examining the county tax base instead of applying a match requirement dependent on Tier designation.
- Allowing grants to be provided for repair and renovation of schools instead of only for new construction.

In addition to the changes made to the Needs-Based Capital Fund, the 2021 Appropriations Act creates a new Public School R&R Fund that will provide each county an equivalent amount of funding based on the amount of funding appropriated to the Fund. As a result, all 100 counties will receive $300,000 in FY 2021-22 and $500,000 in FY 2022-23 for public school repairs and renovations.

Environmental Priorities
The 2021 Appropriations Act provides over $2.0 billion to address environmental issues using a variety of funding sources, including the General Fund, the SFRF, the SERDRF, and the SCIF. As the following sections discuss, funds are allocated for the following purposes: 1) flood mitigation and coastal resiliency, 2) stream debris removal, 3) land preservation, parks and trails expansion, and 4) water, sewer, and stormwater infrastructure.

Flood Mitigation and Resiliency
Nearly $120 million is allocated from the State Emergency Response and Disaster Relief Fund to the Departments of Agriculture (DACS), Environmental Quality (DEQ), and Natural and Cultural Resources (DNCR) for environmental needs related to disaster mitigation and resiliency as follows:

- $38 million to DACS for the Streamflow Rehabilitation Assistance Program, a new program which will provide grants to local governments, nonprofits, and soil and water conservation districts for routine maintenance to streams and drainage ways by removing accumulated debris or sediment and restoring streambanks.
- $20 million to DEQ's Division of Mitigation Services to develop a statewide Flood Resiliency Blueprint to increase community resiliency, provide a resource for stream management, and support the establishment of local government stormwater maintenance programs.
- $41.5 million to DEQ's Division of Coastal Resources for the local coastal planning and management grants, two time-limited coastal resiliency planners, and funding for the Coastal Storm Damage Mitigation Fund.
- $15 million to the NC Land and Water Fund (NCLWF) in DNCR for grants to reduce flood risks in floodplains or wetlands across the State.

Land Preservation, Parks, and Trails Expansion
General Fund appropriations and SCIF allocations are provided for the NCLWF ($48.5 million in FY 2021-22; $51.5 million in FY 2022-23) and the Parks and Recreation Trust Fund ($45.5 million per year). In addition, a new Trails Grants program is created to provide planning, land acquisition, and construction grants for State trails ($29.3 million).

Water, Sewer, and Stormwater Infrastructure
The 2021 Appropriations Act allocates $1.8 billion for water, sewer, and stormwater infrastructure from the SFRF. Of those funds, $82 million is provided to the Department of Commerce (Commerce) for water and sewer projects related to economic development, including $40 million for motorsports venues. An additional $40 million is provided to DNCR for water and sewer projects at State parks. A new stormwater grant program in DEQ is allocated $100 million to provide funding to local governments for stormwater infrastructure. Lastly, $1.5 billion is provided to DEQ for grants to local water and sewer utilities to be distributed as follows:

- $456.4 million to the Viable Utility Reserve to assist units identified by the State Water Infrastructure Authority as being distressed.
- $317.5 million for systems at risk of becoming distressed.
- $732.5 million for all other systems.
- $80.0 million for grants for asset inventory assessments and training.

Economic Development
The 2021 Appropriations Act provides over $1 billion to support economic development from a variety of funding sources, including the General Fund and the State Fiscal Recovery Fund (SFRF). As the sections below discuss, funds are allocated across these economic development areas: 1) small business support, 2) industry support, and 3) site and infrastructure development.

Small Business Support
Funds are allocated from the General Fund and the SFRF to the Departments of Commerce, Revenue (DOR), and Administration (DOA) for small business support programs as follows:

- $500 million to DOR for the Business Recovery Grant Program, a new program to aid businesses in the State that suffered substantial economic damage from the COVID-19 pandemic.
- $20 million to DOA for RETOOL NC Grants, which support small, historically underutilized businesses.
- $5 million in FY 2021-22 and $2 million in FY 2022-23 to Commerce for the One NC Small Business Program, which provides matching and incentive grants to small businesses applying for the competitive federal Small Business Innovation Research (SBIR) and Small Business Technology Transfer (STTR) grants.

Industry Support
General Fund and SFRF appropriations are provided to Commerce for programs supporting industries in the State, including:

- $5 million each year for the E-Sports Industry Grant Fund to encourage e-sports events to be held in the State.
- $5 million for grants to sanctioned motorsports venues and $1 million for grants to small motorsports venues to offset the impacts of the COVID-19 pandemic, and funds may be used to support planned expansions or upgrades delayed due to the pandemic.
- $500,000 each year for the Shellfish Growers Loan Program, which provides low-interest loans to shellfish growers in the State.

Site and Infrastructure Development
The 2021 Appropriations Act establishes an Economic Development Project Reserve and reserves $338 million for this purpose. Of these funds, $135 million is appropriated to Commerce to be transferred to the Department of Transportation (DOT) for site and roadwork at the Guilford-Randolph megasite to support the location of the Toyota electric vehicle battery plant at the site. An additional $18 million is allocated to Commerce for a grant to relocate utility lines at the megasite.

S.L. 2021-189, 2021 Budget Technical Corrections, modifies the 2021 Appropriations Act and appropriates $106.8 million in net General Fund appropriations to Commerce for site work, road work, and the construction of new hangars at the Piedmont Triad International Airport should an airplane manufacturer receive a Job Development Investment Grant (JDIG) award to locate at that site.

In addition to the investments in these sites, the 2021 Appropriations Act also transfers $15 million in both years of this biennium from Commerce to DOT for an interchange project in Buncombe County. The 2021 Appropriations Act also supports enhanced infrastructure development through North Carolina's ports by establishing a new Wilmington Harbor Enhancement Reserve with $283.8 million reserved for this purpose. The funds are intended to be used to match anticipated federal grant funds for deepening the Wilmington Harbor to enable access by heavier vessels.

Justice and Public Safety Restructuring and Other Significant Items

The 2021 Appropriations Act changes the organization of Department of Public Safety (DPS) by transferring the functions of Prisons, Community Corrections (renamed Community Supervision and Reentry), Prison and Community-based Substance Abuse Treatment Services, and Correction Enterprises from DPS to a new Cabinet-level agency, the Department of Adult Correction. This new Department will be dedicated to the care, custody, and supervision of all adults convicted of violating North Carolina laws. As part of the reorganization, the Act also establishes Juvenile Justice as a standalone division within DPS to focus attention and resources on at-risk youth and offenders under its supervision.

To address longstanding budgetary deficits in inmate medical costs, the 2021 Appropriations Act provides an additional $45 million in State Fiscal Recovery Funds and $60.6 million in net General Fund appropriations over the biennium to the new Department of Adult Correction. In addition to funding inmate medical deficits, this amount includes $7.2 million to staff and operate a long-term care facility at Central Prison and $3.4 million to address budgetary shortfalls in prison pharmacy services. These appropriations are intended to help the new agency avoid cost overruns, which have been offset in recent years using lapsed salary funds from across DPS divisions.

Affordable Housing and Housing Assistance

The 2021 Appropriations Act includes over $244 million in total funding for affordable housing and housing assistance across the State. This amount includes $230 million from the State Fiscal Recovery Fund (SFRF), $12 million from the State Emergency Response and Disaster Relief Fund, and just over $2 million from net General Fund appropriations. The majority of the funding, $227 million, is for production of affordable housing units, including $170 million to the NC Housing Finance Agency for the Workforce Housing Loan Program (WHLP). The WHLP provides 0% interest loans for multi-family housing developments that receive federal low-income housing tax credits. It helps reduce rents for families and individuals with low and moderate incomes. The 2021 Appropriations Act also includes funding for Habitat for Humanity and for affordable housing projects in Dare County, Robeson County, and the City of Winston-Salem.

The 2021 Appropriations Act also provides $17 million to the NC Department of Health and Human Services for housing assistance. Of that amount, $15 million from the SFRF is directed for rapid rehousing services for individuals and families at risk of homelessness. These funds may be used to provide financial assistance to cover the cost of rent, utilities, temporary housing, and home repairs. The Appropriations Act also increases the base budget for the Key Rental Assistance program by $2 million from the General Fund to a total of $7.3 million in recurring funds. This program provides rental subsidies for low-income, disabled individuals living in integrated community settings.

In addition to the $244 million in the 2021 Appropriations Act, S.L. 2021-25 includes $830 million in federal American Rescue Plan Act funds to provide financial assistance to renters, via the Emergency Rental Assistance Program, and homeowners, via the Homeowner Assistance Fund, who were negatively impacted by the COVID-19 pandemic.

Transportation

The 2021 Appropriations Act provides a total of $4.2 billion in FY 2021-22 and $4.3 billion in FY 2022-23 from the Highway Fund and Highway Trust Fund for transportation operations, maintenance, and construction. The transportation revenues are comprised of motor fuels tax, highway use tax, and Division of Motor Vehicle fees. As part of the Act, the General Assembly increased the revenues for the Department of Transportation by $70 million in FY 2021-22 and $75 million for FY 2022-23 by permanently transferring short-term lease vehicle tax revenues from the General Fund into the Highway Fund. Increased revenue is appropriated for highway maintenance, bridges, and small construction projects.

As noted in the Site and Infrastructure section of this Budget Brief, the 2021 Appropriations Act establishes the Wilmington Harbor Enhancement Reserve and provides it with $283.8 million from the General Fund. These funds are set aside for the Wilmington Harbor Navigation Improvement Project, which would deepen the 40.2-mile channel to the Port of Wilmington by up to 5 feet, thereby allowing heavier vessels to call the Port. The balance provided to the Reserve would fully fund the projected State match for this anticipated federal project.

Appendix A: FY 2021-23 Revised General Fund Availability Statement

		FY 2021-22	FY 2022-23
1	Unappropriated Balance Remaining FY 2020-21	457,272,694	2,362,641,444
2	Actual/Anticipated Reversions	523,224,136	200,000,000
3	Actual Over Collections[1]	6,212,632,914	-
4	S.L. 2021-19: UNC Building Reserves/Certain Projects	(2,359,159)	-
5	Actual Transfer to Savings Reserve	(877,717,564)	-
6	**Total, Prior Year-End Fund Balance**	**6,313,053,021**	**2,562,641,444**
7			
8	Tax Revenue		
9	Personal Income	15,388,100,000	15,998,900,000
10	Sales and Use	9,681,100,000	9,830,000,000
11	Corporate Income	1,300,500,000	1,343,600,000
12	Franchise	840,000,000	861,300,000
13	Insurance	808,900,000	961,800,000
14	Alcoholic Beverages	453,300,000	461,700,000
15	Tobacco Products	258,300,000	256,900,000
16	Other Tax Revenues	155,800,000	152,700,000
17	**Subtotal, Tax Revenue**	**28,886,000,000**	**29,866,900,000**
18			
19	Non-Tax Revenue		
20	Judicial Fees	216,600,000	224,200,000
21	Investment Income	29,600,000	36,100,000
22	Disproportionate Share	115,400,000	122,500,000
23	Master Settlement Agreement	139,400,000	134,100,000
24	Insurance	100,500,000	103,400,000
25	Other Non-Tax Revenues	217,900,000	220,000,000
26	**Subtotal, Non-Tax Revenue**	**819,400,000**	**840,300,000**
27			
28	**Total, Net Revenue**	**29,705,400,000**	**30,707,200,000**
29			
30	**Adjustments to Tax Revenue**		
31	**Personal Income Tax Changes**		
32	Deduction for PPP Loans, EIDL, & similar programs	(427,000,000)	(35,000,000)
33	Changes to Mill Rehabilitation Tax Credits	1,400,000	(3,700,000)
34	Changes to Historic Rehabilitation Tax Credits	(200,000)	(200,000)
35	Reduce Rate, Change Certain Deductions	(650,000,000)	(1,700,600,000)
36	**Sales and Use Tax Changes**		
37	Credit Short-term Car Rental Proceeds to Highway Fund	(69,800,000)	(74,600,000)
38	**Corporate Income Tax Changes**		
39	Deduction for PPP Loans, EIDL, & similar programs	(183,000,000)	(15,000,000)
40	Changes to Mill Rehabilitation Tax Credits	2,900,000	(7,500,000)
41	Changes to Historic Rehabilitation Tax Credits	(500,000)	(500,000)

Appendix A: FY 2021-23 Revised General Fund Availability Statement

42	**Franchise Tax Changes**		
43	Eliminate Alternate Property Bases	-	(173,300,000)
44	**Insurance Tax Changes**		
45	Changes to Mill Rehabilitation Tax Credits	1,500,000	(3,800,000)
46	Changes to Historic Rehabilitation Tax Credits	(300,000)	(300,000)
47	Limit Gross Premiums Tax on Surety Bonds	(700,000)	(1,000,000)
48	**Tobacco Products Tax Changes**		
49	Expand Cigar Excise Tax	-	25,200,000
50	**Subtotal, Adjustments to Tax Revenue**	**(1,325,700,000)**	**(1,990,300,000)**
51			
52			
53	**Statutorily Required Reservations of Revenue**		
54	NC GREAT Program (S.L. 2019-230)	(15,000,000)	(15,000,000)
55	State Capital and Infrastructure Fund (SCIF)	(1,300,000,000)	(1,345,500,000)
56	**Subtotal, Statutorily Required Reservations of Revenue**	**(1,315,000,000)**	**(1,360,500,000)**
57			
58	**Reserves**		
59	Medicaid Contingency Reserve	(125,000,000)	-
60	Medicaid Transformation Reserve	(215,820,000)	(246,000,000)
61	Information Technology Reserve	(109,661,155)	(165,000,000)
62	Transfer to Savings Reserve	(1,134,006,723)	(1,134,006,722)
63	Additional Transfer to SCIF	(2,349,334,999)	(1,039,500,000)
64	State Emergency and Disaster Response Reserve	(425,000,000)	(375,000,000)
65	Economic Development Project Reserve	(338,000,000)	-
66	Unfunded Liability Solvency Reserve	(40,000,000)	(10,000,000)
67	Wilmington Harbor Enhancements Reserve	(283,800,000)	-
68	**Subtotal, Reserves**	**(5,020,622,877)**	**(2,969,506,722)**
69			
70	**Other Adjustments to Availability**		
71	Adjustment to Transfer from State Treasurer	2,320,420	3,337,657
72	Adjustment from Insurance Reg. Fund	61,578	101,285
73	UNC/Medicaid Receiveables Transfer	31,305,584	31,305,584
74	**Subtotal, Other Adjustments**	**33,687,582**	**34,744,526**
75			
76	**Revised Total General Fund Availability**	**28,390,817,726**	**26,984,279,248**
77			
78	Less General Fund Net Appropriations[2]	26,028,176,282	26,980,674,610
79	**Unappropriated Balance Remaining**	**2,362,641,444**	**3,604,638**

[1] Reflects actual over collections as reported by the Office of State Budget and Management and the Office of the State Controller, including a $20 million adjustment to account for S.L. 2020-28, Funding for Workforce Housing Loan Program.

[2] Net General Fund appropriations include S.L. 2021-180 and S.L. 2021-189.

Appendix B: Correctional Officer Salary Schedule

Years of Experience	FY 2021-22			FY 2022-23		
	COI	COII	COIII	COI	COII	COIII
0	33,130	34,220	36,598	33,958	35,076	37,513
1	35,449	36,615	39,160	36,335	37,530	40,139
2	37,576	38,812	41,510	38,515	39,782	42,548
3	39,455	40,753	43,586	40,441	41,772	44,676
4	41,033	42,383	45,329	42,059	43,443	46,462
5	42,264	43,654	46,689	43,321	44,745	47,856
6+	43,109	44,527	47,623	44,187	45,640	48,814

Appendix C: Probation/Parole Office Salary Schedule

Years of Experience	FY 2021-22	FY 2022-23
0	40,000	41,000
1	42,600	43,665
2	45,369	46,503
3	48,318	49,526
4	51,459	52,745
5	54,804	56,173
6+	58,366	59,824

Appendix D: Teacher Salary Schedule Comparison

Current Years of Experience	FY 2020-21 "A" Schedule	FY 2021-22	Schedule Increase	FY 2021-22 %Δ w/Step Increase	Intended FY 2022-23	FY 2022-23 %Δ w/Step Increase v. FY 2020-21
0	$ 3,500	$ 3,546	1.3%	4.2%	$ 3,592	8.5%
1	$ 3,600	$ 3,647	1.3%	4.1%	$ 3,694	8.3%
2	$ 3,700	$ 3,748	1.3%	4.0%	$ 3,797	8.2%
3	$ 3,800	$ 3,849	1.3%	4.0%	$ 3,899	8.0%
4	$ 3,900	$ 3,951	1.3%	3.9%	$ 4,002	7.9%
5	$ 4,000	$ 4,052	1.3%	3.8%	$ 4,105	7.7%
6	$ 4,100	$ 4,153	1.3%	3.8%	$ 4,207	7.6%
7	$ 4,200	$ 4,255	1.3%	3.7%	$ 4,310	7.5%
8	$ 4,300	$ 4,356	1.3%	3.7%	$ 4,413	7.4%
9	$ 4,400	$ 4,457	1.3%	3.6%	$ 4,515	7.3%
10	$ 4,500	$ 4,559	1.3%	3.6%	$ 4,618	7.2%
11	$ 4,600	$ 4,660	1.3%	3.5%	$ 4,721	7.1%
12	$ 4,700	$ 4,761	1.3%	3.4%	$ 4,823	7.0%
13	$ 4,800	$ 4,862	1.3%	3.4%	$ 4,925	6.9%
14	$ 4,900	$ 4,964	1.3%	3.4%	$ 5,029	4.7%
15	$ 5,000	$ 5,065	1.3%	1.3%	$ 5,131	2.6%
16	$ 5,000	$ 5,065	1.3%	1.3%	$ 5,131	2.6%
17	$ 5,000	$ 5,065	1.3%	1.3%	$ 5,131	2.6%
18	$ 5,000	$ 5,065	1.3%	1.3%	$ 5,131	2.6%
19	$ 5,000	$ 5,065	1.3%	1.3%	$ 5,131	2.6%
20	$ 5,000	$ 5,065	1.3%	1.3%	$ 5,131	2.6%
21	$ 5,000	$ 5,065	1.3%	1.3%	$ 5,131	2.6%
22	$ 5,000	$ 5,065	1.3%	1.3%	$ 5,131	2.6%
23	$ 5,000	$ 5,065	1.3%	1.3%	$ 5,131	6.7%
24	$ 5,000	$ 5,065	1.3%	5.4%	$ 5,131	6.7%
25+	$ 5,200	$ 5,268	1.3%	1.3%	$ 5,336	2.6%

Notes:

- Reflects base “A” teacher salary schedule and does not include any of the various State or locally-funded salary supplements.
- Schedule Increase column displays the increase in the monthly salary amount for an experience-level compared to the same experience-level from the prior fiscal year.
- % Change (w/Step) column displays the increase a teacher with referenced experience level in FY 2020-21 will receive under revised schedule if continuing to work as teacher in upcoming biennium.

Appendix E: Estimated Allocations from Teacher Supplement Assistance Allotment

County	Teacher Supplement Assistance (per State-Funded Teacher)	Total County Allocation (Salaries + Benefits)
Alamance County	771	1,595,412
Alexander County	2,117	893,429
Alleghany County	3,349	442,399
Anson County	3,589	995,661
Ashe County	1,672	454,097
Avery County	1,442	283,257
Beaufort County	1,463	789,194
Bertie County	4,250	798,295
Bladen County	2,609	964,413
Brunswick County	542	566,238
Buncombe County	0	0
Burke County	1,193	1,216,369
Cabarrus County	601	1,904,204
Caldwell County	1,268	1,295,947
Camden County	4,153	763,137
Carteret County	655	442,005
Caswell County	3,595	810,901
Catawba County	753	1,458,582
Chatham County	765	579,113
Cherokee County	1,857	552,476
Chowan County	4,086	731,341
Clay County	2,867	344,657
Cleveland County	1,222	1,583,694
Columbus County	2,058	1,348,084
Craven County	944	1,051,487
Cumberland County	770	3,468,647
Currituck County	949	327,268
Dare County	661	280,566
Davidson County	773	1,593,186
Davie County	1,478	815,479
Duplin County	1,659	1,363,408
Durham County	0	0
Edgecombe County	2,559	1,321,696
Forsyth County	613	2,831,249
Franklin County	1,279	933,085
Gaston County	724	1,991,138
Gates County	4,250	757,850
Graham County	4,250	527,832
Granville County	1,610	965,468
Greene County	4,250	1,163,017
Guilford County	0	0
Halifax County	2,249	1,165,270
Harnett County	1,015	1,816,665
Haywood County	969	612,869

Appendix E: Estimated Allocations from Teacher Supplement Assistance Allotment

County	Teacher Supplement Assistance (per State-Funded Teacher)	Total County Allocation (Salaries + Benefits)
Henderson County	709	828,270
Hertford County	4,250	1,002,958
Hoke County	1,903	1,448,365
Hyde County	4,250	321,781
Iredell County	570	1,262,174
Jackson County	919	313,141
Johnston County	693	2,291,800
Jones County	4,250	461,423
Lee County	1,447	1,289,056
Lenoir County	2,153	1,596,430
Lincoln County	818	828,188
Macon County	1,025	411,288
Madison County	2,313	536,179
Martin County	4,250	1,199,300
McDowell County	1,748	961,755
Mecklenburg County	0	0
Mitchell County	3,312	574,556
Montgomery County	2,097	618,338
Moore County	728	776,732
Nash County	1,176	1,457,699
New Hanover County	528	1,140,658
Northampton County	3,491	541,702
Onslow County	809	1,923,814
Orange County	641	1,072,640
Pamlico County	3,165	389,397
Pasquotank County	1,930	854,948
Pender County	1,023	824,011
Perquimans County	3,772	530,285
Person County	1,868	730,974
Pitt County	865	1,801,594
Polk County	1,801	360,577
Randolph County	932	1,654,222
Richmond County	2,725	1,663,613
Robeson County	1,562	2,967,046
Rockingham County	1,364	1,360,875
Rowan County	883	1,460,258
Rutherford County	1,307	886,501
Sampson County	1,714	1,642,140
Scotland County	3,535	1,811,344
Stanly County	1,362	1,011,474
Stokes County	1,828	962,131
Surry County	1,400	1,269,323
Swain County	2,941	539,932
Transylvania County	1,112	322,084
Tyrrell County	4,250	319,118

Appendix E: Estimated Allocations from Teacher Supplement Assistance Allotment

County	Teacher Supplement Assistance (per State-Funded Teacher)	Total County Allocation (Salaries + Benefits)
Union County	486	1,625,971
Vance County	2,490	1,141,555
Wake County	0	0
Warren County	2,690	446,968
Washington County	4,250	474,794
Watauga County	849	357,958
Wayne County	1,202	1,945,213
Wilkes County	1,455	1,164,468
Wilson County	1,405	1,282,153
Yadkin County	2,263	1,014,290
Yancey County	2,489	527,449

Appendix F: State Fiscal Recovery Fund Appropriations

State Allocation	**$5,439,309,692**
Coronavirus Capital Projects Fund (estimate)	**$277,060,856**
Estimated Interest	**$2,000,000**
Total Availability	**$5,718,370,548**

#	Appropriation Item	Committee	Agency	FY 2021-22	FY 2022-23
1	Budget Stabilization (Community Colleges)	Education	NCCCS	79,983,422	
2	Broadband Access for Rural Community Colleges	Education	NCCCS	15,000,000	
3	Apprenticeship Program Expansion	Education	NCCCS	12,000,000	
4	Longleaf Commitment Student Support Services	Education	NCCCS	6,000,000	
5	Cape Fear Botanical Gardens	Education	NCCCS	321,000	
6	Smart School Bus Pilot	Education	DPI	18,148,000	
7	Crosby Scholars	Education	DPI	500,000	
8	North Carolina Arboretum COVID-19 Expenses	Education	UNC	138,000	
9	PBS North Carolina COVID-19 Expenses	Education	UNC	22,500	
10	Project Kitty Hawk	Education	UNC	97,000,000	
11	Ultraviolet-C Sterilization Units	Education	UNC	2,000,000	
12	Longleaf Commitment Grants	Education	UNC	25,500,000	
13	Private Colleges and Universities COVID-19 Support	Education	UNC	51,000,000	
14	Patriot Foundation Recovery Scholarship Program	Education	UNC	10,000,000	
15	Marine Corps Scholarship Foundation Recovery Program	Education	UNC	3,000,000	
16	COVID-19 Research Grants	Education	UNC	30,000,000	
17	Innovative Highly Treated Wastewater Pilot Program	Education	UNC	20,000,000	
18	Rapidly Emerging Antiviral Drug Development Initiative	Education	UNC	18,000,000	
19	4-H Centers and Camps COVID-19 Support	Education	NCSU	1,700,000	
20	Mobile Medical Units	Education	UNC	500,000	
21	UNC School of the Arts COVID-19 Expenses	Education	UNCSA	364,253	
22	NCSSM COVID-19 Expenses	Education	NCSSM	1,360,230	
23	Rapid Rehousing for Individuals and Families at Risk of Homelessness	HHS	DHHS	15,000,000	

Appendix F: State Fiscal Recovery Fund Appropriations

#	Appropriation Item	Committee	Agency	FY 2021-22	FY 2022-23
24	Nutrition Services for Older Adults	HHS	DHHS	3,585,000	
25	Hospice of Davidson County, North Carolina, Inc.	HHS	DHHS	125,000	
26	Camino Community Development Corporation, Inc.	HHS	DHHS	7,500,000	
27	Winston-Salem Hospital-Based Violence Intervention Program	HHS	DHHS	500,000	
28	Duke University Hospital-Based Violence Intervention Program	HHS	DHHS	375,232	
29	Trellis Supportive Care	HHS	DHHS	250,000	
30	The North Carolina Association of Free & Charitable Clinics (NCAFCC)	HHS	DHHS	15,000,000	
31	Virtual Behavioral Health Services	HHS	DHHS	10,000,000	
32	Atrium Health School-Based Virtual Health	HHS	DHHS	1,000,000	
33	NC Statewide Telepsychiatry Program	HHS	DHHS	1,500,000	
34	Start-up and Capital Grants (Pre-K & Child Care Centers)	HHS	DHHS	20,000,000	
35	Temporary Funding Assistance for ICF/IIDs	HHS	DHHS	12,600,000	
36	Forsyth & Mecklenburg Counties Crisis Behavioral Health Program Joint Partnerships	HHS	DHHS	25,000,000	
37	Incident Response Improvement System	HHS	DHHS	2,500,000	
38	Brynn Marr Hospital	HHS	DHHS	500,000	
39	Communicable Diseases (Funding for Local Health Department	HHS	DHHS	36,000,000	
40	Lead and Asbestos Remediation in School and Child Care Facilities	HHS	DHHS	150,000,000	
41	Temporary Assistance for Facilities that Serve Special Assistance Recipients	HHS	DHHS	48,000,000	
42	Cleveland Vocational Industries Inc.	HHS	DHHS	350,000	
43	Food Distribution	AgNER	DACS	10,000,000	
44	State Fair Receipt Replacement	AgNER	DACS	12,770,000	
45	Western North Carolina Agricultural Center Receipt Replacement	AgNER	DACS	2,030,000	
46	Food Banks	AgNER	DACS	40,000,000	
47	Golden L.E.A.F. (Grants to nonprofits for food security)	AgNER	DACS	10,000,000	
48	Reinvestment Partners	AgNER	DACS	5,000,000	
49	Meat and Seafood Processing Grants	AgNER	DACS	17,000,000	
50	Swine and Dairy Assistance Program	AgNER	DACS	30,000,000	

Appendix F: State Fiscal Recovery Fund Appropriations

#	Appropriation Item	Committee	Agency	FY 2021-22	FY 2022-23
51	Carolina Farm Stewardship Association	AgNER	DACS	2,000,000	
52	Rural Downtown Transformation Grants	AgNER	Commerce	50,000,000	
53	DWS Work-Based Learning Opportunities	AgNER	Commerce	10,000,000	
54	DWS Re-entry Program	AgNER	Commerce	2,000,000	
55	DWS Substance Abuse Program	AgNER	Commerce	2,000,000	
56	DWS Technology and Online Services	AgNER	Commerce	2,000,000	
57	Capacity-Building for CDFIs	AgNER	Commerce	5,000,000	
58	Carolina Small Business Development Fund	AgNER	Commerce	7,000,000	
59	High Point Furniture Market	AgNER	Commerce	1,510,000	
60	Prospera	AgNER	Commerce	250,000	
61	River City Community Development Center	AgNER	Commerce	250,000	
62	Tourism Education Foundation of NC	AgNER	Commerce	200,000	
63	Travel and Tourism Marketing	AgNER	Commerce	30,000,000	
64	Business Marketing	AgNER	Commerce	30,000,000	
65	Rural Tourism Recovery	AgNER	Commerce	1,500,000	
66	Motorsports	AgNER	Commerce	46,000,000	
67	Viable Utility Reserve	AgNER	DEQ	456,400,000	
68	State Drinking Water/Wastewater Reserve Infrastructure Grants	AgNER	DEQ	1,049,975,000	
69	State Drinking Water/Wastewater Reserve Asset Inventory and Technical Assistance Grants	AgNER	DEQ	80,000,000	
70	Local Assistance for Stormwater Infrastructure Investment (LASII)	AgNER	DEQ	103,625,000	
71	State Parks Water and Sewer Projects	AgNER	DNCR	40,000,000	
72	Aquariums Receipt Replacement	AgNER	DNCR	5,700,000	
73	Roanoke Island Festival Park (RIFP) Receipt Replacement	AgNER	DNCR	300,000	
74	Transportation Museum Receipt Replacement	AgNER	DNCR	280,000	
75	Tryon Palace Receipt Replacement	AgNER	DNCR	370,000	
76	USS North Carolina Battleship Commission	AgNER	DNCR	1,400,000	
77	Zoo Receipt Replacement	AgNER	DNCR	1,850,000	
78	Moonshine and Motorsports Trails	AgNER	DNCR	1,000,000	
79	NC Arts Council General Grants	AgNER	DNCR	5,000,000	
80	Grassroots Arts Grants	AgNER	DNCR	10,000,000	
81	State Aid to Public Libraries	AgNER	DNCR	10,000,000	
82	Science Museum Grants	AgNER	DNCR	3,500,000	3,500,000

Appendix F: State Fiscal Recovery Fund Appropriations

#	Appropriation Item	Committee	Agency	FY 2021-22	FY 2022-23
83	NC Symphony Society	AgNER	DNCR	5,000,000	
84	NC Museum of History Foundation	AgNER	DNCR	3,000,000	
85	Carolina Ballet	AgNER	DNCR	4,000,000	
86	Flat Rock Playhouse	AgNER	DNCR	100,000	
87	Laurel Ridge Camp, Conference, and Retreat Center	AgNER	DNCR	100,000	
88	Natural Science Center of Greensboro	AgNER	DNCR	500,000	
89	Paul J. Ciener Botanical Gardens	AgNER	DNCR	100,000	
90	The Lost Colony	AgNER	DNCR	500,000	
91	Personal Protective Equipment (Courts)	JPS	AOC	200,000	
92	Mobile Wi-Fi Hotspot Equipment	JPS	AOC	300,000	
93	Video Conferencing for Courtroom Proceedings	JPS	AOC	4,755,600	
94	Court Overtime Expenses	JPS	AOC	3,936,330	
95	Temporary Courthouse Resources	JPS	AOC	2,397,510	
96	Human Trafficking Grants	JPS	AOC	8,800,000	
97	Economic Assistance Funds (for organizations that provide services to victims of domestic violence and sexual assault)	JPS	AOC	15,000,000	
98	VIPER Equipment Upgrades	JPS	DPS	19,325,000	
99	State Highway Patrol Computer Aided Dispatch (CAD) System	JPS	DPS	11,100,000	
100	Transitional Living Support for Youth Re-entering	JPS	DPS	2,500,000	
101	Treatment for Effective Community Supervision	JPS	DPS	1,000,000	
102	Inmate Medical Deficits	JPS	DPS	45,000,000	
103	RETOOLNC Grants	GG	DOA	20,000,000	
104	Division of Nonpublic Education - Data Improvement	GG	DOA	750,000	
105	ARPA Auditing Funds	GG	Auditor	3,500,000	
106	Continuity of State Operations	GG	OSBM	25,335,471	
107	Pandemic Recovery Office - Extension of Operations	GG	OSBM	11,700,000	
108	Construction Training and Apprenticeship Program	GG	OSBM	3,500,000	
109	Contractor Business Academy for HUBs	GG	OSBM	3,000,000	
110	City of Winston Salem (Affordable housing)	GG	OSBM	10,000,000	
111	Dare County (Affordable housing)	GG	OSBM	35,000,000	
112	League of Municipalities Grants for Audit Software	GG	OSBM	15,000,000	

Appendix F: State Fiscal Recovery Fund Appropriations

#	Appropriation Item	Committee	Agency	FY 2021-22	FY 2022-23
113	Local Government Capacity Assistance	GG	OSBM	53,500,000	
114	State Recognized American Indian Tribes	GG	OSBM	10,000,000	
115	Truck Driver Shortage	GG	OSBM	5,000,000	
116	YMCA Grants	GG	OSBM	11,400,000	
117	Pandemic Recovery and Mitigation	GG	NCGA	21,800,000	
118	Workforce Housing Loan Program	GG	HFA	170,000,000	
119	Grants to Volunteer Fire Departments	GG	DOI	8,000,000	
120	Mainframe Migration	GG	Revenue	2,538,000	
121	Business Recovery Grant Program	GG	Revenue	500,000,000	
122	Driver License Extended Operations	Trans	DOT	3,000,000	
123	NC GREAT Grant - Federal Broadband Funds	Statewide	DIT	72,939,144	
124	NC GREAT Grant (Coronavirus Capital Projects Fund)	Statewide	DIT	277,060,856	
125	Completing Access to Broadband	Statewide	DIT	400,000,000	
126	Stopgap Solutions - Federal Broadband Funds	Statewide	DIT	90,000,000	
127	Broadband Make Ready Accelerator	Statewide	DIT	100,000,000	
128	Awareness and Digital Literacy	Statewide	DIT	12,500,000	12,500,000
129	Broadband Administration	Statewide	DIT	3,750,000	3,750,000
130	Carolina Cyber Network	Statewide	DIT	11,000,000	
131	Broadband Mapping	Statewide	DIT	1,000,000	
132	DPS HVAC for State Facilities	Statewide	Statewide	30,000,000	
133	DHHS HVAC for State Facilities	Statewide	Statewide	20,000,000	
134	Premium Pay Bonuses - State and Local Education Employees	Statewide	Statewide	545,000,000	
135	Premium Pay Bonuses - Direct Care Workers	Statewide	Statewide	133,000,000	
136	State Health Plan (COVID-19 Related Costs)	Statewide	Statewide	101,000,000	
137	**Total Appropriations**			**5,666,120,548**	**19,750,000**
138	**State Recovery Funds Remaining**				**32,500,000**

Note: Remaining funds are for 2 additional years for awareness and digital literacy (128) and broadband administration (item 129).

Appendix G: Estimated State Allocations in the American Rescue Plan

#	Program	Amount
1	Higher Education Emergency Relief Fund	701,279,800
2	Elementary and Secondary School Emergency Relief Fund	3,601,780,364
3	Emergency Assistance to Non-Public Schools	82,952,000
4	IDEA: Grants to States	81,359,400
5	IDEA: Preschool Grants	5,961,100
6	IDEA: Infants & Toddlers	6,298,200
7	Child Care Stabilization Grants	805,767,400
8	Child Care Entitlement to States	16,096,000
9	Child Care and Development Block Grant	502,777,789
10	Community-Based Child Abuse Prevention	7,695,000
11	Child Abuse State Grants	3,067,000
12	Supportive Services	13,984,000
13	Preventive Services	1,363,000
14	Family Violence Prevention and Services	3,691,782
15	Family Caregiver	4,463,000
16	Title VII Long-Term Care Ombudsman	310,000
17	Nursing Home and Long Term Care Strike Teams	14,144,928
18	Elder Justice – Adult Protective Services	2,579,576
19	Congregate and Home Delivered Meals	23,045,000
20	SNAP Administrative Expense Grant	35,443,000
21	WIC Cash Value Vouchers Increase	19,930,600
22	Commodity Supplemental Foods Program	119,000
23	Pandemic Emergency Assistance	16,782,875
24	Mental Health Block Grant	41,535,246
25	Substance Abuse Block Grant	36,420,651
26	Crisis Response Workforce	62,340,758
27	Disease Intervention Workforce	27,361,745
28	Public Health Laboratory Preparedness	142,473
29	Maternal, Infant, and Early Childhood Home Visiting Program	625,310
30	Immunization and Vaccines for Children	102,468,748
31	Community Health Centers Expanded Access to COVID-19 Vaccines, Build Vaccine Confidence	4,057,900
32	Detection and Mitigation of COVID-19 in Homeless Populations	1,439,232
33	Detection and Mitigation of COVID-19 in Confinement Facilities	20,230,000
34	Epidemiology and Lab Capacity for School Testing	315,895,900
35	Expand Genomic Sequencing	6,662,900
36	Small Rural Hospital Improvement Program - Testing and Mitigation	4,909,144
37	Homeless Children and Youth	23,576,625
38	HOME Investment Partnerships Program	137,414,000
39	Emergency Rental Assistance	556,611,000
40	Homeowner Assistance Fund	273,337,000

Appendix G: Estimated State Allocations in the American Rescue Plan

#	Program	Amount
41	Low Income Home Energy Assistance Program	86,970,460
42	Low Income Household Water Assistance Program	17,105,002
43	Emergency Management Performance Grants	2,660,000
44	National Endowment for the Arts - State Arts Agencies	912,000
45	Institute for Museum and Library Services	4,309,000
46	State Small Business Credit Initiative	120,461,927
47	FTA Urbanized Area	4,696,400
48	FTA Nonurbanized Area	13,833,386
49	FTA Rural Transit Assistance Program	209,718
50	FTA Intercity Bus	4,183,036
51	Enhanced Mobility of Seniors and Persons with Disabilities-State	781,873
52	FAA Airport Rescue Grants	2,471,000
53	Total	$ 7,824,513,248
54	Total in bill	$ 7,834,552,821

Note: This schedule above is meant to be illustrative of federal grants that have been, or will be, received by the State in addition to the Coronavirus State Fiscal Recovery Fund funds under the American Rescue Plan Act. These amounts are not inclusive of federal funds distributed or paid directly to individuals, businesses, health care providers, or private postsecondary institutions.

For additional information, please contact:

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EXHIBIT B

FY 2021-23 Revised General Fund Availability Statement

		FY 2021-22	FY 2022-23
1	Unappropriated Balance Remaining FY 2020-21	457,272,694	2,359,141,444
2	Actual/Anticipated Reversions	523,224,136	200,000,000
3	Actual Over Collections[1]	6,212,632,914	-
4	S.L. 2021-19: UNC Building Reserves/Certain Projects	(2,359,159)	-
5	Actual Transfer to Savings Reserve	(877,717,564)	-
6	**Total, Prior Year-End Fund Balance**	**6,313,053,021**	**2,559,141,444**
7			
8	Tax Revenue		
9	Personal Income	15,388,100,000	15,998,900,000
10	Sales and Use	9,681,100,000	9,830,000,000
11	Corporate Income	1,300,500,000	1,343,600,000
12	Franchise	840,000,000	861,300,000
13	Insurance	808,900,000	961,800,000
14	Alcoholic Beverages	453,300,000	461,700,000
15	Tobacco Products	258,300,000	256,900,000
16	Other Tax Revenues	155,800,000	152,700,000
17	**Subtotal, Tax Revenue**	**28,886,000,000**	**29,866,900,000**
18			
19	Non-Tax Revenue		
20	Judicial Fees	216,600,000	224,200,000
21	Investment Income	29,600,000	36,100,000
22	Disproportionate Share	115,400,000	122,500,000
23	Master Settlement Agreement	139,400,000	134,100,000
24	Insurance	100,500,000	103,400,000
25	Other Non-Tax Revenues	217,900,000	220,000,000
26	**Subtotal, Non-Tax Revenue**	**819,400,000**	**840,300,000**
27			
28	**Total, Net Revenue**	**29,705,400,000**	**30,707,200,000**
29			
30	**Adjustments to Tax Revenue**		
31	**Personal Income Tax Changes**		
32	Deduction for PPP Loans, EIDL, & similar programs	(427,000,000)	(35,000,000)
33	Changes to Mill Rehabilitation Tax Credits	1,400,000	(3,700,000)
34	Changes to Historic Rehabilitation Tax Credits	(200,000)	(200,000)
35	Reduce Rate, Change Certain Deductions	(650,000,000)	(1,700,600,000)
36	S.L. 2022-6, Budget Technical Corrections	(3,500,000)	
37	**Sales and Use Tax Changes**		
38	Credit Short-term Car Rental Proceeds to Highway Fund	(69,800,000)	(74,600,000)
39	**Corporate Income Tax Changes**		
40	Deduction for PPP Loans, EIDL, & similar programs	(183,000,000)	(15,000,000)
41	Changes to Mill Rehabilitation Tax Credits	2,900,000	(7,500,000)
42	Changes to Historic Rehabilitation Tax Credits	(500,000)	(500,000)
43	**Franchise Tax Changes**		
44	Eliminate Alternate Property Bases	-	(173,300,000)
45	**Insurance Tax Changes**		
46	Changes to Mill Rehabilitation Tax Credits	1,500,000	(3,800,000)
47	Changes to Historic Rehabilitation Tax Credits	(300,000)	(300,000)
48	Limit Gross Premiums Tax on Surety Bonds	(700,000)	(1,000,000)
49	**Tobacco Products Tax Changes**		
50	Expand Cigar Excise Tax	-	25,200,000
51	**Subtotal, Adjustments to Tax Revenue**	**(1,329,200,000)**	**(1,990,300,000)**

FY 2021-23 Revised General Fund Availability Statement

	FY 2021-22	FY 2022-23
Statutorily Required Reservations of Revenue		
NC GREAT Program (S.L. 2019-230)	(15,000,000)	(15,000,000)
State Capital and Infrastructure Fund (SCIF)	(1,300,000,000)	(1,345,500,000)
Subtotal, Statutorily Required Reservations of Revenue	**(1,315,000,000)**	**(1,360,500,000)**
Reserves		
Medicaid Contingency Reserve	(125,000,000)	-
Medicaid Transformation Reserve	(215,820,000)	(246,000,000)
Information Technology Reserve	(109,661,155)	(165,000,000)
Transfer to Savings Reserve	(1,134,006,723)	(1,134,006,722)
Additional Transfer to SCIF	(2,349,334,999)	(1,039,500,000)
State Emergency and Disaster Response Reserve	(425,000,000)	(375,000,000)
Economic Development Project Reserve	(338,000,000)	-
Unfunded Liability Solvency Reserve	(40,000,000)	(10,000,000)
Wilmington Harbor Enhancements Reserve	(283,800,000)	-
Subtotal, Reserves	**(5,020,622,877)**	**(2,969,506,722)**
Other Adjustments to Availability		
Adjustment to Transfer from State Treasurer	2,320,420	3,337,657
Adjustment from Insurance Reg. Fund	61,578	101,285
UNC/Medicaid Receiveables Transfer	31,305,584	31,305,584
Subtotal, Other Adjustments	**33,687,582**	**34,744,526**
Revised Total General Fund Availability	**28,387,317,726**	**26,980,779,248**
Less General Fund Net Appropriations[2]	26,028,176,282	26,980,674,610
Unappropriated Balance Remaining	**2,359,141,444**	**104,638**

[1] Reflects actual over collections as reported by the Office of State Budget and Management and the Office of the State Controller, including a $20 million adjustment to account for S.L. 2020-28, Funding for Workforce Housing Loan Program.

[2] Net General Fund appropriations include S.L. 2021-180 and S.L. 2021-189.

EXHIBIT C

Beginning Cash, Friday, March 25	**9,842,307,036.79**
Add Receipts:	
Tax and Non-Tax Receipts	355,795,613.80
Coronavirus Relief Receipts	0.00
Other Receipts	599,956,305.18
Less Disbursements:	
Payroll	905,685,444.95
State Aid	137,085,781.42
Medicaid/Other Provider Payments	229,154,428.10
Tax Refunds/Distributions	58,753,931.69
Debt Service	0.00
Coronavirus Relief Transfers Out	0.00
General Operating	585,062,215.17
Ending Cash, Friday, April 01	**8,882,317,154.44**
Less Reserved Cash:	
Due to Local Governments – Sales and Use Tax Payable	731,763,865.24
Other Reserves	23,015,814.94
American Recovery Plan Act Reserve	0.00
Carry Forward Reserve	336,694,838.00
Coronavirus Capital Projects Reserve	0.00
Coronavirus Relief Reserve	0.00
Earthquake Disaster Recovery Reserve	0.00
Economic Development Project Reserve	203,000,000.00
Hurricane Florence Disaster Recovery Reserve	76,140,581.61
Information Technology Reserve	0.00
Local Fiscal Recovery Reserve-ARPA	0.00
Local Govt Coronavirus Relief Reserve	0.00
Medicaid Contingency Reserve	175,372,673.00
Medicaid Transformation Reserve	63,861,127.00
NC GREAT Reserve	0.00
Opioid Abatement Reserve	0.00
Repairs and Renovations Reserve	0.00
SCIF General Fund Reserve	0.00
Savings Reserve	3,115,993,278.98
State Emergency Response/Disaster Reserve	20,711,681.16
Unfunded Liability Solvency Reserve	43,349,119.63
Wilmington Harbor Enhancements Reserve	283,800,000.00
Unreserved Cash Balance, Friday, April 01	**3,808,614,174.88**

EXHIBIT D

Items in the *Leandro* Comprehensive Remedial Plan and FY 2021-23 Education Appropriations

Leandro refers to the case *Hoke County Board of Education v. State*, originally filed in 1994. Items listed below are those that are explicitly in the comprehensive remedial plan, adopted by the order in the case, that are also funded in the enacted budget. This document does not include all K-12 funding in FY 2021-23.

		Comprehensive Remedial Plan						Enacted Budget						Notes
		FY 2021-22	FTE	R/NR?	FY 2022-23	FTE	R/NR?	FY 2021-22	FTE	R/NR?	FY 2022-23	FTE	R/NR?	
1	**Part I: Teachers**													
2	**Professional Educator Preparations and Standards Commission** (I.A.ii.1.)	$200,000	2	R	$200,000	2	R							
3	**Educator Compensation Study** (I.A.ii.2.)	$50,000		NR										
4	**Educator Preparation Programs Study** (I.A.ii.3.)	$25,000		NR										
5	**TeachNC** (I.A.ii.4.)	$500,000	1	R	$500,000	1	R	$100,000	1	R	$100,000	1	R	
6								$880,000		NR	$880,000		NR	
7	**Increase Teachers Graduating** (I.A.iii.1.)													
8	**Increase Teacher Graduates of Color** (I.A.iii.2.)													Amount in Leandro Plan "TBD."
9	**Teacher Recruitment Statewide Entity** (I.A.iii.3.)				$25,000		NR							
10	**Student Recruitment Programs** (I.A.ii.5.)	$300,000		R	$300,000		R							
11	**Teaching Fellows** (I.B.iii.1.)	$1,000,000		R	$4,700,000		R							
12	**Teacher Residency Pilot** (I.C.ii.1.)				$5,000,000		R							
13	**Partnership Teach and other 2+2, grow your own** (I.E.ii.1.)	$2,200,000		R	$2,200,000		R							Enacted budget, without further adjustments, would decrease funds for one program, TAs to Teachers, in FY 2023-24
14	**Office of Equity Affairs** (I.F.iii.2.)	$400,000	4	R	$400,000	4	R							
15	**New Teacher Support Program** (I.G.ii.1.)	$2,200,000		R	$5,000,000		R							
16	**Advanced Teaching Roles** (I.H.iii.1.)	$3,000,000		R	$5,800,000		R	$2,040,000		R	$2,040,000		R	
17	**Wage Comparability Study** (I.J.ii.1.)	$200,000		NR										
18	**National Board Certification** (I.K.ii.1.)	$1,900,000		R	$1,900,000		R	$1,200,000		NR				Enacted budget funds out of ESSER III
19	**Recruitment Bonuses for Low Wealth or High Needs Districts** (I.K.ii.2.)	$3,000,000		R	$6,000,000		R	$4,300,000		R	$4,300,000		R	Enacted budget offers bonuses for counties eligible for low wealth or small county funding
20	**Part II: Principals**													

Items in the *Leandro* Comprehensive Remedial Plan and FY 2021-23 Education Appropriations

		Comprehensive Remedial Plan						Enacted Budget						Notes
		FY 2021-22	FTE	R/NR?	FY 2022-23	FTE	R/NR?	FY 2021-22	FTE	R/NR?	FY 2022-23	FTE	R/NR?	
21	**Principal Fellows/TP3** (II.B.iii.1.)	$8,700,000		R	$9,700,000		R				$1,500,000		R	
22	**Part III: Finance System**													
23	**Children with Disabilities** (III.B.ii.1.)	$40,000,000		R	$70,000,000		R	$13,175,727		R	$13,175,727		R	
24	**Disadvantaged Student Supplemental Funding (DSSF)/At-Risk** (III.B.ii.2.)	$35,000,000		R	$70,000,000		R							
25	**Low-Wealth** (III.B.ii.3.)	$20,000,000		R	$40,000,000		R							
26	**Limited English Proficiency** (III.B.ii.4.)	$10,000,000		R	$20,000,000		R							
27	**Professional Development Allotment** (III.C.iii.1.)	$10,000,000		R	$20,000,000		R	$37,500,000		NR				Enacted budget uses ESSER III funds for Science of Reading only
28	**Teacher Assistants** (III.C.iii.2.)	$20,000,000		R	$30,000,000		R							
29	**Instructional Support** (III.D.ii.1 and III.E.ii.2.)	$40,000,000		R	$80,000,000		R	$9,851,551		R	$9,851,551		R	Enacted budget reserves money for school psychologists
30								$1,700,000		NR				Enacted budget uses ESSER III funds for psychologist recruitment program
31								$15,600,000		R	$15,600,000		R	Increases salaries for certain instructional support personnel
32	**Teacher Salaries** (III.E.ii.2.)	$232,200,000		R	$354,100,000		R	$82,776,979		R	$166,504,825		R	
33								$100,000,000		R	$100,000,000		R	Teacher supplement assistance allotment for counties with lower ability to pay teacher supplements
34	**Principal and Assistant Principal Salaries** (III.E.ii.3.)	$19,000,000		R	$29,700,000		R	$8,950,813		R	$17,926,579		R	
35	**Noninstructional Support** (III.C.iv.1.)							$56,700,000		R	$166,700,000		R	Leandro Plan does not implement until next biennium (FY 2023-25)
36	**Classroom Supplies** (III.C.iv.2.)										$1,900,000		R	Leandro Plan does not implement until next biennium (FY 2023-25)
37	**Central Office Staff** (III.C.iv.5.)							$3,050,575		R	$6,101,150		R	Leandro Plan does not implement until next biennium (FY 2023-25)
38	**Part V: Turn Around**													
39	**District and Regional Support** (V.A.iii.1.)	$10,000,000		R	$19,000,000		R	$18,000,000		NR				Enacted budget from ESSER III

Items in the *Leandro* Comprehensive Remedial Plan and FY 2021-23 Education Appropriations

		Comprehensive Remedial Plan						Enacted Budget						Notes
		FY 2021-22	FTE	R/NR?	FY 2022-23	FTE	R/NR?	FY 2021-22	FTE	R/NR?	FY 2022-23	FTE	R/NR?	
40	**Community School Support** (V.C.ii.1)	$1,500,000		R	$6,000,000		R							
41	**School Lunches** (V.C.iii.1.)				$3,900,000		R							
42	**Part VI: Early Childhood**													
43	**NC Pre-K** (VI.A.ii.1.)	$26,500,000		R	$45,400,000		R	$1,700,000		R	$3,500,000		R	Enacted budget includes funds for 2%/4% rate increases for private child care centers only
44	**Child Care Subsidy** (VI.B.iv.1.)	$10,000,000		R	$10,000,000		R	$206,000,000		NR				Enacted budget requires at least $206M, but DHHS may spend up to $215M of the ARPA child care block grant
45	**Infant-Toddler Program** (VI.C.ii.1.)	$7,700,000		R	$10,000,000		R							
46	**Infant-Toddler Study** (VI.C.ii.2.)	$150,000		NR										
47	**Infant-Toddler Infrastructure Readiness Study** (VI.C.ii.3.)	$100,000		NR										
48	**Professional Development for Infant-Toddler** (VI.C.ii.4.)	$250,000		R	$250,000		R							
49	**Smart Start** (VI.D.ii.1.)	$20,000,000		R	$20,000,000		R	$10,000,000		R	$10,000,000		R	
50	**WAGE$/AWARD$** (VI.E.ii.1.)	$10,000,000		R	$26,000,000		R							
51	**Early Childhood Recruitment** (VI.E.ii.4.)	$500,000		R	$1,250,000		R							Enacted budget provides up to $208M of the $503M NR ARPA child care block grant for workforce, including recruitment
52	**Workforce Data System** (VI.G.ii.1.)	$1,200,000		NR	$500,000		R	$50,000,000		NR				Enacted budget requires at least $50M, but DHHS may spend up to $59M of the ARPA child care block grant
53	**Part VII: Postsecondary and Career**													
54	**Dual Enrollment Study** (VII.A.ii.3)	$50,000		NR				$100,000		NR				Enacted budget combines this study with #60 below
55	**Career and College Ready** (VII.A.ii.4)	$546,500		R	$546,500		R	$546,500		R	$546,500		R	
56	**Cooperative and Innovative High Schools (CIHS)** (VII.B.ii.1)	$1,880,000		R	$1,880,000		R	$1,880,000		R	$1,880,000		R	

Items in the *Leandro* Comprehensive Remedial Plan and FY 2021-23 Education Appropriations

		Comprehensive Remedial Plan						Enacted Budget						Notes
		FY 2021-22	FTE	R/NR?	FY 2022-23	FTE	R/NR?	FY 2021-22	FTE	R/NR?	FY 2022-23	FTE	R/NR?	
57	**North Carolina Virtual Public School (NCVPS) fees** (VII.B.iii.1)	$1,500,000		R	$3,000,000		R							
58	**CTE Credentials** (VII.B.iii.2)	$6,500,000		R	$6,500,000		R	$6,500,000		R	6,500,000		R	
59								$400,000		NR				NR funds out of ESSER III
60	**Barriers of Access Study** (VII.B.iv.1)				$50,000		NR							Enacted budget combines with #54 above and fund in the first year
61	**College Advising Corps** (VII.C.iii.1)	$2,600,000		R	$3,000,000		R	$7,042,000		NR				Enacted budget out of ESSER III
62	**Career Development Coordinators** (VII.C.iii.2)	$100,000		R	$10,000,000		R							
63														
64	**Total**	$550,951,500			$922,801,500			$639,994,145			$529,006,332			
65	**School Capital**													
66	**Needs-Based Public School Capital Fund**							$70,252,612		R	$78,252,612		R	Leandro Plan would fund school capital through a $2 billion bond in FY 2023-24, with debt costs TBD. (III.C.iv.6.)
67	**Public School Building R&R Fund**							$30,000,000		R	$50,000,000		R	

Acronyms Used:

ARPA-American Rescue Plan Act

ESSER-Elementary and Secondary School Emergency Relief Fund

SFRF-State Fiscal Recovery Fund

Notes:

1. Figures exclude ADM adjustments as well as nonrecurring bonuses.
2. Federal funds (including Coronavirus Relief Fund, ESSER I, ESSER II, and ESSER III funds) that are not spent on *Leandro* items are not listed.
3. Items without funding amounts listed or with "TBD" listed in the Comprehensive Remedial Plan are not included.
4. All figures represent increases to the base budget. Base budget figures are not referenced, including the statutory appropriations for the Program Enhancement Teacher allotment.

EXHIBIT E

K-12 and Early Education Appropriations by Fund Conference FY 2021-23							
			FY 2021-22		FY 2022-23		
	CRP		**Recurring**	**Non-recurring**	**Recurring**	**Non-recurring**	**Notes**
1		***DPI - General Fund***					
2		Base Budget		10,016,320,410		10,016,320,410	
3	Yes	Comp. Increase Reserve - Teachers and IS	82,776,979		166,504,825		
4	Yes	Teacher Supplement Assistance Allotment	100,000,000		100,000,000		
5	Yes	Noncertified Personnel - Min. Wage	31,000,000		123,000,000		CRP does not implement until next biennium (FY 2023-25)
6	Yes	Comp. Increase Reserve - Noncertified Personnel	25,700,000		43,700,000		CRP does not implement until next biennium (FY 2023-25)
7	Yes	Comp. Increase Reserve - Certain IS Personnel	11,100,000		11,100,000		
8	Yes	Comp. Increase Reserve - School Counselors	4,500,000		4,500,000		
9	Yes	Comp. Increase Reserve - Central Office	3,050,575		6,101,150		CRP does not implement until next biennium (FY 2023-25)
10	Yes	Comp. Increase Reserve - Principals	6,697,695		13,395,390		
11	Yes	Comp. Increase Reserve - Assistant Principals	2,253,118		4,531,189		
12	Yes	Low Wealth/Small County Recruitment Bonus	4,300,000		4,300,000		CRP bonus would be for Low Wealth/"High Needs"
13		Comp. Increase Reserve - DPI	1,546,656		3,094,597		
14		Residential School Salary Supplements	305,000		305,000		
15		State Retirement Contributions - School District Personnel	38,064,621	42,739,224	84,883,805	65,215,603	
16		State Retirement Contributions - DPI	252,913	283,972	559,070	412,647	
17		State Health Plan - School District Personnel	107,928,633		167,176,842		
18		State Health Plan - DPI	500,838		774,022		
19		Average Salary Adjustment	62,076,002		62,076,002		
20		Average Daily Membership Adjustments	3,568,493		3,568,493		
21		Students with Disabilities Reserve		25,000,000			
22		K-12 ADM Contingency Reserve		10,000,000			
23	Yes	School Mental Health Personnel/School Psychologists	40,862,520		40,862,520		Amount on CRP sheet reflects net with line 69 below
24	Yes	Children with Disabilities	13,175,727		13,175,727		
25	Yes	Career and Technical Education Test Fees	6,500,000		6,500,000		
26	Yes	Career and College Ready Graduate	546,500		546,500		
27		NC Association of School Business	2,225,000		2,225,000		
28	Yes	Classroom Supplies			1,900,000		CRP does not implement until next biennium (FY 2023-25)
29	Yes	Dual Enrollment and Opportunity Study		100,000			Combines two different studies from CRP
30	Yes	Advanced Teaching Roles	2,040,000		2,040,000		
31	Yes	TeachNC Administrator and Recruitment Coordinator FTE	100,000	880,000	100,000	880,000	
32	Yes	Cooperative and Innovative High Schools	1,880,000		1,880,000		

K-12 and Early Education Appropriations by Fund Conference FY 2021-23							
			FY 2021-22		FY 2022-23		
	CRP		**Recurring**	**Non-recurring**	**Recurring**	**Non-recurring**	**Notes**
33		Computer Science Division	750,000		750,000		
34		Computer Science Professional Development		2,500,000			
35		Economics and Financial Literacy Professional Development		1,063,000			
36		Charter Schools Data Management System	250,000		250,000		
37		School Bus Routing Support	50,000		50,000		
38		School Connectivity	4,600,000		4,600,000		
39		Rowan Salisbury Renewal District Evaluation		300,000			
40		School Business FTEs	330,000		330,000		
41		DPI Internal Auditors	190,190		190,190		
42		Subscription Rate Increase	876,883		876,883		
43		North Carolina Center for the Advancement of Teaching (NCCAT)		1,411,256			
44		SSRF/Transportation Fund	2,824,616	175,384	2,824,616		
45		IT Subscription Support	593,597		593,597		
46		Early Grade Literacy		6,500,000		5,500,000	
47		School Safety Grants		9,695,000		9,695,000	
48		DPI Indirect Cost		1,404,000			
49		Muddy Sneakers		500,000			
50		Small County Supplemental Funding	110,000		110,000		
51		Military Family Counselors	350,000		350,000		
52		Center for Safer Schools Safety Training Program	1,700,000	300,000	1,700,000		
53		EC Funding Formula Study		27,500			
54		Charter School Transportation Grant Program	2,353,847	146,153	2,353,847		
55		ScholarPath		1,500,000			
56		Guilford County CTE Pilot		2,000,000			
57		Life Changing Experiences		500,000			
58		NC STEM Network		500,000			
59		Vanguard Educational Institute		50,000			
60		Cybersecurity		7,000,000		7,000,000	
61		Feminine Hygiene		250,000			
62		Communities in Schools of Cape Fear		70,000		70,000	
63		Holocaust and Genocide Education		350,000		400,000	
64		Recruitment and Retention for DPI Staff	1,400,000		1,400,000		
65		Mount Calvary Leadership Training Development Center		250,000		250,000	
66	Yes	TAs to Teachers	(575,000)	575,000	(575,000)	575,000	Part of line 13 on CRP sheet, although additional funding not until FY 2025
67		Sales Tax	(30,000,000)		(31,608,823)		
68		Instructional Support (School Psychologists)	(31,010,969)		(31,010,969)		
69		Base Budget Correction for IT Subscription Support	(934,011)		(934,011)		
70		Izone Grants	(450,552)		(450,552)		
71		Civil Penalties and Forfeitures		(36,000,000)			
72		**DPI General Fund Subtotal**	506,359,871	80,070,489	820,599,910	89,998,250	
73		**DPI General Fund Revised Totals**		10,602,750,770		10,926,918,570	

K-12 and Early Education Appropriations by Fund Conference FY 2021-23							
			FY 2021-22		FY 2022-23		
	CRP		**Recurring**	**Non-recurring**	**Recurring**	**Non-recurring**	**Notes**
74		***DPI/DCDEE - Education Lottery Fund***					
75		Base Budget (excluding Higher Ed Items)		660,552,655		660,552,655	
76	Yes	Needs-Based Public School Capital Fund	70,252,612		78,252,612		CRP calls for $2 billion bond in FY 2023-24. Costs are not included in CRP, so does not appear on CRP sheet.
77	Yes	Public School Building R&R Fund	30,000,000		50,000,000		
78		***DPI - Civil Penalty and Forfeiture Fund and Sales Tax Transfer***					
79		Base Budget		245,289,373		245,289,373	
80		Sales Tax	30,000,000		31,608,823		
81		Civil Penalties and Forfeitures		36,000,000			
82		***DPI - Unfunded Liability Solvency Reserve***					
83		Unfunded Liability Solvency Reserve - School District Personnel				21,893,073	
84		Unfunded Liability Solvency Reserve - DPI				141,986	
85		***DPI - State Fiscal Recovery Fund (ARP)***					
86		State Fiscal Recovery Fund - Premium Pay Bonuses - Public Schools		301,258,568			
87		State Fiscal Recovery Fund - Premium Pay Bonuses		1,580,095			
88		Smart School Bus Pilot		18,148,000			
89		Crosby Scholars		500,000			
90		***UNC - General Fund (K-12 Items)***					
91	Yes	Principal Fellows			1,500,000		
92		***DPI - IT Reserve***					
93		School Business System Modernization		48,748,522		37,850,910	
94		***DPI - Elementary and Secondary Schools Emergency Relief Fund (ARP)***					
95		Student funding floor		20,000,000			
96		Residential schools		1,500,000			
97	Yes	Science of Reading		37,500,000			CRP calls for more general professional development allotment
98		After-School Programs		36,000,000			
99		Research partners		1,000,000			
100		Find Missing Students		7,265,134			
101		OSA Audit		350,000			
102		Competency-based platform		9,000,000			
103		Learning recovery positions		2,500,000			
104		Administration		18,008,902			
105		Pre-K Pyramid		500,000			
106		Tracking expenses		2,000,000			
107		Software tracker employee		200,000			
108		Capital projects database		1,000,000			
109		Beginnings		1,000,000			
110	Yes	College Advising Corps		7,042,000			
111		Schools That Lead		970,000			
112		Communities in Schools		2,400,000			
113		Cyberbullying		16,000,000			
114		Gaggle		5,000,000			
115	Yes	CTE Credentials		400,000			
116		Ed Corps		15,000,000			
117	Yes	District and Regional Support		18,000,000			
118		Summer School		36,000,000			

K-12 and Early Education Appropriations by Fund Conference FY 2021-23							
			FY 2021-22		FY 2022-23		
	CRP		**Recurring**	**Non-recurring**	**Recurring**	**Non-recurring**	**Notes**
119		Covid-19 Enrollment Increase		1,100,000			
120		Plasma Games		2,500,000			
121		Failure Free Reading		2,500,000			
122		Betabox		2,042,000			
123		NCMAKids		500,000			
124	Yes	NBPTS Certification Fee		1,200,000			
125	Yes	School Psychologist Signing Bonus		1,700,000			
126		High-Tech Learning Accelerator		8,000,000			
127		Robotics		1,600,000			
128		Driver's Education		400,000			
129		Teacher and Instructional Support Bonuses		100,000,000			
130		***DPI/K-12 - State Capital and Infrastructure Fund***					
131		DPI - Center for Advancement of Teaching		19,482,815		3,934,137	
132		DPI K-12 Athletic Facility Grants		12,624,000			
133		Alexander Central High Tennis Court		330,000			
134		Alexander Central High Track		300,000			
135		Alleghany County Schools - Athletic Facilities		2,250,000			
136		Bethel Middle School Sports Field		1,500,000			
137		Cleveland County Schools Athletic Facilities		4,900,000			
138		Harnett County Schools Athletic Facilities		325,000			
139		Hertford County Middle School Football Field		150,000			
140		Lincoln County Rescue Park Soccer Fields		1,100,000			
141		Madison High School Athletic Facilities		2,500,000			
142		Mitchell High School Field Turf		1,100,000			
143		Mountain Heritage High School Field Turf		1,100,000			
144		North Lincoln High School Field Turf		1,000,000			
145		Piedmont High School Athletic Facilities		1,200,000			
146		Parkland High School Athletic Fields and Stadium		2,500,000			
147		Stokes County Athletic Facilities		1,750,000			
148		Surry County Athletic Facilities		1,750,000			
149		Washington High School Soccer Field		121,000			
150		Wilkes Central High School Athletic Facilities		5,000,000			
151		Wilkes County High School Athletic Facilities		2,500,000			
152		Northeast Regional School of Biotechnology and Agriscience		400,000			
153		Public Schools of Robeson County Planetarium and Science Center		5,000,000			
154		SEATech		4,000,000			
155		***DHHS DCDEE- General Fund***					
156	Yes	Smart Start	10,000,000		10,000,000		
157	Yes	NC Pre-K Child Care Center Reimbursement Rate Increase	1,700,000		3,500,000		
158		***DHHS DCDEE - State Fiscal Recovery Fund (ARP)***					

K-12 and Early Education Appropriations by Fund Conference FY 2021-23							
			FY 2021-22		FY 2022-23		
	CRP		**Recurring**	**Non-recurring**	**Recurring**	**Non-recurring**	**Notes**
159		Start-up and Capital Grants for child care centers and NC Pre-K classrooms		20,000,000			
160		***DHHS DPH - State Fiscal Recovery Fund (ARP)***					
161		Lead and Asbestos Remediation		150,000,000			
162		***DHHS DCDEE - CCDF Block Grant (ARPA)***					
163	Part	CCDF		502,777,789			$256 million is included in the CRP (lines 42 & 52)

Notes

"CRP" reflects with a substantively similar item was included in the Comprehensive Remedial Plan

Includes only items modified by SL 2021-180; excludes items funded in the base budget or in a previous statutory appropriation

Excludes other K-12 spending adjustments in the UNC budget since SL 2021-180 and the Comprehensive Remedial Plan only overlap with Principal Fellows

TAB 2

STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
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.

SECOND AFFIDAVIT OF MARK TROGDON

I, Mark Trogdon, after being duly sworn, aver as follows:

1. This affidavit supplements my affidavit submitted to the Court on April 8, 2022, which, among other things, provided information regarding my qualifications and experience as well as background information regarding the legislative budget process (the "First Affidavit").

2. As described in my First Affidavit, I have over 28 years of experience with the Fiscal Research Division ("FRD"), which is a division of non-partisan staff who serve the North Carolina General Assembly. On February 1st, I moved to a Senior Advisor to the Legislative Services Officer position from my prior position of Director of Fiscal Research in anticipation of my impending retirement. In my current position I continue to assist FRD.

3. As part of my First Affidavit, I provided calculations comparing the appropriations made under the then-enacted appropriations acts for FY 2021-22 and 2022-23 to the amounts requested in "Years 2 and 3" of the Comprehensive Remedial Plan ("CRP") submitted by Plaintiffs and the Executive Branch. On April 26, 2022, Judge Robinson entered an Order Following Remand, which used the charts provided with my affidavit to make findings regarding the amount of funding provided for each item under Years 2 and 3 of the CRP.

4. The State Budget has been amended since the Court entered its Order Following Remand on April 26, 2022. On July 1, 2022, the General Assembly passed the Current Operations Appropriations Act of 2022, which modified and made additional appropriations for FY 2022-23, which corresponds to "Year 3" of the CRP.

See 2022 N.C. Sess. L. 74 (the "2022 Appropriations Act"). The Governor signed the 2022 Appropriations Act into law on July 11, 2022.[1]

5. As a result of these amendments, which were adopted while this case was on appeal, I understand that the Supreme Court remanded this case to the trial court to "recalculate the appropriate distributions in light of the State's 2022 budget," *Hoke Cnty. Bd. of Educ. v. State*, 382 N.C. 386, 476, 879 S.E.2d 193, 249 (2022), and that the trial court has accordingly requested the Parties provide evidence to allow it to make this calculation.

6. In accordance with the Court's request, I, with the assistance of FRD's non-partisan fiscal staff, prepared the chart attached hereto as **Exhibit A**, which compares the funding appropriated for FY 2021-22 and 2022-23 to the items requested in the CRP. In preparing this chart, FRD adopted the same methodology that Judge Robinson used in making his calculations in his Order Following Remand. (*See* Order Following Remand, ¶¶ 41-42 (explaining the "principles" adopted by the Court in making its calculations and resolving disagreements between the Parties' calculations)).

7. In addition to preparing the attached chart, I have also reviewed the calculations prepared by the Office of State Budget and Management ("OSBM") that

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[1] As set forth in my First Affidavit, the 2021 Appropriations Act, which was enacted in November 2021, established a comprehensive, balanced budget for FY 2021-22 and 2022-23. 2021 N.C. Sess. L. 180. The 2021 Appropriations Act was subsequently modified through the enactment of two technical corrections bills, one of which made additional appropriations, *See* 2021 N.C. Sess. L. 189; 2022 N.C. Sess. L. 6. The 2022 Appropriations Act made further amendments to the budget and made additional appropriations for FY 2022-23. *See* N.C. Sess. L. 2022 N.C. Sess. L. 74.

were attached to Anca Elena Grozav's affidavit filed by the Department of Justice on December 19, 2022.

8. Based on FRD's analysis, we agree with OSBM's conclusions regarding the amount of funding provided for many of the action items in the CRP. The places where our analysis differs from OSBM's submission are as follows:

a. New Teacher Support Program (Line 4) – OSBM's calculation does not include $2,000,000 from the Governor's Emergency Education Relief ("GEER") Fund,[2] which were received by the State from the federal government and then appropriated to the Office of the Governor by the General Assembly. See 2021 N.C. Sess. L. 3, § 1.1.

b. Educator Compensation Study (Line 28) – The CRP called for $50,000 in nonrecurring funds for an educator compensation study (*see* CRP Item I.A.ii.2). OSBM provided DPI with $109,000 in funding for this item in FY 2022-23 from the North Carolina Evaluation Fund grant. The money for that fund was provided through appropriations in the 2021 Appropriations Act. OSBM's chart, however, does not include this money and instead lists $0 for this program.

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[2] The federal GEER program was originally enacted by Congress as part of the Coronavirus Aid, Relief, and Economic Security ("CARES") Act, Public Law 116-136 (March 27, 2020). Congress increased the funds for this program as part of the Consolidated Appropriations Act, Public Law 116-260 (December 27, 2020). The Governor provided $2,000,000 to the New Teacher Support Program from these additional funds, which were originally targeted to the Emergency Assistance to Nonpublic Schools (EANS) portion of the GEER program.

c. Disadvantaged Student Supplemental Funding (Line 45) – The 2022 Appropriations Act increased the amount made available to local school systems through the At-Risk allotment by $26,068,720. This amount was intended to reflect the average actual salaries of school resource officers paid from this allotment. Since school districts were using existing At-Risk funds to pay these salaries, this increase represents additional availability for districts to use for any purpose for which the At-Risk funding is provided.

d. Principal and Assistant Principal Salaries (Line 56) – OSBM's calculation does not include $6,236,038 that the General Assembly appropriated to support masters of school administration ("MSA") interns in FY 2022-23 as part of the 2022 Appropriations Act. This increase provided sufficient funding to support stipends paid to school administrators who are in a MSA program. (*See* CRP Item III.E.ii.3).

e. District and Regional Support (Line 60) – OSBM's calculation does not include $14,000,000 appropriated under the 2022 Appropriations Act for regional literacy and early learning specialists.

f. Review and Adoption of Core Curricular Resources (Line 62) – Although the CRP lists it as an action item for Year 3, the CRP does not identify the amount of funding needed for "Review and Adoption of Core Curricular Resources" (CRP Item V.B.ii.1). Instead, the CRP lists the funding for this item as "TBD." OSBM did not include this item on its

charts. The 2022 Appropriations Act, however, includes $260,000 in recuring appropriations for this item in FY 2022-23, and we therefore have included it in our chart.

g. Additional Cooperative and Innovative High Schools (Line 70) – Like the item listed above, the CRP included "Additional Cooperative and Innovative High Schools" as an action item for Year 3 (CRP Item VII.B.iv.2) but listed the funding for this item as "TBD." OSBM did not include this item in its calculations. The 2022 Appropriations Act, however, includes $730,000 in additional recurring funding for this item, and we therefore have included it in our chart.

9. In addition to showing the amounts appropriated for each item, we have also indicated whether the items listed in the CRP calls for recurring or nonrecurring appropriations. As a general matter, recurring appropriations are intended to be ongoing beyond the current fiscal biennium and will appear in subsequent budgets until a change is enacted by the General Assembly. Recurring appropriations are generally used for ongoing operating expenses, such as salaries. Under the State Budget Act, recurring appropriations are included in the "base budget" for the next biennium, which serves as the starting point for lawmakers as they make budget adjustments in odd-numbered fiscal years (or the first fiscal year within a fiscal biennium). Nonrecurring appropriations are made only for a single fiscal year and are not repeated unless the General Assembly appropriates additional funding in a

subsequent fiscal year. They are not included in the base budget for the next fiscal biennium.

10. I understand there is disagreement among the Parties as to whether to include recurring appropriations in calculating the CRP's Year 2 goals since that year has closed and we are now in Year 3. To aid the Court with its analysis, the chart in **Exhibit A** provides both annual recurring and nonrecurring subtotals.

FURTHER AFFIANT SAYETH NOT.

This the 14th day of March, 2023.

Mark Trogdon

Sworn to and subscribed before
me this 14th day of March 2023.

Notary Public
My Commission Expires: 12-16-2024

TOMMIE M. PURYEAR NOTARY PUBLIC WAKE COUNTY, NC

EXHIBIT A

Leandro refers to the case *Hoke County Board of Education v. State* , originally filed in 1994. Items listed below are those that are explicitly identified in the Comprehensive Remedial Plan (CRP). This document does not include all appropriated health and human services (HHS) and education funding in FY 2021-23.

		Comprehensive Remedial Plan				Enacted Budget				Additional Amount Called for Under the CRP (Methodology of the Court's April 2022 Order)				Notes
		FY 2021-22	R/NR?	FY 2022-23	R/NR?	FY 2021-22	R/NR?	FY 2022-23	R/NR?	FY 2021-22	R/NR?	FY 2022-23	R/NR?	
1	**University of North Carolina (UNC) System**													
2	**Teaching Fellows** (I.B.iii.1.)	$1,000,000	R	$4,700,000	R					$1,000,000	R	$4,700,000	R	There was an estimated $17.5 million unspent balance in Teaching Fellows Trust Fund at end of FY 2021-22 because funds appropriated have exceeded program spending.
3	**Partnership Teach and other 2+2, grow your own** (I.E.ii.1.)	$2,200,000	R	$2,200,000	R					$2,200,000	R	$2,200,000	R	S.L. 2021-180, without further adjustments, would decrease funds for one program, TAs to Teachers, in FY 2023-24.
4	**New Teacher Support Program** (I.G.ii.1.)	$2,200,000	R	$5,000,000	R			$2,000,000	NR	$2,200,000	R	$3,000,000	R	Funds from the Governor's Emergency Education Relief (GEER) federal COVID funds appropriated in S.L. 2021-3 Sec. 1.1. Grozav affidavit shows funding as $0.
5	**Principal Fellows/TP3** (II.B.iii.1.)	$8,700,000	R	$9,700,000	R			$1,500,000	R	$8,700,000	R	$8,200,000	R	
6	**College Advising Corps** (VII.C.iii.1)	$2,600,000	R	$3,000,000	R	$7,042,000	NR							Enacted budget out of ESSER III. See notes 1 and 2.
7	**UNC Recurring Subtotal**	$16,700,000	R	$24,600,000	R	$0	R	$1,500,000	R	$14,100,000	R	$18,100,000	R	
8	**UNC Nonrecurring Subtotal**	$0	NR	$0	NR	$7,042,000	NR	$2,000,000	NR	$0	NR	$0	NR	
9	**UNC System Subtotal**	**$16,700,000**		**$24,600,000**		**$7,042,000**		**$3,500,000**		**$14,100,000**		**$18,100,000**		
11	**Department of Health and Human Services (DHHS)**													
12	**NC Pre-K** (VI.A.ii.1.)	$26,500,000	R	$45,400,000	R	$1,700,000	R	$12,500,000	R	$24,800,000	R	$32,900,000	R	S.L. 2021-180 includes funds for 2%/4% rate increases for private child care centers only. S.L. 2022-74 includes an additional 5% rate increase for all providers on top of the 4% rate increase for child care centers already included in S.L. 2021-180.
13	**Child Care Subsidy** (VI.B.iv.1.)	$10,000,000	R	$10,000,000	R	$206,000,000	NR							S.L. 2021-180 requires at least $206M, but DHHS may spend up to $215M of the ARPA child care block grant, appropriated in FY 2021-22. These funds expire Sept. 30, 2024. See notes 1 and 2.
14	**Infant-Toddler Program** (VI.C.ii.1.)	$7,700,000	R	$10,000,000	R					$7,700,000	R	$10,000,000	R	
15	**Infant-Toddler Study** (VI.C.ii.2.)	$150,000	NR							$150,000	NR			
16	**Infant-Toddler Infrastructure Readiness Study** (VI.C.ii.3.)	$100,000	NR							$100,000	NR			
17	**Professional Development for Infant-Toddler** (VI.C.ii.4.)	$250,000	R	$250,000	R					$250,000	R	$250,000	R	
18	**Smart Start** (VI.D.ii.1.)	$20,000,000	R	$20,000,000	R	$10,000,000	R	$10,000,000	R	$10,000,000	R	$10,000,000	R	
19	**WAGE$/AWARD$** (VI.E.ii.1.)	$10,000,000	R	$26,000,000	R					$10,000,000	R	$26,000,000	R	
20	**Early Childhood Recruitment** (VI.E.ii.4.)	$500,000	R	$1,250,000	R					$500,000	R	$1,250,000	R	S.L. 2021-180 provides up to $208M of the $503M NR ARPA child care block grant for workforce, including recruitment, appropriated in FY 2021-22.
21	**Workforce Data System** (VI.G.ii.1.)	$1,200,000	NR	$500,000	R	$50,000,000	NR							S.L. 2021-180 requires at least $50M, but DHHS may spend up to $59M of the ARPA child care block grant, appropriated in FY 2021-22. See notes 1 and 2.
22	**DHHS Recurring Subtotal**	$74,950,000	R	$113,400,000	R	$11,700,000	R	$22,500,000	R	$53,250,000	R	$80,400,000	R	

		Comprehensive Remedial Plan				Enacted Budget				Additional Amount Called for Under the CRP (Methodology of the Court's April 2022 Order)				Notes
		FY 2021-22	R/NR?	FY 2022-23	R/NR?	FY 2021-22	R/NR?	FY 2022-23	R/NR?	FY 2021-22	R/NR?	FY 2022-23	R/NR?	
23	**DHHS Nonrecurring Subtotal**	$1,450,000	NR	$0	NR	$256,000,000	NR	$0	NR	$250,000	NR	$0	NR	
24	**DHHS Subtotal**	**$76,400,000**		**$113,400,000**		**$267,700,000**		**$22,500,000**		**$53,500,000**		**$80,400,000**		
26	**Department of Public Instruction (DPI)**													
27	**Professional Educator Preparations and Standards Commission** (I.A.ii.1.)	$200,000	R	$200,000	R					$200,000	R	$200,000	R	
28	**Educator Compensation Study** (I.A.ii.2.)	$50,000	NR					$109,909	NR					Funded by North Carolina Evaluation Fund grant through OSBM from funds appropriated in S.L. 2021-180. Grozav affidavit shows funding as $0.
29	**Educator Preparation Programs Study** (I.A.ii.3.)	$25,000	NR							$25,000	NR			
30	**TeachNC** (I.A.ii.4.)	$500,000	R	$500,000	R	$980,000	R/NR	$980,000	R					See note 1. In FY 2021-22, $100,000 was appropriated on a recurring basis and $880,000 was appropriated on a nonrecurring basis. All funds in FY 2022-23 are recurring.
31	**Increase Teachers Graduating** (I.A.iii.1.)			TBD										
32	**Increase Teacher Graduates of Color** (I.A.iii.2.)			TBD										
33	**Teacher Recruitment Statewide Entity** (I.A.iii.3.)			$25,000	NR							$25,000	NR	
34	**Student Recruitment Programs** (I.A.ii.5.)	$300,000	R	$300,000	R					$300,000	R	$300,000	R	
35	**Teacher Residency Pilot** (I.C.ii.1.)			$5,000,000	R							$5,000,000	R	
36	**DRIVE Task Force Recommendations** (I.F.iii.1.)	TBD		TBD										
37	**Office of Equity Affairs** (I.F.iii.2.)	$400,000	R	$400,000	R					$400,000	R	$400,000	R	
38	**Advanced Teaching Roles** (I.H.iii.1.)	$3,000,000	R	$5,800,000	R	$2,040,000	R	$2,040,000	R	$960,000	R	$3,760,000	R	
39	**Wage Comparability Study** (I.J.ii.1.)	$200,000	NR							$200,000	NR			
40	**National Board Certification** (I.K.ii.1.)	$1,900,000	R	$1,900,000	R	$1,200,000	NR			$700,000	R	$1,900,000	R	Enacted budget out of ESSER III. See notes 1 and 2.
41	**Recruitment Bonuses for Low Wealth or High Needs Districts** (I.K.ii.2.)	$3,000,000	R	$6,000,000	R	$4,300,000	R	$4,300,000	R			$1,700,000	R	S.L. 2021-180 offers bonuses for counties eligible for low wealth or small county funding.
42	**School Leadership Academy** (II.C.iii.1.)			TBD										
43	**Grant Program for Incentives for School Leaders to Work in High Need Schools** (II.D.iii.1)			TBD										
44	**Children with Disabilities** (III.B.ii.1.)	$40,000,000	R	$70,000,000	R	$13,175,727	R	$13,175,727	R	$26,824,273	R	$56,824,273	R	

		Comprehensive Remedial Plan				Enacted Budget				Additional Amount Called for Under the CRP (Methodology of the Court's April 2022 Order)				Notes
		FY 2021-22	R/NR?	FY 2022-23	R/NR?	FY 2021-22	R/NR?	FY 2022-23	R/NR?	FY 2021-22	R/NR?	FY 2022-23	R/NR?	
45	**Disadvantaged Student Supplemental Funding (DSSF)/At-Risk** (III.B.ii.2.)	$35,000,000	R	$70,000,000	R			$26,068,720	R	$35,000,000	R	$43,931,280	R	Funding in 2022-74 increases the At-Risk allotment to reflect actual average salaries of school resource officers. Grozav affidavit shows funding as $0.
46	**Low-Wealth** (III.B.ii.3.)	$20,000,000	R	$40,000,000	R					$20,000,000	R	$40,000,000	R	
47	**Limited English Proficiency** (III.B.ii.4.)	$10,000,000	R	$20,000,000	R					$10,000,000	R	$20,000,000	R	
48	**Program Enhancement Teachers** (III.C.ii.1)	$139,700,000	R	$139,700,000	R	$139,700,000	R	$139,700,000	R					See note 5.
49	**Professional Development Allotment** (III.C.iii.1.)	$10,000,000	R	$20,000,000	R	$37,500,000	NR							Enacted budget out of ESSER III for the science of reading professional development. See notes 1 and 2.
50	**Teacher Assistants** (III.C.iii.2.)	$20,000,000	R	$30,000,000	R					$20,000,000	R	$30,000,000	R	
51	**Instructional Support** (III.D.ii.1 and III.E.ii.2.)	$40,000,000	R	$80,000,000	R	$9,851,551	R	$9,851,551	R	$12,848,449	R	$54,548,449	R	S.L. 2021-180 targets money for school psychologists.
52						$1,700,000	NR							Enacted budget out of ESSER III for psychologist recruitment. See notes 1 and 2.
53						$15,600,000	R	$15,600,000	R					Increases salaries for certain instructional support personnel.
54	**Teacher Salaries** (III.E.ii.2.)	$232,200,000	R	$354,100,000	R	$82,776,979	R	$275,375,151	R	$49,423,021	R			See note 1.
55						$100,000,000	R	$170,000,000	R					Teacher supplement assistance allotment for counties with lower ability to pay teacher supplements.
56	**Principal and Assistant Principal Salaries** (III.E.ii.3.)	$19,000,000	R	$29,700,000	R	$8,950,813	R	$30,971,983	R	$10,049,187	R			Both the Grozav affidavit and FRD include pay increases of $24,735,945 for principals and assistant principals in FY 2022-23. However, the Grozav affidavit does not include $6,236,038 in increased budget for the Master of School Administration (MSA) intern program in FY 2022-23. See note 1.
57	**Noninstructional Support** (III.C.iv.1.)					$56,700,000	R	$188,518,207	R					CRP does not implement until next biennium (FY 2023-25).
58	**Classroom Supplies** (III.C.iv.2.)							$1,900,000	R					CRP does not implement until next biennium (FY 2023-25).
59	**Central Office Staff** (III.C.iv.5.)					$3,050,575	R	$7,968,998	R					CRP does not implement until next biennium (FY 2023-25).
60	**District and Regional Support** (V.A.iii.1.)	$10,000,000	R	$19,000,000	R	$18,000,000	NR	$14,000,000	R					$18,000,000 NR from ESSER III (2021-180); Judge Robinson's methodology would spread the these funds over both years of the biennium, and accordingly the Grozav affidavit shows funding as $8,000,000 in FY 2022-23. The $14,000,000 recurring beginning in FY 2022-23 is for regional literacy and early learning specialists, which is not included in the Grozav affidavit. See notes 1 and 2.
61	**Community School Support** (V.C.ii.1)	$1,500,000	R	$6,000,000	R					$1,500,000	R	$6,000,000	R	
62	**Review and Adoption of Core Curricular Resources** (V.B.ii.1)			TBD				$260,000	R					Grozav affidavit does not list this item.
63	**School Lunches** (V.C.iii.1.)			$3,900,000	R			$3,900,000	NR					
64	**Dual Enrollment Study** (VII.A.ii.3)	$50,000	NR			$100,000	NR							Enacted budget combines this study with #69 below.
65	**Career and College Ready** (VII.A.ii.4)	$546,500	R	$546,500	R	$546,500	R	$546,500	R					

		Comprehensive Remedial Plan				Enacted Budget				Additional Amount Called for Under the CRP (Methodology of the Court's April 2022 Order)				Notes
		FY 2021-22	R/NR?	FY 2022-23	R/NR?	FY 2021-22	R/NR?	FY 2022-23	R/NR?	FY 2021-22	R/NR?	FY 2022-23	R/NR?	
66	**Cooperative and Innovative High Schools (CIHS)** (VII.B.ii.1)	$1,880,000	R	$1,880,000	R	$1,880,000	R	$1,880,000	R					
67	**North Carolina Virtual Public School (NCVPS) fees** (VII.B.iii.1)	$1,500,000	R	$3,000,000	R					$1,500,000	R	$3,000,000	R	
68	**CTE Credentials** (VII.B.iii.2)	$6,500,000	R	$6,500,000	R	$6,900,000	R	14,500,000	R					
69	**Barriers of Access Study** (VII.B.iv.1)			$50,000	NR									Enacted budget combines with #64 above and funds in the first year.
70	**Additional Cooperative and Innovative High Schools** (VII.B.iv.2)			TBD				$730,000	R					Grozav affidavit does not list this item.
71	**Career Development Coordinators** (VII.C.iii.2)	$100,000	R	$10,000,000	R					$100,000	R	$10,000,000	R	
72	**DPI Recurring Subtotal**	$597,226,500	R	$924,426,500	R	$445,472,145	R	$918,366,837	R	$189,804,930	R	$277,564,002	R	
73	**DPI Nonrecurring Subtotal**	$325,000	NR	$75,000	NR	$58,500,000	NR	$4,009,909	NR	$225,000	NR	$25,000	NR	
74	**DPI Subtotal**	**$597,551,500**		**$924,501,500**		**$504,952,145**		**$922,376,746**		**$190,029,930**		**$277,589,002**		
76	**Total Recurring**	$688,876,500	R	$1,062,426,500	R	$457,172,145	R	$942,366,837	R	$257,154,930	R	$376,064,002	R	
77	**Total Nonrecurring**	$1,775,000	NR	$75,000	NR	$321,542,000	NR	$6,009,909	NR	$475,000	NR	$25,000	NR	
78	**Total**	$690,651,500		$1,062,501,500		$779,694,145		$948,376,746		$257,629,930		$376,089,002		
80	**School Capital**													
81	**Needs-Based Public School Capital Fund**					$70,252,612	R	$356,252,612	R/NR					CRP would fund school capital through a $2 billion bond in FY 2023-24, with debt costs TBD. (III.C.iv.6.) In FY 2022-23, the Needs-Based Public School Capital Fund received $133,252,612 in recurring appropriations and $223,000,000 in non-recurring appropriations.
82	**Public School Building R&R Fund**					$30,000,000	R	$50,000,000	R					

Notes:

1. The methodology used by the Court in its April 2022 order capped enacted funding for any given item at the maximum called for in the CRP. Thus the "Additional Amount Called for Under the CRP" reflects any non-zero amount after any funding provided in the enacted budget has been subtracted from the amount listed in the CRP.
2. Federal ARPA funds (ESSER and child care block grant) are expendable until September 30, 2024.These funds were appropriated in FY 2021-22. Following the methodology in the Court's April 2022 order, they are split between FY 2021-22 and FY 2022-23 to reflect the longer expenditure period in the "Additional Amount Called for Under the CRP" columns.
3. Figures exclude average daily membership (ADM) adjustments as well as nonrecurring bonuses.
4. Items that have neither funding amounts in the Comprehensive Remedial Plan nor appear in the enacted budget are not included. Items that are "TBD" in the relevant years of the Comprehensive Remedial Plan are included.
5. All figures represent increases to the base budget for FY 2021-22, except for the Program Enhancement Teachers line, which was included in the base budget.
6. Only includes funds determined at a statewide level. Federal COVID funds made available directly to districts are not included.
7. "R" refers to recurring funds, which are annually appropriated in each budget absent further legislative action. "NR" refers to nonrecurring funds, which are appropriated solely for the years indicated.
8. Lines 4, 28, 45, 56, 60, 62, and 70 have amounts different than those represented in the Affidavit of Anca Elen Grozav, filed on December 19, 2022. In total, the "additional amount called for under the CRP" reflected on this sheet is $44,092,775 less than the amount in the Grozav affidavit.

Acronyms Used:

ARPA-American Rescue Plan Act
ESSER-Elementary and Secondary School Emergency Relief Fund
GEER-Governor's Emergency Education Relief Fund
SFRF-State Fiscal Recovery Fund

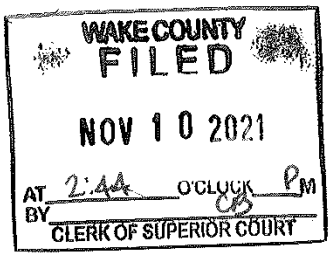
TAB 3

STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
95-CVS-1158

HOKE COUNTY BOARD OF EDUCATION; HALIFAX COUNTY BOARD OF EDUCATION; ROBESON COUNTY BOARD OF EDUCATION; CUMBERLAND COUNTY BOARD OF EDUCATION; VANCE COUNTY BOARD OF EDUCATION; RANDY L. HASTY, individually and as Guardian Ad Litem of RANDELL B. HASTY; STEVEN R. SUNKEL, individually and as Guardian Ad Litem of ANDREW J. SUNKEL; LIONEL WHIDBEE, individually and as Guardian Ad Litem of JEREMY L. WHIDBEE; TYRONE T. WILLIAMS, individually and as Guardian Ad Litem of TREVELYN L. WILLIAMS; D.E. LOCKLEAR, JR., individually and as Guardian Ad Litem of JASON E. LOCKLEAR; ANGUS B. THOMPSON II, individually and as Guardian Ad Litem of VANDALIAH J. THOMPSON; MARY ELIZABETH LOWERY, individually and as Guardian Ad Litem of LANNIE RAE LOWERY, JENNIE G. PEARSON, individually and as Guardian Ad Litem of SHARESE D. PEARSON; BENITA B. TIPTON, individually and as Guardian Ad Litem of WHITNEY B. TIPTON; DANA HOLTON JENKINS, individually and as Guardian Ad Litem of RACHEL M. JENKINS; LEON R. ROBINSON, individually and as Guardian Ad Litem of JUSTIN A. ROBINSON,



Plaintiffs,

and

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION,

Plaintiff-Intervenor,

and

RAFAEL PENN; CLIFTON JONES, individually and as Guardian Ad Litem of CLIFTON MATTHEW JONES; DONNA JENKINS DAWSON, individually and as Guardian Ad Litem of NEISHA SHEMAY DAWSON and TYLER ANTHONY HOUGH-JENKINS,

Plaintiff-Intervenors,

v.

STATE OF NORTH CAROLINA and the STATE BOARD OF EDUCATION,

Defendants,

and

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION,

Realigned Defendant.

ORDER

Over seventeen years ago, Justice Orr, on behalf of a unanimous Supreme Court, wrote:

> The world economy and technological advances of the twenty-first century mandate the necessity that the State step forward, *boldly and decisively*, to see that all children, without regard to their socio-economic circumstances, have an educational opportunity and experience that not only meet the constitutional mandates set forth in *Leandro*, but fulfill the dreams and aspirations of the founders of our

> state and nation. Assuring that our children are afforded the chance to become contributing, constructive members of society is paramount. *Whether the State meets this challenge remains to be determined.*

Hoke County Bd. of Educ. v. State, 358 N.C. 605, 649 (2004) *("Leandro II")* (emphasis added). As of the date of this Order, the State has not met this challenge and, therefore, has not met its constitutional obligation to the children of North Carolina.

The orders of our Supreme Court are not advisory. This Court can no longer ignore the State's constitutional violation. To do so would render both the North Carolina State Constitution and the rulings of the Supreme Court meaningless.

This Court, having held a hearing on October 18, 2021 at which it ordered Plaintiffs and Plaintiff-Intervenors to submit proposed order(s) and supporting legal authorities by November 1, 2021 and Defendants State of North Carolina ("State") and State Board of Education ("State Board," and collectively with the State, "State Defendants") to respond by November 8, 2021, finds and concludes as follows[1]:

I. Findings of Fact

1. In its unanimous opinion in *Leandro II,* the Supreme Court held, "an inordinate number" of students had failed to obtain a sound basic education and that the State had "failed in [its] constitutional duty to provide such students with the opportunity to obtain a sound basic education." In light of that holding, the Supreme Court ordered that "the State must act to correct those deficiencies that were deemed by the trial court as contributing to the State's failure of providing a Leandro-comporting educational opportunity." *Id.* at 647-48.

2. Since 2004, this Court has given the State countless opportunities, and unfettered discretion, to develop, present, and implement a *Leandro*-compliant remedial plan. For over eleven (11) years and in over twenty (20) compliance hearings, the State demonstrated its inability, and repeated failure, to develop, implement, and maintain any kind of substantive structural initiative designed to remedy the established constitutional deficiencies.

3. For more than a decade, the Court annually reviewed the academic performance of every school in the State, teacher and principal population data, and the programmatic resources made available to at-risk students. This Court concluded from over a decade of undisputed evidence that "in way too many school

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[1] The findings and conclusions of the Court's prior Orders—including the January 21, 2020 Consent Order ("January 2020 Order"), September 11, 2020 Consent Order ("September 2020 Order"), June 7, 2021 Order on Comprehensive Remedial Plan ("June 2021 Order"), September 22, 2021 Order ("September 2021 Order"), and October 22, 2021 Order ("October 2021 Order")—are incorporated herein.

districts across this state, thousands of children in the public schools have failed to obtain and are not now obtaining a sound basic education as defined and required by the *Leandro* decision." March 17, 2015 Order.

4. At that time, North Carolina was replete with classrooms unstaffed by qualified, certified teachers and schools that were not led by well-trained principals. Districts across the State continued to lack the resources necessary to ensure that all students, especially those at-risk, have an equal opportunity to receive a *Leandro*-conforming education. In fact, the decade after *Leandro II* made plain that the State's actions regarding education not only failed to address its *Leandro* obligations, but exacerbated the constitutional harms experienced by another generation of students across North Carolina, who moved from kindergarten to 12th grade since the Supreme Court's 2004 decision.

5. This Court examined the record again and in 2018 found that "the evidence before this court . . . is wholly inadequate to demonstrate . . . substantial compliance with the constitutional mandate of *Leandro* measured by applicable educational standards." *See* March 13, 2018 Order. The State Board did not appeal the ruling. Consequently, the Court ordered the parties to identify an independent, third-party consultant to make detailed comprehensive written recommendations for specific actions necessary to achieve sustained compliance with the constitutional mandates articulated in the holdings of *Leandro v. State,* 346 N.C. 336, 357 (1997) *("Leandro I")* and *Leandro II.* The State, along with the Plaintiffs and Penn Intervenors, recommended WestEd to serve in that capacity. The Governor also created the Commission on Access to a Sound Basic Education (the "Commission") at that time "to gather information and evidence to assist in the development of a comprehensive plan to address compliance with the constitutional mandates." Governor Roy Cooper Exec. Order No. 27 (Nov. 15, 2017).

6. By Order dated March 13, 2018, the Court appointed WestEd to serve as the Court's consultant, and all parties agreed that WestEd was qualified to serve in that capacity. *See* January 2020 Order at 10. In support of its work, WestEd also engaged the Friday Institute for Educational Innovation at North Carolina State University and the Learning Policy Institute (LPI), a national education policy and research organization with extensive experience in North Carolina. WestEd presented its findings and recommendations to the Court in December 2019 in an extensive report entitled, *"Sound Basic Education for All: An Action Plan for North Carolina,"* along with 13 underlying studies (collectively, the "WestEd Report"). The WestEd Report represents an unprecedented body of independent research and analysis of the North Carolina educational system that has further informed the Court's approach in this case.

7. The WestEd Report concluded, and this Court found, that the State must complete considerable, systematic work to deliver fully the opportunity to obtain a sound basic education to all children in North Carolina. *See* January 2020 Order at 2-3. The WestEd Report found, for example, that hundreds of thousands of North Carolina

children continue to be denied the opportunity for a sound basic education. Indeed, the State is in many ways further away from constitutional compliance than it was when the Supreme Court issued its *Leandro I* decision almost 20 years ago. (WestEd Report, p. 31). Minimal progress has been made, as evidenced by multiple data sources on two of the primary educational outputs identified in *Leandro*: (i) the proficiency rates of North Carolina's students, especially at-risk students, in core curriculum areas, and (ii) the preparation of students, especially at-risk students, for success in postsecondary degree and credential programs. (Report, p. 31).

8. Based on the WestEd Report, the Court found that due to the increase in the number of children with higher needs, who require additional supports to meet high standards, the State faces greater challenges than ever before in meeting its constitutional obligations. January 2020 Order at 15. For example, North Carolina has 807 high-poverty districts schools and 36 high-poverty charter schools, attended by over 400,000 students (more than a quarter of all North Carolina students). *Id.* The Court also found that state funding for education has not kept pace with the growth and needs of the PreK-12 student body. *Id.* at 17. And promising initiatives since the *Leandro II* decision were neither sustained nor scaled up to make a substantial impact. *Id.*

9. Plaintiffs and Penn Intervenors (collectively, "Plaintiffs") as well as State Defendants all agreed 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." January 2020 Order at 3. The Court agreed and, therefore, ordered State Defendants to work "expeditiously and without delay" to create and fully implement a system of education and educational reforms that will provide the opportunity for a sound basic education to all North Carolina children.

10. The parties submitted a Joint Report to the Court on June 15, 2020 that acknowledged that the COVID-19 pandemic has exacerbated many of the inequities and challenges that are the focus of this case, particularly for students of color, English Language Learners, and economically-disadvantaged students. The Joint Report set forth specific action steps that "the State *can and will* take in Fiscal Year 2021 (2020-21) to begin to address the constitutional deficiencies previously identified by this Court" (the "Year One Plan"). The parties all agreed that the actions specified in the Year One Plan were necessary and appropriate to remedy the constitutional deficiencies in North Carolina public schools.

11. On September 11, 2020, the Court ordered State Defendants to implement the actions identified in the Year One Plan. September 2020 Order, Appendix A. The Court further ordered State Defendants, in consultation with Plaintiff parties, to develop and present a Comprehensive Remedial Plan to be fully implemented by the end of 2028 with the objective of fully satisfying State Defendants' *Leandro* obligations by the end of 2030. Lastly, to assist the Court in entering this order and to promote transparency, the Court

ordered State Defendants to submit quarterly status reports of progress made toward achieving each of the actions identified in the Year One Plan.

12. State Defendants submitted their First Status Report on December 15, 2020. The Court was encouraged to see that some of the initial action items were successfully implemented and that the SBE had fulfilled its obligations. However, the Court noted many shortcomings in the State's accomplishments and the State admitted that the Report showed that it had failed to implement the Year One Plan as ordered. For example, House Bill 1096 (SL 2020-56), which was enacted by the General Assembly and signed into law by the Governor on June 30, 2020, implemented the identified action of expanding the number of eligible teacher preparation programs for the NC Teaching Fellows Program from 5 to 8. Increased funding to support additional Teaching Fellows for the 2021-22 academic year, however, was not provided. Similarly, Senate Bill 681 (SL 2020-78) was enacted by the General Assembly and signed into law by the Governor on July 1, 2020 to create a permanent Advanced Teaching Roles program that would provide grants and policy flexibility to districts seeking to implement a differentiated staffing model. Senate Bill 681, however, did not provide any new funding to provide additional grants to school districts, as required by the Year One Plan.[2]

13. The State Defendants submitted their Comprehensive Remedial Plan (which includes the Appendix) on March 15, 2021. As represented by State Defendants, the Comprehensive Remedial Plan identifies the programs, policies, and resources that "are necessary and appropriate actions that must be implemented to address the continuing constitutional violations and to provide the opportunity for a sound basic education to all children in North Carolina." Specifically, in *Leandro II,* the Supreme Court unanimously affirmed the trial court's finding that the State had not provided, and was not providing, competent certified teachers, well-trained competent principals, and the resources necessary to afford all children, including those at-risk, an equal opportunity to obtain a sound basic education, and that the State was responsible for these constitutional violations. *See* January 2020 Order at 8; 358 N.C. at 647-48. Further, the trial court found, and the Supreme Court unanimously affirmed, that at-risk children require more resources, time, and focused attention in order to receive a sound basic education. *Id.*; *Leandro II,* 358 N.C. at 641. Regarding early childhood education, the Supreme Court affirmed the trial court's findings that the "State was providing inadequate resources" to "'at-risk' prospective enrollees" ("pre-k" children), "that the State's failings were contributing to the 'at-risk' prospective enrollees' subsequent failure to avail themselves of the opportunity to obtain a sound basic education," and that "State efforts towards providing remedial aid to 'at-risk' prospective enrollees were inadequate." *Id.* at 69, *Leandro II.* 358 N.C. at 641-42.

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[2] The First Status Report also detailed the federal CARES Act funds that the Governor, the State Board, and the General Assembly directed to begin implementation of certain Year One Plan actions. The Court notes, however, that the CARES Act funding and subsequent federal COVID-related funding is nonrecurring and cannot be relied upon to sustain ongoing programs that are necessary to fulfill the State's constitutional obligation to provide a sound basic education to all North Carolina children.

Consequently, the Comprehensive Remedial Plan addresses each of the "*Leandro* tenets" by setting forth specific actions to be implemented over the next eight years to achieve the following:

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

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

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

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

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

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

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

January 2020 Order at 4-5.

14. The Appendix to the Comprehensive Remedial Plan identifies the resources necessary, as determined by the State, to implement the specific action steps to provide the opportunity for a sound basic education. This Court has previously observed "that money matters provided the money is spent in a way that is logical and the results of the expenditures measured to see if the expected goals are achieved." Memorandum of Decision, Section One, p. 116. The Court finds that the State Defendants' Comprehensive Remedial Plan sets forth specific, comprehensive, research-based and logical actions, including creating an assessment and accountability system to measure the expected goals for constitutional compliance.

15. WestEd advised the parties and the Court that the recommendations contained in its Report are not a "menu" of options, but a comprehensive set of fiscal, programmatic, and strategic steps necessary to achieve the outcomes for students required by our State Constitution. WestEd has reviewed the Comprehensive Remedial Plan and has advised the Court that the actions set forth in the Plan are necessary and appropriate for implementing the recommendations contained in WestEd Report. The Court concurs with WestEd's opinion and also independently reaches this conclusion based on the entire record in this case.

16. The Supreme Court held in 1997 that if this Court finds "from competent evidence" that the State is "denying children of the state a sound basic education, a denial of a fundamental right will have been established." *Leandro I*, 346 N.C. at 357. This Court's finding was upheld in *Leandro II* and has been restated in this Court's Orders in 2015 and 2018. It is, therefore, "incumbent upon [the State] to establish that their actions denying this fundamental right are 'necessary to promote a compelling government interest.'" *Id.* The State has not done so.

17. To the contrary, the State has repeatedly acknowledged to the Court that additional State actions are required to remedy the ongoing denial of this fundamental right. *See, e.g.*, State's March 15, 2021 Submission to Court at 1 (State acknowledging that "this constitutional right has been and continues to be denied to many North Carolina children"); *id.* ("North Carolina's PreK-12 education system leaves too many students behind, especially students of color and economically disadvantaged students."); *id.* ("[T]housands of students are not being prepared for full participation in the global, interconnected economy and the society in which they will live, work, and engage as citizens."); State's August 16, 2021 Submission to Court at 1 (acknowledging that additional State actions are required to remedy the denial of the constitutional right). *See also, e.g.*, January 2020 Order at 15 (noting State's acknowledgment that it has failed to meet its "constitutional duty to provide all North Carolina students with the opportunity to obtain a sound basic education."); *id.* ("[T]he Parties do not dispute [ ] that many children across North Carolina, especially at-risk and economically-disadvantaged students, are not now receiving a *Leandro*-conforming education."); *id.* at 17 (State has "yet to achieve the promise of our Constitution and provide all with the opportunity for a sound basic education"); June 2021 Order at 6 ("State Defendants have acknowledged that additional State actions are required to remedy the denial of this fundamental right.").

18. After seventeen years, State Defendants presented to the Court a Comprehensive Remedial Plan outlining those additional State actions necessary to comply with the mandates of the State Constitution.

19. The Comprehensive Remedial Plan sets out the "nuts and bolts" for how the State will remedy its continuing constitutional failings to North Carolina's children. It sets out (1) the specific actions identified by the State that must be

implemented to remedy the continuing constitutional violations, (2) the timeline developed by the State required for successful implementation, and (3) the necessary resources and funding, as determined by the State, for implementation.

20. The Comprehensive Remedial Plan is the *only* remedial plan that the State Defendants have presented to the Court in response its January 2020, September 2020, and June 2021 Orders. The State Defendants have presented no alternative remedial plan.

21. With regard to the Comprehensive Remedial Plan, the State has represented to this Court that the actions outlined in the Plan are the "necessary and appropriate actions that must be implemented to address the continuing constitutional violations." *See* State's March 2021 Submission at 3, 4 (emphasis added). The State further represented to the Court that the full implementation of each year of the Remedial Plan was required to "provide the opportunity for a sound basic education to all children in North Carolina." *Id.* at 3. The State assured the Court that it was "committed" to fully implementing its Comprehensive Remedial Plan and within the time frames set forth therein. *Id.*

22. The State has represented to the Court that more than sufficient funds are available to execute the current needs of the Comprehensive Remedial Plan. *See, e.g.*, State's August 6, 2021 Report to Court. The State of North Carolina concedes in its August progress report to the Court that the State's reserve balance included $8 billion and more than ***$5 billion*** in forecasted revenues at that time that exceed the existing base budget. Yet, the State has not provided the necessary funding to execute the Comprehensive Remedial Plan.

23. The Court understands that those items required by the Year One Plan that were not implemented as ordered in the September 2020 Order have been included in, or "rolled over" to, the Comprehensive Remedial Plan. The Court notes that the WestEd Report contemplated that its recommendations would be implemented gradually over eight years, with later implementation building upon actions to be taken in the short term. Failure to implement all of the actions in the Year One Plan will necessarily make it more difficult for State Defendants to implement all the actions described in the Comprehensive Remedial Plan in a timely manner. The urgency of implementing the Comprehensive Remedial Plan on the timeline currently set forth by State Defendants cannot be overstated. As this Court previously found:

> [T]housands of students are not being prepared for full participation in the global, interconnected economy and the society in which they live, work and engage as citizens. The costs to those students, individually, and to the State are considerable and if left unattended will result in a North Carolina that does not meet its vast potential.

January 2020 Order.

24. Despite the urgency, the State has failed to implement most actions in the Comprehensive Remedial Plan and has failed to secure the resources to fully implement the Comprehensive Remedial Plan.

25. The Comprehensive Remedial Plan would provide critical supports for at-risk students, such as:

- comprehensive induction services for beginning teachers in low performing, high poverty schools;
- costs of National Board certification for educators in high need, low-performing schools;
- critical supports for children with disabilities that could result from increasing supplemental funding to more adequate levels and removing the funding cap;
- ensuring greater access to key programs for at-risk students by combining the DSSF and at-risk allotments for all economically disadvantaged students; and
- assisting English learner students by eliminating the funding cap, simplifying the formula and increasing funding to more adequate levels.

26. As of the date of this Order, therefore, the State's implementation of the Comprehensive Remedial Plan is already behind the contemplated timeline, and the State has failed yet another class of students. Time is of the essence.

27. The Court has granted "every reasonable deference" to the legislative and executive branches to "establish" and "administer a system that provides the children of the various school districts of the state a sound basic education," 346 N.C. at 357, including, most recently, deferring to State Defendants' leadership in the collaborative development of the Comprehensive Remedial Plan over the past three years.

28. Indeed, in the seventeen years since the *Leandro II* decision, this Court has afforded the State (through its executive and legislative branches) discretion to develop its chosen *Leandro* remedial plan. The Court went to extraordinary lengths in granting these co-equal branches of government time, deference, and opportunity to use their informed judgment as to the "nuts and bolts" of the remedy, including the identification of the specific remedial actions that required implementation, the time frame for such implementation, the resources necessary for the implementation, and the manner in which to obtain those resources.

29. On June 7, 2021, this Court issued an Order cautioning: "If the State fails to implement the actions described in the Comprehensive Remedial Plan—actions which it admits are necessary and which, over the next biennium, the Governor's proposed budget and Senate Bill 622 confirm are attainable—'it will then be the duty of this Court to enter a judgment granting declaratory relief and such other relief as needed to correct the wrong . . . .'" June 2021 Order (quoting *Leandro I*, 346 N.C. at 357).

30. The 2021 North Carolina legislative session began on January 13, 2021 and, as of the date of this Order, no budget has passed despite significant unspent funds and known constitutional violations. In addition, with the exception of N.C.G.S. § 115C-201(c2) related to enhancement teacher allotment funding, no stand-alone funding measures have been enacted to address the known constitutional violations, despite significant unspent funds.

31. The failure of the State to provide the funding necessary to effectuate North Carolina's constitutional right to a sound basic education is consistent with the antagonism demonstrated by legislative leaders towards these proceedings, the constitutional rights of North Carolina children, and this Court's authority.

32. This Court has provided the State with ample time and every opportunity to make meaningful progress towards remedying the ongoing constitutional violations that persist within our public education system. The State has repeatedly failed to act to fulfill its constitutional obligations.

33. In the seventeen years since the *Leandro II* decision, a new generation of school children, especially those at-risk and socio-economically disadvantaged, were denied their constitutional right to a sound basic education. Further and continued damage is happening now, especially to at-risk children from impoverished backgrounds, and that cannot continue. As Justice Orr stated, on behalf of a unanimous Supreme Court, "the children of North Carolina are our state's most valuable renewable resource." *Leandro II,* 358 N.C. at 616. "If inordinate numbers of them are wrongfully being denied their constitutional right to the opportunity for a sound basic education, our state courts cannot risk further and continued damage. . . ." *Id.* (emphasis added).

II. Conclusions of Law

1. The people of North Carolina have a constitutional right to an opportunity to a sound basic education. It is the duty of the State to guard and

maintain that right. N.C. Const. art. 1, sec. 15 ("The people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right."); *id.* art. IX, sec. 2(1) ("The General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools, which shall be maintained at least nine months in every year, and wherein equal opportunities shall be provided for all students."); 346 N.C. at 345 (1997) (holding that the Constitution guarantees the "right to a sound basic education").

2. The "State" consists of each branch of our tripartite government, each with a distinctive purpose. *State v. Berger*, 368 N.C. 633, 635 (2016) (citations and internal quotation marks omitted) ("The General Assembly, which comprises the legislative branch, enacts laws that protect or promote the health, morals, order, safety, and general welfare of society. The executive branch, which the Governor leads, faithfully executes, or gives effect to, these laws. The judicial branch interprets the laws and, through its power of judicial review, determines whether they comply with the constitution."). Here the judicial branch, by constitutional necessity, exercises its inherent power to ensure remedies for constitutional wrongs and compels action by the two other components of the "State"—the legislative and executive branches of government. *See Leandro II*, 358 N.C. at 635 ("[B]y the State we mean the legislative and executive branches which are constitutionally responsible for public education . . . .").

3. Our constitution and laws recognize that the executive branch is comprised of many public offices and officials. The Treasurer and State Superintendent of Public Instruction are two such officials. See N.C. Const. art. III, §7 and Cooper v. Berger, 371 N.C. 799,800 (2018). The Office of State Budget and Management , the Office of the State Controller, and the Department of Health and Human Services are also within the executive branch. See generally, N.C. Const. art. III, §§ 5(10), 11; N.C. Gen. Stat. § 143C-2-1; N.C. Gen. Stat. § 143B-426.35 – 426.39B; and N.C. Gen. Stat. § 143-B-136.1 – 139.7. The University of North Carolina System is also constitutionally responsible for public education. See N.C. Const. art. IX, § 8.

4. The Court concludes that the State continues to fail to meet the minimum standards for effectuating the constitutional rights set forth in article I, section 15 and article IX, section 2 of our State constitution and recognized by our Supreme Court in *Leandro I* and *II*. The constitutional violations identified in *Leandro I* and *II* are ongoing and persist to this day.

5. The General Assembly has a duty to guard and maintain the right to sound basic education secured by our state constitution. *See* N.C. Const. art. 1, sec. 15. As the arm of the State responsible for legislation, taxation, and appropriation,

the General Assembly's principal duty involves adequately funding the minimum requirements for a sound basic education. While the General Assembly could also choose to enact new legislation to support a sound basic education, the General Assembly has opted to largely ignore this litigation.

6. Thus, the General Assembly, despite having a duty to participate in guarding and maintaining the right to an opportunity for a sound basic education, has failed to fulfill that duty. This failure by one branch of our tripartite government has contributed to the overall failure of the State to meet the minimum standards for effectuating the fundamental constitutional rights at issue.

7. "[W]hen inaction by those exercising legislative authority threatens fiscally to undermine" the constitutional right to a sound basic education "a court may invoke its inherent power to do what is reasonably necessary for the orderly and efficient exercise of the administration of justice." *See In re Alamance County Court Facilities*, 329 N.C. 84, 99 (1991) (citation and internal quotation marks omitted).

8. Indeed, in *Leandro II* a unanimous Supreme Court held that "[c]ertainly, 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." 358 N.C. at 642.

9. Article I, section 18 of the North Carolina Constitution's Declaration of Rights—which has its origins in the Magna Carta—states that "every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay." N.C. Const. art. I, § 18; *see Lynch v. N.C. Dept. of Justice*, 93 N.C. App. 57, 61 (1989) (explaining that article I, section 18 "guarantees a remedy for legally cognizable claims"); *cf. Craig ex rel. Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 342 (2009) (noting the Supreme Court of North Carolina's "long-standing emphasis on ensuring redress for every constitutional injury").

10. Article I, section 18 of the North Carolina Constitution recognizes the core judicial function to ensure that right and justice—including the constitutional right to the opportunity to a sound basic education—are not delayed or denied.

11. Because the State has failed for more than seventeen years to remedy the constitutional violation as the Supreme Court ordered, this Court must provide a remedy through the exercise of its constitutional role. Otherwise, the State's

repeated failure to meet the minimum standards for effectuating the constitutional right to obtain a sound basic education will threaten the integrity and viability of the North Carolina Constitution by:

a. nullifying the Constitution's language without the people's consent, making the right to a sound basic education merely aspirational and not enforceable;

b. ignoring rulings of the Supreme Court of North Carolina setting forth authoritative and binding interpretations of our Constitution; and

c. violating separation of powers by preventing the judiciary from performing its core duty of interpreting our Constitution. *State v. Berger*, 368 N.C. 633, 638 (2016) ("This Court construes and applies the provisions of the Constitution of North Carolina with finality.").

12. It appears that the General Assembly believes the Appropriations Clause, N.C. Const. art. V, section 7, prevents any court-ordered remedy to obtain the minimum amount of State funds necessary to ensure the constitutionally-required opportunity to obtain a sound basic education.

13. Our Supreme Court has recognized that the Appropriations Clause ensures "that the people, through their elected representatives in the General Assembly, ha[ve] full and exclusive control over the allocation of the state's expenditures." *Cooper v. Berger*, 376 N.C. 22, 37 (2020). In *Richmond County Board of Education v. Cowell*, 254 NC App 422 (2017) our Court of Appeals articulated that Article 5 Section 7 of the North Carolina Constitution permits state officials to draw money from the State Treasury only when an appropriation has been "made by law." This court concludes that Article 1 Section 15 of the North Carolina Constitution represents an ongoing constitutional appropriation of funds sufficient to create and maintain a school system that provides each of our State's students with the constitutional minimum of a sound basic education. This constitutional provision may therefore be deemed an appropriation "made by law."

14. In *Cooper v Berger*, 376 N.C. 22 (2020) our Supreme Court noted that the General Assembly's authority over appropriations was grounded in its function as the voice of the people. *See* 376 N.C. at 37. It must also be noted, however, that the Constitution itself "expresses the will of the people in this State and is, therefore, the supreme law of the land." *In re Martin*, 295 N.C. 291, 299 (1978); *see also Gannon v. Kansas*, 368 P.3d 1024, 1057 (Kan. 2016) (explaining that "[t]he constitution is the direct mandate of the people themselves"). Accordingly, the Court concludes that

Article I, § 15 represents a constitutional appropriation, such an appropriation may be considered to have been made by the people themselves, through the Constitution, thereby allowing fiscal resources to be drawn from the State Treasury to meet that requirement. The Constitution reflects the direct will of the people; an order effectuating 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.

15. If the State's repeated failure to meet the minimum standards for effectuating the constitutional right to obtain a sound basic education goes unchecked, then this matter would merely be a political question not subject to judicial enforcement. Such a contention has been previously considered—and rejected—by our Supreme Court. *Leandro I*, 346 N.C. at 345. Accordingly, it is the Court's constitutional duty to ensure that the ongoing constitutional violation in this case is remedied. N.C. Const. art. I, § 18.

16. Indeed, the State Budget Act itself recognizes that it should not be construed in a manner to "abrogate[] or diminish[] the inherent power" of any branch of government. N.C. Gen. Stat. § 143C-1-1(b). The inherent power of the judicial branch to ensure and effectuate constitutional rights cannot be disputed. *Cf. Ex Parte McCown*, 139 N.C. 95 (1905) ("[L]aws without a competent authority to secure their administration from disobedience and contempt would be vain and nugatory.").

17. "It is axiomatic that the terms or requirements of a constitution cannot be in violation of the same constitution—a constitution cannot violate itself." *Leandro I*, 346 N.C. at 352; *accord Stephenson v. Bartlett*, 355 N.C. 354, 397 (2002). As a result, the appropriations clause cannot be read to override the people's right to a sound basic education.

18. This Court cannot permit the State to continue failing to effectuate the right to a sound basic education guaranteed to the people of North Carolina, nor can it indefinitely wait for the State to act. Seventeen years have passed since *Leandro II* and, in that time, too many children have been denied their fundamental constitutional rights. Years have elapsed since this Court's first remedial order. And nearly a year has elapsed since the adoption of the Comprehensive Remedial Plan. This has more than satisfied our Supreme Court's direction to provide "every reasonable deference to the legislative and executive branches," *Leandro I*, 346 N.C. at 357, and allow "unimpeded chance, 'initially at least,' to correct constitutional deficiencies revealed at trial," *Leandro II*, 358 N.C. at 638 (citation omitted).

19. To allow the State to indefinitely delay funding for a *Leandro* remedy when adequate revenues exist would effectively deny the existence of a constitutional right to a sound basic education and effectively render the Constitution and the Supreme Court's *Leandro* decisions meaningless. The North Carolina Constitution, however, guarantees that right and empowers this Court to ensure its enforcement. The legislative and executive branches of the State, as creations of that Constitution, are subject to its mandates.

20. Accordingly, this Court recognizes, as a matter of constitutional law, a continuing appropriation from the State Treasury to effectuate the people's right to a sound basic education. The North Carolina Constitution repeatedly makes school funding a matter of constitutional—not merely statutory—law. Our Constitution not only recognizes the fundamental right to the privilege of education in the Declaration of Rights, but also devotes an entire article to the State's education system. Despite the General Assembly's general authority over appropriations of State funds, article IX specifically directs that proceeds of State swamp land sales; grants, gifts, and devises made to the State; and penalties, fines, and forfeitures collected by the State shall be used for maintaining public education. N.C. Const. art. IX, §§ 6, 7. Multiple provisions of article IX also expressly require the General Assembly to adequately fund a sound basic education. *See* N.C. Const. art. IX, §§ 2, 6, 7. When the General Assembly fulfills its constitutional role through the normal (statutory) budget process, there is no need for judicial intervention to effectuate the constitutional right. As the foregoing findings of fact make plain, however, this Court must fulfill its constitutional duty to effect a remedy at this time.

21. The right to a sound basic education is one of a very few affirmative constitutional rights that, to be realized, requires the State to supply adequate funding. The State's duty to carry out its obligation of ensuring this right has been described by the Supreme Court as both "paramount" (*Leandro II*, 358 N.C. at 649 and "sacred." *Mebane Graded Sch. Dist. v. Alamance Cty.*, 211 N.C. 213-(1937). The State's ability to meet this constitutional obligation is not in question. The unappropriated funds in the State Treasury greatly exceed the funds needed to implement the Comprehensive Remedial Plan. Consequently, there is no need to make impossible choices among competing constitutional priorities.

22. The Court further concludes that in addition to the aforementioned constitutional appropriation power and mandate, the Court has inherent and equitable powers that allow it to enter this Order. The North Carolina Constitution provides, "All courts shall be open; every person for an injury done him in his lands, goods, person, or reputation *shall have remedy by due course of law*; and right and justice shall be administered without favor, denial, or delay." N.C. CONST. art. I, § 18

(emphasis added). The North Carolina Supreme Court has declared that "[o]bedience to the Constitution on the part of the Legislature is no more necessary to orderly government than the exercise of the power of the Court in requiring it when the Legislature inadvertently exceeds its limitations." *State v. Harris*, 216 N.C. 746, 764 (1940). Further, "the courts have power to fashion an appropriate remedy 'depending upon the right violated and the facts of the particular case.'" *Simeon v. Hardin*, 339 N.C. 358, 373 (1994) (quoting *Corum v. Univ. of N.C.*, 330 N.C. 761, 784, *cert. denied*, 506 U.S. 985 (1992)).

23. As noted above, the Court's inherent powers are derived from being one of three separate, coordinate branches of the government. *Ex Parte McCown*, 139 N.C. 95, 105-06 (1905) (citing N.C. Const. art. I, § 4)). The constitution expressly restricts the General Assembly's intrusion into judicial powers. *See* N.C. Const. art. IV, § 1 ("The General Assembly shall have no power to deprive the judicial department of any power or jurisdiction that rightfully pertains to it as a co-ordinate department of the government...."); *see also Beard v. N. Carolina State Bar*, 320 N.C. 126, 129 (1987) ("The inherent power of the Court has not been limited by our constitution; to the contrary, the constitution protects such power."). These inherent powers give courts their "authority to do all things that are reasonably necessary for the proper administration of justice." *State v. Buckner*, 351 N.C. 401, 411 (2000); *Beard*, 320 N.C. 126, 129.

24. In fact, it is the separation of powers doctrine itself which undergirds the judicial branch's authority to enforce its order here. "Inherent powers are critical to the court's autonomy and to its functional existence: 'If the courts could be deprived by the Legislature of these powers, which are essential in the direct administration of justice, they would be destroyed for all efficient and useful purposes.'" *Matter of Alamance Cty. Ct. Facilities*, 329 N.C. 84, 93–94 (1991) ("*Alamance*") (citing *Ex Parte Schenck*, 65 N.C. 353, 355 (1871)). The Supreme Court's analysis of the doctrine in *Alamance* is instructive:

> An overlap of powers constitutes a check and preserves the tripartite balance, as two hundred years of constitutional commentary note. "Unless these [three branches of government] be so far connected and blended as to give to each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained."

Id. at 97 (quoting *The Federalist* No. 48, at 308 (J. Madison) (Arlington House ed. 1966)).

25. The Supreme Court has recognized that courts should ensure when considering remedies that may encroach upon the powers of the other branches, alternative remedies should be explored as well as minimizing the encroachment to the extent possible. *Alamance*, 329 N.C. at 100-01. The relief proposed here carefully balances these interests with the Court's constitutional obligation of affording relief to injured parties. First, there is no alternative or adequate remedy available to the children of North Carolina that affords them the relief to which they are so entitled. State Defendants have conceded that the Comprehensive Remedial Plan's full implementation is necessary to provide a sound basic education to students and there is nothing else on the table. *See, e.g.,* March 2021 Order.

26. Second, this Court will have minimized its encroachment on legislative authority through the least intrusive remedy. Evidence of the Court's deference over seventeen years and its careful balancing of the interests at stake includes but is not limited to:

a. The Court has given the State seventeen years to arrive at a proper remedy and numerous opportunities proposed by the State have failed to live up to their promise. Seventeen classes of students have since gone through schooling without a sound basic education;

b. The Court deferred to State Defendants and the other parties to recommend to the Court an independent, outside consultant to provide comprehensive, specific recommendations to remedy the existing constitutional violations;

c. The Court deferred to State Defendants and the other parties to recommend a remedial plan and the proposed duration of the plan, including recommendations from the Governor's Commission on Access to Sound Basic Education;

d. The Court deferred to State Defendants to propose an action plan and remedy for the first year and then allowed the State Defendants additional latitude in implementing its actions in light of the pandemic's effect on education;

e. The Court deferred to State Defendants to propose the long-term comprehensive remedial plan, and to determine the resources necessary for full implementation. (*See* March 2021 Order);

f. The Court also gave the State discretion to seek and secure the resources identified to fully implement the Comprehensive Remedial Plan. (*See* June 2021 Order);

g. The Court has further allowed for extended deliberations between the executive and legislative branches over several months to give the State an additional opportunity to implement the Comprehensive Remedial Plan;

h. The status conferences, including more recent ones held in September and October 2021, have provided the State with additional notice and opportunities to implement the Comprehensive Remedial Plan, to no avail. The Court has further put State on notice of forthcoming consequences if it continued to violate students' fundamental rights to a sound basic education.

The Court acknowledges and does not take lightly the important role of the separation of powers. In light of the foregoing, and having reviewed and considered all arguments and submissions of Counsel for all parties and all of this Court's prior orders, the findings and conclusions of which are incorporated herein, it is hereby **ORDERED** that:

1. The Office of State Budget and Management and the current State Budget Director ("OSBM"), the Office of the State Controller and the current State Comptroller ("Controller"), and the Office of the State Treasurer and the current State Treasurer ("Treasurer") shall 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 as follows:

(a) Department of Health and Human Services ("DHHS"): $189,800,000.00;

(b) Department of Public Instruction ("DPI"): $1,522,053,000.00; and

(c) University of North Carolina System: $41,300,000.00.

2. OSBM, the Controller, and the Treasurer, are directed to treat the foregoing funds as an appropriation from the General Fund as contemplated within N.C. Gen. Stat. § 143C-6-4(b)(2)(a) and to carry out all actions necessary to effectuate those transfers;

3. Any consultation contemplated by N.C. Gen. Stat. § 143C-6-4(b1) shall take no longer than five (5) business days after issuance of this Order;

4. DHHS, the University of North Carolina System, the State Superintendent of Public Instruction, and all other State agents or State actors

receiving funds under the Comprehensive Remedial Plan are directed to administer those funds to guarantee and maintain the opportunity of a sound basic education consistent with, and under the time frames set out in, the Comprehensive Remedial Plan, including the Appendix thereto;

5. In accordance with its constitutional obligations, the State Board of Education is directed to allocate the funds transferred to DPI to the programs and objectives specified in the Action Steps in the Comprehensive Remedial Plan and the Superintendent of Public Instruction is directed to administer the funds so allocated in accordance with the policies, rules or and regulations of the State Board of Education so that all funds are allocated and administered to guard and maintain the opportunity of a sound basic education consistent with, and under the time frames set out in, the Comprehensive Remedial Plan, including the Appendix thereto, and

6. OSBM, the Controller, and the Treasurer are directed to take all actions necessary to facilitate and authorize those expenditures;

7. To the extent any other actions are necessary to effectuate the year 2 & 3 actions in the Comprehensive Remedial Plan, any and all other State actors and their officers, agents, servants, and employees are authorized and directed to do what is necessary to fully effectuate years 2 and 3 of the Comprehensive Remedial Plan;

8. The funds transferred under this Order are for maximum amounts necessary to provide the services and accomplish the purposes described in years 2 and 3 of the Comprehensive Remedial Plan. Savings shall be effected where the total amounts appropriated are not required to perform these services and accomplish these purposes and the savings shall revert to the General Fund at the end of fiscal year 2023, unless the General Assembly extends their availability; and

9. This Order, except the consultation period set forth in paragraph 3, is hereby stayed for a period of thirty (30) days to preserve the *status quo,* including maintaining the funds outlined in Paragraph 1 (a)-(c) above in the State Treasury, to permit the other branches of government to take further action consistent with the findings and conclusions of this Order.

This Order may not be modified except by further Order of this Court upon proper motion presented. The Court shall retain jurisdiction over this matter.

This the 10th day of November, 2021.

W. David Lee

The Honorable W. David Lee
North Carolina Superior Court Judge

TAB 4

STATE OF NORTH CAROLINA

WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
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,

Defendant

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.

ORDER FOLLOWING REMAND

1. **THIS MATTER** is before the Court following the issuance by the Superior Court on 10 November 2021 of an order (hereinafter the "10 November Order")

directing the Office of State Budget and Management and the current State Budget Director, the Office of the State Controller and the current State Comptroller, and the Office of the State Treasurer and the current State Treasurer to transfer a total of $1,753,153,000.00 in three separate payments: (1) to the Department of Health and Human Services ("DHHS") ($189,800,000.00), (2) to the Department of Public Instruction ("DPI") ($1,522,053,000.00), and (3) to the University of North Carolina System ("UNC System") ($41,300,000.00). (*See* Or. 19, ECF No. 23.4. ["10 Nov. Or."].)

I.

PROCEDURAL BACKGROUND

2. This case has a history spanning nearly 27 years. Because the 10 November Order details much of the extensive procedural history of this case, the Court recites here only the factual and procedural background which may provide helpful context for this Order.

3. On 15 March 2021, the State Defendants submitted to the Court a Comprehensive Remedial Plan and Appendix (hereinafter the "CRP"). (Comprehensive Remedial Plan, ECF No. 20.2 ["CRP"].) The CRP was developed by experts retained to assist certain of the parties to determine what concrete steps were necessary and advisable to ensure that children in the State's K-12 grades obtain a "sound basic education" as mandated by the North Carolina State Constitution. The CRP was agreed to by the Plaintiffs and the State Defendants.[1]

[1] While elemental to our system of government, this case demonstrates the fact that there are three co-equal branches of government — the judicial branch, the executive branch, and the legislative branch. The record before this Court demonstrates that, until very recently, the "State Defendants" actively participating in this action were comprised of the executive

4. On 7 June 2021, the trial court ordered that the CRP be implemented in full and in accordance with the timelines set forth therein[2] and directed the State Defendants to secure such funding and resources necessary to implement in a sustainable manner the programs and policies set forth in the CRP. (7 June 2021 Or. 7.)

5. Between 7 June 2021 and 10 November 2021, the North Carolina General Assembly did not pass, and the Governor did not sign, any legislation providing funding and resources necessary to implement the CRP as ordered by the trial court.

6. On 10 November 2021, the trial court entered the 10 November Order directing the transfer of funds totaling $1,753,153,000. The payments ordered by the trial court were to fully fund years 2 and 3 of the CRP. The trial court stayed the effect of the 10 November Order for thirty days.

7. In the 10 November Order, the trial court determined which of three entities (DPI, DHHS, UNC System) received funding for each of the programs to be undertaken or continued during years 2 and 3 of the CRP based on the CRP's designation of the "responsible party" for that program. (State of N.C.'s 4/14/22 NOF

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branch (the Governor's office, the State Department of Education, the State Department of Public Instruction, and the State Department of Health and Human Services) but not the Legislative Branch. In fact, the record discloses that in 2011 the Legislature sought to intervene in this proceeding but its motion was denied by the trial court in its discretion.

[2] The CRP was a detailed document providing for a host of specific programs to be implemented over an eight-year period with costs associated for each year for each program. By virtue of the level of detail within the CRP, parties involved in the implementation of the CRP had a roadmap for the amount of money necessary to fund each of the programs each year as well as being able to determine the total cost for the CRP each year.

Ex. 1., ECF No. 37.1; *see, e.g.*, CRP I.A.ii.1.(a) (listing DPI as the administrative agency responsible for implementation of the program in question).

8. Eight days after the issuance of the 10 November Order, on 18 November 2021, the General Assembly passed, and the Governor signed, the Current Operations and Appropriations Act of 2021, 2021 N.C. Sess. L. 180 (the "Budget Act"). (ECF No. 23.5.) The Budget Act provided significant funding for the State's education programs.

9. Following the issuance of the 10 November Order, appeals were taken by certain parties — including the State of North Carolina — to the North Carolina Court of Appeals.

10. In addition to the initial notices of appeal to the Court of Appeals, on 24 November 2021, Ms. Linda Combs, a non-party to this action and the Comptroller of the State of North Carolina, through counsel petitioned the Court of Appeals for a Writ of Prohibition, Temporary Stay, and Writ of Supersedeas ("the Petition"). (ECF No. 10.) The Petition sought an order preventing Ms. Combs from being required to comply with the provisions of the 10 November Order directing her to transfer funds to DHHS, DPI, and the UNC System on the bases that: (1) the Superior Court lacked jurisdiction to order Ms. Combs to take the actions set forth in the 10 November Order, (2) the 10 November Order "is at variance with the rules prescribed by law," and (3) the 10 November Order requires Ms. Combs to act in a manner which will defeat a legal right. On 30 November 2021, a panel of the North Carolina Court of

Appeals issued its Order granting the Petition.[3] The Court of Appeals expressly ruled that "the trial court's conclusion that it may order petitioner to pay unappropriated funds from the State Treasury is constitutionally impermissible and beyond the power of the trial court." (*In re. The 10 Nov. 2021 Or. in Hoke Cnty. Bd. Ed. et al. vs. State of North Carolina and W. David Lee (Wake County File 95 CVS 1158)*, No. P21-511, ECF No. 23.8.)

11. Also on 30 November 2021, the trial court separately issued *sua sponte* a Notice of Hearing and Order Continuing Stay of Court's November 10, 2021 Order, (ECF No. 23.6), setting a status conference for the Court "to determine what, if any, modifications may be required to its November 10 Order in light of the Appropriations Act and/or other matters properly before the Court." (30 Nov. Or. 2, ECF No. 23.6.) The trial court also extended the stay set by the 10 November Order so the order did not become effective.

12. Following issuance by the Court of Appeals of its Order of Prohibition, a number of parties filed petitions and notices of appeal with the North Carolina Supreme Court seeking "by-pass" review by the Supreme Court of the issues arising from both the 10 November Order and the Court of Appeals panel's entry of a writ of prohibition. Other parties sought dismissal of the appeal to the Supreme Court and denial of the request for by-pass review.

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[3] The Court of Appeals panel's Order states in relevant part: "We therefore issue the writ of prohibition and restrain the trial court from enforcing the portion of its order requiring the petitioner to treat the $1.7 billion in unappropriated school funding identified by the court 'as an appropriation from the General Fund as contemplated within N.C.G.S. § 143C-6-4(b)(2)(a) and to carry out all actions necessary to effectuate those transfers.' Under our Constitutional system, that trial court lacks the power to impose that judicial order."

13. On 8 December 2021, the Honorable Philip E. Berger, in his official capacity as the President *Pro Tempore* of the North Carolina Senate, and, the Honorable Timothy K. Moore, in his official capacity as the Speaker of the North Carolina House of Representatives (collectively the "Legislative Intervenors"), intervened as a matter of right in the trial court proceeding pursuant to N.C.G.S. § 1-72.2(b). (App. R. 142–48.) Following intervention, the Legislative Intervenors on 8 December 2021 filed a Motion to Dismiss Plaintiffs' and Plaintiffs-Intervenors' Notices of Appeal and Petitions for Discretionary Review in the Supreme Court.

14. On 21 March 2022, the North Carolina Supreme Court issued three orders. In its first order, the Supreme Court ruled that the various petitions and notices seeking to appeal to that Court would be held in abeyance, with no action, pending further order of the Supreme Court. In its second order, the Supreme Court allowed the State of North Carolina's Petition for Discretionary Review Prior to Determination by the Court of Appeals and Plaintiff's Petition for Discretionary Review Prior to Determination by the Court of Appeals. The second order also remanded this case to the Superior Court "for the purpose of allowing the trial court to determine what effect, if any, the enactment of the State Budget has upon the nature and extent of the relief that the trial court granted in its 11 November 2021 order" (the "Remand Order"). (ECF No. 13 ["Remand Or."].) In its third order, Supreme Court Chief Justice Paul M. Newby assigned the task identified in the Remand Order to the undersigned Special Superior Court Judge. (Designation Or., ECF No. 1.) The Remand Order permitted the undersigned to make findings of fact

and conclusions of law and to certify any amended order to the Supreme Court within thirty days, meaning on or before 20 April 2022. (Remand Or. 2.)

15. Pursuant to the Supreme Court's directives, the undersigned on 22 March 2022 issued a Notice of Conference for Purposes of Developing a Schedule for Further Briefing and Argument, (ECF No. 2), and conducted an initial conference with the parties on 24 March 2022. Following the initial conference, the Court entered its order of 24 March 2022 noticing a hearing for 13 April 2022 and providing a schedule for briefing, submission of affidavits and other evidence to be considered. (Scheduling Or. and Notice of Hearing, ECF No. 5.) The next day, the undersigned entered a Supplemental Briefing Order, (ECF No. 6), directing the parties to provide information to the Court, among other issues, directly related to:

> a. The amount of the funds appropriated in the 2021 Appropriations Act, 2021 N.C. Sess. Laws 180, that directly fund the various programs and initiatives called for in the Comprehensive Remedial Plan;
>
> b. The amount of funds remaining in the General Fund currently both in gross and net of appropriations in the 2021 Appropriations Act;
>
> c. The effect of the appropriations in the 2021 Appropriations Act on the ability of the Court to order the Legislature to transfer funds to the Department of Health and Human Services, Department of Public Instruction, and the University of North Carolina System. *See Richmond Cty. Board of Education v. Cowell,* 254 N.C. App. 422 (2017).

(Supp. Br. Or. 2.)

16. In accordance with the Court's scheduling directives, on 4 April 2022, the State of North Carolina filed the Affidavit of Kristin L. Walker, Chief Deputy Director of State Budget for the North Carolina Office of State Budget and Management, (ECF No. 12), along with attachments to her affidavit, (ECF Nos. 12.1–12.4), explaining, in Ms. Walker's opinion, based on her review and the review of assistants under her supervision, what portions of years 2 and 3 of the CRP were funded by the Budget Act.

17. In summary, Ms. Walker testified that, by her calculation, the Budget Act funded approximately 63 percent of year 2 CRP programs and 49 percent of year three programs. (Walker Aff. ¶ 6.) Further, Ms. Walker testified that the North Carolina treasury would contain $2.38 billion unappropriated and unreserved in fiscal year 2021–22, $22 million unappropriated and unreserved in fiscal year 2022–23, and that the State's Savings Reserve would contain $4.25 billion in unappropriated funds at the end of the two-year budget cycle. (Walker Aff. ¶ 8.)

18. On 8 April 2022, the parties filed briefs and supporting documents including affidavits and proposed findings of fact and conclusions of law. (ECF Nos. 20–27.)

19. On 13 April 2022, the Court heard oral argument in this matter.

20. Following the 13 April hearing, the parties submitted further position statements, charts, and information regarding their respective positions.

21. The original deadline for the trial court to provide the Supreme Court with its certified order was 20 April 2022. On 19 April 2022, the trial court filed a Request

for Extension of Time to File Order on Remand, (ECF No. 42), seeking a seven-day extension of time to comply with the Supreme Court's Remand Order. On 20 April 2022, the Supreme Court granted the trial court's extension request. (ECF No. 44.)

22. Also on 20 April 2022, the trial court issued a Notice of Hearing for a follow-up conference on 22 April 2022 with counsel regarding disagreements between them as to the amount of funding provided in the Budget Act for specific programs in the CRP. (ECF No. 43.) On 22 April 2022, the undersigned conducted the follow-up conference with counsel. On 25 April 2022, the Legislative Intervenors provided the Court with information regarding their position on issues raised during the 22 April 2022 hearing. (Leg. Intervenors' Supp. Resp. to Court's Question at Apr. 22, 2022 Hearing, ECF No. 47 ["Leg. Supp. Resp."].) The matter is now ripe for ruling.

II.

SCOPE OF ISSUES ON REMAND

23. The parties have spent considerable time arguing the scope of the issues to be addressed by the trial court on remand. Specifically, the parties disagree on the proper interpretation of the Supreme Court's Remand Order and the directive by the Supreme Court that this Court determine "what effect, if any, the enactment of the State Budget has upon the nature and extent of the relief that the trial court granted in [the 10 November Order.]" (Remand Or. 2.)

24. The Legislative Intervenors urge, pursuant to their interpretation of the Remand Order, that the Court make a *de novo* legal determination on the legality and enforceability of the 10 November Order — claiming that, as concluded by the

panel of the Court of Appeals, the trial court lacked legal authority to order funds transferred from the North Carolina treasury to fund specific educational programs. Additionally and alternatively, the Legislative Intervenors ask the trial court to re-examine the evidence in the record, including an examination of the programs funded by the Budget Act and determine that the Budget Act as passed fully satisfies the State's obligation to provide K-12 students with a sound basic education as established by the Supreme Court in *Leandro v. State,* 346 N.C. 336 (1997).

25. By comparison, Plaintiffs and the State Defendants contend that the trial court's task is simply to examine the Budget Act as passed and determine the amount of funding provided therein for each of the CRP programs during years 2 and 3 of the CRP — thereby permitting the trial court to mathematically determine the amount of underfunding of the CRP by the Budget Act. Based on these determinations, the Plaintiffs and State Defendants contend that the 10 November Order should be amended to provide for the transfer of the revised amounts of funding necessary to comply with the CRP.

26. As to the Legislative Intervenor's first argument, the Court acknowledges that the Court of Appeals has already ruled on the enforceability of the 10 November Order. As noted above, on 30 November 2021, a panel of the Court of Appeals ruled that "the trial court's conclusion that it may order petitioner to pay unappropriated funds from the State Treasury is constitutionally impermissible and beyond the power of the trial court." *In re. the 10 November 2021 Order in Hoke County Bd. Ed. et al. v. State of N.C. and W. David Lee,* at 2. The Court of Appeals' 30 November

Order has not been overruled or modified and the undersigned concludes that it is binding on the trial court. Accordingly, this court cannot and shall not consider the legal issue of the trial court's authority to order State officers to transfer funds from the State treasury to fund the CRP. Rather, the undersigned believes that this court should, by an amended order, comply with the Court of Appeals' determination.

27. The Court also declines to determine, as Legislative Intervenors urge, that the Budget Act as passed presumptively comports with the constitutional guarantee for a sound basic education. To make a determination on the compliance of the Budget Act with the constitutional right to a sound basic education would involve extensive expert discovery and evidentiary hearings. This Court does not believe that the Supreme Court's Remand Order intended the undersigned, in a period of 30 days, or, as extended, 37 days, to perform such a massive undertaking.

28. Rather, the Court understands its mandate from the Supreme Court to require the trial court to enter a reasoned order which includes findings of fact and conclusions of law in two distinct categories. First, this Court is directed to determine whether the Budget Act as passed by the Legislature and signed by the Governor eight days after the 10 November Order, funds to any extent (and if so, to what extent), programs in years 2 and 3 of the CRP. Logically, if the Budget Act fully funds all of the programs and priorities during years 2 and 3 of the CRP, the 10 November Order, to the extent it orders State officials to transfer a total of $1,753,153,000.00 to DHHS, DPI, and the UNC System would arguably be mooted or made unnecessary by events transpiring subsequent to the entry of the 10 November Order.

29. Second, the Court understands that the Supreme Court's mandate implicitly requires this Court to inquire into the current status of the State budget and how appropriations in the Budget Act affect the amount of unappropriated funds in the State treasury. In this regard, the undersigned interprets the 10 November Order to have been based or supported, at least in substantial part, on the trial court's finding that there were sufficient unappropriated funds in the North Carolina treasury to fund years 2 and 3 of the CRP.

30. Finally, this Court understands that, depending on the outcome of the first two evaluations, if this Court concludes that the relief provided in the decretal provisions of the 10 November Order should be modified or amended, this Court is to enter an order so amending the trial court's earlier order. To the extent this Court may have misinterpreted its task in the Remand Order, it stands ready to comply to the best of its ability to any further orders and instructions of the Supreme Court.

III.

FINDINGS OF FACT[4]

31. Pursuant to the Supreme Court's directive, the Court makes the following findings of fact.

32. The Court requested and was provided information by all parties regarding the provisions of the Budget Act as they relate to the specific programs to be

[4] To the extent any finding contained in this section of the Court's order is more properly considered a conclusion of law, the undersigned intends it to be so considered. Similarly, to the extent any conclusion of law made hereinafter is more properly considered a finding of fact, the undersigned intends it to be so considered.

undertaken during years 2 and 3 of the CRP.[5] (*See* Scheduling Or. and Supplemental Br. Or., ECF Nos. 5–6.)

33. Based on the Court's review of analyses provided to it by the North Carolina Office of State Budget and Management ("OSBM") and the General Assembly's Fiscal Research Division ("FRD"), and the arguments and submissions of the parties, the evidence demonstrates that significant necessary services for students, as identified in the CRP, remain unfunded and/or underfunded by the Budget Act.[6]

34. In the 10 November Order, the trial court determined that it would cost approximately $1.75 billion to fund years 2 and 3 of the CRP. (*See* 10 Nov. Or. 19.) Based on the materials and evidence before it, the Court finds that the Budget Act fails to provide nearly one-half of those total necessary funds. Specifically, the Budget Act funds approximately 63% of the total cost of the programs to be conducted during year 2 and approximately 50% of the total cost of the programs to be conducted during year 3.

35. The parties submitted to the Court two competing spreadsheets purporting to show the funding status of each CRP program during years 2 and 3. (*See* Trogdon

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[5] The CRP covers a period of eight years during which a host of different educational programs and initiatives are to be initiated and conducted. The CRP is broken down by year and initiative or program and provides an anticipated annual cost for each of the initiatives and programs during any given year.

[6] While the focus of the Court's inquiry pursuant to the Remand Order is on appropriations in the Budget Act to fund the programs in years 2 and 3 of the CRP, that funding is but a portion of the overall investment made by the State of North Carolina, in its legislative appropriations every two years, to educate its children.

Aff. Ex. D, ECF No. 27.4 ["FRD Chart"]; Walker Aff. Ex. 2, ECF No. 12.2 ["OSBM Chart"].)

36. The chart submitted by the State of North Carolina (the "OSBM Chart") was prepared by Kristen L. Walker, Chief Deputy Director of State Budget for the North Carolina Office of State Budget and Management. The data and conclusions within the OSBM Chart are endorsed for the most part[7] by the State, Plaintiffs, and the Penn Intervenors.

37. The chart submitted by the Legislative Intervenors (the "FRD Chart") was prepared under the supervision of Mark Trogdon, Director of Fiscal Research at the nonpartisan Fiscal Research Division ("FRD"), a division of the North Carolina General Assembly. (Trogdon Aff. ¶¶ 1, 49, ECF No. 27.)

38. The OSBM Chart and the FRD Chart are largely in agreement on the funding status of the CRP programs for years 2 and 3. Areas of disagreement between the two charts are as follows:

a. The Budget Act appropriated funds to several CRP programs where such funds were provided by the federal American Rescue Plan Act (ARPA) and the Elementary and Secondary Schools Emergency Relief ("ESSER III") Fund.[8] (ARPA, Public Law 117-2, 50 Stat. 664 (March 11, 2021). The FRD Chart credits CRP programs as funded to the extent the General Assembly has appropriated federal ARPA

[7] Based on supplemental filings by the parties, Ms. Walker's numbers for certain program expenses were modified to account for federal funding and program grants that were not included in her original calculations. *See* infra n.9.
[8] *See* FRD Chart rows 18, 27, 30, 39, 44, 52, 59, 61.

and ESSER III monies to fund those programs. The OSBM Chart treats some of those programs as unfunded.[9]

b. The FRD Chart includes $59,750,575 included in the Budget Act which would fund CRP programs which do not begin or require funding until year 4 of the CRP. (FRD Chart rows 35–37.) The OSBM Chart does not include this funding.

c. The OSBM Chart acknowledges, in addition to $18,750,000 each year for years 2 and 3 in federal funds from ESSER III, additional funding in two different appropriations for professional development in the Budget Act in the amounts of $2,500,000 and $1,411,256, for year 2 of the CRP. (OSBM Chart row 31.) The FRD Chart does not include these funds as the Budget Act does not specifically earmark any of these funds for professional development and thus there is no certainty the funds will be put to such use. (Trogdon Aff. ¶ 50(d)(i).)

d. The OSBM Chart credits $305,000 in each of CRP years 2 and 3 toward CRP program III.E.ii.2. where the Budget Act appropriates that sum to support salary increases for personnel at three residential schools for the deaf and blind. (*See* OSBM Chart row 33.) The FRD Chart does not include this funding due to the specialized

[9] On 14 April 2022, the State of North Carolina filed a chart containing partial revisions to the OSBM Chart, (ECF No. 37.4 ["State's Ex. 4"]). The revised chart acknowledges funding from the ARPA childcare block grant for CRP programs VI.B.iv.1 and VI.G.ii.1, and thus the revised chart changes those programs from unfunded, (*see* OSBM Chart rows 51, 59), to fully funded, bringing it in agreement with the FRD Chart regarding those programs. (State's Ex. 4 rows 6, 14.)

nature of these schools and because the CRP does not specifically mention them. (*See* Trogdon Aff. ¶ 50(d)(ii).)

e. The OSBM Chart included funds which were appropriated for the "enhancement teacher allotment," CRP program III.C.ii.1. (OSBM Chart row 30.) The FRD Chart does not include these funds because they were not appropriated by the Budget Act, but instead were previously appropriated by the General Assembly in 2018 N.C. Sess. Laws 2, § 5(d).

39. The FRD Chart notes that the General Assembly appropriated additional funds to K-12 and early education which are not contemplated by the CRP. (Trogdon Aff. ¶ 51.) These appropriations include capital funding for school business systems modernization, public school building repair and renovations, and needs-based capital projects. (Trogdon Aff. ¶¶ 52–53.)

40. After careful consideration of the materials and oral argument presented by all parties to this matter, and because the Court finds that neither of the parties has fully and accurately presented the amount of year 2 and 3 CRP funding provided by the Budget Act, the Court, based upon its own calculations, finds the figures shown in the chart appended to this Order as Exhibit A.

41. The Court started its analysis by use of the FRD chart.[10] (*See* FRD Chart 1–4.) The Court then adjusted the chart in accordance with the following principles:

[10] The decision to use the FRD Chart as a starting point was based on the fact that the Court agrees with the FRD Chart's inclusion of federal monies from ESSER III and ARPA which the General Assembly appropriated for years 2 and 3 CRP programs, and the OSBM Chart did not include such federal monies for several programs. The Court considers those funds

a. Where the Budget Act has appropriated *federal* funding, via ARPA or ESSER III, for an item in year 2 and/or year 3, the Court considers such funding to be available to the responsible party during either year 2 or year 3. In those cases, funding is split such that it is allocated first to year 2, with any excess funding allocated to year 3.

b. Where the Budget Act has appropriated *state* funding to CRP programs, such funding is available to the responsible party only during the year in which it was appropriated. In those cases, funds appropriated for CRP year 2 are not available for year 3, or vice versa, even if there are excess funds available.

c. Where the Budget Act has provided more funds for a program than the CRP requires for that year, the Court considers the program to be overfunded.

d. To the extent that the Budget Act appropriates funds for CRP programs *outside* of years 2 and 3 or overfunds a CRP program during years 2 and 3, the Court does not credit those appropriations. (*See* FRD Chart rows 35–37.) The 10 November Order dealt solely with funding for years 2 and 3 of the CRP and only determined that the CRP programs during those two years should be fully funded — not

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properly included in a calculation of the extent to which the CRP may be underfunded, notwithstanding the fact that the funds in question originate from sources outside the State treasury or State revenue. Therefore, the Court has credited those items as funded up to the amount of funding required for the CRP program in question.

overfunded. Accordingly, funding in subsequent years or funding in excess of the amount required by the CRP is not relevant to the Court's present inquiry.

42. The Court has reviewed the sums and calculations contained in the OSBM Chart and FRD Chart and resolving the disagreements between the two finds as follows:

a. Where the Budget Act appropriates sufficient federal monies from ESSER III and ARPA grants for years 2 and 3 CRP programs, the Court considers those programs to be fully funded for years 2 and 3 notwithstanding the fact that the funds in question originate from sources outside the State treasury or State revenue. Therefore, the Court has credited those items[11] as funded up to the amount of funding required for the CRP program in question.

b. The CRP program for professional development, (CRP III.C.iii.1.), is fully funded for years 2 and 3 of the CRP via federal ESSER III funds, (*see* FRD Chart row 27; OSBM Chart row 31), and accordingly, the Court need not determine whether the two allotments in the amounts of $2,500,000 and $1,411,256, (*see* OSBM chart rows 32–33) are properly credited to CRP program III.C.iii.1.

c. The Budget Act's appropriation of $305,000 in each of CRP years 2 and 3, which the state has directed be spent on salary supplements

[11] *See* rows 18, 27, 30, 39, 44, 52, and 61 of the FRD Chart.

for licensed personnel at the State's residential schools for the deaf and blind, is not properly credited to CRP program III.E.ii.2. (*See* OSBM Chart row 32.) As acknowledged by the legislative intervenors, this appropriation applies only to residential schools, and is not available to fund teacher salaries in local school systems as contemplated by program III.E.ii.2. (Leg. Supp. Resp. ¶ 2.) The Court agrees, and accordingly does not include the appropriation of $305,000 for each of years 2 and 3 in its calculation.

d. Although the Program Enhancement Teachers program, (CRP program III.C.ii.1), was fully funded by 2018 N.C. Sess. Laws 2, § 5(d), prior to the passage of the Budget Act, the Court nonetheless credits such funding, as to do otherwise would indicate that a CRP program remains unfunded when it is, in fact, fully funded.

43. The Budget Act reserves during each year of the two-year budget cycle $1.134 billion to the State's Savings Reserve, which brings the total of unappropriated funds in the State's Savings Reserve to $4.25 billion after the fiscal year 2022–23 legislatively-mandated transfer. (Walker Aff. ¶ 8; Trogdon Aff. ¶ 42.) The Savings Reserve "is established as a reserve in the General Fund and is a component of the unappropriated General Fund balance." N.C.G.S. § 143C-4-2.

44. Under North Carolina law,

> [e]ach Current Operations Appropriations Act enacted by the General Assembly shall include a transfer to the Savings Reserve of *fifteen percent (15%) of each fiscal year's estimated growth in State tax revenues* that are deposited in the General Fund, except that if that transfer

> would cause the balance of the Reserve to exceed the recommended Savings Reserve balance developed pursuant to subsection (f) of this section then the amount transferred pursuant to this subsection shall be reduced accordingly.

N.C.G.S. § 143C-4-2(d) (emphasis added).

45. The Budget Act includes significant reductions in the rates of certain personal income and corporate taxes such that the projected tax revenue to be received by the State during the Budget Act's two-year cycle is reduced from current levels by over $2.3 billion. Due to the fact that there is no estimated growth in State tax revenues during the budget cycle, the $1.134 billion transferred into the Savings Reserve each of the next two budget years are not required pursuant to the fifteen percent (15%) statutory transfer, but are instead a transfer made in the discretion of the General Assembly. In addition to the discretionary Savings Reserve transfers provided for in the Budget Act, the Budget Act also provides for the discretionary transfer of over $2 billion into the State's Capital and Infrastructure Reserve.

46. As a matter of mathematical calculation, the funds transferred on a discretionary basis to the State's Savings Reserve and the State's Capital and Infrastructure Reserve during the two-year budget cycle is substantially in excess of the amount necessary to fully fund the CRP during years 2 and 3 of the CRP.

IV.

CONCLUSIONS OF LAW

47. Based on the foregoing Findings of Fact, the Court makes the following Conclusions of Law.

48. Based on the Supreme Court's Remand Order, and the express directive contained therein, this Court has authority to reconsider the trial court's 10 November Order. Further, pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure, a trial court can reconsider any interlocutory ruling, like the 10 November Order, at any time prior to entry of final judgment and adjudication of the rights and liabilities of all parties to the proceeding. *See Pender Farm Dev., LLC v. NDCO, LLC,* 2020 NCBC LEXIS 110, at *4 (N.C. Super. Ct. Sep. 25, 2020). Reconsideration is within the trial court's discretion, *W4 Farms, Inc. v. Tyson Farms, Inc.,* 2017 NCBC LEXIS 99, at *5 (N.C.. Super. Ct. Oct. 19, 2017), and may be especially appropriate where an intervening development or change in controlling law has occurred. *See e.g. Pender v. Bank of Am. Corp.,* No. 3:05-CV-238-MU, 2011 U.S. Dist. LEXIS 1838, at *7 (W.D.N.C. Jan. 7, 2011) (citation omitted).

49. In this regard, the Court notes that, as noted previously herein, (*see supra* ¶ 11), even prior to assumption of jurisdiction of this matter by the Supreme Court and entry of its Remand Order, the trial court had, on 30 November 2021 issued a notice of hearing to allow the trial court "to determine what, if any modifications may be required to its November 10 Order in light of the Appropriations Act and/or other matters properly before the Court."

50. The Budget Act, as passed and enacted, when combined with other funds properly considered and included, partially but not totally funds years 2 and 3 of the CRP. Specifically, of a total cost of $1,753,153,000 necessary to fund the programs called for in the CRP during the two years in question, the Budget Act, when

combined with other funds properly considered and included, provides funding for CRP programs during years 2 and 3 in the amount of $968,046,752. As a result, the total underfunding of CRP programs during years 2 and 3 of the CRP is $785,106,248 in the aggregate.

51. The underfunding of years 2 and 3 of the CRP, on a per-entity basis is as follows:

a. Underfunding of programs for which DHHS is responsible: $142,900,000;

b. Underfunding of programs for which DPI is responsible: $608,006,248;

c. Underfunding of programs for which the UNC System is responsible: $34,200,000.[12]

52. At the time the 10 November Order was entered, the State's reserve balance included $ 8 billion and $ 5 billion in forecasted revenues at that time exceeding the existing base budget. (10 Nov. Or. ¶ 22.)

53. The Budget Act anticipates a net of $2.38 billion unappropriated and unreserved funds at the end of Fiscal Year 2021–22, the first year of the two-year budget cycle in the Budget Act. (Walker Aff ¶ 8.) The Budget Act also anticipates that the unappropriated balance remaining at the conclusion of fiscal year 2021–22 will remain available to fund appropriations and reservations in fiscal year 2022–23.

[12] Attached as Exhibit A hereto is a chart listing CRP programs to be conducted during years 2 and 3, the amount of funding required for each CRP program during each year of years 2 and 3, the amount of funding by the Budget Act and other funds properly included in determining aggregate funding of the CRP programs during years 2 and 3, and the amount of underfunding of the same.

(Trogdon Aff. ¶ 41.) The Budget Act thus projects that the State will have an unappropriated, *unreserved* balance of $104,638 at the conclusion of fiscal year 2022–23. (Trogdon Aff. ¶ 41 (emphasis added).) But because funds in the Savings Reserve are defined by N.C.G.S. § 143C-4-2(a) as being "a component of the unappropriated General Fund balance[,]" the funds transferred by the Budget Act, totaling $1.134 billion in each of fiscal years 2021–22 and 2022–23 remain part of the General Fund balance. Accordingly, the unappropriated (but not "unreserved") balance in the General Fund at the conclusion of fiscal year 2022-2023 will be in excess of $4.25 billion.

54. Taking the two-year budget as a whole, the General Fund does contain sufficient unappropriated monies to make the transfer anticipated by the 10 November Order and the lesser amount of underfunding identified above.

55. The Court of Appeals has determined that the trial court had no proper basis in law to direct the transfer by State officers or departments of funds to DHHS, DPI, and the UNC System. As such, this Court concludes that the 10 November Order should be amended to remove a directive that State officers or employees transfer funds from the State Treasury to fully fund the CRP but should amend the 10 November Order to determine that the State of North Carolina has failed to comply with the trial court's prior order to fully fund years 2 and 3 of the CRP.

56. The Order should be further amended to determine specifically that the additional amounts that are due to DHHS, DPI, and the UNC System for undertaking

the programs called for in years 2 and 3 of the CRP should be modified and amended as follows:

a. The amount to be provided to DHHS should be reduced from $189,800,000 to $142,900,000

b. The amount to be provided to DPI should be reduced from $1,522,053,000 to 608,006,248.

c. The amount to be provided to the UNC System should be reduced from $41,300,000 to $34,200,000.

57. The Order should be amended to include a judgment that the DHHS, DPI, and UNC System have and recover from the State the sums set forth in paragraph 56 immediately above.

V.

ORDER

58. It is THEREFORE ORDERED that decretal paragraphs 1–9 on pages 19–20 of the trial court's 10 November Order are stricken and are amended as follows:

1. It is hereby ORDERED, ADJUDGED AND DECREED that the Department of Health and Human Services; the Department of Public Instruction, and the University of North Carolina System have and recover from the State of North Carolina to properly fund years 2 and 3 of the Comprehensive Remedial Plan the following sums in addition to those sums otherwise provided for the Comprehensive Remedial Plan by the Budget Act and federal or other funds made available:

a. The Department of Health and Human Services recover from the State of North Carolina the sum of $142,900,000;

b. The Department of Public Instruction recover from the State of North Carolina the sum of $608,006,248; and

c. The University of North Carolina System recover from the State of North Carolina the sum of $34,200,000.

d. The DHHS, DPI, UNC System, and all other State agents or State actors receiving funds under the Comprehensive Remedial Plan, are directed to administer those funds consistent with, and under the time frames set out in the Comprehensive Remedial Plan, including the Appendix thereto.

2. To the extent any other actions are necessary to effectuate the year 2 and 3 programs in the Comprehensive Remedial Plan, any and all other State actors and their officers, agents, servants, and employees are authorized and directed to do what is necessary to fully effect years 2 and 3 of the Comprehensive Remedial Plan.

3. The funds adjudged to be owed by the State to DHHS, DPI, and the UNC System under this Order are for maximum amounts necessary, when combined with sums already appropriated by the General Assembly in the Budget Act or otherwise, to provide the services and accomplish the purposes described in years 2 and 3 of the Comprehensive Remedial Plan. Savings shall be effected where the total amounts appropriated are not required to perform these services and accomplish these

purposes and the savings shall revert to the General Fund at the end of fiscal year 2023, unless the General Assembly extends their availability.

This Order is certified to the North Carolina Supreme Court.

SO ORDERED, this the 26th day of April, 2022.

/s/ Michael L. Robinson

Michael L. Robinson
Special Superior Court Judge

CERTIFIED TRUE COPY FROM ORIGINAL
Clerk of Superior Court, Wake County
By: _____
Assistant Deputy Clerk of Superior Court
Date: 5-25-22

TAB 5

STATE OF NORTH CAROLINA

COUNTY OF WAKE

FILED
2021 DEC -8 P 4:17
WAKE CO., C.S.C.
BY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
95-CVS-1158

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.

NOTICE OF INTERVENTION

Pursuant to N.C. Gen. Stat. § 1-72.2(b), Legislative Intervenor-Defendants Philip E. Berger, in his official capacity as President *Pro Tempore* of the North Carolina Senate, and Timothy K. Moore, in his official capacity as Speaker of the North Carolina House of Representatives (the "Legislative Intervenors") hereby give notice of their intervention, as of right, as agents of the State on behalf of the General Assembly in this matter. In support of this notice, Legislative Intervenors show the Court the following:

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

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

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

4. The Appropriations Clause of the North Carolina State Constitution provides that "[n]o money shall be drawn from the State treasury but in consequence of appropriations made by law, and an accurate account of the receipts and expenditures of State funds shall be published annually." N.C. Const. Art. V, § 7(1). As a result, the North Carolina Supreme Court has held "the power of the purse is the exclusive prerogative of the General Assembly." *Cooper v. Berger*, 376 N.C. 22, 37 (2020).

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

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

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

8. The Court's Order seeks to direct State officials to pay money from the State treasury in a manner contrary appropriations made in the State Budget. In doing so, the Order contravenes the doctrine of Separation of Powers reflected in Article I, Section 6 of the State Constitution, which provides that, "The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." As our Courts have held, "[b]ecause the State constitution vests the authority to appropriate money solely in the legislative branch, the Separation of Powers Clause 'prohibits the judiciary from taking public monies without statutory authorization.'" *Richmond Cty. Bd. of Educ. v. Cowell*, 254 N.C. App. 422, 427 (2017) (quoting *In re Alamance Cty. Court Facilities*, 329 N.C. 84, 99, 405 S.E.2d 125, 132 (1991)). To do otherwise would cause the judiciary to impermissibly "arrogate [to itself] a duty reserved by the constitution exclusively to another body." *Id.*

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

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

This the 8th day of December, 2021.

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CERTIFICATE OF SERVICE

The undersigned certifies that on December 8, 2021, he caused a true and correct copy of the foregoing document to be served via U.S. Mail upon the following:

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TAB 6

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No. P21-511

IN RE. THE 10 NOVEMBER 2021 ORDER IN HOKE COUNTY BOARD OF EDUCATION ET AL. VS. STATE OF NORTH CAROLINA AND W. DAVID LEE (WAKE COUNTY FILE 95 CVS 1158)

From Wake
(95CVS1158)

O R D E R

The following order was entered:

The petition for a writ of prohibition is decided as follows: we allow the petition and issue a writ of prohibition as described below.

This Court has the power to issue a writ of prohibition to restrain trial courts "from proceeding in a matter not within their jurisdiction, or from acting in a matter, whereof they have jurisdiction, by rules at variance with those which the law of the land prescribes." State v. Allen, 24 N.C. 183, 189 (1841); N.C. Gen. Stat. s. 7A-32.

Here, the trial court recognized this Court's holding in Richmond County Board of Education v. Cowell that "[a]ppropriating money from the State treasury is a power vested exclusively in the legislative branch" and that the judicial branch lacked the authority to "order State officials to draw money from the State treasury." 254 N.C. App. 422, 803 S.E.2d 27 (2017). Our Supreme Court quoted and relied on this language from our holding in Cooper v. Berger, 376 N.C. 22, 47, 852 S.E.2d 46, 64 (2020).

The trial court, however, held that those cases do not bar the court's chosen remedy, by reasoning that the Education Clause in "Article I, Section 15 of the North Carolina Constitution represents an ongoing constitutional appropriation of funds."

We conclude that the trial court erred for several reasons.

First, the trial court's interpretation of Article I would render another provision of our Constitution, where the Framers specifically provided for the appropriation of certain funds, meaningless. The Framers of our Constitution dedicated an entire Article--Article IX--to education. And that Article provides specific means of raising funds for public education and for the appropriation of certain monies for that purpose, including the proceeds of certain land sales, the clear proceeds of all penalties, forfeitures, and fines imposed by the State, and various grants, gifts, and devises to the State. N.C. Const. Art. IX, Sec 6, 7. Article IX also permits, but does not require, the General Assembly to supplement these sources of funding. Specifically, the Article provides that the monies expressly appropriated by our Constitution for education may be supplemented by "so much of the revenue of the State as may be set apart for that purpose." Id. Article IX then provides that all such funds "shall be faithfully appropriated and used exclusively for establishing and maintaining a uniform system of free public schools." Id. If, as the trial court reasoned, Article I, Section 15 is, itself, "an ongoing constitutional appropriation of funds"--and thus, there is no need for the General Assembly to faithfully appropriate the funds--it would render these provisions of Article IX unnecessary and meaningless.

Second, and more fundamental, the trial court's reasoning would result in a host of ongoing constitutional appropriations, enforceable through court order, that would devastate the clear separation of powers between the Legislative and Judicial branches and threaten to wreck the carefully crafted checks and balances that are the genius of our system of government. Indeed, in addition to the right to education, the Declaration of Rights in our Constitution contains many other, equally vital protections, such as the right to open courts. There is no principled reason to treat the Education Clause as "an ongoing constitutional appropriation of funds" but to deny that treatment to these other, vital protections in our Constitution's Declaration of Rights. Simply put, the trial court's conclusion that it may order petitioner to pay unappropriated funds from the State Treasury is constitutionally impermissible and beyond the power of the trial court.

We note that our Supreme Court has long held that, while our judicial branch has the authority to enter a money judgment against the State or another branch, it had no authority to order the appropriation of monies to satisfy any execution of that judgment. See State v. Smith, 289 N.C. 303, 321, 222 S.E.2d 412, 424 (1976) (stating that once the judiciary has established the validity of a claim against the State, "[t]he judiciary will have performed its function to the limit of its constitutional powers. Satisfaction will depend upon the manner in which the General Assembly discharges its constitutional duties."); Able Outdoor v. Harrelson, 341 N.C. 167, 172, 459 S.E.2d 626, 629 (1995) (holding that "the Judicial Branch of our State government [does not have] the power to enforce an execution [of a judgment] against the Executive Branch").

We therefore issue the writ of prohibition and restrain the trial court from enforcing the portion of its order requiring the petitioner to treat the $1.7 billion in unappropriated school funding identified by the court "as an appropriation from the General Fund as contemplated within N.C. Gen. Stat. s. 143C-6-4(b)(2)(a) and to carry out all actions necessary to effectuate those transfers." Under our Constitutional system, that trial court lacks the power to impose that judicial order.

Our issuance of this writ of prohibition does not impact the trial court's finding that these funds are necessary, and that portion of the judgment remains. As we explained in Richmond County, "[t]he State must honor that judgment. But it is now up to the legislative and executive branches, in the discharge of their constitutional duties, to do so. The Separation of Powers Clause prevents the courts from stepping into the shoes of the other branches of government and assuming their constitutional duties. We have pronounced our judgment. If the other branches of government still ignore it, the remedy lies not with the courts, but at the ballot box." 254 N.C. App. 422, 429, 803 S.E.2d 27, 32.

Panel consisting of Judge DILLON, Judge ARROWOOD, and Judge GRIFFIN.

ARROWOOD, Judge, dissenting.

I dissent from the majority's order granting a Writ of Prohibition. I vote to allow the Motion for Temporary Stay which is the only matter that I believe is properly before the panel at this time. This matter came to the panel for consideration of a non-emergency Motion for Temporary Stay that was ancillary to petitions for a Writ of Prohibition under Rule 22 of the Rules of Appellate Procedure and for Writ of Supersedeas under Rule 23 of the Rules of Appellate Procedure on 29 November 2021. The trial court had stayed the order at issue until 10 December 2021, the date when the time to appeal from the order would expire. Thus, there are no immediate consequences to the petitioner about to occur.

Under Rules 22 and 23 of the Rules of Appellate Procedure, a respondent has ten days (plus three for service by email) to respond to a petition. This time period runs by my calculation through 7 December 2021, before the trial court's stay of the order expires. However, the majority of this panel--ex meru motu--caused an order to be entered unreasonably shortening the time for respondents to file a response until only 9:00 a.m. today. While the rules allow the Court to shorten a response time for "good cause shown[,]" in my opinion such action in this case was arbitrary, capricious and lacked good cause and instead designed to allow this panel to rule on this petition during the month of November.

Rather, as the majority's order shows shortening the time for a response was a mechanism to permit the majority to hastily decide this matter on the merits, with only one day for a response, without a full briefing schedule, no public calendaring of the case, and no opportunity for arguments and on the last day this panel is constituted. This is a classic case of deciding a matter on the merits using a shadow docket of the courts.

I believe this action is incorrect for several reasons. The Rules of Appellate Procedure are in place to allow parties to fully and fairly present their arguments to the Court and for the Court to fully and fairly consider those arguments. In my opinion, in the absence of any real time pressure or immediate prejudice to the parties, giving a party in essence one day to respond, following a holiday weekend, and then deciding the matter on the merits the day the response is filed violates these principles. My concerns are exacerbated in this case by the fact that no adverse actions would occur to the petitioner during the regular response time

as the trial court had already stayed its own order until several days after responses were due. In addition, this Court also has the tools through the issuance of a temporary stay to keep any adverse actions from occurring until it rules on the matter on the merits.

Therefore, I dissent from the majority's shortening the time for a response and issuing an order that decides the the merits of the entire appeal without adequately allowing for briefing or argument. My vote is to issue a temporary stay of the trial court's order.

By order of the Court this the 30th of November 2021.

WITNESS my hand and the seal of the North Carolina Court of Appeals, this the 30th day of November 2021.

Eugene H. Soar
Clerk, North Carolina Court of Appeals

Copy to:
Hon. Robert Neal Hunter, Jr., Attorney at Law, For Combs, Linda, State Controller
Hon. W. David Lee, Senior Resident Judge
Mr. Amar Majmundar, Senior Deputy Attorney General
Mr. Matthew Tulchin, Special Deputy Attorney General
Ms. Tiffany Y. Lucas, Deputy General Counsel
Mr. Thomas J. Ziko
Mr. Neal A. Ramee, Attorney at Law
Mr. David Nolan, Attorney at Law
H. Lawrence Armstrong
Ms. Melanie Black Dubis, Attorney at Law
Mr. Scott B. Bayzle
Ms. Elizabeth M. Haddix, Attorney at Law
Hon. Frank Blair Williams, Clerk of Superior Court

TAB 7

No. _____ TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA
****

HOKE COUNTY BOARD OF EDUCATION; et al., *Plaintiff*s, 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-Appellees, and CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, Realigned Defendant.	)	From the Court of Appeals No. P21-511

****

PLAINTIFFS' NOTICE OF APPEAL, PETITION FOR DISCRETIONARY REVIEW AND, ALTERNATIVELY, PETITION FOR WRIT OF CERTIORARI

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No. _____ TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA
****

HOKE COUNTY BOARD OF EDUCATION; et al., *Plaintiff*s,	)	
and	)	
CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, *Plaintiff*-Intervenor,	)	From the Court of Appeals No. P21-511
and	)	
RAFAEL PENN, et al., *Plaintiff*-Intervenors,	)	
v.	)	
STATE OF NORTH CAROLINA and the STATE BOARD OF EDUCATION, Defendants-Appellees,	)	
and	)	
CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, Realigned Defendant.	)	

****

PLAINTIFFS' NOTICE OF APPEAL, PETITION FOR DISCRETIONARY REVIEW AND, ALTERNATIVELY, PETITION FOR WRIT OF CERTIORARI

****

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Plaintiffs Hoke County Board of Education *et al.* (collectively, "Plaintiffs") respectfully appeal from and petition the Supreme Court of North Carolina to certify for discretionary review the writ of prohibition issued by the North Carolina Court of Appeals on 30 November 2021.

The 30 November 2021 writ of prohibition is labeled an "Order." As Judge John Arrowood noted in the dissent, however, the majority "decide[d] the merits of the entire appeal" and thus the order operates as a decision. Plaintiffs therefore appeal as a matter of right on two separate and independent grounds.

First, Plaintiffs have the right to appeal, pursuant to N.C. Gen. Stat. § 7A-30(2), N.C. R. App. P. 14(b)(1), based on the dissenting opinion of Judge Arrowood. The issues that form the basis of the dissenting opinion and that are to be presented to this Court for review are as follows:

1. Whether the Court of Appeals acted arbitrarily and capriciously by – *ex meru motu* – shortening the time to respond to the Petition for Writ of Prohibition.

2. Whether the Court of Appeals had "good cause" to shorten the time to respond to the Petition for Writ of Prohibition where the underlying order was stayed and no consequences to the petitioner were imminent.

3. Whether the Court of Appeals erred in deciding the merits of the appeal and issuing the writ of prohibition when other remedies were available.

Second, Plaintiffs have the right to appeal, pursuant to N.C. Gen. § 7A-30(1), N.C. R. App. P. 14(b)(2), because the subject matter of the appeal directly involves substantial questions arising under Article I, Section 15, Article I, Section 18, Article IV, Section 1, Article V, Section 7, and Article IX, Section 2, of the North Carolina Constitution. Specifically, the writ of prohibition raises the following substantial constitutional questions:

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."

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.

3. Whether the legislative authority to appropriate funds pursuant to Article V, Section 7 of the North Carolina Constitution overrides and renders meaningless the constitutional right to a sound basic education under Article I, Section 15 and Article IX, Section 2.

4. Whether the writ of prohibition contravenes Article IV, Section I of the North Carolina Constitution by allowing the judgment of the General Assembly to override the power of the judiciary to order a remedy for an established constitutional violation.

5. Is the State's obligation under Article IX, Section 2 of the North Carolina Constitution to provide for a "general and uniform system of free public schools" unenforceable and therefore meaningless where the General Assembly refuses to appropriate the funds necessary to do so.

These issues are not "frivolous," nor have they been conclusively decided by this Court. *See State v. Campbell,* 282 N.C. 125, 128, 191 S.E.2d 752, 755 (1972). As demonstrated herein, the Court of Appeals raised and passed on these issues in ruling: (a) Article IX of the State Constitution "does not require the General Assembly" to fund the opportunity for a sound basic education, if such funds are not available from monies expressly enumerated for education; (b) in the face of an established constitutional violation, the trial court lacked authority under Article I, Sections 15 and 18 to order the specific remedy proposed by the State; and (c) the doctrine of separation of powers prohibits the judicial branch from enforcing its own orders where the legislative branch refuses to fulfill its constitutional obligations.

The prior rulings of this Court set forth with specificity how the State has violated and continues to violate the constitutional rights of the Plaintiffs

and children across the State of North Carolina, particularly those children at-risk of academic failure. *Hoke Cty. Bd. of Educ. v. State*, 358 N.C. 605, 623, 636-38, 599 S.E.2d 365, 381, 390-91 (2004). The Court of Appeals, however, has interpreted the State Constitution to provide no remedy for such violations and to render the courts impotent where the General Assembly refuses to act. This Court has previously recognized the continuing harm: "We cannot … imperil even one more class [of students] unnecessarily." *Id.* at 616, 599 S.E.2d at 377.

Additionally, Plaintiffs seek discretionary review, pursuant to N.C. Gen. § 7A-31 and N.C. R. App. P. 15 of the remaining portions, if any, of the writ of prohibition because, as set forth herein, the subject matter: (1) has significant public interest; (2) involves principles of major significance to the jurisprudence of this State; and (3) the decision of the Court of Appeals appears likely to be in conflict with decisions of the Supreme Court, including, without limitation, *Leandro v. State,* 346 N.C. 336, 354, 488 S.E.2d 249, 259 (1997) ("*Leandro I*") and *Hoke County Bd. of Educ. v. State*, 358 N.C. 605, 599 S.E.2d 365 (2004) ("*Leandro II*").

Finally, in the event that the Court should determine that Plaintiffs do not have a right to appeal the "order" because it is denominated as such, Petitioners respectfully request, in the alternative, that the Court issue a

writ of certiorari to review the Court of Appeals' 30 November 2021 writ of prohibition.

In support of this Notice of Appeal and Petition for Discretionary Review or, in the alternative, Petition for Writ of Certiorari, Plaintiffs show unto this Honorable Court the following:

INTRODUCTION

This case is about one of the most important rights enumerated in our State Constitution: the fundamental right of every child in North Carolina to have the equal opportunity to obtain a sound basic education in a public school.

There is no question that the State is constitutionally obligated to ensure that *every* child in North Carolina, regardless of age, race, gender, socio-economic status, or the district in which he or she lives, is provided the opportunity to receive a sound basic education. In *Leandro v. State,* 346 N.C. 336, 354, 488 S.E.2d 249, 259 (1997), Chief Justice Mitchell, writing on behalf of a unanimous Supreme Court in this case, held that Article IX of the North Carolina Constitution guarantees to all children this inalienable fundamental right.

There is also no question that the State has violated—and continues to violate—the Constitution by denying this fundamental right to children across North Carolina. In 2004, Justice Orr, again on behalf of a unanimous

Supreme Court, affirmed the trial court's finding that the State had "failed in [its] constitutional duty to provide [] students with the opportunity to obtain a sound basic education." *Leandro II*, 358 N.C. at 638, 599 S.E.2d at 390-91. Indeed, the State has admitted—repeatedly and unequivocally—to its continuing violation of the Constitution.

And there is no question as to what must be done to remedy the ongoing constitutional violations. After being granted years of deference to develop a remedy of its own choosing, the State—acting in this case through its legislative and executive branches, 358 N.C. at 638, 599 S.E.2d at 390-91— presented the trial court with its Comprehensive Remedial Plan for constitutional compliance. That Plan sets out (1) the specific actions *identified by the State* that must be implemented to remedy the continuing constitutional violations, (2) the timeline *developed by the State* required for successful implementation, and (3) the funding, *as determined by the State*, for implementation. Indeed, the State represented to the trial court—and it is thus undisputed in this case—that the actions outlined in its Remedial Plan are the "necessary and appropriate actions that *must* be implemented to address the continuing constitutional violations." State's Comprehensive Remedial Plan dated 15 March 2021at 3, 4, App. 58-59 (emphasis added).

The question that remains, however, is whether the judicial branch has any role to play in vindicating the constitutional rights of the people of North

Carolina. The outcome of this appeal will determine whether this Court's previous unanimous decisions in *Leandro I* and *Leandro II*, and indeed the rights enumerated in Article IX of our Constitution, have any meaning or ring hollow; whether the courts of North Carolina may enforce a constitutional right, or if they are subservient to the will of the General Assembly; whether our State's "most valuable renewable resource" will be preserved by our tri-partite system of government, or destroyed by it. *Leandro II*, 358 N.C. at 616, 599 S.E.2d at 377.

The public significance of the subject matter cannot be overstated. Right now, thousands of at-risk children are being denied the opportunity to avail themselves of their fundamental constitutional right to a sound basic education. Immediate and final adjudication by this Court is necessary to prevent further and irreparable harm to these children. Given the importance of this matter, this Court has previously noted that this litigation, to the extent possible, should not be delayed because "[w]e cannot … imperil even one more class unnecessarily." *Leandro II*, 358 N.C. at 616, 599 S.E.2d at 377.

STATEMENT OF FACTS

The Parties

This action was filed in May of 1994 against the State of North Carolina and the State Board of Education. The original plaintiffs were

students, guardians, and school boards from five of the poorest counties in North Carolina: Cumberland, Halifax, Hoke, Robeson, and Vance. Students, guardians and schools boards from six urban school districts later intervened as plaintiffs, of which Charlotte-Mecklenburg County Board of Education remains as a plaintiff-intervenor and a realigned defendant. Certain students who attended high schools within the Charlotte-Mecklenburg system and, the North Carolina State Conference of the National Association for the Advancement of Colored People (Rafael Penn *et al.*) also later intervened. They are among the hundreds of thousands of students across North Carolina deprived of the opportunity to acquire *Leandro*-compliant education.

Leandro I

The State moved to dismiss the Plaintiffs' Complaint, and that ruling came before this Court in 1997. Chief Justice Mitchell, writing on behalf of a unanimous Court, held that Article IX of the North Carolina Constitution guarantees to all children the opportunity to obtain a sound basic education in a public school. *Leandro I*, 346 N.C. at 354, 488 S.E.2d at 259. The Court remanded the case for trial to determine whether children in North Carolina had been denied that opportunity. *Id*. at 358, 488 S.E.2d at 261.

The Trial and Liability Judgment

Following a trial that spanned the course of three months, the trial court ruled that the State had indeed failed to carry out its constitutional duty to provide children, especially those at-risk, with the opportunity to obtain a sound basic education. The trial court also ruled that the State could not avoid its constitutional responsibility by blaming the local school districts.

The trial court ordered the State to provide the requisite resources necessary to ensure that all children, including those at-risk, have an equal opportunity to a sound basic education. The State again appealed the trial court's decision.

Leandro II

In 2004, Justice Orr, again on behalf of a unanimous Supreme Court, affirmed the trial court's finding that the State had "failed in [its] constitutional duty to provide [] students with the opportunity to obtain a sound basic education." *Leandro II*, 358 N.C. at 638, 599 S.E.2d at 390-91. In light of that holding, the Court ordered that "the State must act to correct those deficiencies that were deemed by the trial court as contributing to the State's failure of providing an *Leandro*-comporting educational opportunity." *Id.* This Court remanded the case to the trial court to oversee the remedial phase of the litigation, noting that, "[a]ssuring that our children are afforded

the chance to become contributing, constructive members of society is paramount." *Id.* at 649, 599 S.E.2d at 397.

This Court held that if the State failed to live up to its constitutional duties as ordered, the trial court is empowered to impose a specific remedy and instruct State actors to implement it. Specifically, this Court held:

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

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

Remedial Phase (2004 – 2021)

Since *Leandro II,* the trial court gave the State multiple opportunities to develop and present a plan to remedy the established constitutional deficiencies. For seventeen (17) years, in over twenty (20) compliance hearings, the State demonstrated its inability and repeated failure to do so. During this time, the trial court annually reviewed the academic performance of every school in the State, teacher and principal data, and programmatic resources available to at-risk students. The trial court concluded that "in way too many school districts across this state, thousands of children in the public schools have failed to obtain and are not now obtaining a sound basic

education as defined and required by the *Leandro* decision." *See* 17 March 2015 Order. The State did not appeal that Order.

The trial court examined the record again in 2018 and found that "the evidence before this court . . . is wholly inadequate to demonstrate . . . substantial compliance with the constitutional mandate of Leandro measured by applicable educational standards." *See* 13 March 2018 Order. The State did not appeal that Order, App. 15

Indeed, the State has admitted—repeatedly and unequivocally—to its continuing violation of the Constitution. *See, e.g.*, Consent Order of 21 January 2020, at 15 (State acknowledging that it has failed to meet its "constitutional duty to provide all North Carolina students with the opportunity to obtain a sound basic education."); *id.* ("[T]he Parties do not dispute [ ] that many children across North Carolina, especially at-risk and economically-disadvantaged students, are not now receiving a *Leandro*-conforming education."); *id.* at 17 (State conceding that it has "yet to achieve the promise of our Constitution and provide all with the opportunity for a sound basic education"); State's Submission of 15 March 2021, ("State's March 2021 Submission") at 1 (admitting that "this constitutional right has been and continues to be denied to many North Carolina children"); *id.* ("North Carolina's PreK-12 education system leaves too many students behind, especially students of color and economically disadvantaged

students."); *id.* ("[T]housands of students are not being prepared for full participation in the global, interconnected economy and the society in which they will live, work, and engage as citizens."); Order dated 7 June 2021, at 6 ("State Defendants have acknowledged that additional State actions are required to remedy the denial of this fundamental right."); State's Submission of 16 August 2021, at 1 (same) App. 146.

In January 2020, the trial court entered an order entitled "Consent Order: Current State of *Leandro* Compliance And The Implementation of A Concrete, Particularized Remedial Plan." Plaintiffs and Penn-Intervenors, as well as the State Defendants all agreed, and represented to the trial court, 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." January 2020 Order at 3. The trial court then ordered the State Defendants to work "expeditiously and without delay" to create and fully implement a system of education and educational reforms that will provide the opportunity for a sound basic education to all North Carolina children. *Id.* at 33.

On 21 March 2021, the State presented a Comprehensive Remedial Plan for constitutional compliance (the "Remedial Plan"). After being granted *years* of deference, the Remedial Plan sets out the "nuts and bolts" for how the State will remedy its continuing constitutional failings to North

Carolina's children. The Remedial Plan is multi-faceted. It sets out (1) the specific actions identified by the State that must be implemented to remedy the continuing constitutional violations, (2) the timeline developed by the State required for successful implementation, and (3) the necessary resources and funding, as determined by the State, for implementation.

Indeed, the State represented to the trial court that the actions outlined in the Remedial Plan are the "necessary and appropriate actions that **must** be implemented to address the continuing constitutional violations." State's March 2021 Submission at 3, 4 (emphasis added). The State further represented that the full implementation of each year of the Remedial Plan was required to "provide the opportunity for a sound basic education to all children in North Carolina." *Id.* at 3. And, the State assured the trial court that it was "committed" to fully implementing the Remedial Plan and within the time frames set forth therein. *Id.*

The trial court reviewed the Remedial Plan and agreed with the State. The trial court found that "the actions, programs, policies, and resources propounded by and agreed to [by] State Defendants, and described in the Comprehensive Remedial Plan, are necessary to remedy continuing constitutional violations and to provide the opportunity for a sound basic education to all public school children in North Carolina." *See* Order dated 7 June 2021, at 7 (§ A) App. 113. With the consent of the State, the trial court

ordered the Remedial Plan to be fully implemented in accordance with the schedule identified by the State. *Id.* (§ B).

Recognizing the passage of time since the *Leandro II* decision, the trial court stressed to the State, "[t]ime is of the essence." *Id.* at 5-6. ("The urgency of implementing the Comprehensive Remedial Plan on the timeline currently set forth by State Defendants cannot be overstated.") The court further cautioned:

> If the State fails to implement the actions described in the Comprehensive Remedial Plan—actions which it admits are necessary and which, over the next biennium, the Governor's proposed budget and Senate Bill 622 confirm are attainable—'it will then be the duty of this Court to enter a judgment granting declaratory relief and such other relief as needed to correct the wrong.'"

Id. at 6 (quoting *Leandro I*, 346 N.C. at 357; 488 S.E.2d at 261).

The trial court held a hearing on 18 October 2021, at which time, the State reported that it had not implemented the Comprehensive Remedial Plan, as it had been ordered to do so. Importantly, the State conceded—without qualification—that it has more than enough resources to fully fund and implement every single component of Year 2 and Year 3 of the Remedial Plan as ordered. State's First Progress Report dated 6 August 2021, App. 121.

The trial court then directed the Plaintiffs and the State to submit proposed orders and/or legal memoranda addressing the State's non-compliance. After receiving those submissions, the trial court entered an order in open court on 10 November 2021 directing the necessary state actors to transfer from the undesignated cash surplus the funds required to implement the Remedial Plan. By its terms, the November 10 Order was stayed for thirty (30) days from its entry (or to 10 December 2021).

Writ of Prohibition

While the 10 November 2021 Order was stayed, Linda Combs, Controller of the State of North Carolina, filed a petition for writ of prohibition, writ of supersedeas and temporary stay on 24 November 2021 – the day before Thanksgiving. Under ordinary appellate procedure, any response would have been due on 7 December 2021. The first business day following Thanksgiving, Monday, 29 November 2021, at approximately 11:00 a.m.[1], the Court of Appeals shortened the time to respond to the petition to 9:00 a.m. on 30 November 2021. The same day responses were submitted, the Court of Appeals (panel consisting of Judge Dillon, Judge Arrowood, and Judge Griffin) issued the writ of prohibition to "restrain the trial court from enforcing the portion of its order requiring the petitioner" to transfer funds to

[1] Counsel for Plaintiffs were not included on the original communication from the Clerk of the Court of Appeals, but it appears that the order was distributed to others at approximately 11:00 a.m.

implement the State's Comprehensive Remedial Plan, on the grounds that the "trial court lacks the power to impose that judicial order."

The majority went on the say that the writ of prohibition "does not impact the court's finding that these funds are necessary, and that portion of the judgment remains." Judge Arrowood dissented from the majority's order as "incorrect for several reasons." Specifically, Judge Arrowood dissented "from the majority's shortening the time for a response and issuing an order that decides the merits of the entire appeal without adequately allowing for briefing or argument." Judge Arrowood noted:

> The Rules of Appellate Procedure are in place to allow parties to fully and fairly present their arguments to the Court and for the Court to fully and fairly consider the arguments. In my opinion, in the absence of any real time pressure or immediate prejudice to the parties, giving a party in essence one day to respond, following a holiday weekend, and then deciding the matter on the merits the day the response is filed violates these principles.

Judge Arrowood further noted that this was a "classic case of deciding a matter on the merits using a shadow docket of the courts." A copy of the Court of Appeals' writ of prohibition is attached at App. 166.

REASONS A PETITION FOR DISCRETIONARY REVIEW OR, ALTERNATIVELY, A WRIT OF CERTIORARI SHOULD ISSUE TO REVIEW THE DECISION OF THE COURT OF APPEALS

I. The Court of Appeals' Use of a "Shadow Docket" Denied Plaintiffs a Meaningful Opportunity to Respond to the Petition for Writ of Prohibition.

Under Rule 22 of the North Carolina Rules of Appellate Procedure, the respondent or any party has ten days to file a response to a petition for writ of prohibition. The time for filing a response may only be shortened "for good cause shown." N.C. R. App. P. 22(c).

Here, the petition for writ of prohibition was filed by Linda Combs, Controller of the State of North Carolina, the afternoon before courts closed for two days for the Thanksgiving holiday. Monday, 29 November 2021, the Court of Appeals *sua sponte* entered an Order requiring all parties to respond to the petition by 9:00AM the next day. The Court of Appeals provided no reasoning for shortening the response time to less than 24 hours. Such a drastic shortening of the response time in a case of constitutional significance that has been pending for over 27 years is even more perplexing given the order the Petitioner sought to prohibit was already stayed until 10 December 2021.

Judge Arrowood, in his dissent, recognized the unreasonable shortening of the response time as "arbitrary, capricious, and lack[ing] good

cause and instead designed to allow this panel to rule on this petition during the month of November." Judge Arrowood went on to say that the majority's Order shortening the response time was "a mechanism to permit the majority to hastily decide this matter on the merits, with only one day for a response, without a full briefing schedule, no public calendaring of the case, and no opportunity for arguments and on the last day this panel is constituted." The majority's actions demonstrated "a classic case of deciding a matter on the merits using a shadow docket of the courts." Finally, acknowledging the thirty-day stay of the trial court's order, Judge Arrowood opined that his procedural concerns were exacerbated "by the fact that no adverse actions would occur to the petitioner during the regular response time."

State constitutional issues should not be resolved in hasty gamesmanship by judges apparently bent to decide issues in secret without ample notice to litigants or the public. Such procedural irregularities undermine the public confidence in our judiciary system and should not—indeed cannot—be tolerated when the fundamental, constitutional rights of our State's children are involved. This Court should review the writ of prohibition to renounce the majority's use of its shadow docket and to afford all parties a full and fair opportunity to be heard on the merits before this Court.

II. The Standards For Issuance of a Writ of Prohibition Were Not Met.

Writs of prohibition are "extraordinary" writs that are appropriate only in the rarest of cases. *See generally,* Rules 22 and 23 of the North Carolina Rules of Appellate Procedure. Indeed, an 1841 case cited by the petitioner below, *State v. Allen*, 24 N.C. 183, 2 Ired. 183 (1841), highlights how seldom–if ever–a writ of prohibition would be appropriate:

> The only question before us is, whether the Superior Court erred in quashing the writ of prohibition, and we have no hesitation in answering this question in the negative. . . . Instances, indeed, are to be found, where the writ of prohibition has been used, not to restrain the action of Courts, but to prevent individuals from committing acts of irremediable mischief—in cases of waste and nuisance. These instances, however, are not of modern occurrence, and are viewed as of an anomalous character.

Id. at 188-189 (emphasis added). *See also Holly Shelter R. Co. v. Newton,* 133 N.C. 136, 45 S.E. 549, 550 (1903) (holding a writ of prohibition "issues only in cases of extreme necessity" and noting that in all cases "in which application for this extraordinary remedy has been made in this state . . . it was refused."). A writ of prohibition, like a writ of mandamus, is a "personal action" against the trial court judge and is granted "only in the case of necessity." *Sutton v. Figgatt,* 280 N.C. 89. 93, 185 S.E.2d 97, 99 (1971) (affirming denial of petition for writ of mandamus).

The State filed an appeal of the trial court's order on 7 December 2021, three days before the expiration of the trial court's stay on the Order. The trial court's thirty-day stay the Order gave the State ample time to appeal, and made clear that there was no risk of immediate irreparable harm to Linda Combs, both as an individual and as a state actor, at the time the writ of prohibition was filed.

The availability of an appeal and the lack of immediate irreparable harm facing the Petitioner means that the writ was unnecessary and should not have issued in the first instance. *State v. Whitaker*, 114 N.C. 818, 19 S.E. 376, 376–77 (1894) ("It is settled that this writ does not lie for grievances which may be redressed, in the ordinary course of judicial proceedings, by appeal, or by recordari or certiorari in lieu of an appeal.…Being a prerogative writ, it is to be used, like all such, with great caution and forbearance…where none of the ordinary remedies provided by law will give the desired relief, and damage and wrong will ensue pending their application."); *Holly Shelter R. Co. v. Newton*, 133 N.C. 132, 45 S.E. 549, 550 (1903) (holding that a writ of prohibition will be "issue[d] only in cases of extreme necessity" and not "when there is any sufficient remedy by ordinary methods, as appeal, injunction, etc., or when no irreparable damage will be done"); *State v. Inman* 224 N.C. 531, 542, 31 S.E. 2d 641, 647 (1944) ("The writ of prohibition…has been uniformly denied where there is other remedy.").

Rather than using the writ of prohibition with "great caution and forbearance" where there is no sufficient remedy by ordinary appeal, the majority abused the process as a way for two judges to hastily "decide" an appeal—before the panel composition changed—without providing the due process rights afforded to appellants or appellees. Issues of this importance should be resolved by meaningful briefing on the merits and through the proper appellate process.

This Court, therefore, should review the Court of Appeals' 30 November 2021 Order to clarify when the extraordinary writ of prohibition is – and is not – appropriate, and the proper procedure lower courts should follow to consider and decide such petitions.

III. The Court of Appeals' Decision Issuing the Writ of Prohibition Contradicts the North Carolina Constitution and the Prior Rulings of This Court.

Without allowing a full briefing schedule or other meaningful opportunity for the parties to be heard, the Court of Appeals effectively vacated the trial court's 10 November 2021 Order. While the majority purports to leave the trial court's judgment that the funds to implement the Comprehensive Remedial Plan are necessary ("that portion of the judgment remains"), it eviscerates the trial court's (and arguably this Court's) ability to enforce that valid judgment. The majority's order ignores the prior rulings of this Court, renders the State Constitution meaningless, and exalts the

legislative branch above the other branches of government. Because it so clearly raises significant constitutional issues regarding the roles of the courts and the legislature as co-equal branches of government, as well as the court's authority to remedy established constitutional violations, this Court should issue a writ of certiorari to review the Court of Appeals' decision.

A. The Trial Court's Order Adhered to the Limitations Outlined in Supreme Court Precedent, and Was a Lawful Exercise of its Inherent Powers.

This Court has repeatedly affirmed the courts' inherent powers as one of three separate, coordinate branches of the government. *Ex Parte McCown*, 139 N.C. 95, 105-06, 51 S.E. 957, 961 (1905) (citing N.C. Const. Art. I, § 4)). These inherent powers are not limited by the Constitution, but are instead protected by the Constitution. *Beard v. N. Carolina State Bar*, 320 N.C. 126, 129, 357 S.E.2d 694, 695 (1987). The General Assembly has no power to deprive the courts of their "authority to do all things that are reasonably necessary for the proper administration of justice." *State v. Buckner*, 351 N.C. 401, 411, 527 S.E.2d 307, 313 (2000); *Beard*, 320 N.C. at 129, 357 S.E.2d at 696. Allowing the legislature to destroy these inherent powers, which "are critical to the court's autonomy and to its functional existence," would destroy the courts "for all efficient and useful purposes." *Matter of Alamance Cnty. Ct. Facilities*, 329 N.C. 84, 93–94, 405 S.E.2d 125, 22 129 (1991) ("Alamance") (citing *Ex Parte Schenck*, 65 N.C. 353, 355 (1871)). Furthermore, such

deprivation of the courts' ability to protect constitutional rights would violate a fundamental judicial principle first recognized in *Marbury v. Madison*, "that every right, when withheld, must have a remedy, and every injury its proper redress." 5 U.S. 137, 147, 2 L. Ed. 60 (1803). *See also* N.C. Const. Art I, Sec. 18.

In granting the writ of prohibition, the Court of Appeals hypothesized that the trial court's reasoning would lead to "a host of ongoing constitutional appropriations, enforceable through court order," that would "devastate" the separation of powers doctrine. The Court of Appeals' decision, however, ignores the unique facts, procedural history and prior rulings in this case, as well as existing precedent that has already outlined significant limitations on the courts' power to order such remedies. The trial court's 10 November 2021 Order falls squarely within those limitations.

The Court of Appeals has previously recognized that the judiciary may order state officials to draw money from the State Treasury, subject to certain limitations. *Richmond County Board of Education v. Cowell*, 254 N.C. App. 422, 803 S.E.2d 27 (2017). *Richmond County* dealt with a claim by the Richmond County Board of Education that the State had impermissibly used fees collected for certain criminal offenses to fund county jail programs, rather than returning the money to the Board for use by public schools, as is required by Article IX, § 7 of the NC Constitution. *Id.* at 427. The trial court

ordered that the State Treasurer and Controller transfer funds from the State Treasury to the Board. The Court of Appeals reversed, holding that the trial court *could* remedy the constitutional harm by ordering the State to return the money to the board, but could not order the State to give the Board new money. *Id.* at 427-28. (emphasis added). The Court of Appeals acknowledged that where the Constitution mandates funds be used for a particular purpose, "it is well within the judicial branch's power to order" that those funds be expended in accordance with constitutional dictates. *Id.* Only because the funds had already been spent did the Court of Appeals reverse the trial court's order. *Id.*

Richmond County presents two limitations on a court's power to direct state officials to draw money from the State Treasury: 1) the court must identify available funds, and 2) the order must be tied to an appropriation "made by law." The trial court's 10 November 2021 Order did exactly that, and the Court of Appeals erred in finding otherwise.

In *In re Alamance County Court Facilities*, after thoroughly analyzing the separation of powers doctrine, this Court held that the judicial branch *may* invoke its inherent power and "seize purse strings otherwise held exclusively by the legislature branch" where the integrity of the judiciary is threatened, but the employment of that power is subject to limitations. 329 N.C. 84, 98-99, 405 S.E.2d 125, 132 (1991) (emphasis added). This Court went

on to hold that the judiciary may infringe on the legislature's traditional authority to appropriate state funds "*no more* than is reasonably necessary" and in a way that is "no more forceful or invasive than the exigency of the circumstances requires." *Id.* at 99-100, 405 S.E.2d at 132-33.

In re Alamance County Court Facilities, therefore, outlined two more limitations to the judicial power to order a monetary remedy against the State: 1) the court must "bow to establish procedural methods where these provide an alternative to the extraordinary exercise of its inherent power;" and 2) "the court in exercising that power must minimize the encroachment upon those with legislative authority in appearance and in fact." *Id*. at 100-01, 405 S.E.2d at 133.

The right to education is uniquely valued in our State Constitution's Declaration of Rights, which this Court has recognized as having "primacy…in the minds of the framers." *Corum v. University of North Carolina*, 330 N.C. 761, 782, 413 S.E.2d 276, 289-90 (1992). In addition to recognizing the "right to the privilege of education" in Article I, § 15, the Constitution later devotes an entire section to education. N.C. Const. Art IX. This article commands the General Assembly to "provide…a general uniform system of *free* public schools," N.C. Const. Art. IX, § 2(1) (emphasis added), and to "*faithfully appropriate*[] and use[] exclusively" certain proceeds from state lands, money stocks, bonds, other state property, and "grants, gifts and

devises," together with other state revenue, to "*establish*[] and *maintain*[] a uniform system of *free* public schools," N.C. Const. Art. IX, § 6; N.C. Const. Art. IX, § 7(1) (emphasis added).

Unlike "the right to open courts," for example, our Constitution repeatedly provides for funding the right to education, and recognizes that this right cannot be realized without this necessary funding. For more than 27 years and throughout more than 20 court hearings, the trial court has granted exceptional deference to the legislature to ensure that every student is granted their constitutional right to a sound basic education. But the legislature has repeatedly refused to satisfy its constitutional duty, notwithstanding the State's own admission that the Comprehensive Remedial Plan is necessary to remedy the longstanding violation of students' fundamental right to a sound basic education and admission that the State has more than ample funds ($8 billion in state reserves) available to cover the cost of Years 2 and 3 of its Remedial Plan.

The State's unwillingness or inability since the 2004 *Leandro II* decision to correct its constitutional violations shows that there is no alternative or adequate remedy available to Plaintiffs. Indeed, this Court has previously held in this case:

> Certainly, when the State fails to live up to its constitutional duties, a court is empowered to order the deficiency remedied, and if the offending branch

> of government or its agents either fail to do so or have consistently shown an inability to do so, a court is empowered to provide relief by imposing a specific remedy and instructing the recalcitrant state actors to implement it.

Hoke Cnty. Bd. of Educ. v. State, 358 N.C. 605, 642, 599 S.E.2d 365, 393 (2004). The Court of Appeals' decision ignores this Court's prior ruling and, as discussed below, eviscerates the right to a sound basic education by leaving the vindication of that right solely in the hands of the legislature.

B. Allowing the General Assembly to Violate the Constitution Without Judicial Review Exalts the Legislature Above the Co-Equal Judicial Branch, Contrary to the State Constitution.

The General Assembly's refusal to remedy its ongoing Constitutional violations is an attempt to encroach on the powers of the judiciary. The Court of Appeals condoned this imbalance of power by issuing the writ of prohibition, thus this Court should review that decision.

It is a fundamental principle of constitutional law that the courts and the legislature are coordinate branches of government and neither is superior to the other. *Nicholson v. Educ. Assistance Auth.,* 275 N.C. 439, 168 S.E.2d 401 (1969). This Court has expressly identified the roles of each branch, including the role of the judicial branch to "interpret[] the laws and, through its power of judicial review, determine[] whether they comply with the constitution." *State v. Berger*, 368, N.C. 633, 635, 781 S.E.2d 248, 250 (2016). The General Assembly "shall have no power to deprive the judicial

department of any power or jurisdiction that rightfully pertains to it as a co-ordinate department of the government. . . ." N. C. Const. Art. IV, § 1.

The writ of prohibition, however, allows the General Assembly to continue to ignore its constitutional obligations indefinitely and deprives the judicial branch of any power of review. Indeed, under the Court of Appeals' reasoning, the legislature could appropriate a mere $100 – or some other grossly insufficient amount – to fulfill its obligation to provide a "general and uniform system of free public education," and the people of North Carolina would have no judicial recourse. According to the Court of Appeals, thousands of students would have to wait at least two years to allow "the ballot box" to remedy that clear constitutional violation. That is not the law of North Carolina. That is not the law of this case. *Leandro II*, 358 N.C. at 616, 599 S.E.2d at 377 ("We cannot … imperil even one more class unnecessarily"); *Leandro I,* 346. N.C. at 345, 488 S.E.2d at 253-54 (holding educational adequacy is not a political question).

The Appropriations Clause, N.C. Const. Art. V, section 7, similarly does not limit the constitutional role of the courts. *See, e.g., Hickory v. Catawba County* and *School District v. Catawba County*, 206 N.C. 165, 173 S.E. 56 (1934) (upholding a writ of mandamus requiring defendant counties to assume payment and indebtedness for the City where county commissioners failed to provide for the maintenance of public schools; *White v. Worth*, 126

N.C. 570, 36 S.E. 132, 134 (1900) (affirming the issuance of mandamus to the state auditor and treasurer and holding, "[t]he legislature having general powers of legislation, all these acts must be observed and enforced, *unless they conflict with the vested constitutional rights of the plaintiff*") (emphasis added).

Specifically, this Court noted in *Cooper v. Berger,* 376 N.C. 22, 852 S.E.2d 46 (2020), that the legislature's authority over appropriations is grounded in its function as the voice of the people. 376 N.C. at 37, 852 S.E.2d at 58. The Constitution itself, however, "expresses the will of the people of this State and is, therefore the supreme law of the land." *In re Martin,* 295 N.C. 291, 299, 245 S.E.2d 766 (1978). The trial court recognized Article I, Section 15 as an appropriation "made by law," *i.e.*, made by the people of North Carolina expressed through the Constitution. It is consistent, therefore, with the framers' desire to give the people ultimate control over the state's expenditures. 376 N.C. at 37, 852 S.E.2d at 58.

CONCLUSION

For the reasons set forth herein, Plaintiffs respectfully request that this Court retain this appeal pursuant to N.C. Gen. Stat. § 7A-30(2), N.C. R. App. P. 14(b)(1) and N.C. Gen. § 7A-30(1), N.C. R. App. P. 14(b)(2). To the extent that the Court does not retain the appeal, Plaintiffs respectfully request that

this Court grant this petition for discretionary review, or alternatively, issue a writ of certiorari to review the 30 November 2021 order of the Court of Appeals to address the following issues:

1. Whether the Court of Appeals acted arbitrarily and capriciously by – *ex meru motu* – shortening the time to respond to the Petition for Writ of Prohibition.

2. Whether the Court of Appeals had "good cause" to shorten the time to respond to the Petition for Writ of Prohibition where the underlying order was stayed and no consequences to the petitioner were imminent.

3. Whether the Court of Appeals erred in deciding the merits of the appeal and issuing the writ of prohibition when other remedies were available.

4. 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."

5. 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.

6. Whether the legislative authority to appropriate funds pursuant to Article V, Section 7 of the North Carolina Constitution overrides and renders meaningless the constitutional right to a sound basic education under Article I, Section 15 and Article IX, Section 2.

7. Whether the writ of prohibition contravenes Article IV, Section I of the North Carolina Constitution by allowing the judgment of the General Assembly to override the power of the judiciary to order a remedy for an established constitutional violation.

8. Is the State's obligation under Article IX, Section 2 of the North Carolina Constitution to provide for a "general and uniform system of free public schools" unenforceable and therefore meaningless where the General Assembly refuses to appropriate the funds necessary to do so.

The children of North Carolina have waited long enough for vindication of their constitutional right to the opportunity for a sound basic education and deserve no less.

This the 15th day of December 2021.

Electronically Submitted
Melanie Black Dubis
N.C. Bar No. 22027

N.C. R. App. P. 33(b) Certification: I certify that all the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

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CERTIFICATE OF SERVICE

I hereby certify that on 15 December 2021 the foregoing was served upon the parties by electronic mail and US Mail addressed as follows:

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N.C. Bar No. 22027

(Appendix and Exhibits Omitted)

TAB 8

Nos. 425A21-1 and 425A21-2 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

* * * * * * * * * * * * * * *

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

From N.C. Court of Appeals
22-86

From Wake
95CVS1158

* * * * * * * * * * * * * * *

ORDER

On 15 December 2021, Plaintiffs filed a Notice of Appeal, Petition for Discretionary Review, and Petition for Writ of Certiorari seeking this Court's review of the Court of Appeals' 30 November 2021 Writ of Prohibition. These petitions and subsequent filings from Plaintiff-Intervenors, Legislative Defendants, and the State Controller in December 2021 and January 2022 were filed under case number 425A21, later designated as 425A21-1.

On 14 February 2022, Defendant State of North Carolina filed with this Court a Petition for Discretionary Review Prior to Determination by the Court of Appeals in this matter. In its petition, the State requested that this Court "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 petition and subsequent responses by Plaintiffs, Plaintiff-Intervenors, and Legislative Defendants were filed under case number 425A21-2.

On 21 March 2022, this Court addressed these petitions in two separate orders. In the first order, the Court addressed the various December 2021 and January 2022 petitions from Plaintiffs, Plaintiff-Intervenors, Legislative Defendants, and the State Controller. This order directed these petitions to be "held in abeyance, with no further action, including the filing of briefs, to be taken until further order of the Court."

In the second order, the Court addressed the State's 14 February 2022 petition and subsequent responses. This order allowed the State's and Plaintiffs' petitions,

but remanded the case to the trial court "for a period of no more than thirty days for the purpose of allowing the trial court to determine what effect, if any, the enactment of the State Budget has upon the nature and extent of the relief that the trial court granted in its 11 November 2021 Order." This Order did not specifically address the State's request to consolidate the State's appeal numbered 425A21-2 with Plaintiffs' appeal numbered 425A21-1.

On 26 April 2022, the trial court issued its order on remand. In their subsequent briefing and oral arguments to this Court in 425A21-2, the parties addressed the merits of both the trial court's November 2021 and April 2022 Orders and the Court of Appeals' 30 November 2021 Writ of Prohibition.

Now, on our own motion, the Court hereby treats the Writ of Prohibition filed 30 November 2021 by the Court of Appeals in 425A21-1 as consolidated with 425A21-2 to the extent necessary for the Court to address the arguments pertaining to the Writ made by the parties here; further, we hereby stay the Writ of Prohibition pending any further filings in 425A21-1 pertaining to issues not already addressed in the opinion filed on this day in 425A21-2. The State's motion to consolidate is otherwise dismissed as moot.

By order of the Court in conference, this the 2nd day of November 2022.

/s/ Hudson, J.
Associate Justice

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 4th day of November 2022.

Grant E. Buckner
Clerk of the Supreme Court

Copy to:
North Carolina Court of Appeals
Hon. Robert Neal Hunter, Jr., Attorney at Law, For Combs, Linda, State Controller - (By Email)
Judge Michael L. Robinson, Attorney at Law - (By Email)
Mr. Amar Majmundar, Special Deputy Attorney General, For State of N.C. - (By Email)
Mr. Matthew Tulchin, Special Deputy Attorney General, For State of N.C. - (By Email)
Ms. Tiffany Y. Lucas, Deputy General Counsel, For State of N.C. - (By Email)
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Mr. Neal A. Ramee, Attorney at Law, For Charlotte-Mecklenburg Schools - (By Email)
Mr. David Nolan, Attorney at Law, For Charlotte-Mecklenburg Schools - (By Email)
Mr. H. Lawrence Armstrong, Attorney at Law, For Hoke County Board of Education, et al. - (By Email)
Ms. Melanie Black Dubis, Attorney at Law, For Hoke County Board of Education, et al. - (By Email)
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Ms. Catherine G. Clodfelter, Attorney at Law, For Hoke County Board of Education, et al. - (By Email)
Mr. W. Swain Wood, First Assistant Attorney General, For State of N.C. - (By Email)
Mr. Ryan Y. Park, Solicitor General, For State of N.C. - (By Email)
Ms. Sripriya Narasimhan, Deputy General Counsel, For State of N.C. - (By Email)
Mr. Michael A. Ingersoll, Attorney at Law, For Berger, Philip E., et al. - (By Email)
Ms. Elizabeth Lea Troutman, Attorney at Law, For N.C. Justice Center - (By Email)
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Mr. Daniel F.E. Smith, Attorney at Law, For N.C. Justice Center - (By Email)
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Mr. South A. Moore, General Counsel Fellow, For State of N.C. - (By Email)
Mr. Marcus Pollard, Attorney at Law, For Education Justice Alliance, et al. - (By Email)
Mr. Raymond Albert Starling, Attorney at Law - (By Email)
West Publishing - (By Email)
Lexis-Nexis - (By Email)

Justice BERGER dissenting.

For the reasons stated in the dissenting opinion in 425A21-2, I dissent from this order which summarily disposes of 425A21-1 which was appealed of right.

Chief Justice NEWBY and Justice BARRINGER join in this dissent.

TAB 9

No. 425A21-1 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 and STATE BOARD OF EDUCATION,
Defendants-Appellees,

and

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

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-Appellants.

From the North Carolina Court of Appeals
No. COA 22-86

From Wake County
95 CVS 1158

****

MOTION BY THE CONTROLLER OF THE STATE OF NORTH CAROLINA TO DISSOLVE OR LIFT STAYS ENTERED IN THIS MATTER REGARDING THE WRIT OF PROHIBITION PREVISOUSLY ENTERED BY THE COURT OF APPEALS

****

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

NOW COMES, Nels Roseland, Controller of the State of North Carolina, pursuant to Rule 37 of the Rules of Appellate Procedure and respectfully moves this Court to lift the stays imposed in its 4 November 2022 Order and Opinion restraining the enforcement of the Writ of Prohibition granted to the Controller by the North Carolina Court of Appeals on 30 November 2021.

This motion is made because the stays previously entered hinder the proper operations of the Controller's Office until the legal issues discussed hereinafter, which were unresolved in this Court's 4 November 2022 Order and Opinion, are resolved. Maintaining the stays will allow the Controller's Office to operate under the fiscal and budgetary statutes until such time as the Court resolves the issues addressed. In an order entered in this case on 4 November 2022, the Court stayed the writ of prohibition entered by the Court of Appeals "*pending any further filings in 425A21-1 pertaining to issues not already addressed in the opinion filed this day in 425A21-2.*" ((4 November 2022 Order at p 3 (emphasis added)). Petitioner thus understands, if the motion is granted, the stay will be lifted and the writ of prohibition automatically

reinstated. In the alternative, and to the extent necessary to do so, Petitioner moves that the stay be lifted. Petitioner understands the appellate rules are silent on the legal standard for granting such motions. However, good cause exists and the motion is made to allow the protective action to be taken given the fact that the need for relief is urgent and outweighs any benefit existing in maintaining the status quo. This action is taken in good faith and not for the purpose of delay but is necessary given the unique status of this case.

Procedural History

On 24 November 2021, the Controller, a non-party to the proceedings in *Hoke County Board of Education et al v. State of North Carolina* (425A21-2) (hereinafter referred to as the superior court case), filed a Petition seeking a Writ of Prohibition against Judge W. David Lee. This case was captioned in the Court of Appeals, *In Re the 10 November 2021 Order of Judge W. David Lee in Hoke County Board of Education, et al. v. State of North Carolina, et al.*, 95 CVS 1156 (425A21-1) (hereinafter referred to as the appellate case). This petition for writ invoked the original jurisdiction of the appellate division pursuant to N.C. Gen. Stat. § 7A-32 and N.C. Const. art. IV, § 1. Personal

service of the Petition was made on Judge Lee[1] by the Sheriff, registered mail, and by electronic mail.

The portion of the 10 November 2021 Order to which the Controller objected was denominated the "transfer provision" and reads as follows:

> The Office of State Budget and Management and the current State Budget Director ("OSBM"), the Office of the State Controller and the current State Comptroller ("Controller"), and the Office of the State Treasurer and the current State Treasurer ("Treasurer") shall 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 as follows:
>
> (a) Department of Health and Human Services ("DHHS"): $189,800,000.00;
>
> (b) Department of Public Instruction ("DPI"): $1,522,053,000.00; and
>
> (c) University of North Carolina System: $41,300,000.00.
>
> OSBM, the Controller, and the Treasurer, are directed to treat the foregoing funds as an appropriation from the General Fund as contemplated within N.C. Gen. Stat. § 143C-6-4(b)(2)(a) and to carry out all actions necessary to effectuate those transfers;
>
> Any consultation contemplated by N.C. Gen. Stat. § 143C-6-4(b1) shall take no longer than five (5) business days after issuance of this Order"

---

[1] Rule 38(c) of the Rules of Appellate Procedure provides Judge Robinson and now Judge Ammons would be automatically substituted for Judge Lee in the Writ.

The Petition advanced four legal issues in support of the Writ: I. The Court lacked jurisdiction over the Controller; II. The Order is contrary to the express language of the General Statutes; III. The Order is contrary to the express language of the Constitution; and, IV. The Order is Contrary to the Controlling Precedents of the Appellate Division. Some of the parties in the superior court case filed briefs and motions in the Court of Appeals seeking to prevent the issuance of the Writ of Prohibition. Subsequently, the Court of Appeals decided to issue the Writ without resolving two of the legal issues framed (Issues I and II).

A Writ of Prohibition was entered on 30 November 2021. Subsequently Judge Lee was removed as the special judge to hear the case and Judge Robinson was appointed by the Chief Justice to hear the superior court case. On 15 December 2021, Plaintiffs in the superior court case filed a Notice of Appeal, Petition for Discretionary Review and Petition for Writ seeking the Supreme Court's review of the Court of Appeals' 30 November 2021 Writ of Prohibition. These petitions and other pleadings were then placed in a file numbered (425A-21-1) and given the same caption as the superior court case. These appeals and petitions have not yet been acted on by the Supreme Court. (See Exhibit A Docket Sheet.)

Concurrently, the superior court case was appealed to the Court of Appeals and, subsequently, the superior court case was removed to this Court

on by-pass motion from the Attorney General and other parties to the superior court case.

The Attorney General requested these two actions be consolidated pursuant to Rule 40 of the North Carolina Rules of Appellate Procedure. However, this Court did not immediately rule on this motion. On 21 March 2022, this Court directed all matters, including the filing of briefs involving both cases, to be held in abeyance until further order of the Court. (See ¶3 Order of 22 November 2022 in 425A21-1 and 425A-21-2). The matters involving the superior court case were remanded to the trial court by order of this Court on 21 March 2022 under the Court's terms of this Order, requiring Judge Robinson to address intervening events involving appropriations enacted after Judge Lee's Order was made. After the hearing, Judge Robinson amended the 10 November 2021 Order removing the "transfer provision" which engendered the need for the Writ under the law of the case doctrine. Judge Robinson's Order also calculated the effect the appropriation acts had on the "transfer provisions." His Order was subsequently appealed.

The Controller did appear at the hearings before Judge Robinson to ensure the trial court enforced the Writ of Prohibition obtained in the Court of Appeals. In addition, the Controller and his staff filed extensive affidavits and briefs describing the operation of the Controller's office and how money is distributed to agencies under the regular accounting and budget statutes and

procedures dealing with appropriated funds. These affidavits were included in the record on appeal in the superior court case. The affidavits outline the statutory and legal issues presented by a "judicial" appropriation order which are not presented in a legislative appropriation. These representations and legal issues made the trial court aware of the legal difficulties presented in Judge Lee's 18 November Order should the trial court reaffirm the transfer provision.

Judge Robinson's Order amended the 18 November 2021 Order of Judge Lee omitting the "transfer provision" portion of the Order. This deletion was based in part on the Writ of Prohibition entered by the Court of Appeals and his finding that the Writ was the "law of the case." Because the trial court removed the transfer provision based on the law of the case doctrine, the court did not have to address the alternative legal issues raised by the Controller regarding the accounting and budget statute issues which the judicial appropriation presented.

Subsequently, this Court ordered the superior court case 425A-21-2 for oral argument on 28 August 2022 but did not resolve the state's consolidation motion at the time of the oral argument. The Court did hear arguments which touched on some, but not all, the issues involved in the Writ of Prohibition at its hearing in August, 2022.

The Court issued its opinion in the superior court case (425A-21-2) on 4 November 2022 and an order in the appellate case (425A-21-1) staying the Writ of Prohibition. This Court has never called the appellate case 425A-21-1 for briefing or a hearing on the merits of the legal issues raised and not addressed by the Court of Appeals, and the additional legal issues raised and not addressed at the trial court by the Controller at the time of the hearing on the trial court's 22 April 2022 Order.

Grounds for Dissolving the Stay

The appellate case is still pending in the court under this Court's original jurisdiction. The Court's 22 November Order and Opinion stays are interim orders as relates to the resolution of the appellate case. Under Rule 37 of the Rules of Appellate Procedure, because this case (425A-21-1) has not been called for argument, the Controller may file a motion to lift the stay under Appellate Rule 37(a) which reads as follows: "Unless another time is expressly provided by these rules, the motion may be filed and served at any time before the case is called for oral argument."

Case no. 425A-21-1, the appellate case, has never been called for argument.[2] The *post-hoc* nature of the Court's reasoning contained in the Order of 4 November 2022 does not comply with Appellate Rule 40 which would

[2] Controller recognizes Extraordinary Writs hearings are discretionary with this Court .

have required both cases to be consolidated *before* the hearing in August. The plain language of the rule requires cases to be consolidated for purposes of the arguments in the Supreme Court. Nevertheless, both the 4 November 2022 Order and Opinion did not vacate, reverse, or void the Writ of Prohibition or grant certiorari or supersedeas but only stayed the Writ.

The 4 November 2022 Order, by its terms, is a stay of a specific proceeding within the appellate case. Here the stay was issued because the Writ of Prohibition *may* interfere with the rights of the parties in the superior court proceedings. However, there is an ambiguity in the order because it anticipates the Controller may need to make additional filings to protect his rights as well. "We hereby stay the Writ of Prohibition pending any further filing in 425A21-1 pertaining to issues not already addressed in the opinion filed on this day in 425A21-2. The State's motion to consolidate is otherwise dismissed as moot."

The following issues were not addressed in the opinion filed on 4 November 2022 and raised in the Petition filed in Court of Appeals.

1. Whether the Court lacked personal jurisdiction over the Controller?
2. Whether the Court Order is contrary to the express language of the General Statutes?

3. Whether state and local agency officials, who are not parties to the superior court case and who transfer the funds or spend the funds are liable under N.C. Gen. Stat. § 143C-10-1 for civil and criminal penalties provided therein? The rights of the "state actors" required to implement the order need to be explicitly addressed.

The additional issues which were raised in the trial court and not addressed by the 4 November 2022 Order and Opinion are as follows:

1. Who is the person or agency to whom the "the total amount of funds necessary to effectuate years 2 & 3 of the CRP (Comprehensive Remedial Plan) from the unappropriated balance within the General Fund to the state agencies and state actors with fiscal responsibility for implementing the CRP is to be sent? Under normal procedures involving legislatively approved appropriation awards (pursuant to N.C.G.S § 143C-6-1), agencies who receive the awarded funds submit detailed accounting and funding requests to OSBM who then approves transactions into the North Carolina State Accounting System (managed by the State Controller per N.C.G.S. § 143B-426.39(1)) which when approved by both OSBM and OSC serve as a budgetary control to ensure the requesting party who requests the funds is the appropriate party and secondly the requested amounts do not

exceed or overspend the legislatively determined levels of funding. These budgetary controls which ensure the correct party receives the awarded funds in the correct amounts is not addressed in the November 2022 order.

2. How is the Controller to treat the foregoing funds as "contemplated within 143-C-6-4(b)(2)(a) since that statute requires "consultation" between parties who are not litigants in this lawsuit and not within the Controller's management, *e.g.* the Department of Public Instruction, the Department of Health and Human Resources and the University of North Carolina?

The following statutory issues were not addressed in the opinion or the court below and present legal issues for disbursement of funds not yet answered.

1. Are "judicially appropriated" funds subject to N.C. Gen. Stat. § 143C01-2(b) which requires reversion to the general fund for amounts not expended by the agency who is to receive them?

2. Do the local school boards and counties have to comply with the provisions of N.C. Gen. Stat. § 115C-433 and N.C. Gen. Stat. § 115C-422, "The School Budget and Fiscal Control Act," when receiving these funds?

3. What is the sequential cash flow process to be used in disbursing the funds ordered?

4. Are the Controller's responsibilities under N.C. Gen. Stat. § 143B-426.39 (1),(3),(4), (5) suspended for purposes of this Order? Is the State Controller expected by the Court to approve and specify accounting detailed school funding allocations for the various purposes captured in the CRP? If the State Controller is expected by the Court to perform detailed judicial compliance and oversight of Leandro related financial accounting directives, will he be provided additional administrative funding by the Court to perform these compliance and reporting functions?

The Controller's function is part of a larger network of safeguards the General Assembly enacted to prevent errors, fraud waste and abuse in government spending. The Controller, acting in concert with the Legislative Fiscal Research Division staff and the Office of State Budget and Management has procedural safeguards built into the distribution process where the recipient of funds does not simply receive a check for the full amount of several years' appropriation. The money is released as it is needed and applied for. There is a cash flow process the Order as it stands does not recognize. Furthermore, the recipient of the funds must indicate what the use is for the funds and in what amounts over time, so the Controller can ensure that no

surplus funds are awarded. In a typical legislative appropriations act, detailed school funding formulas, parameters and allocations are delineated prescribing which of the over 100 school districts receive funds by various amounts, and these allocation details are not addressed in the November 2022 order.

The Controller has control of the funds to ensure proper accounting code treatment between various agency budget codes and accounts as required by N.C. Gen. Stat. § 143B.436 (1), (3), (4), and (5). Put differently, the Controller must know not only the agency that is receiving the money but what amounts of funds need to be transferred to the agency budget code to fund approved expenditures. These details are typically coordinated in conjunction with the Office of State Budget and Management and the Legislative Fiscal Research Division Staff, so expenditures can be tracked and accounted for by purpose, location, and spending level. The Comprehensive Remedial Plan is ambiguous on these details to determine who specifically benefits, by what amount and in which school district.

From the Controller's view, it would be fundamentally unfair for a court to subject him, his staff, and the recipient agency staff to criminal and civil liability before the basic elements of procedural due process were met including notice, an opportunity to respond, counsel, and the right to an appeal including a hearing on these issues. The proceedings below and in the Appellate Division

in handling the appeal of this case deny him these procedural rights. More importantly, forcing the Controller to participate in subsequent hearings in the superior court case, in which he has no rights as a party in order to have some say in a subsequent appeal is problematic and paradoxical as a matter of substantive law.

While this movant does not believe it is necessary to do so, if the Court believes otherwise, the Controller asks this Court employ Rule 2 of the Rules of Appellate Procedure to suspend the rules to address his motion. In the alternative, the Controller asks this Court to lift the stay until such time as the trial court has finished its hearings on remand of the companion case *Hoke County, et al, v, State of North Carolina* (425A21-2), which was consolidated with this case for oral argument and was remanded to the trial court for further hearings.

The public interest is always served by following the Constitution and all the statutes regarding the handling of public funds. This Court has general equitable authority over the trial courts to supervise their operations.

The Court has remanded the superior court case for resolution by a new judge on issues involving subsequent appropriations. It would be expeditious for this Court to lift the stay or issue a new Writ of Prohibition regarding the additional statutory issues discussed in this motion. It is more likely than not this Court will have to address whatever declaratory results are reached by

the lower court on remand of the superior court case and lifting the stay will serve the public interest and allow the parties to ensure all statutes regarding the distribution of public funds are observed.

The Office of the Controller's role is to ensure that money, however appropriated, goes to the agency in appropriate amounts for approved expenditures in a timely manner. Granting large sums of money to agencies without appropriate safeguards to ensure the funds will be spent for the purposes intended is problematic for the Controller and the public. Proper accounting for the funds, timely sequential release of the funds for the purposes intended is critical to ensure the goals intended by the declaratory judgment of this Court will be achieved.

Relief Sought

The Controller asks this Court to exercise its supervisory authority to dissolve the stay of the Writ of Prohibition previously entered in this matter. In the alternative, the Controller asks this Court to lift the stay until such time as this Court can review the issues raised by the Controller at the prior proceedings and such additional issues as this Court orders to be resolved by the trial court in the superior court case regarding the handling of funds judicially appropriated, as discussed *ante*.

In addition, the Controller asks this Court for such other relief as the Court may determine to be deemed just and proper. [3]

Respectfully submitted this 8th day of February, 2023.

HIGGINS BENJAMIN, PLLC

Electronically Submitted
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Attorney for Nels Roseland,
Acting Controller for the
State of North Carolina

[3] Pursuant to Rule 37, The Movant has notified the other parties to both this action and the superior court action by email of his intent to file a motion to lift the stay. Based upon their prior litigation positions, the movant represents to the court the parties will not consent to the motion as is and may want to be heard on this motion.

CERTIFICATE OF SERVICE

The undersigned certifies that on February 8, 2023, a copy of the foregoing was served electronically and U.S. Mail on the following:

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TAB 10

No. 425A21-1 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

* * * * * * * * * * * * * * *

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

From N.C. Court of Appeals
P21-511

From Wake
95CVS1158

* * * * * * * * * * * * * * *

ORDER

This matter is before the Court on the State Controller's motion to dissolve or lift a stay of the writ of prohibition previously issued by this Court, and legislative-intervenors' motion for leave to brief additional issues, motion to confirm reinstatement of the writ of prohibition, and conditional petition for writ of certiorari.

On 4 November 2022, this Court issued its opinion in No. 425A21-2, *Hoke County Board of Education, et al. v. State of North Carolina, et al.*, 382 N.C. 386, 879 S.E.2d 193 (2022). Prior to the issuance of that opinion, the State moved to consolidate that case, No. 425A21-2, with this case, No. 425A21-1. The State's motion to consolidate was resolved by this Court's 4 November 2022 order, which stated in relevant part:

> Now, on our own motion, the Court hereby treats the Writ of Prohibition filed 30 November 2021 by the Court of Appeals in 425A21-1 as consolidated with 425A21-2 to the extent necessary for the Court to address the arguments pertaining to the Writ made by the parties here; further, we hereby stay the Writ of Prohibition pending any further filings in 425A21-1 pertaining to issues not already addressed in the opinion filed on this day in 425A21-2. The State's motion to consolidate is otherwise dismissed as moot.

Upon review of the Controller's motion to lift the stay and the arguments set forth therein, this Court concludes that the motion constitutes a "filing[ ] in 425A21-1 pertaining to issues not already addressed in the opinion" filed 4 November 2022. Specifically, the Controller argues that there are many issues presented in this case that were left unaddressed in the Court's earlier opinion in No. 425A21-2. The Controller further argues that "it would be fundamentally unfair for a court to subject him, his staff, and the recipient agency staff to criminal and civil liability before the basic elements of procedural due process were met including notice, an opportunity to respond, counsel, and the right to an appeal including a hearing on these issues."

Because the Controller's motion is a further filing in 425A21-1 pertaining to

issues not already addressed by this Court, and because the Controller has made a sufficient showing of substantial and irreparable harm should the stay remain in effect, we lift the stay, thereby reinstating the writ of prohibition, until this Court has an opportunity to address the remaining issues in this case.

In addition, this Court notes that legislative-intervenors properly intervened as of right in the related case, No. 425A21-2. However, they did not move to intervene in the case at hand, No. 425A21-1, and this Court's 4 November 2022 order does not relieve them of this procedural requirement. Therefore, we dismiss legislative-intervenors' filings for failure to intervene.

By order of the Court in Conference, this the 3rd day of March 2023.

/s/ Allen, J.
For the Court

Justice Morgan and Justice Earls dissent as set out in the attached statement.

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 3rd day of March 2023.

Grant E. Buckner
Clerk of the Supreme Court

Copy to:
North Carolina Court of Appeals
Mr. Robert Neal Hunter, Jr., Attorney at Law, For Combs, Linda, State Controller - (By Email)
Hon. W. David Lee, Senior Resident Judge - (By Email)
Mr. Amar Majmundar, Special Deputy Attorney General, For State of N.C. - (By Email)
Mr. Matthew Tulchin, Special Deputy Attorney General, For State of N.C. - (By Email)
Ms. Tiffany Y. Lucas, Deputy General Counsel, For State of N.C. - (By Email)
Mr. Thomas J. Ziko, Attorney at Law, For State Board of Education - (By Email)
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Ms. Jaelyn D. Miller, Attorney at Law, For Hoke County Board of Education, et al. - (By Email)
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Mr. Russ Ferguson, Attorney at Law, For Berger, Philip E., et al. - (By Email)
Mr. W. Clark Goodman, Attorney at Law, For Berger, Philip E., et al. - (By Email)
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Mr. South A. Moore, Assistant General Counsel, For State of N.C. - (By Email)
West Publishing - (By Email)
Lexis-Nexis - (By Email)

Justice EARLS dissenting.

I agree that the Legislative-Intervenors' motions and petition for a writ of certiorari should be dismissed. However, I dissent from this Court's extraordinary, unprincipled, and unprecedented action allowing the Controller's motion in this matter. Today's order abandons the concepts of respect for precedent, law of the case, stare decisis, and the rule of law all in the name of preventing the State from complying with its constitutional duty to provide a sound basic education to the children of this state.

Though this motion is styled as a motion to "dissolve or lift stays entered . . . by the Court of Appeals," in substance it is an attempt to make an end run around the Rules of Appellate Procedure regarding rehearing and merely seeks rehearing on issues this Court has already decided. In fact, the Controller's position represents a stunning reversal from prior arguments to this Court, as the Controller previously argued that the issues related to the Controller's collateral attack on the trial court's order necessarily would be addressed in *Leandro IV*. Controller's Resp. Br. at 3, n.1, *Hoke Cnty. Bd. Of Educ. v. State,* 382 N.C. 386 (2022) (No. 425A21-2) (stating that "the resolution of the second case [425A21-2] will resolve the issues arising from the first case [425A21-1]") [hereinafter Controller's Resp. Br.]. And indeed, as detailed below, those issues were addressed in the Court's opinion in *Leandro VI.* Yet the Controller now asserts that many issues were left unaddressed in the Court's opinion

and repeats the illogical argument already rejected by this Court that, by complying with the ruling of the North Carolina Supreme Court, the Controller could be subject to criminal and civil liabilities.[1] The new Court majority adopts this tortured misrepresentation of the proceedings to date without so much as a mention of any of the arguments made by the other parties to the case.

However, as the record reflects all too well, the only issues not already addressed in *Leandro IV* relate to whether Plaintiffs were denied a meaningful opportunity to be heard when the Court of Appeals majority shortened the time for Plaintiffs to respond to the Controller's filing in that court and used what the dissent identifies as a "shadow docket" to grant relief. Order on Writ of Prohibition at 2 (P21-511) (2022). These procedural issues were not expressly addressed in *Leandro IV* but were made irrelevant by this Court's ruling. Contrary to the Controller's new argument, the Court made clear in its Consolidation Order that it was addressing the merits of both the trial court's November 2021 and April 2022 Orders and the 30 November 2021 Writ of Prohibition issued by the Court of Appeals. 4 November 2022 Order of the North Carolina Supreme Court in *Hoke Cnty. Bd. of Educ. v. State*, Nos. 425A21-1 and 425A21-2 [hereinafter 4 November 2022 Order]. If the Controller believed in good faith that the Court failed to properly or adequately consider an issue in the case, he had but one option; that is, to petition for rehearing pursuant to N.C.

[1] This was previously argued by the Controller and rejected by this Court by our Order directing him to comply with the trial court's transfer directive. *See* Controller's Resp. Br. at 12-13.

R. App. P. 31(a).

Although the Controller has failed to seek rehearing under Rule 31 of the North Carolina Rules of Appellate Procedure, this motion asks the Court to do exactly that: to decide again, and in a contrary manner, issues that were already decided in *Leandro IV*. This is not allowed under our appellate rules. *See, e.g.*, *Nowell v. Neal*, 249 N.C. 516, 521(1959) (stating "the appropriate method of obtaining redress from errors committed by this Court" is a petition for rehearing).

To be clear, Rule 31 is the only mechanism by which a party can ask this Court to rehear or address issues they allege the Court has not properly or adequately considered. N.C.R. App. P. 31. Rule 31 petitions have a firm deadline, which cannot be extended. *See* N.C.R. App. P. 27 (c) (The "Court may not extend the time for . . . filing . . . a petition for rehearing"). The deadline to seek rehearing in this case, as in all other cases, expired "fifteen days after the mandate of the court [was] issued." *See* N.C.R. App. 31(a). The Controller's motion effectively raises rehearing despite being time barred from doing so. *See* N.C.R. App. 31(a). The North Carolina Rules of Appellate Procedure do not allow for such gamesmanship. The Controller cannot legitimately request a "do over" with a newly constituted Court in order to obtain a different result. And even more importantly, this Court cannot legitimately allow such a procedure.

First and foremost, the Controller misconstrues this Court's 4 November 2022 Order. In that Order, this Court "stay[ed] the Writ of Prohibition pending any further

filings in 425A21-1 pertaining to issues not already addressed in this opinion filed on this day in 425A21-2." 4 November 2022 Order. The Controller asserts "the stay was issued because the Writ of Prohibition *may* interfere with the rights of the parties in the superior court proceedings." The Controller also notes the Order is ambiguous because it "anticipates the Controller may need to make additional filings to protect his rights as well."

However, this Court explicitly stated its reasons for staying the Writ of Prohibition at least three times in *Leandro IV*, 382 N.C. 129 (2022). The Court explained that the case was remanded for further proceedings and instructed the trial court to "recalculat[e] the amount of funds to be transferred in light of the State's 2022 Budget" and subsequently "order those State officials to transfer those funds to the specified State agencies." *Leandro IV*, 382 N.C. at 391. Accordingly, "[t]o enable the trial court to do so" this Court "stay[ed] the 30 November 2021 Writ of Prohibition issued by the Court of Appeals." *Id*. To be sure, this Court then reiterated this reasoning two additional times. *Leandro IV*, 382 N.C. at 429, 476.

Even more fundamentally, the central question resolved by this Court in *Leandro IV* was whether the judiciary has the inherent authority to compel compliance with state constitutional guarantees when the responsible branches of government fail to act. *See, e.g., Leandro IV,* 382 N.C. at 429. The Order granting the Writ of Prohibition addressed the exact same question. It is impossible to reconcile

our decision in *Leandro IV*, that yes, the judiciary has that authority, *Id.,* with the Court's decision today to reinstate the Writ of Prohibition.

The Controller asks this Court to rehear issues about the Court's personal jurisdiction over him. This issue, along with any due process concerns the Controller raises in his motion, were addressed by the Court in *Leandro IV*. There, this Court rejected those concerns by noting that "[a] court cannot reasonably add as a party to a case every state official who may be involved in implementing a remedy; instead, the interests of those officials are represented by that agency, branch, or the State as a whole." *Leandro IV*, 382 N.C. at 466. Indeed, these issues were also a source of disagreement between the majority and dissent. *See id*. ("the dissent contends that affirming the November 2021 Order would violate the rights of the Controller. But as an executive branch official, the Controller's interests have been adequately represented throughout this litigation."); *see also id*. at 529-30 (Berger, J., dissenting).

The Controller also asks this Court to rehear issues that were addressed by the Remedial Order affirmed in *Leandro IV*. These questions pertain to how the transfer of funds complies with the State Budget Act. But in *Leandro IV* this Court stated that "the Controller . . . [was] directed to treat the . . . funds as an appropriation from the General Fund as contemplated within [N.C.G.S] 143C-6-4(b)(2)(a) and to carry out all actions necessary to effectuate those transfers. *Leandro IV*, 382 N.C. at 423 (quoting Remedial Order). N.C.G.S. 143C-6-4(b)(2)(a) of the State

Budget Act allows a "State agency," with "approval of the Director of the Budget" to "spend more than was apportioned in the certified budget by adjusting the authorized budget" where "[r]equired by a court . . . order." Thus, this Court's reference to that section addresses the administrative issues the Controller raises.

Additionally, while the Controller asks this Court to lift or dissolve the stay of the Writ of Prohibition, granting the motion will lead to an absurd result. First, lifting the stay is premature given our Court's reason for staying the Writ of Prohibition, which was to "enable the trial court to comply with" the order "reinstat[ing] the trial court's order directing certain state officials to transfer the funds required to implement years two and three of the CRP." *Leandro IV*, 382 N.C. at 466. Thus, the stay must remain until the transfer directive is reinstated. That has not happened.

Next, lifting the stay will result in two contradictory appellate court orders—the Court of Appeals' Writ of Prohibition and this Court's *Leandro IV* Opinion and Order—being in effect simultaneously. While this Court's opinion requires further proceedings, mandates entry of the remedial order, and confirms the trial court has jurisdiction, the Writ of Prohibition divests the trial court of jurisdiction, prevents further trial court proceedings, and prohibits entry of the trial court's remedial order. But because an earlier Court of Appeals decision must yield to on point precedent from this Court, lifting or dissolving the stay cannot have the effect the movant wants. *See State v. Leaks*, 240 N.C. App. 573 (2015) ("[t]his Court is bound to follow the precedent of our Supreme Court [.]") (citing *State v. Scott*, 180 N.C. App. 462, 465

(2006). The trial court must follow this Court's *Leandro IV* opinion, despite the requested relief being granted.

To the extent the Controller purports to identify issues that could arise in subsequent proceedings, these issues have already been decided, or, if they have not, are not ripe for decision. For example, the Controller's motion raises a number of questions unrelated to the trial court's transfer directive. Instead, these questions relate to the particulars of disbursing the funds moving forward. Furthermore, this Court is asked to determine whether the trial court's order is contrary to the General Statutes and whether state and local agency officials who transfer funds can be liable civilly or criminally under N.C.G.S. § 14C-10.1. These questions are addressed by the Remedial Order, which was affirmed by *Leandro IV*. 382 N.C. at 423, 2022-NCSC-108, ¶ 77. To the extent that any of the presented questions might require judicial intervention in the future, proper procedure requires they first be presented to a superior court judge as this Court does not receive testimony or facts, *Nale v. Ethan Allen*, 199 N.C. App. 511, 521 (2009) ("It is not the role of the appellate courts to make findings of fact."); *Cutter v. Wilkerson*, 544 U.S. 709, 718 n.7 (2005) ("we are a court of review, not of first review"), or issue advisory opinions. *Wise v. Harrington Grove Cmty. Ass'n, Inc.*, 357 N.C. 396, 408 (2003) ("It is no part of the function of the courts to issue advisory opinions."); *see also, Leandro IV*, 382 N.C. at 510 (Berger, J., dissenting) ("[i]t is no part of the function of the courts, in the exercise of the judicial power vested in them by the Constitution, to give advisory opinions.").

Finally, the majority accepts the outlandish proposition that, although all of these issues were fully briefed,[2] the Controller argued before this Court at oral argument, and the Court issued its ruling in *Leandro IV* resolving all of the issues in the appeal, somehow the basic elements of procedural due process have not been afforded to the Controller and therefore the Court of Appeals' Writ of Prohibition effectively overruling *Leandro IV* must go into effect. Rather, allowing this motion strikes another nail in the coffin for the rule of law. Our legal system is based on the premise that this Court's orders and opinions will be treated as final and binding interpretations of North Carolina law and its constitution. The "law of the case" has long been a tenant of our jurisprudence. *See, e.g., In re J.A.M.,* 375 N.C. 325, 332 (2020) ("Our decision in *J.A.M. II* constitutes 'the law of the case' and is binding as to the issues decided therein . . . Accordingly, we overrule respondent's arguments insofar as they concern the trial court's prior adjudication of neglect.") (citing *Shores v. Rabon,* 253 N.C. 428, 429 (1960) (per curiam)); *Hayes v. City of Wilmington*, 243 N.C. 525 (1956) ("[W]hen an appellate court passes on a question and remands the cause for further proceedings, the questions there settled become the law of the case,

[2] For example, issues regarding the Court's personal jurisdiction over the Controller, the General Assembly, and procedural due process requirements were previously briefed by the Controller. Controller Resp. Br. at 12-16, 18-22. In that same filing, the Controller represented that "[u]nlike the other parties, [Controller] requests the Court to simply affirm the 28 April Order and dismiss the remainder of the appeals including any further appellate review of the Writ of Prohibition." Controller's Resp. Br. at 3. The fact that this Court denied that request does not give the Controller the right to come back to this Court asking us to reverse that decision.

both in subsequent proceedings in the trial court and on subsequent appeal, provided the same facts and the same questions . . . are involved in the second appeal"). Without principled explanation or justification, the majority abandons this rule.

"Today, education is perhaps the most important function of the state and local governments . . . It is the very foundation of good citizenship. *Leandro IV*, 382 N.C. at 476 (*quoting Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)). Assuring that our children are afforded the chance to become contributing, constructive members of society is paramount. Whether the State meets this challenge remains to be determined." *Id.* (quoting *Hoke County Bd. of Educ. v. State*, 358 N.C. 605, 649 (2004) ("Leandro II")). Unfortunately, we have waited much too long to see whether the State will abide by its constitutional mandate to provide our children, including at-risk children struggling in under-resourced schools, with a basic, sound education. Thus far, at least twenty-eight classes of students "have already passed through our state's school system without benefit of relief." *Leandro IV*, 382 N.C. at 475. Not only is it true that justice delayed is justice denied, but denying adequate educational opportunities "entails enormous losses, both in dollars and in human potential, to the State and its citizens." *Id.* If our Court cannot or will not enforce state constitutional rights, those rights do not exist, the constitution is not worth the paper it is written on, and our oath as judicial officers to uphold the constitution is a meaningless charade. For the reasons stated herein, I dissent.

Justice MORGAN joins in this dissenting opinion.

TAB 11

No. 425A21-1 TENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

HOKE COUNTY BOARD OF EDUCATION et al,
Plaintiffs-Appellants

and

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION,
Plaintiff-Intervenors-Petitioners

v.

STATE OF NORTH CAROLINA and THE STATE BOARD OF EDUCATION
Defendants-Appellees

and

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION
Realigned Defendants Petitioners

From Wake County
95 CVS 11582

From the N.C. Court of Appeals
P21-511

****

RENEWED

MOTION BY LEGISLATIVE INTERVENORS

FOR LEAVE TO BRIEF ADDITIONAL ISSUES

AND CONDITIONAL PETITION FOR *CERTIORARI*

****

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No. 425A21-1 TENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

HOKE COUNTY BOARD OF EDUCATION et al,
Plaintiffs-Appellants

and

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION,
Plaintiff-Intervenors-Petitioners

v.

STATE OF NORTH CAROLINA and THE STATE BOARD OF EDUCATION
Defendants-Appellees

and

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION
Realigned Defendants Petitioners

From Wake County
95 CVS 11582

From the N.C. Court of Appeals
P21-511

****

RENEWED

MOTION BY LEGISLATIVE INTERVENORS

FOR LEAVE TO BRIEF ADDITIONAL ISSUES

AND CONDITIONAL PETITION FOR *CERTIORARI*

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

NOW COME Legislative Intervenor-Defendants, Philip E. Berger, in his official capacity as President *Pro Tempore* of the North Carolina Senate and Timothy K. Moore, in his official capacity as Speaker of the North Carolina House of Representatives (together, "Legislative Intervenors"), and renew their Motion for Leave to Brief Additional Issues and Conditional Petition for Writ of *Certiorari* filed on 8 February 2023. On 3 March 2023, this Court entered a special order in which it determined that, although Legislative Intervenors had properly intervened in case No. 425A21-2 (which is related to this proceeding), doing so did not relieve them of the procedural requirement to file a separate notice of intervention in case (No. 425A21-1). As a result, the Court dismissed Legislative Intervenors' Motion and Petition because they had not yet formally been made parties to this case. Shortly thereafter, Legislative Intervenors noticed their intervention as of right in this case, pursuant to N.C. Gen. Stat.§ 1-72.2, which allows them to intervene in any action challenging an act of the General Assembly at any time, including in the appellate courts, "regardless of the stage of the proceeding." *See* N.C. Gen. Stat. § 1-72.2(b).

Now that they have formally been made parties to this case, Legislative Intervenors renew their Motion for Leave to Brief Additional Issues and Petition for Writ of *Certiorari*. In doing so, Legislative Intervenors note that Plaintiffs and the Attorney General have already filed briefs responding to the substance of their motion and petition. Accordingly Legislative Intervenors ask that the Court rule on their motion and petition without delay, in order to provide needed instruction to the

trial court as to the status of these proceedings and its own jurisdiction.[1]

INTRODUCTION

On 4 November 2022 this Court, on its own motion, issued an Order in which it, (i) consolidated this appeal with case no. 425A21-2, and (ii) stayed, but did not vacate, the Court of Appeals' 30 November 2021 Writ of Prohibition prohibiting the trial court from enforcing a 10 November 2021 order that purported to direct State Officials to transfer money out of the State Treasury without a legislative appropriation. As set forth below the Court took these steps so that the trial court could order State officials to transfer money to fund Years 2 and 3 of a "Comprehensive Remedial Plan," which Plaintiffs and the Executive Branch contend is necessary to remedy alleged deficiencies in the State's educational system. *See Hoke Cnty. Bd. of Educ. v. State*, 382 N.C. 386, 879 S.E.2d 193 (2022) ("*Hoke County III*"). However, in doing so, the Court recognized that it had not yet provided the parties an opportunity to brief issues arising out of their petitions and appeals from the writ of prohibition itself. Accordingly, the Court stayed the writ of prohibition "*pending any further filings in 425A21-1 pertaining to issues not already addressed in the opinion filed this day in 425A21-2.*" (4 November 2022 Order at p 3 (emphasis added)).

Pursuant to the Court's 4 November 2022 Order, Legislative Intervenors

---

[1] The case underlying this appeal has now been assigned to Superior Court Judge James Ammons, who has scheduled a status conference on 10 March 2023, to set a case management schedule for further trial court proceedings. Because further proceedings in this Court would divest the trial court of jurisdiction, a ruling from this Court is necessary in order for the trial court to determine how to properly proceed.

hereby renew their request that the Court permit briefing on the issues identified below that were either not addressed, or not adequately addressed, in the Court's opinion in *Hoke County III*. Further, although Legislative Intervenors believe all the issues identified below are encompassed by the questions presented in Plaintiffs' petitions, Legislative Intervenors conditionally petition the Court to grant *certiorari* to the extent necessary to review these issues.

FACTS AND PROCEDURAL HISTORY

This case (425A21-1) is one of two proceedings before the Supreme Court that arise out of a 10 November 2021 order issued by Superior Court Judge W. David Lee in a 28-year-old lawsuit commonly referred to as the "*Leandro*" litigation.

This proceeding (425A21-1) involves the parties' appeals from a 30 November 2021 writ of prohibition issued by the Court of Appeals, which enjoined the trial court from enforcing the transfer provisions of Judge Lee's order. The second case (425A21-2) involved the parties' direct appeals from Judge Lee's 10 November 2021 order, which the Court agreed to hear pursuant to bypass petitions filed by Plaintiffs and the Attorney General. The Court issued a decision in case no. 425A21-2 on 4 November 2022. *See Hoke County III*, 382 N.C. at 386, 879 S.E.2d at 193.

As this Court is aware, the history of the *Leandro* litigation dates to May 1994, when local school boards from five "relatively poor school systems" in Cumberland, Halifax, Hoke, Robeson, and Vance Counties, along with students and parents from those districts, sued the State and State Board of Education, alleging that the conditions in their respective districts fell below the threshold necessary to provide them an opportunity for a sound basic education as guaranteed by the North Carolina

Constitution. The case has resulted in four decisions from this Court,[2] including the Court's decision on 4 November 2022 in case no. 425A1-2. The majority and dissenting opinions in that decision detail the procedural history of this litigation, including the proceedings that led to the issuance of Judge Lee's 10 November 2021 transfer order. *See Hoke County III*, 382 N.C. at 392-429, 879 S.E.2d at 199-220; *id.* at 481-510, 879 S.E.2d at and 253-69.

Despite the length of this litigation, the proceedings that led to Judge Lee's November 2021 order only occurred in the several years since Judge Howard Manning retired in 2016. In 2018, the Attorney General, together with the Plaintiffs, asked the Court to appoint WestEd, a private, San Francisco-based consultant, to develop proposals to "correct" alleged deficiencies in the State's education system. In January 2020, after WestEd's report was finally released to the public, the trial court signed a jointly-prepared consent order directing the Executive Branch to create a plan to implement WestEd's recommendations, which became the Comprehensive Remedial Plan ("CRP"). (R p 1632).[3] Plaintiffs consented to the Plan, and in June 2021, the Court issued an order—again drafted by the parties—approving the CRP and requiring the State to implement it. (R p 1678).

The CRP largely mirrors the requests the Governor and State Board of

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[2] Those decisions are *Leandro v. State*, 346 N.C. 336, 488 S.E.2d 249 (1997) ("*Leandro I*"); *Hoke Cnty. Bd. of Educ. v. State,* 358 N.C. 605, 599 S.E.2d 365 (2004) ("*Hoke County I*"); *Hoke Cnty. Bd. of Educ. v. North Carolina*, 367 N.C. 156, 749 S.E.2d 451 (2013) ("*Hoke County II*"); and *See Hoke Cnty. Bd. of Educ. v. State*, 382 N.C. 386, 879 S.E.2d 193 (2022) ("*Hoke County III*").

[3] For ease of reference and to avoid the attachment of voluminous appendix materials, this motion and petition cites to the record on appeal filed in case no. 425A21-2.

Education submitted as part of the Governor's proposed budget—that is, it tracks the Governor's legislative agenda. It includes over 146 action items that would rework virtually every element of the State's educational program over an eight-year period. The Executive-branch agencies that prepared the CRP acknowledged in numerous places that their proposals would require action by the North Carolina General Assembly, either to amend existing statutes or appropriate money for their proposals. *See, e.g.*, (R pp 1687-1742 (listing "General Assembly" among the "Responsible Parties")). Indeed, while the authors of the CRP marked the funding necessary to accomplish many of tasks "TBD," the Appendix attached to the CRP estimates that, by FY 2028, it would require at least $5.4 billion each year in recurring appropriations, with another $3.6 billion in non-recurring appropriations over the course of the eight-year plan. (R pp 1743-71).

Even though they acknowledged their proposals would require legislative approval, Plaintiffs and the Attorney General never sought to consult the General Assembly, either in the course of developing the CRP or after they secured an order directing the State to implement it. *Hoke County III*, 382 N.C. at 513, 879 S.E.2d at 271 (Berger, J., dissenting) ("This was all done to the exclusion of the one entity that controlled what the parties wanted to accomplish—the General Assembly. Put another way, executive branch bureaucrats and government actors, sanctioned by the court, agreed to a process that called for the expenditure of taxpayer money without consultation from the branch of government to which that duty is constitutionally committed."). Yet, in status conferences the Attorney General repeatedly complained that executive agencies could not implement the plan because, at the time, no budget

had been adopted for the FY 2021-22 and 22-23 biennium. (R pp 1772-73).

In November 2021, Plaintiffs and the Attorney General submitted briefs and a proposed order to Judge Lee that purported to, in the absence of a budget, require the State Controller and Treasurer to transfer more than $1.7 billion out of the State treasury to fund Years 2 and 3 of the CRP. The trial court acknowledged the Appropriations Clause prohibits drawing money from the treasury unless "in consequence of appropriations made by law." N.C. Const. art. V, § 7. It also acknowledged that this Court's cases hold that the General Assembly has the exclusive power over appropriations (R pp 1836-37 (citing *Cooper v.* Berger, 376 N.C. 22, 852 S.E.2d 46 (2020) and *Richmond Cnty. Bd. of Educ. v. Cowell*, 254 N.C. App. 422, 803 S.E.2d 27 (2017))). Nevertheless, Judge Lee reasoned that the trial court could order the requested appropriation. In doing so, he accepted Plaintiffs' argument that "Article I, Section 15 of the North Carolina Constitution represents an ongoing constitutional appropriation of funds," and thus concluded that the court had "inherent power" to order the appropriations to fund the CRP. (R p 1837).

Judge Lee directed that the Office of State Budget and Management ("OSBM"), Treasurer, and Controller transfer $1,754,153,000 to the Department of Public Instruction, Department of Health and Human Services, and the University of North Carolina System to pay for the items listed in Years 2 and 3 of the CRP and to "treat the foregoing funds as an appropriation from the General Fund." (R p 1841). At the conclusion of the Order, Judge Lee stayed its implementation for 30 days to "preserve the *status quo*." (R p 1842).

On 18 November 2021, while Judge Lee's order was stayed, the General

Assembly enacted the Current Operations and Appropriations Act of 2021, N.C. Sess. Law. 2021-180 (the "2021 Appropriations Act" or "Budget"), which the Governor signed into law the same day. Although the budget appropriated $21.5 billion in net General Funds over the FY 2021-23 biennium for K-12 public education—approximately 41% of the total biennial budget—it did not contain allocations identical to the Executive Branch's CRP.

On 24 November 2021, Dr. Linda Combs, Controller for the State of North Carolina and a non-party, petitioned the North Carolina Court of Appeals for writ of prohibition restraining implementation of the November 10 Order, noting that the Budget and the Order created conflicting directives with which it would be impossible to comply. (R p 1893). In her petition, the Controller raised four primary arguments: (1) the trial court lacked jurisdiction to issue the transfer order; (2) the transfer order is contrary to the express language of the General Statutes; (3) the order is contrary to the express language of the State Constitution; and (4) the order conflicts with controlling decisions from the appellate courts.

On 30 November 2021, the Court of Appeals issued a writ of prohibition "restrain[ing] the trial court from enforcing the portion of its order requiring petitioner to treat the $1.7 billion in unappropriated funding . . . 'as an appropriation from the General Fund . . . .]" (R p 2009). In issuing the writ, the Court of Appeals held that the trial court erred in several respects, although it did not address all of the Controller's arguments:

- First, the court reasoned that treating Article I, section 15 as a "constitutional appropriation" would contravene decisions, such as those

in *Cooper v. Berger and Richmond Cnty. Bd. of Educ. v. Cowell*, which have consistently held that "appropriating money from the State treasury is a power vested exclusively in the legislative branch" under the Appropriations Clause. (R p 2008).

- Second, the court concluded such an interpretation would "render another provision of our Constitution meaningless." (R p 2008). As the court recounted, Article IX, which deals with education, includes numerous sections which "provid[e] specific means of raising funds for public education . . . including the proceeds of all penalties, forfeitures, as well as fines imposed by the State, various grants, gifts, and devises." N.C. Const. art IX, § 6, 7. It also authorizes the General Assembly to supplement these sources of funding by "so much of the revenue of the State as may be set apart for that purpose." N.C. Const. art. IX, § 6. The Constitution requires that all such funds "shall be faithfully appropriated and used exclusively for establishing and maintaining a uniform system of free public schools." *Id.* If Article I, Section 15 were treated as an "ongoing appropriation," the court reasoned "there [would be] no need for the General Assembly to 'faithfully appropriate' the funds" and "it would render these provisions . . . unnecessary and meaningless." (R p 2008).
- Finally, the Court of Appeals held the transfer order "would result in a host of ongoing appropriations, enforceable through court order, that would devastate the clear separation of powers between the Legislative

> and Judicial Branches and threaten to wreck the carefully crafted checks and balances that are the genius of our system of government." (R p 2009).

Judge Arrowood filed a dissent, contending that the majority should not have accelerated the deadlines to respond to the Controller's petition and instead should have issued only a temporary stay rather than a writ of prohibition. (R p 2009-10). In other words, the dissent disagreed only with form of the relief awarded—*i.e.*, a writ of prohibition enjoining the transfer order rather than an order staying it—not the substance of the court's reasoning. *Id.*

On 15 December 2021, Plaintiffs filed a "Notice of Appeal, Petition for Discretionary Review and, Alternatively, Petition for Writ of *Certiorari*" seeking review of the Court of Appeals' 30 November 2021 order granting the writ of prohibition. Plaintiffs-Intervenors likewise filed a "Notice of Appeal and Petition for Discretionary Review" the same day. In their petitions, Plaintiffs and Plaintiff-Intervenors argued that the writ of prohibition effectively operated as a "decision on the merits" of their appeals. Accordingly, they asked the Court to grant *certiorari* on broad questions that would allow it to reach the merits of both the 10 November 2021 transfer order and the writ of prohibition. Those petitions and appeals are still pending before this Court as case no. 425A21-1.[4]

On 7 December 2021, the Attorney General appealed Judge Lee's 10 November

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[4] Legislative Intervenors initially opposed Plaintiffs' and Plaintiff-Intervenors' appeals and petitions for discretionary review and petitions for writ of *certiorari*. However, because the Supreme Court has now heard and ruled upon the related case without resolving all issues presented, Legislative Intervenors no longer oppose

2021 transfer order. (R p 1847). The next day, the General Assembly, by and through the Legislative Intervenors, intervened as of right in the trial court pursuant to N.C. Gen. Stat. § 1-72.2 and filed a notice of appeal as well. (R p 1851). The Attorney General then filed a petition asking the Supreme Court to bypass the Court of Appeals and take up the parties' appeals from the 10 November 2021 order immediately. Those appeals proceeded before this Court as case no. 425A21-2.[5]

On 21 March 2022, the Supreme Court granted the Attorney General's bypass petition, but simultaneously remanded the case for 30 days "for the purpose of allowing the trial court to determine what effect, if any, the enactment of the State Budget has upon the nature and extent of the relief that the trial court granted" in the November Order. (21 March 2022 Order Remanding Case, at 2 (No. 425A21-2)). At the same time, the Court issued an Order directing that Plaintiffs' petitions and appeals from the Court of Appeals' writ of prohibition be "held in abeyance, with no other action, including the filing of briefs, to be taken until further order of the Court." (21 March 2022 Order at 2 (No. 425A21-1)). The next day, the case was reassigned to Judge Michael L. Robinson of the North Carolina Business Court. (R p 1873).

Pursuant to the Court's instructions, Judge Robinson issued an order on 26 April 2022 amending Judge Lee's 10 November 2021 transfer order. In doing so,

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Plaintiffs' and Plaintiff-Intervenors' petitions, but instead ask that the Court grant those petitions and, to the extent necessary, also grant *certiorari* to review the additional issues listed below.

[5] In its petition, the Attorney General also requested that the Court consolidate the parties' appeal from Judge Lee's 10 November 2021 order (425A21-2) with the appeals from the writ of prohibition (425A21-1). However, the Court never acted on that request and subsequently denied it as moot on 4 November 2022.

Judge Robinson concluded that the amounts the order declared to be due the various executive agencies should be reduced to reflect amounts appropriated from State and federal sources in the State Budget. Judge Robinson also concluded he was bound by the Court of Appeals' Writ of Prohibition, which "ha[d] not been overruled or modified" and therefore was "binding on the trial court." (R pp 2627-28). Accordingly, he amended the 10 November 2021 order "to remove [the] directive that State officers or employees transfer funds from the State treasury to fully fund the CRP." (R pp 2629, 2640).

Plaintiffs, Plaintiff-Intervenors, the Attorney General, and Legislative Intervenors each timely filed notices of appeal from the amended order. (R pp 2648-70).

On 1 June 2022, the Court ordered the parties to submit briefing on their appeals from the amended transfer order in case no. 425A21-2. At the same time, the Court noted that the petitions and appeals from the writ of prohibition in case no. 425A21-1 would continue to be "held in abeyance." (1 June 2022 Order (425A21-2)). The Court subsequently called case no. 425A21-2 for oral argument on 28 August 2022. At no time prior to the case involving the direct appeals being heard, however, did the Court order cases 425A21-1 and 425A21-2 consolidated.

On 4 November 2022, the Court issued a decision in case no. 425A21-2, which this motion refers to as "*Hoke County III*." The majority held that in "exceedingly rare and extraordinary circumstances," the judiciary could use its "inherent power" to "direct the transfer of adequate available state funds." *See Hoke County III,* 382 N.C. at 464, 879 S.E.2d at 242. The majority thus reinstated the transfer provisions

in Judge Lee's 10 November 2021 order and remanded the case to the trial court to "recalculate" the amounts necessary to fund years 2 and 3 of the CRP in light of the State Budget, which was amended while the case was on appeal. "To enable the trial court to do so" the majority announced that it would issue a special order staying the writ of prohibition "on its own motion." *Id.* – N.C. –, 879 S.E.2d at 199 fn. 2.

On the same day, the Court issued an Order in case no. 425A21-1, in which it (i) consolidated the two appeals, to address those issues concerning the writ of prohibition that were also addressed in the opinion, and (ii) stayed (but did not vacate) the writ of prohibition pending any filings on additional issues. In that regard, the order directed as follows:

> Now on our own motion, the Court hereby treats the Writ of Prohibition filed 30 November 2021 by the Court of Appeals in 425A21-1 as consolidated with 425A21-2 to the extent necessary for the Court to address the arguments pertaining to the Writ made by the parties here; further ***we hereby stay the Writ of Prohibition pending any further filings in 425A21-1 pertaining to issues not already addressed in the opinion*** filed on this day in 425A21-2.

(4 November 2021 Order (425A21-1) (emphasis added)).[6]

On 3 March 2023, following motions filed on 8 February 2023 by the State Controller and Legislative Intervenors, the Court issued a Special Order whereby it reinstated the writ of prohibition until it addresses the issues remaining in this case. Still, the Court has never ordered briefing in case no. 425A21-1 or called the case for hearing. Likewise, the Court has not acted on Plaintiffs' and Plaintiff-Intervenors'

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[6] The Court also dismissed the State's motion to consolidate "as moot." (*Id.*)

petitions for discretionary review or *certiorari*.

ARGUMENT

The Court's 3 March 2023 Special Order and its decision to stay—rather than vacate—the writ of prohibition pending any further filings reflected a recognition that the parties have not yet had an opportunity to be heard on their appeals from the writ of prohibition itself. As the dissent explained, summarily deciding the parties' appeals from the writ, on the Court's "own initiative," without briefing, and when it had previously announced that the appeal would be "held in abeyance," would not only violate due process but also require the exercise of "unbounded power in the face of fundamental fairness and basic legal tenets." *Hoke County III*, 382 N.C. at 535, 879 S.E.2d at 284 (Berger, J., dissenting). By providing that the writ of prohibition will automatically be reinstated as soon a party files a request to brief additional issues, the Court has protected the parties' right to be heard.

Accordingly, Legislative Intervenors now ask the Court for leave to brief the issues identified below. These include issues that were not addressed in the majority's opinion in *Hoke County III* (case no. 425A21-2), as well as additional questions raised in the wake that decision. While these issues are encompassed within the questions presented by Plaintiffs' petitions for discretionary review and *certiorari*, Legislative Intervenors conditionally petition the Court for *certiorari* to the extent necessary to review any of these issues.

I. THE DECISION IN *HOKE COUNTY III* LEFT NUMEROUS ISSUES UNADDRESSED.

Although it spans 139 pages, the majority's opinion in *Hoke County III* left

numerous, critical issues unaddressed.

First, the majority's opinion did not address whether the trial court's issuance of the 10 November 2021 violated the Controller's and Legislative Intervenors' rights to due process. In seeking the writ of prohibition, the Controller argued that the trial court lacked personal jurisdiction over her, and further violated her right to due process, by issuing orders that purportedly required the Controller distribute funds from the Treasury in a manner contrary to the Constitution, the State Budget Act, and the State Budget, when she was never served with process, never made a party to the case, and never given notice and an opportunity to be heard. (*See* Controller's Petition for Writ of Prohibition, Temporary Stay, and Supersedeas at 10). This is critical, since, among other things, the State Budget Act imposes civil and criminal liability on State officials who disburse funds from the Treasury without a legislative appropriation. *See* N.C. Gen. Stat. § 143C-10-1(a) (making it a Class 1 misdemeanor for a person to "knowingly and willfully . . . (1) withdraw funds from the State treasury for any purpose not authorized by an act of appropriation."). The act likewise provides that a State official convicted of violating its provisions shall "forfeit[] his office or employment." *See* N.C. Gen. Stat. § 143C-10-1(c). Despite this, the majority ignored Controller's due process arguments, as well as the concomitant conclusion that, because the Controller was never provided notice and an opportunity to be heard, the trial court was without jurisdiction to order the Controller to transfer funds in violation of the Budget Act. *See Hoke County III*, 382 N.C. at 530, 879 S.E.2d at 281 (Berger, J., dissenting) (noting that the majority opinion fails to address the

trial court's violation of the Controller's right to due process).

The majority opinion similarly did not address whether the trial court violated the General Assembly's right to due process. *Id.* at 530-32, 879 S.E.2d at 281-82. As the dissent noted, from January 2011 until it was finally able to intervene as of right in December 2021, the General Assembly was not represented in this case. Although the Attorney General initially represented both the Legislative and Executive Branches, it stopped representing the legislative branch in January 2011, citing a purported "conflict of interest." *See id.* at 479, 879 S.E.2d at 251.[7] In 2011, Judge Manning denied the General Assembly's motion to intervene on a discretionary basis, because, as he understood it, the case did not involve the level of funding appropriated by the General Assembly, or the statutes governing the State's educational system, but instead involved the Executive Branch's failure to implement the State's educational program and oversee the operations of local school districts. *Id.*; *see also Hoke County*, 358 N.C. at 632, 599 S.E.2d at 387 (noting that, following the only trial in this matter, "the trial court concluded that the 'the bulk of the core' of the State's Educational Delivery System … is sound, valid and meets the constitutional standards enumerated by *Leandro*.") The General Assembly accordingly was not able

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[7] Judge Robinson likewise concluded that the Attorney General had not sought to protect the interests of the legislative branch, or its role within our State Constitution, but had instead only advocated for the interests of the Executive Branch. (26 April 2022 Order at 2-3, n.1 (R pp 2619-20) ("The record before this Court demonstrates that, until very recently, the 'State Defendants' actively participating in this action were comprised of the executive branch (the Governor's office, the State Department of Education, the State Department of Public Instruction, and the State Department of Health and Human Services) but not the Legislative Branch.")))).

to participate in this case until *after* Judge Lee issued his 10 November 2021 order, at which time it intervened as of right pursuant to N.C. Gen. Stat. § 1-72.2,[8] on the grounds that the order challenged an act of the General Assembly by attempting to order appropriations contrary to the State Budget. (R p 1851).

As a result, throughout the entire time the Attorney General was *cooperating with the Plaintiffs* to secure orders appointing West Ed and requiring "the State" to develop and fund the CRP, no one was representing the interests of the Legislature—which is the only branch with the power under our constitution to appropriate money or revise the State's education statutes. *See Hoke County III*, 382 N.C. at 513, 879 S.E.2d at 271 (Berger J., dissenting) ("Put another way, executive branch bureaucrats and government actors, sanctioned by the [trial] court, agreed to a process that called for the expenditure of taxpayer money without consultation from the branch of government to which that duty is constitutionally committed.") The trial court thus "created a situation where the people of this State, acting through their elected representatives, were not afforded notice and the opportunity to be heard." *Id*. at 531, 879 S.E.2d at 282. Yet, despite these "obvious due process concerns", the majority's opinion in *Hoke County III* did nothing to address them. *Id.* at 530, 382 S.E.2d at 281.

Second, the majority's opinion in *Hoke County III* did not address whether the trial court lacked subject matter jurisdiction to issue orders purporting to grant relief

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[8] N.C. Gen. Stat § 1-72.2 was not amended to give Legislative Intervenors the right to intervene in cases challenging acts of the General Assembly until 2013. *See Berger v. N. Carolina State Conf. of the NAACP*, 213 L. Ed. 2d 517, 142 S. Ct. 2191, 2198 (2022).

on a *statewide* basis. Among other things, the majority did not address whether the Plaintiffs in this case—whose claims are based on the alleged conditions in their individual school districts—have standing to bring claims on behalf of students in school districts where they do not live. In *Hoke County,* the Court questioned whether Plaintiffs even had standing to represent the students *within* their respective districts, or instead should be limited to individual relief. While the Court reasoned that the "unique procedural posture and substantive importance" of this case might warrant "broadened both standing and evidentiary parameters," it expressly held that such an analysis would only permit Plaintiffs to represent students in their own school districts. *See Hoke County*, 358 N.C. at 376, 599 S.E.2d at 376 (concluding that this expanded view of standing would permit, at most, the Court to consider "whether plaintiffs made a clear showing that harm had been inflicted on Hoke County students. . . .") This was, in part, a product of the way Plaintiffs structured their claims. As this Court recognized, those claims rested, not on any alleged failure with the State's educational system as a whole, but instead the unique conditions in Plaintiffs' individual districts. *Hoke County*, 358 N.C. at 609, 599 S.E.2d at 373. Plaintiffs thus do not have standing to assert claims on behalf of every school district in the State, nor are their claims representative of those that might be brought by students in the other 109 school districts in North Carolina. The dissent recognized this and questioned whether allowing Plaintiffs to secure orders dictating educational policy on a statewide basis violated the rights of unrepresented parties. *See id. at* 488-89, 879 S.E.2d at 256-57; *see also id.* at 530, 879 S.E.2d at 281n.23. The majority,

however, did not address it.

Finally, the majority's opinion failed to address whether the Plaintiff school districts should first have to exhaust all funds available to them to pay for items in the CRP—including COVID-relief funds—before obtaining a judgment against the State. In *Hoke County*, this Court held that, when assessing whether the State fulfilled has its constitutional obligation, the court should include programs funded with federal money. *See* 358 N.C. at 646, 599 S.E.2d at 395 ("While the State has a duty to provide the means for such educational opportunity, no statutory or constitutional provisions require that it is concomitantly obliged to be the exclusive source of the opportunity's funding."). Thus, Judge Manning held in 2000, that before Plaintiffs can obtain a remedy or judgment against the State, they must show by clear evidence that they have "exhausted" "all available resources" they might use to fund the programs they contend are necessary, no matter whether that money comes from State, federal, or local sources. (R p 317). The trial court's order, however, did not do this. Indeed, the orders ignore the unprecedented sums the Plaintiff school districts have received in the form of COVID-relief funds. Since the pandemic began, North Carolina's school districts (including the Plaintiffs in this case) have received more than $6.4 billion in additional federal and State funding, often with the only limitation that the money be used to address "learning loss"—a category that would cover most, if not all, of the 146 action items in the CRP.[9] As of today, nearly $2.2

[9] *See* COVID Funds, North Carolina Department of Public Instruction, Financial and Business Services, available at https://tinyurl.com/35tb83ns (last visited, February 7, 2023).

billion of that money (approximately 37%) remains unspent.[10] Hoke County Public Schools, alone, has been received more than $40 million, with $14 million still unspent.[11] Although Legislative-Intervenors presented arguments on this issue, the majority opinion did not answer whether Plaintiffs must first look to their own funds—including those provided for COVID-relief—before demanding additional money from the State.

The parties should be permitted to submit briefing on these issues—many of which will dictate the course of any further proceedings in the trial court—before a final decision is issued on the writ of prohibition.

II. THE DECISION IN *HOKE COUNTY III* RAISED NUMEROUS ADDITIONAL QUESTIONS THAT REQUIRE RESOLUTION BY THIS COURT.

The majority's opinion in *Hoke County III* raised numerous additional issues that must be resolved prior to issuing a decision on the writ of prohibition or any further proceedings in the trial court.

Principal among these is the inherent conflict between the writ of prohibition and the Court's decision itself.

The Court of Appeals issued the writ of prohibition based on its conclusion that the trial court acted in a matter without jurisdiction and in a manner contrary to law. (R p 2008 (citing *State v. Allen*, 24 N.C. 183, 189 (1841)). That conclusion rested on

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10 *Id.*

11 *Id.*

both the text of the Appropriations Clause[12] and an unbroken line of Supreme Court decisions, which have consistently held "appropriating money from the State treasury is a power vested exclusively in the legislative branch" and thus the judicial branch "lack[s] the authority to 'order State officials to draw money from the State treasury.'" *Cooper v. Berger*, 376 N.C. 22, 47, 852 S.E.2d 46, 64 (2020) (quoting *Richmond Cnty. Bd. of Educ. v. Cowell*, 254 N.C. App. 422, 423, 803 S.E.2d 27, 29 (2017)); *see also Richmond Cnty. Bd. of Educ.*, 254 N.C. App. at 426, 803 S.E.2d at 31 ("The Separation of Powers clause prevents the judicial branch from reaching into the public purse on its own" even if to remedy the violation of another constitutional provision directing how those funds must be used); *In re Alamance Cnty. Court Facilities*, 329 N.C. 84, 94, 405 S.E.2d 125, 129 (1991) (holding that the Separation of Powers Clause "prohibits the judiciary from taking public monies without statutory authorization"); *State v. Davis*, 270 N.C. 1, 14, 153 S.E.2d 749, 758 (1967) ("[T]he appropriations clause "states in language no man can misunderstand that the legislative power is supreme over the public purse").

Although it ordered the opposite result, the majority in *Hoke County III* never addressed the merits of the writ of prohibition. Indeed, the majority's opinion never even suggests that the writ was anything but proper. It also relies on the very same cases that led the Court of Appeals to conclude that the 10 November 2021 transfer orders violated the separation of powers. This includes the Court's decision in *In re*

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[12] The Appropriations Clause of Article V, Section 7 of the State Constitution provides: "No money shall be drawn from the State treasury but in consequence of appropriations made by law . . . ." N.C. Const. art V, § 7.

Alamance County Court Facilities—a decision in which the Court *rejected* a judicial attempt to the appropriation of county funds. Yet, as the dissent noted, faithful application of *Alamance County* and the Court's other Appropriations Clause cases should have required *reversal* of the trial court's 10 November 2021 Order. *Hoke County III*, 382 N.C. at 528, 879 S.E.2d at 280 (explaining that "faithfully applying *Alamance County* to this case renders the decision a simple one" and should require reversal of the trial court's transfer order). The majority's opinion does nothing to square its analysis with the writ of prohibition (which has now been reinstated). Allowing the parties to brief the issues here, as contemplated by the majority's opinion and the Court's 4 November 2022 Order, will give the Court the opportunity to resolve the conflict between *Hoke County III* and the decisions that supported the Court of Appeals' writ of prohibition.

The majority's opinion in *Hoke County III* raises other issues as well. For instance, the trial court's 10 November 2021 order directs OSBM, the Treasurer, and the Controller to "transfer" funds to NC DHHS, NC DPI, and the University of North Carolina system, and to "treat the foregoing funds as an appropriation from the General Fund as contemplated" within the State Budget Act, N.C. Gen. Stat. § 143C-1-1, *et seq*. (R p 1841). That act sets forth numerous requirements and establishes internal controls for the appropriation, allocation, and disbursement of State funds. Yet, while the trial court's order purportedly requires State officials "transfer" money to State agencies *in accordance with the State Budget Act*—an act that has never been held unconstitutional—complying with the trial court's directives would require State

officials to disregard many of the act's provisions.

First, the State Budget Act does not allow for the wholesale "transfer" of funds to State agencies, as the order seems to contemplate. Instead, the State Budget Act requires that agencies request *allotments* within the Treasury from which they may draw money by submitting requests to pay qualifying expenses. *See* N.C. Gen. Stat § 143C-6-3 ("Allotments"), § 143B-426.40G (establishing procedures for the submission and approvals of requests ("warrants") for the payment of money from the State Treasury and providing that "[t]he State Controller shall have the exclusive responsibility for the issuance of all warrants for payment from of money from the State Treasury").

Second, the State Budget Act provides that, except in certain limited circumstances, appropriations that are not spent by the end of the fiscal year must revert back to the fund from which they were appropriated. *See* N.C. Gen. Stat. § 143C-1-2. The trial court's order purports to modify this statute (without any finding it is unconstitutional) by providing that money for Years 2 and 3 of the CRP will only revert if unspent at the end of the *second year* (*i.e.*, FY 2023, or "Year 3" of the CRP) (R p 1842). This creates obvious problems. Many of the action items in the CRP call for increases to *recurring* a*ppropriations*—which it anticipates will be made each year—to pay for new positions, increased salaries, and additional operating expenses. Once a fiscal year ends, transferring money for such recurring expenses can no longer be "necessary," since money for those same items will be included again in the next year of the plan. Yet, by disregarding the State Budget Act's provisions governing reversion, the trial court's order, and the majority's decision, treat every

amount listed in the CRP as a cumulative obligation. They thus purport to require the transfer of *all* money included in the CRP for Years 2 and 3, even though Year 2 has come and gone. This would result in the transfer, in many cases, of *double* the amount Plaintiffs contend is necessary to pay for various ongoing programs in FY 2023. The majority's opinion ignores this problem and provides no instruction to the trial court as to how to resolve it.

Third, the majority has done nothing to clarify whether the Controller will still have the authority, under both the State Budget Act and the Internal Control Act, to impose internal controls on the money transferred to ensure that the receiving agencies spend it for the intended purposes. Instead, the trial court's order runs roughshod over the numerous statutory provisions that establish these internal controls by ordering State officials to "transfer" large, undifferentiated sums of money to State agencies on a wholesale basis. (R p 1841).

The Court should resolve the conflicts between the transfer directives and these other governing statutes before any further proceedings in the trial court.

Finally, the Court should answer how future legislative measures to provide for and improve the State's educational system should be treated. At the very outset of this case, this Court rejected the notion that there is only "one way" to provide the State's children with the opportunity for a sound basic education. Thus, in *Leandro*, the Court explained that given "[t]he very complexity of the problems of financing and managing a statewide public school system suggests that there will be ***more than one*** constitutionally permissible method of solving them." 346 N.C. at 356, 488 S.E.2d at 260 (emphasis added). Therefore, "within the limits of rationality, the

legislature's efforts to tackle the problems should be entitled to respect." *Id.* This itself reflects the usual rule that acts of the legislature should be treated as presumptively constitutional. *See, e.g., Cooper v. Berger*, 376 N.C. at 33, 852 S.E.2d at 56. The majority in *Hoke County III* acknowledged this and called on the General Assembly to "moot the necessity for further transfer directives" through legislative measures in future years. *See Hoke County III*, 382 N.C. at 468, 879 S.E.2d at 244; *see also id.* at 471 879 S.E.2d at 246 ("[I]t is true that the CRP is by no means the only path toward constitutional compliance under *Leandro*."). Yet, the majority refused to analyze whether the General Assembly's efforts to provide for State's educational system through the 2022-23 State Budget met its constitutional obligations, much less treat those measures as presumptively valid. Instead, it chose to measure the sufficiency of the State Budget, not against the substantive requirements of our State Constitution as enunciated in *Leandro*, but instead in terms of whether it met the demands of the CRP. This creates a Catch-22. If the General Assembly is to provide an alternative to the Executive's proposals to the CRP, it will necessarily come in the form of legislation and appropriations in the State Budget. The majority's opinion, however, ignores this and gives no direction as to whether future efforts to provide for the State's educational system should be assessed under the normal rules applicable to all legislation, or instead should be judged only against the measures proposed by Plaintiffs and the Executive Branch in the CRP.

The Court should grant briefing on these critical issues—all of which will

necessarily dictate further proceedings, if any, in the trial court.

III. THE COURT SHOULD GRANT LEAVE TO BRIEF THE ADDITIONAL ISSUES NOT ADDRESSED IN *HOKE COUNTY III*.

In light of the above, Legislative Intervenors request that the Court grant leave to brief the following issues, which were either not addressed in, or have been raised in the wake of, the Court's decision in *Hoke County III*, and which must be resolved before the Court decides the parties' appeals from the writ of prohibition:

1. Whether the Court of Appeals acted properly in issuing its writ of prohibition restraining the trial court from enforcing its 10 November 2021 order?

2. Whether the trial court's 10 November 2021 order violated the due process rights of the Controller and the General Assembly, and through it, the people of North Carolina, by ordering measures that are either contrary to statute or require legislative approval without notice and an opportunity to be heard?

3. Whether the trial court lacked subject matter jurisdiction to issue its 10 November 2021 order purporting to direct the Controller and other State officials to transfer money out of the State Treasury, without a legislative appropriation, to fund the measures proposed by the Executive Branch in the CRP?

4. Whether the trial court acted beyond its jurisdiction and in a manner contrary to law by issuing the transfer directives in its 10 November 2021 order?

5. Whether trial court acted beyond its jurisdiction and in a manner contrary to law by issuing orders that purported to dictate educational policy on a statewide basis when Plaintiffs' claims were limited to the conditions in their individual school districts?

6. Whether Plaintiffs lacked standing to assert claims regarding, and to obtain orders directing the operations of, school districts where they do not reside and that were never made part of their claims?

7. Whether the trial court acted in a manner contrary to law by requiring the Controller and State officials to "transfer" funds to various Executive Branch agencies without a legislative appropriation and in a manner

contrary to the State Budget Act?

8. Whether the trial court erred by concluding that the funds subject to its transfer order were "necessary" to provide children with a sound basic education?

9. Whether legislative efforts to address the educational needs of the State's children, including appropriations made through the State Budget, should be given the same presumption of constitutionality applicable to all legislation?

IV. IF NECESSARY, THE COURT SHOULD GRANT *CERTIORARI* TO REVIEW THE ADDITIONAL ISSUES ARISING FROM THE WRIT OF PROHIBITION.

Although Legislative Intervenors initially opposed Plaintiffs' and Plaintiff-Intervenors' petitions for discretionary review and *certiorari* from the writ of prohibition, given the state of the proceedings to date, Legislative Intervenors now withdraw that opposition and ask the Court to grant those petitions. As discussed above, the Court's intervening decision in *Hoke County III* has left numerous, unanswered questions that are of significant—if not paramount—public interest and of critical importance to the jurisprudence of this State.

Further, while Legislative Intervenors believe all of the issues above are encompassed within the broad questions presented by Plaintiffs and Plaintiff-Intervenors' petitions, Legislative Intervenors ask that, to the extent it deems necessary, the Court grant *certiorari* to review the questions listed above. Issuance of *certiorari* under these circumstances is warranted, and comports with the requirements of, Rule 21 of the Rules of Appellate Procedure, which provides that *certiorari* "may be issued in appropriate circumstances to permit review of the decisions and orders of the Court of Appeals" when either the right to an appeal has

been lost or no right of appeal exists. *See* N.C. R. App. 21(a)(2).

The Court's decision in *Hoke County III*, and recent order reinstating the writ of prohibition have created numerous unresolved questions regarding the proper interpretation of our State Constitution, including the roles of the respective branches within our system of Separation of Powers, the substantive requirements of the State's obligation to provide children with the opportunity for a sound basic education, as well as the scope and extent of the judiciary's power under the Appropriations Clause. Those questions demand review, and until answered will leave the trial court without guidance as to how to proceed in one of the most consequential cases ever to be filed in this State.

RELIEF REQUESTED

Based on the foregoing, Legislative-Intervenors ask that the Court:[13]

1. Grant Plaintiffs' and Plaintiff-Intervenors' Petitions for Discretionary Review and *Certiorari*;

2. Grant leave for the parties to brief the issues listed above, which were not addressed in, or were raised by, the Court's decision in *Hoke County III;*

3. To the extent necessary, grant *certiorari* to review the additional issues on which Legislative-Intervenors seek review;

4. Provide that the record from the Court of Appeals, which constitutes the

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[13] Pursuant to N.C. R. App. P. 37(c) Legislative Intervenors notified Plaintiffs and other parties in this case of the relief requested in this motion through email to counsel on 3 March 2023. Given that each of the parties (other than the Controller) have already filed briefs opposing this motion, Legislative Intervenors expect that they intend to oppose this renewed motion on the same grounds.

record on appeal in this matter pursuant to N.C. R. App. 14(c) and 15(f), be supplemented by the record in case no. 425A21-2.

5. Enter a schedule for the submission of briefs on the parties' petitions and the issues listed above as follows:

a. Submission of opening briefs: 45 days from issuance of the Court's order on the parties' petitions and this motion;

b. Submission of response briefs: 30 days from the filing of the parties' opening briefs;

c. Reply briefs: 20 days from the submission of response briefs.[14]

Respectfully submitted, this the 3rd day of March, 2023.

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Pursuant to Rule 33(b) I certify that all of the attorneys listed below have authorized me to list their names on this document as if they

[14] Given the unique procedural posture of this case, Legislative Intervenors ask that the Court treat all parties as both appellants and appellees for the purposes of briefing these issues.

had personally signed it.

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CERTIFICATE OF SERVICE

The undersigned certifies that on 3 March 2023 he caused a true and correct copy of the foregoing document to be served via e-mail upon the following:

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No. 425A21-1 TENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

HOKE COUNTY BOARD OF EDUCATION et al.,
Plaintiffs,

and

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION,
Plaintiff-Intervenor,

and

RAFAEL PENN, CHARLOTTE-MECKLENBURG BRANCH OF THE STATE CONFERENCE OF THE NAACP *et al.*,
Plaintiffs-Intervenors,

v.

STATE OF NORTH CAROLINA,
Defendant,

and

THE STATE BOARD OF EDUCATION
Defendant,

and

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION
Realigned Defendant,

and

From Wake County
95 CVS 11582

From the N.C. Court of Appeals
P21-511

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-

****

VERIFICATION

****

Legislative Intervenors hereby submit the following VERIFICATION, attesting to the matters set fort in their Renewed Motion for Leave to Brief Additional Issues and Conditional Petition for Certiorari, submitted on March 3, 2023.

The undersigned counsel for Petitioner Legislative Intervenors, after being duly sworn, says:

The contents of the Renewed Motion and Conditional Petition for *Certiorari* are true to my knowledge, except those matters stated upon information and belief, and, as to those matters, I believe them to be true.

Matthew F. Tilley

Mecklenburg, County, North Carolina

Sworn to and subscribed before me:

Date: 3-06-2023

Mark F. Foster III

Name: Mark F. Foster III

My Commission Expires: Oct. 27, 2026

MARK F. FOSTER, III NOTARY PUBLIC MECKLENBURG COUNTY, N.C.

CERTIFICATE OF SERVICE

The undersigned certifies that on 6 March 2023 he caused a true and correct copy of the foregoing document to be served via e-mail upon the following:

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TAB 12

382 N.C. 386

2022-NCSC-108

HOKE COUNTY BOARD OF EDUCATION, et al.; Charlotte-Mecklenburg Board of Education; and Rafael Penn, et al.,

v.

STATE of North Carolina; State Board of Education; Charlotte-Mecklenburg Board of Education; 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.

No. 425A21-2

Supreme Court of North Carolina.

Filed November 4, 2022

Background: Proceeding was brought to review State's compliance with comprehensive remedial plan (CRP) that was developed pursuant to a consent order to achieve its obligation under the State Constitution to provide all children the opportunity to obtain a sound basic education in a public school. The Superior Court, Wake County, W. David Lee, J., 2021 WL 8566348, entered order requiring transfer of state funds to fully fund the CRP. After an appeal and a grant of discretionary review, the case was remanded. The Superior Court, Michael L. Robinson, J., 2022 WL 1266320, entered order removing transfer directives, and case returned to the Supreme Court.

Holdings: The Supreme Court, Hudson, J., held that:

(1) trial court acted within its inherent power in issuing order directing transfer of state funds to implement CRP;

(2) Budget Act did not satisfy State's constitutional obligations;

(3) order for transfer of funds did not raise non-justiciable political questions; and

(4) transfer order was not an impermissible constitutional determination in a friendly suit.

Remanded.

Berger, J., filed dissenting opinion in which Newby, C.J., and Barringer, J., joined.

1. Appeal and Error ⚿3172

Supreme Court reviews constitutional questions de novo.

2. Constitutional Law ⚿580

Constitutional analysis begins with the text.

3. Constitutional Law ⚿1075

State constitutional provision declaring that the people have a right to the privilege of education and that it is the duty of the State to guard and maintain that right is obligatory, and places an affirmative duty on the shoulders of the State. N.C. Const. art. 1, § 15.

4. Education ⚿656

State constitutional provision stating that the General Assembly "shall provide by taxation and otherwise" for a general and uniform system of free public schools with equal opportunities for all students is obligatory, and the ultimate responsibility for securing the people's right to education lies with the State. N.C. Const. art. 9, § 2(1).

5. Constitutional Law ⚿501

Fundamental purpose of State Constitution's Declaration of Rights is to provide citizens with protection from the State's encroachment upon those rights N.C. Const. art. 1, § 1 et seq.

6. Constitutional Law ⚿580

Supreme Court gives the State Constitution liberal interpretation in favor of its citizens with respect to those provisions which were designed to safeguard liberty and security of citizens.

7. Education ⚿656

Education provisions of the State Constitution combine to guarantee every child of state an opportunity to receive a sound basic education in public schools, and this right is substantive, robust, and paramount. N.C. Const. art. 1, § 15; N.C. Const. art. 9, §§ 2, 6, 7.

8. Civil Rights ⚿1756

When constitutional rights are violated, justice requires a remedy. N.C. Const. art. 1, § 18.

9. Civil Rights ⚿1756

The nature of the constitutional right and the extent of the violation dictate the appropriate nature and extent of the corresponding remedy.

10. Civil Rights ⚿1756

A longstanding violation of a fundamental constitutional right demands a remedy of equivalent magnitude.

11. Education ⚿656

Education provisions of the State Constitution create a positive duty for the legislature to fulfill its role, as part of the State, in maintaining the people's right to education by providing by taxation and otherwise for a general and uniform system of free public schools. N.C. Const. art. 1, § 15; N.C. Const. art. 9, §§ 2, 6, 7.

12. Education ⚿656

State constitutional right to the opportunity to receive a sound basic education is not one of mere education access, but of education adequacy. N.C. Const. art. 1, § 15; N.C. Const. art. 9, §§ 2, 6, 7.

13. Education ⚿656

Under the state constitutional right to the opportunity to receive a sound basic education, the General Assembly is not merely responsible for ensuring that there is an operational school building in each district that lets students in its front doors, but for ensuring that once a student enters those doors, he or she has the opportunity to receive, at minimum, a sound basic education. N.C. Const. art. 1, § 15; N.C. Const. art. 9, §§ 2, 6, 7.

14. Education ⚿28
Statutes ⚿1009

General Assembly is broadly empowered by the State Constitution to enact legislation to advance its policy goals, including in the realm of education. N.C. Const. art. 2, §§ 1, 22, 23; N.C. Const. art. 3, § 5(3); N.C. Const. art. 5, §§ 2, 7.

15. Constitutional Law ⚿961

State judiciary has responsibility to protect state constitutional rights of citizens.

16. Constitutional Law ⚿2470

When the exercise of remedial power necessarily includes safeguarding the constitutional rights of the parties, the court has the inherent authority to direct local legislative authorities to perform that duty.

17. Constitutional Law ⚿2470, 2540

Inherent power of court to address constitutional violations through equitable remedies must be exercised with as much concern for its potential to usurp powers of another branch as for usurpation it is intended to correct; it is tool to be utilized only where other means to rectify threat to judicial branch are unavailable or ineffectual and its wielding must be no more forceful or invasive than exigency of circumstances requires.

18. Constitutional Law ⚿961

Only when established methods fail and the court shall determine that by observing them the assistance necessary cannot be had, or when an emergency arises which the established methods cannot or do not instantly meet, then and not till then does occasion arise for a court to exercise its inherent power to address constitutional violations through equitable remedies.

19. Constitutional Law ⚿2525
Courts ⚿1

The court's judicious use of its inherent power to reach towards the public purse must recognize two critical limitations: it must bow to established procedural methods where these provide alternative to extraordinary exercise of its inherent power, and in the interests of future harmony of branches, the court in exercising that power court must minimize encroachment upon those with legislative authority in appearance and in fact.

20. Constitutional Law ⚿600

When considering the meaning of multiple constitutional provisions, a court seeks to read the provisions in harmony.

21. Constitutional Law ⚿600

Terms or requirements of a constitution cannot be in violation of the same constitution; a constitution cannot violate itself.

22. Education ⚿219

In exercising its powers under the appropriations clause of the State Constitution, the General Assembly must also comply with its duties under the education provisions of the Constitution; this means that the General Assembly must exercise its appropriations powers such that every student receives the opportunity to obtain a sound basic education. N.C. Const. art. 1, § 15; N.C. Const. art. 5, § 7; N.C. Const. art. 9, §§ 2, 6, 7.

23. Education ⚿219

General Assembly is constitutionally required to appropriate at least enough funding to public education such that every child in every school in every district is provided with the opportunity to receive at least a sound basic education. N.C. Const. art. 1, § 15; N.C. Const. art. 5, § 7; N.C. Const. art. 9, §§ 2, 6, 7.

24. Constitutional Law ⚿2508

Because the State Constitution itself requires the General Assembly to adequately fund the state's system of public education, in exceedingly rare and extraordinary circumstances, a court may remedy an ongoing violation of the constitutional right to the opportunity to a sound basic education by ordering the transfer of adequate available state funds. N.C. Const. art. 1, § 15; N.C. Const. art. 5, § 7; N.C. Const. art. 9, §§ 2, 6, 7.

25. Constitutional Law ⚿502

Above any statute or legislative prerogative, the State Constitution expresses the will of the people in the State and is, therefore, the supreme law of the land.

26. Constitutional Law ⚿2332

State Constitution incorporates a system of checks and balances that gives each branch of the government some control over the others. N.C. Const. art. 1, § 6.

27. Constitutional Law ⚿2332

Separation of powers clause of State Constitution requires that, as the three branches of government carry out their duties, one branch will not prevent another branch from performing its core functions. N.C. Const. art. 1, § 6.

28. Constitutional Law ⚿2330

As cases arise that probe the contours of foundational constitutional principles, the Supreme Court must look freshly at the separation of powers provision in the State Constitution, with an eye to the actual constitutional, pragmatic, and philosophical limitations on the power granted therein. N.C. Const. art. 1, § 6.

29. Civil Rights ⚿1756

When extraordinary circumstances render it necessary and proper for a court to exercise its inherent authority to address constitutional violations through equitable remedies, the court is obligated and empowered to craft and order flexible equitable relief to remedy the violation of fundamental constitutional rights.

30. Equity ⚿3

When equitable relief is sought, a court claims the power to grant, deny, limit, or shape that relief as a matter of discretion.

31. Equity ⚿3

A court of equity traditionally has discretion to shape the relief in accord with its view of the equities or hardships of the case.

32. Equity ⚿57

Equity regards as done that which in fairness and good conscience ought to be done.

33. Civil Rights ⚿1756

Various rights protected by the State Constitution's Declaration of Rights may require greater or lesser relief to rectify their violation, depending upon right violated and facts of particular case. N.C. Const. art. 1, § 1 et seq.

34. Civil Rights ⚿1756

The judiciary is empowered with inherent constitutional power to fashion a common

law remedy for a violation of a particular constitutional right.

35. Constitutional Law ⇨2450

When necessary for the proper administration of justice based on the inaction of another branch, and within important limitations, inherent judicial power may include the authority to craft a remedy whereby one branch exercises some activities usually belonging to one of the other two branches in order to fully and properly discharge its duties.

36. Constitutional Law ⇨2508, 2546
Education ⇨219

Trial court acted within its inherent power in issuing order directing state officials to transfer available funds to implement portions of comprehensive remedial plan that was developed pursuant to a consent order to achieve State's obligation under State Constitution to provide all children in state an opportunity to obtain a sound basic education in a public school, where court provided the executive and legislative branches time and space to fix the violation on their own terms for over 17 years, executive and legislative branches repeatedly failed to remedy an established statewide violation, court exhausted all established alternative methods before directing transfer of funds, and court sought the least intrusive remedy that would still adequately address the violation. N.C. Const. art. 1, §§ 6, 15; N.C. Const. art. 9, §§ 2, 6, 7.

37. Appeal and Error ⇨3163, 3401

It is well within the Supreme Court's ability and authority to properly identify factual findings and legal conclusions as such, regardless of how they are labeled by a trial court.

38. Constitutional Law ⇨961

When a constitutional violation persists after extended judicial deference, a court is empowered to provide relief by imposing a specific remedy and instructing the recalcitrant state actors to implement it.

39. Education ⇨219

Budget Act did not satisfy State's constitutional obligations, as set forth in a Supreme Court opinion, to provide all children the opportunity to obtain a sound basic education in a public school, where a comprehensive remedial plan that was developed pursuant to consent order was the only remedial plan that State presented to Court, and the Act, as measured against the 18-year remedial phase of case, did not substantially comply with the constitutional mandate as measured by applicable educational standards. N.C. Const. art. 1, §§ 6, 15; N.C. Const. art. 9, §§ 2, 6, 7; N.C. Gen. Stat. Ann. § 143C-1-2.

40. Constitutional Law ⇨2580

Trial court's order directing state officials to transfer available funds to implement portions of comprehensive remedial plan that was developed pursuant to a consent order to achieve State's obligation under State Constitution to provide all children in state an opportunity to obtain a sound basic education in a public school did not involve non-justiciable political questions, where the court assessed the State's compliance with the State's own determination of constitutional educational adequacy, not the court's. N.C. Const. art. 1, §§ 6, 15; N.C. Const. art. 9, §§ 2, 6, 7.

41. Constitutional Law ⇨961
Education ⇨219

Trial court's order directing state officials to transfer available funds to implement portions of comprehensive remedial plan that was developed pursuant to a consent order to achieve State's obligation under State Constitution to provide all children in state an opportunity to obtain a sound basic education in a public school was not an impermissible constitutional determination in a friendly suit prior to intervention of legislative defendants, where case was hotly contested for decades, and State repeatedly asserted either that it had achieved constitutional compliance or that trial court no longer had jurisdiction over case, even if State made efforts to achieve constitutional compliance over 17 years after Supreme Court's decision finding a constitutional violation. N.C. Const. art. 1, §§ 6, 15; N.C. Const. art. 9, §§ 2, 6, 7.

42. Constitutional Law ⚭2508, 2546

When the executive and legislative branches fail to fulfill their constitutional duties to guard and maintain children's state constitutional right to the opportunity to a sound basic education, 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. N.C. Const. art. 1, § 15; N.C. Const. art. 9, §§ 2, 6, 7.

Appeal pursuant to N.C.G.S. § 7A-31(b) from the 10 November 2021 order by Judge W. David Lee in Superior Court, Wake County, and from the 26 April 2022 order of Judge Michael L. Robinson in Superior Court, Wake County. On 21 March 2022, pursuant to N.C.G.S. § 7A-31(a) and Rule 15(e) of the North Carolina Rules of Appellate Procedure, the Supreme Court allowed the State's petition for discretionary review prior to determination by the Court of Appeals. Heard in the Supreme Court on 31 August 2022.

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Jane R. Wettach and John Charles Boger, for Professors and Long-Time Practitioners of Constitutional and Educational Law, amici curiae.

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HUDSON, Justice.

¶ 1 A quarter-century ago, this Court recognized that the North Carolina Constitution vests in all children of this state the right to the opportunity to receive a sound basic education and that it is the constitutional duty of the State to uphold that right. *Leandro v. State*, 346 N.C. 336, 345, 488 S.E.2d 249 (1997) (*Leandro I*). In 2004, we affirmed the trial court's determination "that the State had failed in its constitutional duty to provide certain students with the opportunity to attain a sound basic education," and that "the State must act to correct those deficiencies." *Hoke County Bd. of Educ. v. State*, 358 N.C. 605, 607, 647–48, 599 S.E.2d 365 (2004) (*Leandro II*). At that still-early stage of the litigation, this Court deferred to the legislative and executive branches to craft and implement a remedy to this failure. *Id.* at 643, 599 S.E.2d 365. However, we also expressly noted 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.

Id. at 642, 599 S.E.2d 365.

¶ 2 In the eighteen years since, despite some steps forward and back, the foundational basis for the ruling of *Leandro II* has remained unchanged: today, as in 2004, far too many North Carolina schoolchildren, especially those historically marginalized,[1] are not afforded their constitutional right to the opportunity to a sound basic education. As foreshadowed in *Leandro II*, the State has proven—for an entire generation—either unable or unwilling to fulfill its constitutional duty.

¶ 3 Now, this Court must determine whether that duty is a binding obligation or an unenforceable suggestion. We hold the former: the State may not indefinitely violate the constitutional rights of North Carolina schoolchildren without consequence. Our Constitution is the supreme law of the land; it is not optional. In exercising its powers under the Appropriations Clause, the General Assembly must also comply with its duties under the Education Provisions.

¶ 4 Accordingly, in response to decades of inaction by other branches of state government, the judiciary must act. This Court has long recognized that our Constitution empowers the judicial branch with inherent authority to address constitutional violations through equitable remedies. *See, e.g.*, *Wilson v. Jenkins*, 72 N.C. 5, 6 (1875); *In re Alamance Cnty. Court Facilities*, 329 N.C. 84, 94, 405 S.E.2d 125 (1991) (*Alamance*). Today, to remedy that inaction, we exercise that power. For twenty-five years, the judiciary has deferred to the executive and legislative branches to implement a comprehensive solution to this ongoing constitutional violation. Today, that deference expires. If this Court is to fulfill its own constitutional obligations, it can no longer patiently wait for the day, year, or decade when the State gets around to acting on its constitutional duty "to guard and maintain" the constitutional rights of North Carolina schoolchildren. Further deference on our part would constitute complicity in the violation, which this Court cannot accept. Indeed, ultimately "[i]t is the state judiciary that has the responsibility to protect the state constitutional rights of the citizens." *Corum v. Univ. of N.C.*, 330 N.C. 761, 783, 413 S.E.2d 276 (1992).

¶ 5 After decades of largely choosing to watch this litigation from the sidelines, Legislative Defendants now intervene to allege a variety of procedural and substantive infirmities. They argue that despite twenty-eight years of focusing on statewide problems and statewide solutions, this case really involves only Hoke County. They argue that the passage of the 2021 Budget Act fulfills their constitutional duties under *Leandro*. They argue that because this case implicates education policies, it raises non-justiciable political questions. They argue that prior to their intervention, this case constituted a friendly suit with no actual controversy before the court.

¶ 6 These claims unequivocally fail. They are untimely, distortive, and meritless. At best, they reveal a fundamental misunderstanding of the history and present reality of this litigation. At worst, they suggest a desire for further obfuscation and recalcitrance in lieu of remedying this decades-old constitutional violation. In any event, they do not prevent this Court from exercising its inherent authority to realize the constitutional right of North Carolina children to the opportunity to a sound basic education.

¶ 7 Accordingly, we affirm and reinstate the trial court's 10 November 2021 Order's directive instructing certain State officials to transfer the funds necessary to comply with Years 2 and 3 of the State's Comprehensive Remedial Plan. We vacate in part and reverse in part the trial court's April 2022 Order removing that transfer directive. We

1. For instance, students from economically disadvantaged families and communities, students with learning differences, English-language learners, and students of color. *See, e.g., Leandro II,* 358 N.C. at 632, n.13, 636, n. 16, 599 S.E.2d 365 (defining "at-risk").

remand the case to the trial court for the narrow purpose of recalculating the amount of funds to be transferred in light of the State's 2022 Budget. Once those calculations have been made, we instruct the trial court to order those State officials to transfer those funds to the specified State agencies. To enable the trial court to do so, we stay the 30 November 2021 Writ of Prohibition issued by the Court of Appeals.[2] Finally, we instruct the trial court to retain jurisdiction over the parties to monitor State compliance with this order. In so doing, we uphold our own obligation to safeguard the constitutional rights of North Carolina's schoolchildren while still allowing for our coequal branches to correct course in the years to come.

I. Factual and Procedural History

¶ 8 The long history of this litigation is well documented. Nevertheless, the extraordinary nature of the remedy we order today—and Legislative Defendants' attempt to rewrite and relitigate the case's history—demands a summary of the equally extraordinary path that now renders that remedy necessary.

A. *Leandro I*: Establishing the Right

¶ 9 In May 1994, students and families from five rural North Carolina school districts united to sue the State and the State Board of Education for failing to provide adequate educational opportunities. These students and families—including Robert Leandro and his mother Kathleen, after whom the case would be named—represented students and schools at all levels of K–12 education, from Rollins Elementary School in Henderson to Carroll Middle School in Lumberton to Hoke County High School in Raeford. The Boards of Education of the five rural counties—Hoke, Halifax, Robeson, Cumberland, and Vance—likewise joined the students and families as plaintiffs in the suit (collectively referred to as Plaintiffs).

¶ 10 Specifically, Plaintiffs brought a declaratory judgment action "based on state constitutional and statutory provisions that entitle all North Carolina children to receive adequate and equitable educational opportunities, no matter where in the State they may live." Plaintiffs' complaint alleged that "[s]uch opportunities have been denied to children in some of the poorest school districts in the State[ ] as a result of an irrational, unfair, and unconstitutional funding system."

¶ 11 To support this claim, Plaintiffs identified specific examples of inadequate educational opportunities resulting from inadequate funding. For instance, Plaintiffs noted facilities issues such as a "lack [of] adequate classroom space," instructional issues such as a lack of basic science equipment and up-to-date textbooks, and personnel issues such as a lack of well qualified teachers. "The end result of the[se] inferior education opportunities caused by this unconstitutional system[,]" Plaintiffs alleged, "is poorly educated students."

¶ 12 That end result showed in student achievement. Plaintiffs noted that under numerous tests, "the majority of children in plaintiff districts have been unable to satisfy the State's standards for basic proficiency." Likewise, Plaintiffs showed that the performance of students in plaintiff districts on the Scholastic Aptitude Test (SAT) for college admission lagged well below the statewide average, and that students from plaintiff districts who *do* graduate and enter or attempt to enter college faced significant challenges due to their lack of foundational educational opportunities.

¶ 13 Plaintiffs further noted that the funding differences between wealthy and poor districts at the heart of these disparities "are not accounted for by the amount of tax effort exerted by districts." Indeed, "[t]he average tax effort of plaintiff districts—that is, the amount of local dollars spent on education for every dollar of property tax valuation—is substantially *higher* than the average tax effort in the wealthiest North Carolina school districts." (emphasis added). Rather, Plaintiffs alleged, the significant gap in education funding and subsequent gap in educational opportunities falls on the shoulders of the State.

2. On its own motion, today the Court is issuing a Special Order to stay this Writ.

¶ 14 Cumulatively, Plaintiffs alleged that the consequences of these inadequate educational opportunities could not be more dire:

> Plaintiff students and other students from plaintiff districts face a lifetime of relative disadvantage as a result of their inadequate educational opportunities. They have diminished prospects for higher education, for obtaining satisfying employment, and for providing well for themselves and their families. They face increased risks of unemployment, welfare dependency, drug and alcohol addiction, violence, and imprisonment. Thus the inferior educational opportunities in plaintiff districts perpetuate a vicious cycle of poverty and despair that will, unless corrected, continue from one generation to the next. This cycle entails enormous losses, both in dollars and in human potential, to the State and its citizens.

¶ 15 Based on this factual foundation, Plaintiffs alleged that the failure of the State and State Board of Education "to provide plaintiff schoolchildren with adequate educational opportunities violates Articles I and IX of the [North Carolina] Constitution."[3] Accordingly, Plaintiffs' complaint asked the court to:

> [Declare] that education is a fundamental right, and that the public education system of North Carolina, including its system of funding, violates the Constitution of North Carolina by failing to provide adequate educational opportunities . . .;
>
> [Declare] that the education system of North Carolina must be reformed so as to assure that all North Carolina schoolchildren, no matter where they may live in the State, receive adequate educational opportunities, . . .;
>
> [Declare] that, to assure adequate educational opportunities, the State must provide for the necessary resources, including well qualified teachers and other school personnel in fully sufficient numbers, adequate school buildings, equipment, technology, and instructional materials; . . . .
>
> [Declare] that the public education system of North Carolina, including its system of funding, must recognize and provide for the needs of at[-]risk schoolchildren and others who are educationally disadvantaged;
>
> Order defendants to take all steps necessary to provide plaintiff school boards with the funds necessary to provide their students with an adequate education;
>
> [R]etain jurisdiction over this case to ensure full compliance with the [c]ourt's decree; [and]
>
> [Order] such other equitable relief including relief by way of injunction or mandamus as the [c]ourt deems proper.

¶ 16 In October 1994, students and families from five urban school districts, along with the districts themselves, joined Plaintiffs' suit as "Plaintiff Intervenors." Plaintiff Intervenors—representing schools in Buncombe, Charlotte-Mecklenburg, Durham, Wake, and Forsyth Counties—alleged that the State's educational funding system also failed to account for "the burdens faced by urban school districts that must educate large numbers of students with extraordinary educational needs." Accordingly, Plaintiff Intervenors raised the same constitutional claims and requests as Plaintiffs, asserting that "[a]s a result of defendants' violations of their constitutional duty, [Plaintiff Intervenors] have been denied access to an adequate public school education" under the North Carolina Constitution.

¶ 17 In response, the State and the State Board of Education (collectively, the State or State Defendants) moved to dismiss Plaintiffs' complaint. State Defendants claimed that the trial court lacked jurisdiction over the complaint because the issues raised were non-justiciable, State Defendants were shielded by sovereign immunity, and Plaintiffs failed to state a claim upon which relief could be granted. Defendants contended that the North Carolina constitution does not "create[ ] a right to an adequate education in the public schools, greater than the right to attend a free public school for nine months a

3. Plaintiffs likewise asserted claims based on equal protection, equal educational opportunities, due process, and statutory rights.

year in which equal opportunities are afforded as provided by Article IX of the Constitution," and therefore that "neither the State nor the State Board of Education has deprived any plaintiff of any right under the North Carolina Constitution."

¶ 18 After a hearing, the trial court denied State Defendants' motion to dismiss. State Defendants appealed this ruling to the North Carolina Court of Appeals.

¶ 19 In March 1996, the Court of Appeals reversed the trial court's denial of State Defendants' motion to dismiss. *Leandro v. State*, 122 N.C. App. 1, 468 S.E.2d 543 (1996). The Court of Appeals held that "the fundamental educational right under the North Carolina Constitution is limited to one of equal *access* to education, and it does not embrace a qualitative standard." *Id.* at 11, 468 S.E.2d 543 (emphasis added). "Thus," the court stated, "[Plaintiffs'] claims that the Constitution provides a fundamental right to *adequate* educational opportunities, and that the State has violated that alleged right, should have been dismissed for failure to state a claim upon which relief can be granted." *Id.* Plaintiffs subsequently appealed this ruling to this Court.

¶ 20 In July 1997, this Court unanimously reversed.[4] *Leandro I*, 346 N.C. at 358, 488 S.E.2d 249. As an initial matter, the Court addressed the State's argument that courts could not hear cases on claims of educational adequacy because they raised "nonjusticiable political questions." *Id.* at 344–45, 488 S.E.2d 249. The Court squarely rejected this notion. *Id.* Rather, "[w]hen a government action is challenged as unconstitutional, the courts have a duty to determine whether that action exceeds constitutional limits." *Id.* at 345, 488 S.E.2d 249. "Therefore," the Court held, "it is the duty of this Court to address plaintiff-parties' constitutional challenge to the state's public education system." *Id.*

¶ 21 Next, the *Leandro I* Court addressed the primary question of that case: whether the North Carolina Constitution establishes the right to *qualitatively adequate* educational opportunities, rather than mere educational *access*. *Id.* Here, the Court unanimously agreed with Plaintiffs' claim: the educational rights enshrined in our Constitution do not merely protect a student's ability to *access* an education; rather, "there is a qualitative standard inherent in the right to education guaranteed by this state's constitution." *Id.* at 346, 488 S.E.2d 249. More specifically, this Court

> conclude[d] that the right to education provided in the state constitution is a right to a sound basic education. An education that does not serve the purpose of preparing students to participate and compete in the society in which they live and work is devoid of substance and is constitutionally inadequate.

Id. at 345, 488 S.E.2d 249. Accordingly, the Court held that "[t]he trial court properly denied defendants' motion to dismiss this claim for relief[, and] [t]he Court of Appeals erred in concluding otherwise." *Id.* at 348, 488 S.E.2d 249.

¶ 22 After recognizing the right to a sound basic education, this Court then set out to broadly define its contours. "For purposes of our Constitution," the Court held,

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

4. Justice Orr dissented from the Court's rejection of Plaintiff's argument regarding *equal* educational opportunities but concurred in the Court's recognition of Plaintiff's claim regarding educational adequacy. *Id.* at 358–64, 488 S.E.2d 249 (Orr, J., dissenting in part and concurring in part).

> cation or gainful employment in contemporary society.

Id. at 347, 488 S.E.2d 249.

¶ 23 The *Leandro I* Court then noted certain factors that the trial court could consider on remand in assessing whether Plaintiff-parties were being afforded their constitutional right to a sound basic education. *Id.* at 355, 488 S.E.2d 249. These factors included, but were expressly not limited to, "[e]ducational goals and standards adopted by the legislature," " 'input' [measurements] such as per-pupil funding or general educational funding provided by the state," and " 'output' measurements" such as "the level of performance of the children of the state and its various districts on standard achievement tests." *Id.* at 355, 357, 488 S.E.2d 249.

¶ 24 Finally, the *Leandro I* Court noted the powers and duties of each branch of our government in protecting the constitutional right to a sound basic education. Because "the administration of the public schools of the state is best left to the legislative and executive branches," the Court clarified that "the courts of this state must grant every reasonable deference to [those] branches when considering whether they have established and are administering a system that provides the children of the various school districts of the state a sound basic education." *Id.* at 357, 488 S.E.2d 249. "[A] clear showing to the contrary must be made before the courts may conclude that they have not." *Id.* "Only such a clear showing," the Court counseled, "will justify a judicial intrusion into an area so clearly the province, *initially at least*, of the legislative and executive branches as the determination of what course of action will lead to a sound basic education." *Id.* (emphasis added).

¶ 25 After noting the importance of this initial deference, though, this Court made clear its own constitutional obligation:

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

Id. (emphasis added).

¶ 26 With these principles as a guide, this Court then remanded the case back to the trial court to determine whether the State was upholding its constitutional duty to provide all children with a sound basic education. *Id.* at 358, 488 S.E.2d 249.

B. *Leandro II*: Establishing a Violation

¶ 27 Upon remand, then-Chief Justice Mitchell designated the case as exceptional under Rule 2.1 of our General Rules of Practice and assigned it to Judge Howard Manning.[5] Thereafter, Judge Manning presided over several years of fact finding, research, and hearings culminating in a fourteen-month trial in which the court took evidence from over forty witnesses and thousands of pages of exhibits to answer one foundational question: whether the State was complying with or violating *Leandro I*'s constitutional mandate to provide all children with the opportunity to receive a sound basic education. At the conclusion of this process, the trial court issued its factual findings and legal conclusions via four "Memoranda of Decision" published between October 2000 and April 2002.

¶ 28 In its first Memorandum of Decision, issued 12 October 2000, the trial court considered the constitutionality of the major components of North Carolina's Statewide Education Delivery system. As a preliminary matter, the trial court explained that "[b]ecause of the sheer size and complexity of

5. We take a moment of privilege to express the Court's gratitude to Judge Manning for his many years of diligent service to the State presiding over this case.

dealing with evidence relating to five (5) low wealth districts," the court "made the initial decision to take evidence on one system" that would serve as a representative district. "The [c]ourt suggested that the low wealth district be Hoke County and the parties agreed with that decision[.]" Upon selecting this representative district, the court noted that "[i]t is clear that the same issues affecting each small district are similar[.]" Thereafter, the trial court focused its inquiry primarily—though not exclusively—on this representative county, and "plaintiff-intervenors were permitted to participate fully in discovery and in the trial of the case centered on Hoke County." Likewise, the State repeatedly made clear that despite the parties' selection of Hoke County as a representative district, its various remedial "efforts have been directed to establishing and maintaining a *State-wide* system which provides adequate educational opportunities to *all* students," and that "[t]he State has never understood the Supreme Court or [the trial] [c]ourt to have ordered the defendants to provide students in Hoke County or any of the other plaintiff or plaintiff-intervenor school districts special treatment, services or resources which were not available to at-risk students in other LEAs across the State." (emphasis added).

¶ 29 After noting this procedure, the trial court's first Memorandum of Decision noted its preliminary conclusions of law. Most pertinently, the court determined that as a whole, North Carolina's Statewide Educational Delivery System—including its curriculum, teacher licensing and certification standards, funding delivery system, and school accountability program—was "sound, valid, and constitutional when measured against the sound basic education standard of *Leandro*." "However," the court noted, "the existence of a constitutionally sound and valid [educational delivery system], standing alone, does not constitute clear evidence that [that system] is being properly implemented . . . in such a manner as to provide each child with an equal opportunity to receive a sound basic education." The court made clear that these legal conclusions applied "to all school systems in North Carolina, including Hoke County."

¶ 30 In its second Memorandum of Decision, issued 26 October 2000, the trial court considered the implementation of the various facets of the statewide educational delivery system with respect to at-risk students. The court determined that in order "for at-risk children to have an equal opportunity for a sound basic education, the State should provide quality pre-kindergarten programs for at-risk children." Again, the court emphasized that its findings and conclusions were directed at both Hoke County and "other counties in North Carolina."

¶ 31 In its third Memorandum of Decision, issued 26 March 2001, the trial court compared student achievement data from at-risk students in various counties across the state. The court considered several different measures of student achievement, including standardized test scores, high school retention rates, and vocational and college preparedness. "This comparison showed that there were at-risk students failing to achieve a sound basic education statewide, as well as in Hoke County, and that the low performance of at-risk students was similar regardless of the wealth and resources of the school system attended." "Taking all of the evidence into account, the [c]ourt determined that the at-risk children in North Carolina are not obtaining a sound basic education[.]" Again, the court emphasized that "[t]his problem is not limited to Hoke County." Indeed, the court expressly stated that the evidence

> show[ed] that HCSS is not alone or isolated in terms of the poor academic performance of great numbers of its at-risk students. Poor academic performance of at-risk populations of North Carolina public school students permeates throughout the State regardless of the "wealth" or local funding provided. Based on the data available and the enormity of the at-risk problems throughout the State, the [c]ourt cannot close its eyes to this fact and look only at HCSS. The poor academic performance of at-risk populations is too widespread to by-pass and put off for another day.

"Reduced to essentials," the court concluded, "the plaintiffs and plaintiff-intervenors have produced clear and convincing evidence that

there are at-risk children in Hoke County and throughout North Carolina who are, by virtue of the ABCs accountability system and other measures, not obtaining a sound basic education."

¶ 32 In its fourth and final Memorandum of Decision, issued 4 April 2002, the trial court issued its final judgments and orders. First, the trial court enumerated certain minimum requirements for statewide *Leandro* compliance including: (1) "that every classroom be staffed with a competent, certified, well-trained teacher who is teaching the standard course of study by implementing effective educational methods that provide differentiated, individualized instruction, assessment and remediation to the students in that classroom;" (2) "that every school be led by a well-trained, competent Principal with the leadership skills and the ability to retain competent, certified, and well-trained teachers;" and (3) "that every school be provided, in the most cost-effective manner, the resources necessary to support the effective instructional programs within that school so that the educational needs of all children, including at-risk children, to obtain a sound basic education, can be met." Second, the trial court concluded that "there are children at-risk of educational failure who are not being provided the equal opportunity to obtain a sound basic education because their particular LEA, such as the Hoke County Public Schools, is not providing them with one or more of the educational services set out . . . above." Third, the trial court emphasized that "the State of North Carolina is ultimately responsible for providing each child with access to a sound basic education and that this ultimate responsibility cannot be abdicated by transferring responsibility to local boards of education." Fourth, the trial court declared that "the State of North Carolina is ORDERED to remedy the [c]onstitutional deficiency for those children who are not being provided the basic educational services set out [above], whether they are in Hoke County[ ] or another county within the State." Fifth, the court stated that "[t]he nuts and bolts of how this task should be accomplished is not for the [c]ourt to do," but rather "belongs to the executive and legislative branches of government." "By directing this to be done," the court noted, "the [c]ourt is showing proper deference to the executive and legislative branches by allowing them, initially at least, to use their informed judgment as to how best to remedy the identified constitutional deficiencies." Finally, the court clarified that its prior three Memoranda of Decision were incorporated into its final judgment and "constitute the Decision and Judgment of th[e] [c]ourt," ordered the State to keep the plaintiff-parties and the court advised of its remedial actions, and retained jurisdiction over the case to resolve issues of enforcement.

¶ 33 On 6 May 2002, the State appealed. Thereafter, both the plaintiff-parties and the State sought discretionary review by this Court prior to a determination by the Court of Appeals. On 18 March 2003, this Court allowed the parties' motions for discretionary review. The appeal was heard in this Court on 10 September 2003.

¶ 34 On 30 July 2004, in *Leandro II*, this Court unanimously affirmed the trial court's central conclusion: "the State had failed in its constitutional duty to provide certain students with the opportunity to attain a sound basic education, as defined by this Court's holding in [*Leandro I*]." 358 N.C. at 608, 599 S.E.2d 365.

¶ 35 As an initial matter, the Court in *Leandro II* noted the unique procedural history of this case. Because the trial court designated Hoke County "as the representative plaintiff district," this Court noted that "our consideration of the case is properly limited to the issues relating solely to Hoke County as raised at trial." *Id.* at 613, 599 S.E.2d 365. The Court recognized, however, that "plaintiffs from the four other rural districts . . . were not eliminated as parties as a result of the trial court's decision to confine evidence to its effect on Hoke County Schools." *Id.* at 613 n.5, 599 S.E.2d 365. Accordingly, "[w]ith regard to the claims of named plaintiffs from the other four rural districts, [this Court] remanded [the case] to the trial court for further proceedings that include, but are not necessarily limited to, presentation of relevant evidence by the parties, and findings and conclusions of law by

the trial court." *Id.* More generally, though, the Court emphasized that

> the unique procedural posture and substantive importance of the instant case compel us to adopt and apply the broadened parameters of a declaratory judgment action that is premised on issues of great public interest. The children of North Carolina are our state's most valuable renewable resource. If inordinate numbers of them are wrongfully being denied their constitutional right to the opportunity for a sound basic education, our state courts cannot risk further and continued damage because the perfect civil action has proved elusive.

Id. at 616, 599 S.E.2d 365. Likewise, the Court noted that while declaratory judgment actions

> require that there be a genuine controversy to be decided, they do not require that the participating parties be strictly designated as having adverse interests in relation to each other. In fact, declaratory judgment actions, by definition, are premised on providing parties with a means for courts of record to declare such rights, status, and other legal relations among such parties.

Id. at 617, 599 S.E.2d 365 (cleaned up). This procedural flexibility is necessary, the Court concluded, because

> *Leandro* and our state Constitution ... accord[ ] the right at issue to all children of North Carolina, regardless of their respective ages or needs. Whether it be the infant Zoe, the toddler Riley, the preschooler Nathaniel, the "at-risk" middle-schooler Jerome, or the not "at-risk" seventh-grader Louise, the constitutional right articulated in *Leandro* is vested in them all.

Id. at 620, 599 S.E.2d 365.

¶ 36 With these procedural issues addressed, the *Leandro II* Court then assessed the merits of the trial court's ruling. First, the Court considered "whether there was a clear showing of evidence supporting the trial court's conclusion that 'the constitutional mandate of *Leandro* has been violated [in the Hoke County School System] and action must be taken by both the LEA [Local Educational Area] and the State to remedy the violation.' " *Id.* at 623, 599 S.E.2d 365 (alterations in original). After reviewing the evidence documented by the trial court regarding educational "inputs," academic "outputs," post-secondary and vocational opportunities, and the State's educational delivery system and funding mechanisms, the Court agreed with the trial court's foundational determination: "the State's method of funding and providing for individual school districts such as Hoke County was such that it did not comply with *Leandro*'s mandate of ensuring that all children of the state be provided with the opportunity for a sound basic education." *Id.* at 637, 599 S.E.2d 365. The Court concluded that "the trial court's approach to the issue was sound and its order reflects both findings of fact that were supported by the evidence and conclusions that were supported by ample and adequate findings of fact." *Id.* at 638, 599 S.E.2d 365. Therefore, the Court "affirmed those portions of the trial court's order that conclude that there has been a clear showing of a denial of the established right of Hoke County students to gain their opportunity for a sound basic education and those portions of the order that require the State to assess its education-related allocations to the county's schools so as to correct any deficiencies that presently prevent the county from offering its students the opportunity to obtain a *Leandro*-conforming education." *Id.*

¶ 37 Second, the *Leandro II* Court addressed the trial court's Pre-K ruling. On the questions of rights and violations, the Court agreed with the trial court: the evidence presented at trial clearly supported the conclusion "that there was an inordinate number of 'at-risk' children who were entering the Hoke County school district ... behind their non 'at-risk' counterparts[,]" that such "at-risk children were likely to stay behind, or fall further behind, their non 'at-risk' counterparts as they continued their education[,]" "that the State was providing inadequate resources for such 'at-risk' prospective enrollees, and that the State's failings were contributing to the 'at-risk' prospective enrollees' subsequent failure to avail themselves of the opportunity to obtain a

sound basic education." *Id.* at 641, 599 S.E.2d 365. Accordingly, the Court agreed with the trial court's conclusion "that State efforts towards providing remedial aid to 'at-risk' prospective enrollees were inadequate." *Id.* at 642, 599 S.E.2d 365.

¶ 38 On the question of remedy, though, this Court disagreed. "[T]here is a marked difference," the Court noted, "between the State's recognizing a need to assist 'at-risk' students prior to enrollment in the public schools and a court order compelling the legislative and executive branches to address that need in a singular fashion." *Id.*

> In our view, while the trial court's findings and conclusions concerning the problem of 'at-risk' prospective enrollees are well supported by the evidence, a similar foundational support cannot be ascertained for the trial court's order requiring the State to provide pre-kindergarten classes for either all of the State's 'at-risk' prospective enrollees or all of Hoke County's 'at-risk' prospective enrollees.

Id. While the Court

> assuredly recognize[d] the gravity of the situation for "at-risk" prospective enrollees in Hoke County and elsewhere, and acknowledge[d] the imperative need for a solution that will prevent existing circumstances from remaining static or spiraling further, we [were] equally convinced that the evidence indicates that the State shares our concerns and, more importantly, that the State has already begun to assume its responsibilities for implementing corrective measures.

Id. at 643. Accordingly, the Court held that the trial court's Pre-K remedy was "premature" and "reverse[d] those portions of the trial court order that . . . require[d] the State to provide pre-kindergarten services as the remedy for [the aforementioned] constitutional violations." *Id.* at 645, 599 S.E.2d 365.

¶ 39 Simultaneously, though, the *Leandro II* Court emphasized that if push came to shove, it would not shy away from its duty to address constitutional violations.

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

Id. at 642, 599 S.E.2d 365.

¶ 40 Finally, the *Leandro II* Court addressed the question of federal funds. Plaintiffs contended that the trial court had erred by considering educational services provided by federal funds within its statewide assessment for *Leandro* compliance. *Id.* at 645–46, 599 S.E.2d 365. The Court disagreed and concluded that the trial court's consideration of federal funds was permissible because "the relevant provisions of the North Carolina Constitution do not forbid the State from including federal funds in its formula for providing the state's children with the opportunity to obtain a sound basic education." *Id.* at 646, 599 S.E.2d 365. "While the State has a duty to provide the means for such educational opportunity," the Court clarified, "no statutory or constitutional provisions require that it is concomitantly obliged to be the exclusive source of the opportunity's funding." *Id.*

¶ 41 The *Leandro II* Court concluded by emphasizing the "paramount" importance of education toward "[a]ssuring that our children are afforded the chance to become contributing, constructive members of society." *Id.* at 649, 599 S.E.2d 365. "Whether the State meets this challenge[,]" the Court noted, "remains to be determined." *Id.* Accordingly, the Court remanded "to the lower court[,] and ultimately into the hands of the legislative and executive branches, one more installment in the 200-plus year effort to provide an education to the children of North Carolina." *Id.* "As for the pending cases involving either other rural school districts or urban school districts," the Court "order[ed] that they should proceed, as necessary, in a fashion that is consistent with the tenets outlined in this opinion." *Id.* at 648, 599 S.E.2d 365.

C. Remedial Phase: 2004–2018

¶ 42 Following *Leandro II*, the trial court diligently undertook its responsibilities on re-

mand and initiated the remedial phase of the *Leandro* litigation. For over a decade, through more than a dozen hearings, the trial court took evidence and heard arguments from the parties regarding the State's various efforts to achieve constitutional compliance. In alignment with its 2002 Judgment and *Leandro II*, the trial court took evidence and rendered factual finding and legal conclusions regarding the constitutional adequacy of educational opportunities not just in Hoke County, but statewide. For instance, at different points during this period, the trial court reviewed evidence regarding the State's Disadvantaged Student Supplemental Funding (DSSF) program, county-specific student achievement data from Hoke and other counties, statewide grade-specific achievement data, and statewide subject-specific achievement data, among many other categories. The trial court primarily issued its factual findings and legal conclusions based on this evidence in periodic "Notice of Hearing and Order[s]" or "Report[s] from the Court," in which the trial court memorialized past proceedings, made factual findings and legal conclusions, and requested particular information from the parties in upcoming hearings.

¶ 43 Reviewing a few of these orders is illustrative. First, on 9 September 2004, the trial court's order focused in part on the State's response to statewide teacher recruitment and retention issues through the DSSF program. After reviewing the submissions of the parties, the trial court concluded that "[t]here is no dispute that there exists a serious problem in hiring, training[,] and retaining certified teachers in North Carolina, especially in the low wealth plaintiff LEAs and other low wealth LEAs." The court observed that the Department of Public Instruction and the State Board of Education

> acknowledged the constitutional deficiency and the lack of compliance under *Leandro* in the classroom teacher area and sought $22,000,000 from the General Assembly to fund the DSSF pilot program for sixteen (16) LEAs in which there was demonstrated need to remedy the constitutional deficiency of the presence of a competent, certified[,] and well trained teacher in individual classrooms.

"Despite knowing of this deficiency and being repeatedly advised of [the] demonstrated need for assistance in these low-wealth school districts and despite being advised of the constitutional requirements in *Leandro*," the court noted, "the General Assembly of North Carolina passed its budget and adjourned without funding the DSSF program for any LEA, including HCSS." As such, the trial court "direct[ed] counsel for the State . . . to be prepared [at the next hearing] to report to the [c]ourt on behalf of the legislative branch of government (the General Assembly) what action the General Assembly has taken[ ] to address its failure to fund the pilot $22,000,000 DSSF program."

¶ 44 Second, on 15 March 2009, the trial court's order focused primarily on Halifax County Public Schools. After an extensive review of student achievement data broken down by individual schools and grade-levels throughout the district, the trial court concluded that

> [t]he majority of these children in the Halifax County Public Schools from elementary school through high school are not receiving the equal opportunity to obtain a sound basic education and the State of North Carolina must take action to remedy this deprivation of constitutional rights since the State of North Carolina is responsible to see that these schools become *Leandro* compliant in the classroom and in the principal's office and in the general administration and leadership of the system.

"Accordingly," the trial court concluded, "it is time for the State to exert itself and exercise command and control over the Halifax County Public Schools beginning in the school year 2009–2010, nothing more and nothing less." More broadly, based on the extensive evidence presented, the trial court reiterated its conclusion regarding a statewide *Leandro* violation:

> poor academic performance remains a problem in a host of elementary, middle[,] and high schools throughout North Carolina and as a result, the children of those schools who are blessed with the right to the equal opportunity to obtain a sound

> basic education as guaranteed by the Constitution and as set out in *Leandro* are being deprived of their constitutional right to that opportunity on a daily basis.

Indeed, this legal conclusion was repeated verbatim in the trial court's subsequent orders on 3 August 2009, 26 March 2010, and 20 May 2011, among many others.[6]

¶ 45 Third, on 5 May 2014, the trial court's order focused on "the reading problem."[7] The trial court summarized its factual findings regarding various reading programs and assessments from Halifax County, Forsyth County, Durham County, Guilford County, Johnston County, Union County, and Charlotte-Mecklenburg County, among several others. Based on these statewide factual findings, the trial court concluded "that there are way too many thousands of school children from kindergarten through ... high school who have not obtained the sound basic education mandated and defined above and reaffirmed by the North Carolina Supreme Court in November 2013."

¶ 46 Fourth, on 17 March 2015, the trial court's order addressed the State's recent "redefin[ing] and relabeling [of] the standards for academic achievement." The court expressed its concern that

> [n]o matter how many times the [c]ourt has issued Notices of Hearings and Orders regarding unacceptable academic performance, and even after the North Carolina Supreme Court plainly stated that the mandates of *Leandro* remain "in full force and effect[,]" many adults involved in education ... still seem unable to understand that **the constitutional right to have an equal opportunity to obtain a sound basic education is a right vested in <u>each and every child</u> in North Carolina regardless of their respective age or educational needs**.

Based on these findings, trial court again concluded "that the valid assessments of student achievement in North Carolina show that many thousands of children in K–12 ... are not obtaining a sound basic education. This is an ongoing problem that needs to be dealt with and corrected." Accordingly, the trial court ordered the State to "propose a definite plan of action as to how the State of North Carolina intends to correct the educational deficiencies in the student population."

¶ 47 These orders illustrate several key themes within the record. First, the trial court made extensive factual findings over the course of about twelve years regarding many educational "inputs" and "outputs" including school funding, teacher retention, instructional methods, and academic performance. In reviewing this data, the trial court's findings of fact consider the efficacy of the State's various piecemeal proposals to achieve *Leandro* compliance, such as the DSSF and the redefining of academic standards. Second, these factual findings did not

6. On 15 August 2011, Legislative Defendants filed a Motion to Intervene and For Clarification from the trial court order issued 18 July 2011 regarding "Pre-K services for at-risk four year[-]olds." On 2 September 2011, the trial court denied Legislative Defendants' motion, reasoning that the defendant in this case was the State as a whole, "not the legislative branch—nor the executive branch" individually. In 2013, the General Assembly enacted N.C.G.S. § 1-72.2, which established that legislative leaders "have standing to intervene on behalf of the General Assembly as a party in any judicial proceeding challenging a North Carolina statute or provision of the North Carolina Constitution." N.C.G.S. § 1-72.2(b). In 2017, N.C.G.S. § 1-72.2 was amended by adding: "[i]ntervention pursuant to this section shall be effected upon the filing of a notice of intervention of right in the trial or appellate court in which the matter is pending regardless of the stage of the proceeding." Here, the record reflects no attempt by Legislative Defendants to intervene in this litigation between the 2011 motion and their 2021 intervention.

7. On 8 November 2013, this Court considered a third appeal within this litigation. *Hoke Cnty. Bd. of Educ. v. State*, 367 N.C. 156, 749 S.E.2d 451 (2013) (*Leandro III*). There, plaintiffs challenged the General Assembly's 2011 statutory changes to its "More at Four" Pre-K program. *Id.* at 156, 749 S.E.2d 451. However, before this Court could consider the case, the General Assembly substantively amended the statute with the apparent intent of ridding the law of its dubious constitutionality. *Id.* at 159, 749 S.E.2d 451. Accordingly, this Court "conclude[d] that the questions originally in controversy between the parties [were] no longer at issue and that th[e] appeal [was] moot." *Id.* Nevertheless, the Court took the opportunity to emphasize that "[o]ur mandates in [*Leandro I* and *II*] remain in full force and effect." *Id.* at 160, 749 S.E.2d 451.

focus solely on Hoke County, but expressly drew upon testimony and evidence regarding rural, urban, and suburban counties across the state. Third, based upon this clear and convincing evidence, the trial court repeatedly documented its ultimate legal conclusion that "in way too many school districts across the state, thousands of children in the public schools have failed to obtain, and are not now obtaining[,] a sound basic education as defined by and required by the *Leandro* decisions." Put differently, the trial court repeatedly concluded based on clear and convincing evidence that, despite its piecemeal compliance efforts, the State remained in an ongoing and statewide violation of its constitutional duty. Fourth, despite its growing impatience with the State's failure to remedy its statewide violation, the trial court continued—for well over a decade—to defer to the executive and legislative branches to craft a remedy. Fifth and finally, in response to the repeated failure of various piecemeal remedial attempts, the trial court ultimately ordered the State to propose and implement a comprehensive "definite plan of action" to remedy its statewide *Leandro* violation.

D. WestEd Report and the Comprehensive Remedial Plan: 2018–2021

¶ 48 On 7 October 2016, upon Judge Manning's retirement, then-Chief Justice Mark Martin reassigned this case to Judge W. David Lee.[8] On 10 July 2017, the State Board of Education filed a Motion for Relief Pursuant to Rule 60 and Rule 12 requesting that the trial court relinquish jurisdiction over the case. The SBE contended that "[b]ecause the factual and legal landscapes have significantly changed [since the beginning of the case], the original claims, as well as the resultant trial court findings and conclusions, are divorced from the current law and circumstances [and] are stale." As such, the SBE argued, "[c]ontinued status hearings on the present system ... exceed the jurisdiction established by the original pleadings in this action."

¶ 49 On 7 March 2018, the trial court denied the SBE's motion to relinquish jurisdiction. First, the court stated its factual findings, including expressly finding that "[t]he court record is replete with evidence that the *Leandro* right continues to be denied to hundreds of thousands of North Carolina schoolchildren" and that "a definite plan of action is still necessary to meet the requirements and duties of the State of North Carolina with regard to its children having equal opportunity to obtain a sound basic education." While the court noted that it "indeed indulges in the presumption of constitutionality with respect to each and every one of the legislative enactments cited by the SBE," that "is not the issue before the court." Rather, the court found, "the evidence before this court upon the SBE motion is wholly inadequate to demonstrate that these enactments translate into substantial compliance with the constitutional mandate of *Leandro* measured by applicable educational standards."

¶ 50 Based on these factual findings, the trial court concluded that "[t]he changes in the factual landscape that have occurred during the pendency of this litigation do not serve to divest the court of its jurisdiction to address the constitutional right at issue in this case." Further, the court concluded that "there is an ongoing constitutional violation of every child's right to receive the opportunity for a sound basic education[,]" and that "[t]his court not only has the *power* to hear and enter appropriate orders declaratory and remedial in nature, but also has a *duty* to address this violation." The trial court concluded that "state defendants have the burden of proving that remedial efforts have afforded substantial compliance with the constitutional directives of our Supreme Court," and that "[t]o date, neither defendant has met this burden." "Both law and equity demand the prospective application of the constitutional guarantee of *Leandro* to every child in this State."

¶ 51 In closing, the trial court emphasized its own constitutional duty and growing im-

8. We take a moment of privilege to express the Court's gratitude to Judge Lee's family (Judge Lee himself recently passed away on 4 October 2022) for his many years of diligent service to the State presiding over this case.

patience with the legislative and executive branches:

> This [c]ourt notes that both branches have had more than a decade since the Supreme Court remand in *Leandro II* to chart a course that would adequately address this continuing constitutional violation. The clear import of the *Leandro* decisions is that if the defendants are unable to do so, it will be the duty ... of the court to enter a judgment "granting declaratory relief and such other relief as needed to correct the wrong while minimizing the encroachment upon the other branches of government." (*Leandro I*).
>
> This trial court has held status conference after status conference and continues to exercise tremendous judicial restraint. This court is encouraged by Governor Cooper's creation of the Governor's Commission on Access to a Sound Basic Education.... The time is drawing nigh, however, when due deference to both the legislative and executive branches must yield to the court's duty to adequately safeguard and actively enforce the constitutional mandate on which this case is premised. It is the sincere desire of this court that the legislative and executive branches heed the call.

¶ 52 That same day, the trial court also issued a Consent Order Appointing Consultant. In January 2018, the State and plaintiffs filed a joint motion in which they proposed to nominate, for the court's consideration and appointment, an independent, non-party consultant to assess the current state of *Leandro* compliance in North Carolina and to make subsequent comprehensive recommendations for specific actions necessary to achieve sustained constitutional compliance. In its subsequent Order, the court agreed to the parties' request and stated that the appointed consultant would be charged with recommending specific actions the State should take to meet the core requirements of *Leandro*, including providing a competent and well-trained teacher in every classroom, providing a competent and well-trained principal in every school, and identifying resources necessary to ensure that all students have an equal opportunity to obtain a sound basic education. In its Consent Order, the trial court consented to the parties' joint nomination of WestEd, a nationally acclaimed nonpartisan education research and development nonprofit, to serve as the independent non-party consultant. As such, WestEd was instructed to submit its final recommendation to the parties and the court within one year, and the parties were required to submit a subsequent "proposed consent order ... of specific actions to achieve compliance with the constitutional mandates establish forth above."

¶ 53 Thus began the WestEd chapter of this litigation. For the next year, in collaboration with the Friday Institute for Educational Innovation at North Carolina State University and the Learning Policy Institute, WestEd conducted thirteen distinct studies to better identify, define, and understand key issues and challenges to North Carolina's education system and to offer a comprehensive framework of change for the State. The researchers developed and carried out an extensive research agenda to investigate the current state and major needs of North Carolina public education in four overarching areas: (1) access to effective educators, (2) access to effective school leaders, (3) adequate and equitable school funding and resources, and (4) adequate accountability and assessment systems.

¶ 54 WestEd's methodology was comprehensive. Each of its thirteen studies was designed to address specific research questions and used mixed-method designs such as data analysis, school visits, focus group interviews with key stakeholders, statewide surveys, reviews of prior studies, and cost function analysis. "Site visits, interviews, and focus groups were designed to maximize engagement with education stakeholders representing the diversity of the state in terms of geography, school level, and school type as well as the characteristics of the student and educator populations." Researchers collected new data from schools in forty-four counties, engaged with over 1,200 educators, and examined existing data from Duke University's North Carolina Education Research Data

Center and UNC's Education Policy Initiative at Carolina.

¶ 55 On 4 October 2019, WestEd submitted its final report to the trial court. In short, the WestEd Report concluded that as North Carolina educators "prepare for the 2019–20 school year, the state is *further away* from meeting its constitutional obligation to provide every child with the opportunity for a sound basic education than it was when the Supreme Court of North Carolina issued the *Leandro* decision more than 20 years ago." (emphasis added). "Although there have been many efforts on the part of the state and districts to improve students' achievement, the challenges of providing every student with a sound basic education have increased, along with the number of at-risk students." Specifically, the WestEd Report found systemic deficiencies in teacher and principal quality and supply (especially in low-wealth districts) and programmatic funding and resources (especially those necessary to support disadvantaged students), among other statewide shortcomings. While the WestEd Report noted that many promising initiatives had been put in place, they "have neither been sustained nor been brought to scale and are insufficient to adequately address the *Leandro* requirements."

¶ 56 Accordingly, the WestEd Report issued eight primary findings and recommendations. These recommendations included revising the state funding model to provide adequate and equitable resources, providing all at-risk students with the opportunity to attend high-quality early childhood programs, directing resources and opportunities to economically disadvantaged students, revising the student assessment and school accountability systems, and building an effective regional and statewide system of support for the improvement of low-performing and high-poverty schools, among others. For each of these recommendations, the WestEd Report provided a detailed "investment overview and sequenced action plan" which described the timeline, stakeholders, and resources necessary for proper implementation. Likewise, the action plan itemized the necessary statewide investments for each recommendation for each fiscal year from 2020–2021 to 2027–2028.

¶ 57 On 21 January 2020, the trial court issued its subsequent Consent Order. First, the trial court noted that "[t]he State of North Carolina, North Carolina State Board of Education, and other actors have taken significant steps over time in an effort to improve student achievement and students' opportunity to access a sound basic education." "However," the trial court continued,

> historic and current data before the [c]ourt show that considerable, systemic work is necessary to deliver fully the *Leandro* right to all children in the State. In short, North Carolina's PreK-12 public education system leaves too many students behind—especially students of color and economically disadvantaged students. As a result, thousands of students are not being prepared for full participation in the global, interconnected economy and the society in which they will live, work, and engage as citizens. The costs to those students, individually, and to the State are considerable and if left unattended will result in a North Carolina that does not meet its vast potential.

¶ 58 Next, the trial court addressed the WestEd Report. The court concluded that "[t]he WestEd Report confirms what this [c]ourt has previously made clear: that the State Defendants have not yet ensured the provision of education that meets the required constitutional standard to all school children in North Carolina." The court observed that the WestEd Report's "findings and recommendations are rooted in an unprecedented body of research and analysis, which will inform decision-making and th[e] [c]ourt's approach to this case."

¶ 59 Based on the WestEd Report, the trial court made two primary conclusions of law. First, the trial court concluded that "North Carolina has substantial assets to draw upon to develop a successful PreK-12 education system that meets the *Leandro* tenets." These assets "includ[e] a strong state economy, a deep and long-standing commitment to public education to support the social and economic welfare of its citizens, and an engaged business community

that sees the value and economic benefits of the public education system."

¶ 60 Second, the trial court concluded that "despite numerous initiatives, many children are not receiving a *Leandro*-conforming education; systemic changes and investments are required to deliver the constitutional right to all children." On this point, the court acknowledged that "the State Defendants face greater challenges than ever" in achieving *Leandro* compliance, and that "systemic, synchronous action and investments are necessary to successfully deliver the *Leandro* tenets," including in teacher quality and supply, principal quality and supply, resources and school funding, assessment and accountability systems, low-performing and high-poverty schools, early childhood learning and Pre-K, and alignment and preparation for post-secondary opportunities. Throughout its order, the trial court repeatedly emphasized that "[t]he Defendants have not yet met their constitutional duty to provide all North Carolina students with the opportunity to obtain a sound basic education."

¶ 61 Based on these legal conclusions, the trial court ordered "the State Defendants to work expeditiously and without delay to take all necessary actions to create and fully implement" a comprehensive remedial plan to address each of the seven *Leandro* compliance issues noted above. The trial court further ordered the parties

> [t]o keep the [c]ourt fully informed as to the remedial progress ... [by] submit[ting] a status report to the [c]ourt ... setting out ...:
>
> 1. Specific actions that the State Defendants must implement in 2020 to begin to address the issues identified by WestEd and described herein and the seven components set forth above;
>
> 2. A date by which the State Defendants, in consultation with each other and the Plaintiffs, will submit to the [c]ourt additional, mid-range actions that should be implemented, including specific actions that must be taken, a timeframe for implementation, and an estimate of the resources in addition to current funding, if any, necessary to complete those actions[; and]
>
> 3. A date by which the State Defendants, in consultation with each other and the Plaintiffs, will submit to the [c]ourt a comprehensive remedial plan ... to provide all public school children the opportunity for a sound basic education, including specific long-term actions that must be taken, a timeframe for implementation, an estimate of resources in addition to current funding, if any, necessary to complete those actions, and a proposal for monitoring implementation and assessing the outcomes of the plan.

The trial court likewise ordered State Defendants to "identify the State actors and institutions responsible for implementing specific actions and components of the proposed Plan," and retained jurisdiction over the case and parties.

¶ 62 On 15 June 2020, the parties submitted their initial "Fiscal Year 2021 Remedial Plan and Action Steps" to the trial court. As instructed, the joint report stated the parties' shared goals and commitments for each of the seven issue areas identified in the trial court's January 2020 Order for fiscal year 2021. These commitments addressed both broad issues, such as "[s]ignificantly increas[ing] the racial and ethnic diversity of North Carolina's qualified and well-prepared teacher workforce," and more specific steps, such as "[r]emov[ing] [the] 12.75 percent funding cap for students with disabilities to provide supplemental funding for all students with disabilities at the current formula rate."

¶ 63 On 1 September 2020, the trial court issued a "Consent Order on *Leandro* Remedial Action Plan for Fiscal Year 2021" in response to the parties' joint report. The trial court approved the report and ordered Defendants to implement its remedial actions by 30 June 2021. Further, the trial court ordered Defendants, "in consultation with Plaintiff parties, [to] develop and present to the [c]ourt[ ] a *Leandro* Comprehensive Remedial Plan to be fully implemented by the end of 2028 with the objective of fully satisfying the Defendant's *Leandro* obligations by the end of 2030." The court likewise ordered Defendants to submit quarterly status reports "to assist the [c]ourt's efforts to enter a final, enforceable judgment in this case, while

promoting transparency in these proceedings."

¶ 64 On 15 March 2021, State Defendants submitted their Comprehensive Remedial Plan (CRP) to the trial court. As mandated by the trial court's prior orders, the CRP laid out "both broad programs and discrete, individual action steps to be taken [between 2021 and 2028] to achieve the overarching constitutional obligation to provide[ ] all children the opportunity to obtain a sound basic education in a public school [by 2030]." "The Parties agree[d] that the actions outlined in [the CRP] are the necessary and appropriate actions needed to address the constitutional violations in providing the opportunity for a sound basic education to all children in North Carolina."

¶ 65 As its title indicates, the CRP is comprehensive. For each of the seven pillar issues, the CRP enumerates specific action steps to be initiated in various fiscal years between 2021 and 2028. Each action step lists the various state actors responsible for its implementation and itemizes the specific funding required in each year. Some of the steps, such as "[u]pdat[ing] the State's school administrator preparation standards and principal licensure requirements to align with the National Education Leadership Preparation (NELP) standards," require administrative effort, but no additional funding. Others, such as "[p]rovid[ing] funding to cover the reduced-price lunch co-pays for all students who qualify for reduced-price meals so that those students would receive free lunches," require a static amount of funding ($3.9 million) each fiscal year. Still others, like "[i]ncreas[ing] low wealth funding to provide eligible counties supplemental funding equal to 110% of the statewide local revenue per student," require increasing funding in each fiscal year (growing from $20 million in 2022 to $182.7 million by 2028). The CRP is the only remedial plan submitted to the trial court by any party in this case.

¶ 66 On 11 June 2021, the trial court issued its "Order on Comprehensive Remedial Plan." After reviewing and approving the CRP, the trial court noted that "[t]he urgency of implementing the [CRP] on the timeline currently set forth by State Defendants cannot be overstated .... Time is of the essence." The trial court further emphasized that "[i]f the State fails to implement the actions described in the [CRP,] ... 'it will then be the duty of this [c]ourt to enter a judgment granting declaratory relief and such other relief as needed to correct the wrong.' [*Leandro I*,] 346 N.C. at 357, 488 S.E.2d 249." Finally, the trial court ordered that "the [CRP] shall be implemented in full and in accordance with the timelines set forth therein," and that

> [t]he State shall inform and engage its actors, agencies, divisions, and/or departments as necessary to ensure the State's compliance with this Order, including without limitation seeking and securing such funding and resources as are needed and required to implement in a sustainable manner the programs and policies set forth in the [CRP].

E. November 2021 Order, April 2022 Order, and Present Appeal

¶ 67 On 6 August 2021, State Defendants submitted their first progress report regarding implementation of the CRP. Plaintiff parties submitted responses on 25 August 2021. On 8 September 2021, the trial court held a subsequent hearing to review the State's progress toward the CRP. In short, State Defendants made clear to the trial court that they had not made progress toward substantially implementing the action steps within the CRP due to inadequate existing allocations of the necessary funding.

¶ 68 On 22 September 2021, the trial court issued its subsequent "Order on First Progress Reports for Implementation of Comprehensive Remedial Plan." Therein, the trial court made the following "findings of fact, each of which was stipulated to by Counsel on the record at the [8 September 2021] hearing:"

> 1. The [CRP], developed by State Defendants in consultation with Plaintiffs, is a fair and reasonable plan that is based upon the extensive evidence developed in this action .... The parties to this action agree that this fair and reasonable plan is the necessary step to provide the children of

> our State the opportunity to obtain a sound basic education.
>
> . . . .
>
> 3. The [CRP] represents the only robust and all-embracing plan to secure the opportunity for a sound basic education that has been presented to the [c]ourt over the course of this decades-long litigation . . . .
>
> . . . .
>
> 5. The State of North Carolina presently has available the fiscal resources needed to implement Years 2 and 3 of the [CRP], which in total is approximately $1.7 billion. According to the First Progress Report from the State, as of the time the Report was filed a collection of funding sources could be utilized to support the policies, programs, and procedures in the [CRP]. To wit, an unappropriated cash balance of $8 billion, projected revenues for the current fiscal year of 2021–22 exceeding the current budgetary allocations by about $5 billion, and additional funding from the federal government amounting to over $5 billion.

¶ 69 Following these findings, the trial court noted that

> [i]mproved educational policies, programs, and procedures alone do not ensure that the children of our State have the opportunity to obtain a sound basic education unless those policies, programs, and procedures are in fact supported by the resources and funds necessary for implementation. Accordingly, should all necessary steps to fully fund the [CRP] not be taken by the State—that is, our legislative and executive branches—as of [18 October 2021], this [c]ourt is prepared to implement the judicial remedies at its disposal to ensure that our State's children are finally guaranteed their constitutionally-mandated opportunity to obtain a sound basic education.

¶ 70 Therefore, the trial court ordered the parties to appear before it on 18 October 2021 "to inform the court of the State's progress in securing the full funds necessary to implement the [CRP]." "In the event the full funds necessary to implement the [CRP] are not secured by that date," the trial court ordered, "the [c]ourt will hear and consider any proposals for how the [c]ourt may use its remedial powers to secure such funding."

¶ 71 On 18 October 2021, the trial court conducted this compliance hearing. That same day, the trial court issued an Order in which it noted that it had been "informed by counsel that an appropriations bill in which the [CRP] is fully funded has not, as of that date, been finalized and enacted." "Because the full funds necessary to implement the [CRP] were not secured by [that day], the [c]ourt heard proposals for how [it] may use its remedial powers to secure such funding." The trial court further ordered that Plaintiffs would have until 1 November 2021 to submit "any additional authorities, memoranda of law, or proposed orders for the [c]ourt's consideration on the use of its remedial powers, which include, but are not necessarily limited to, a writ of mandamus, a legislative injunction, sanctions, or a combination thereof," and that State Defendants would have until 8 November 2021 to subsequently respond.

¶ 72 On 10 November 2021, the trial court issued the subsequent Order (November 2021 Order) now before us for review. First, the November 2021 Order made findings of fact summarizing the history of the litigation to that point. The court repeated its prior conclusion that "the evidence before this court is wholly inadequate to demonstrate substantial compliance with the constitutional mandate of *Leandro* measured by applicable educational standards." (cleaned up). The court "noted many shortcomings in the State's accomplishments and the State admitted that [its Progress] Report showed that it had failed to implement the Year One Plan as ordered." The court found that "more than sufficient funds are available to execute the current needs of the [CRP]." "As of the date of this Order," the trial court declared, "the State's implementation of the [CRP] is already behind the contemplated timeline, and the State has failed yet another class of students. Time is of the essence."

¶ 73 Next, the trial court noted its years and years of deference. The court found that, in compliance with this Court's 1997 instructions in *Leandro I*, it had "granted every reasonable deference to the legislative and

executive branches to establish and administer a [*Leandro*-compliant education] system . . ., including, most recently, deferring to State Defendants' leadership in the collaborative development of the [CRP] over the past three years." The court noted its

> extraordinary lengths in granting these coequal branches of government time, deference, and opportunity to use their informed judgment as to the 'nuts and bolts' of the remedy, including the identification of the specific remedial actions that required implementation, the time frame for such implementation, the resources necessary for the implementation, and the manner in which to obtain those resources.

The trial court further found that "[t]he failure of the State to provide the funding necessary to effectuate North Carolina's constitutional right to a sound basic education is consistent with the antagonism demonstrated by legislative leaders towards these proceedings, the constitutional rights of North Carolina children, and this [c]ourt's authority." The court found that it had "provided the State with ample time and every opportunity to make meaningful progress towards remedying the ongoing constitutional violations that persist within our public education system." Nevertheless, "[t]he State has repeatedly failed to act to fulfill its constitutional obligations."

¶ 74 Finally, the court found that "[i]n the seventeen years since the *Leandro II* decision, a new generation of school children, especially those at-risk and socioeconomically disadvantaged, were denied their constitutional right to a sound basic education. Further and continued damage is happening now, especially to at-risk children from impoverished backgrounds, and that cannot continue."

¶ 75 Accordingly, the trial court made the following conclusions of law. First, regarding its own constitutional duties and powers, the trial court concluded:

> 11. Because the State has failed for more than seventeen years to remedy the constitutional violation as the Supreme Court ordered, this [c]ourt must provide a remedy through the exercise of its constitutional role. Otherwise, the State's repeated failure to meet the minimum standards for effectuating the constitutional right to a sound basic education will threaten the integrity and viability of the North Carolina Constitution by:
>
> a. nullifying the Constitution's language without the people's consent, making the right to a sound basic education merely aspirational and not enforceable;
>
> b. ignoring rulings of the Supreme Court of North Carolina setting forth authoritative and binding interpretations of our Constitution; and
>
> c. violating separation of powers by preventing the judiciary from performing its core duty of interpreting our Constitution.
>
> . . . .
>
> 13. . . . This [c]ourt concludes that Article I Section 15 of the North Carolina Constitution represents an ongoing constitutional appropriation of funds sufficient to create and maintain a school system that provides each of our State's students with the constitutional minimum of a sound basic education. This constitutional provision may therefore be deemed an appropriation "made by law" [under Article V Section 7].
>
> 14. . . . [S]uch an appropriation may be considered to have been made by the people themselves, through the Constitution, thereby allowing fiscal resources to be drawn from the State Treasury to meet that requirement. The Constitution reflects the direct will of the people; an order effectuating Article I, § 15's constitutional appropriation is fully consistent with the framers['] desire to give the people ultimate control over the state's expenditures.
>
> . . . .
>
> 20. Accordingly, this [c]ourt recognizes, as a matter of constitutional law, a continuing appropriation from the State Treasury to effectuate the people's right to a sound basic education. . . . When the General Assembly fulfills its constitutional role through the normal (statutory) budget process, there is no need for judicial intervention to effectuate the constitutional right. As the foregoing findings of fact make plain, however, this [c]ourt must fulfill its

constitutional duty to effect a remedy at this time.

. . . .

22. The [c]ourt further concludes that . . . [it] has inherent and equitable powers that allow it to enter this Order. . . .

. . . .

23. . . . [T]he [c]ourt's inherent powers are derived from being one of three separate, coordinate branches of the government. . . .

24. In fact, it is the separation of powers doctrine itself which undergirds the judicial branch's authority to enforce its order here. "Inherent powers are critical to the court's autonomy and to its functional existence: 'If the courts could be deprived by the Legislature of these powers, which are essential in the direct administration of justice, they would be destroyed for all efficient and useful purposes.' " *Matter of Alamance Cty. Ct. Facilities*, 329 N.C. 84, 93–94 [405 S.E.2d 125] (1991) . . . (citing *Ex Parte Scheneck*, 65 N.C. 353, 355 (1871)).

¶ 76 Second, regarding its duty to limit its encroachment upon its coequal branches, the trial court concluded:

25. . . . The relief proposed here carefully balances these interests with the [c]ourt's constitutional obligation of affording relief to injured parties. First, there is no alternative or adequate remedy available to the children of North Carolina that affords them the relief to which they are so entitled. State Defendants have conceded that the [CRP]'s full implementation is necessary to provide a sound basic education to students and there is nothing else on the table. . . .

26. Second, this [c]ourt will have minimized its encroachment on legislative authority through the least intrusive remedy. Evidence of the [c]ourt's deference over the last seventeen years and its careful balancing of the interests at stake includes but is not limited to:

a. The [c]ourt has given the State seventeen years to arrive at a proper remedy and numerous opportunities proposed by the State have failed to live up to their promise. Seventeen classes of students have since gone through schooling without a sound basic education;

b. The [c]ourt deferred to State Defendants and the other parties to recommend to the [c]ourt an independent, outside consultant to provide comprehensive, specific recommendations to remedy the existing constitutional violations;

c. The [c]ourt deferred to State Defendants and the other parties to recommend a remedial plan and the proposed duration of the plan . . . .

d. The [c]ourt deferred to State Defendants to propose an action plan and remedy for the first year and then allowed the State Defendants additional latitude in implementing its actions in light of the pandemic's effect on education;

e. The [c]ourt deferred to State Defendants to propose a long-term comprehensive remedial plan, and to determine the resources necessary for full implementation . . . .

f. The [c]ourt also gave the State discretion to seek and secure the resources identified to fully implement the [CRP]. . . .

g. The [c]ourt has further allowed for extended deliberations between the executive and legislative branches over several months to give the State an additional opportunity to implement the [CRP];

h. The status conferences, including more recent ones held in September and October 2021, have provided the State with additional notice and opportunities to implement the [CRP], to no avail. The [c]ourt has further put [the] State on notice of forthcoming consequences if it continued to violate students' fundamental rights to a sound basic education.

¶ 77 Based on these findings of fact and conclusions of law, the trial court ordered the following:

1. The Office of State Budget and Management and the current State Budget Director ("OSBM"), the Office of the State Controller and the current State Comptroller ("Controller"), and the Office of the State Treasurer and the current State Treasurer ("Treasurer") shall take the necessary actions to transfer the total amount of funds necessary to effectuate years 2 & 3 of the [CRP], from the unappropriated balance within the General Fund to the state agencies and state actors with fiscal responsibility for implementing the [CRP] as follows:

(a) Department of Health and Human Services ("DHHS"): $189,800,000.00;

(b) Department of Public Instruction ("DPI"): $1,522,058,000.00; and

(c) University of North Carolina System: $41,300,000.00

2. OSBM, the Controller, and the Treasurer are directed to treat the foregoing funds as an appropriation from the General Fund as contemplated within [N.C.G.S.] § 143C-6-4(b)(2)(a) and to carry out all actions necessary to effectuate those transfers;

. . . .

4. DHHS, the University of North Carolina System, and the State Superintendent of Public Instruction, and all other State agents or State actors receiving funds under the [CRP] are directed to administer those funds to guarantee and maintain the opportunity of a sound basic education consistent with, and under the time frames set out in, the [CRP], including the Appendix thereto;

5. In accordance with its constitutional obligations, the State Board of Education is directed to allocate the funds transferred to DPI to the programs and objectives specified in the Action Steps in the [CRP] and the Superintendent of Public Instruction is directed to administer the funds so allocated in accordance with the policies, rules, . . . and regulations of the State Board of Education so that all funds are allocated and administered to guard and maintain the opportunity of a sound basic education consistent with, and under the time frames set out in, the [CRP], including the appendix thereto[;]

6. OSBM, the Controller, and the Treasurer are directed to take all actions necessary to facilitate and authorize those expenditures;

7. To the extent any other actions are necessary to effectuate the year 2 & 3 actions in the [CRP], any and all other State actors and their officers, agents, servants, and employees are authorized and directed to do what is necessary to fully effectuate years 2 and 3 of the [CRP];

8. The funds transferred under this Order are for maximum amounts necessary to provide the services and accomplish the purposes described in years 2 and 3 of the [CRP]. Savings shall be effected where the total amounts appropriated are not required to perform these services and accomplish these purposes and the savings shall revert to the General Fund at the end of fiscal year 2023, unless the General Assembly extends their availability[.]

Finally, the trial court declared that its Order would be "stayed for a period of thirty (30) days to preserve the *status quo* . . . to permit the other branches of government to take further action consistent with the findings and conclusions of this Order."

¶ 78 One week later, on 18 November 2021, the State enacted An Act to Make Budget Appropriations for Current Operations of State Agencies, Departments, and Institutions, and for Other Purposes, S.L. 2021-180, https://www.ncleg.gov/EnactedLegislation/SessionLaws/PDF/2021-2022/SL2021-180.pdf (Budget Act).

¶ 79 On 24 November 2021, the Controller of the State of North Carolina petitioned the Court of Appeals for a Writ of Prohibition. The Controller sought an order preventing her from being required to comply with the trial court's November 2021. Specifically, the Controller asserted that the transfer directive within the trial court' November 2021 was legally erroneous and required her to act in a manner which would defeat a legal right.

¶ 80 On 30 November 2021, the trial court issued a "Notice of Hearing and Order Continuing Stay of Court's November 10, 2021

Order." After reviewing the Budget Act, the trial court concluded that the Act "appear[ed] to provide for some—but not all—the resources and funds required to implement years 2 & 3 of the [CRP], which may necessitate a modification in the November 10 Order." Therefore, the court announced that it would hold a hearing on 13 December 2021 for the State "to inform the [c]ourt of the specific components of the [CRP] plan for years 2 & 3 that are funded by the [Budget] Act and those that are not." The court further stayed its 10 November 2021 Order until ten days after the conclusion of its December hearing.

¶ 81 But the trial court's planned 13 December hearing never came to pass. Instead, also on 30 November 2021, the Court of Appeals issued a writ of prohibition restraining the trial court from proceeding in the matter. In its writ, the Court of Appeals concluded that the trial court's November Order erred for two reasons. First, the Court of Appeals reasoned that the trial court's interpretation of a constitutional appropriation within Article I, § 15 would render the subsequent Educational Provisions in Article IX "unnecessary and meaningless." Second, the Court of Appeals stated that the trial court's reasoning "would result in a host of ongoing constitutional appropriations ... that would devastate the clear separation of powers between the legislative and judicial branches and threaten to wreck the carefully crafted checks and balances that are the genius of our system of government." The Court of Appeals therefore restrain[ed] the trial court from enforcing its direct transfer order. Judge Arrowood dissented from the Court of Appeals' Order.[9]

¶ 82 On 7 December 2021, the State appealed the November 2021 Order to the Court of Appeals. The next day, 8 December 2021, for the first time since their August 2011 Motion to Intervene regarding Pre-K, Legislative Defendants intervened as a matter of right pursuant to N.C.G.S. § 1-72.2(b) and likewise appealed the trial court's November Order to the Court of Appeals.

¶ 83 On 14 February 2022, the State filed with this Court a Petition for Discretionary Review Prior to Determination by the Court of Appeals of the trial court's November 2021 Order. On 24 and 28 February 2022, Plaintiffs and Plaintiff Intervenors likewise requested this Court's discretionary review prior to determination by the Court of Appeals. On 28 February 2022, Legislative Defendants filed a response requesting that this Court deny the State's petition.

¶ 84 On 21 March 2022, this Court issued an order allowing the State's petition. Before appellate review, however, this Court remanded the case to the trial court "for a period of no more than thirty days for the purpose of allowing the trial court to determine what effect, if any, the enactment of the [2021] State Budget has upon the nature and extent of the relief that the trial court granted in its 11 November 2021 order." This Court instructed the trial court to "make any necessary findings of fact and conclusions of law and to certify any amended order that it chooses to enter with this Court on or before the thirtieth day following the entry of this order." That same day, Chief Justice Newby reassigned this case from Judge Lee to Judge Michael L. Robinson.[10]

¶ 85 On 24 March, 13 April, and 22 April 2022, the trial court conducted hearings with the parties to determine the effect of the 2021 Budget Act on the relief granted in the trial court's November 2021 Order. At these hearings, the parties took contrasting views on the scope of this Court's 21 March 2022 Remand Order. Legislative Defendants contended that the remand order allowed the trial court "to make a de novo legal determination on the legality and enforceability of the 10 November Order—claiming that, as concluded by the panel of the Court of Appeals, the trial court lacked legal authority to

9. The dissent reasoned that the majority's *ex meru motu* shortening of the time for Plaintiff parties to file a response to the petition to one day when there were no immediate consequences in the case "was arbitrary, capricious and lacked good cause and instead designed to allow this panel to rule on this petition during the month of November" before a new panel was assigned.

10. We take a moment of privilege to express the Court's gratitude to Judge Robinson for his diligent service to the State presiding over this case.

order funds transferred from the North Carolina treasury to fund specific educational programs." Alternatively, Legislative Defendants argued "that the Budget Act as passed fully satisfies the State's obligation to provide K–12 students with a sound basic education as established by the Supreme Court in [*Leandro I*]."

¶ 86 "By comparison, Plaintiffs and the State Defendants contend[ed] that the trial court's task [was] simply to examine the Budget Act as passed and determine the amount of funding provided therein for each of the CRP programs during years 2 and 3 of the CRP." The State's evidence, based on the affidavit of the Chief Deputy Director of State Budget for the North Carolina Office of State Budget and Management, indicated that "the Budget Act funded approximately 60 percent of year 2 CRP programs and 49 percent of year three programs."

¶ 87 On 26 April 2022, the trial court issued its subsequent order (April 2022 Order), also now before us for review. As an initial matter, the trial court addressed the parties' arguments regarding its own authority in light of the Court of Appeals' Writ of Prohibition. Because that order "has not been overruled or modified[,]" the court "conclude[d] that it is binding on the trial court." "Accordingly," the trial court determined that it "cannot and shall not consider the legal issue of the trial court's authority to order State officers to transfer funds from the State treasury to the CRP."

¶ 88 The trial court then addressed the effect of the Budget Act on the CRP. "Based on [its] review of analyses provided to it by [OSBM] and the General Assembly's Fiscal Research Division . . ., and the arguments and submissions of the parties," the trial court found that "significant necessary services for students, as identified in the CRP, remain unfunded and/or underfunded by the Budget Act." The court found that "the Budget Act fail[ed] to provide nearly one-half of the[ ] total necessary funds." Specifically, the court found that "the Budget Act fund[ed] approximately 63% of the total cost of the programs to be conducted during year 2 and approximately 50% of the total cost of the programs to be conducted during year 3." Regarding the State's unappropriated savings, the trial court found that "[t]he Budget Act reserves during each year of the two-year budget cycle $1.134 billion to the State's Saving Reserve, which brings the total of unappropriated funds in the State's Savings Reserve to $4.25 billion after the fiscal year 2022–23 legislatively-mandated transfer." Therefore, "[a]s a matter of mathematical calculation," the trial court found that "the funds transferred on a discretionary basis to the State's Savings Reserve and the State's Capital and Infrastructure Reserve during the two-year budget cycle is substantially in excess of the amount necessary to fully fund the CRP during years 2 and 3 of the CRP."

¶ 89 Based on these findings of fact, the trial court concluded that the Budget Act "partially but not totally fund[ed] years 2 and 3 of the CRP." Specifically, the court concluded that "the total underfunding of CRP programs during years 2 and 3 . . . is $785,106,248 in the aggregate." Regarding the State's potentially available funds, the court concluded that "the General Fund does contain sufficient unappropriated monies to make the transfer anticipated by the 10 November Order and the lesser amount of underfunding identified above." However, based on the Court of Appeals' Writ of Prohibition, the trial court "conclude[d] that the 10 November Order should be amended to remove a directive that State officers or employees transfer funds from the State treasury to fully fund the CRP." Instead, the trial court concluded that its Order must simply "determine that the State of North Carolina has failed to comply with the trial court's prior order to fully fund years 2 and 3 of the CRP" without specifically directing the State officials to make the transfers necessary to do so.

¶ 90 Accordingly, the trial court ordered:

> The Department of Health and Human Services[,] the Department of Public Instruction, and the University of North Carolina System have and recover from the State of North Carolina to properly fund years 2 and 3 of the [CRP] the following sums in addition to those sums otherwise provided for the [CRP] by the

Budget Act and federal or other funds made available:

a. The [DHHS] recover from the State of North Carolina the sum of $142,900,000;

b. The [DPI] recover from the State of North Carolina the sum of $608,006,248; and

c. The [UNC] System recover from the State of North Carolina the sum of $34,200,000.

¶ 91 In alignment with the November 2021 Order, the trial court further ordered that "DHHS, DPI, UNC System, and all other State agents or State actors receiving funds under the [CRP] are directed to administer those funds consistent with, and under the time frames set out in the [CRP], including the Appendix thereto." Likewise, the court ordered that upon administering these funds, any "savings shall revert to the General Fund at the end of fiscal year 2023, unless the General Assembly extends their availability."

¶ 92 In July 2022, the State enacted the 2022 Appropriations Act. An Act to Modify the Current Operations Appropriations Act of 2021 and to Make Other Changes in the Budget Operations of the State, S.L. 2022-74, https://www.ncleg.gov/EnactedLegislation/SessionLaws/PDF/2021-2022/SL2022-74.pdf.

¶ 93 Following the trial court's April 2022 Order, this case returned to the jurisdiction of this Court. On appeal, Plaintiffs, Plaintiff-Intervenors, and the State argued that, contrary to the order of the Court of Appeals, under the extraordinary circumstances summarized here, the trial court had the proper authority to direct State actors to transfer the available funds necessary to fulfill years two and three of the Comprehensive Remedial Plan in its November 2021 Order.[11] The State Board of Education emphasized that the CRP is the product of the State's efforts to fulfill its constitutional commitment and that the CRP's action steps are necessary to avoid judicial encroachment on the Board's constitutional authority.

¶ 94 Contrastingly, Legislative Defendants argued that the trial court's November 2021 Order's transfer provisions violated the Separation of Powers Clause of our State's Constitution.[12] Legislative Defendants further argued that both the November 2021 and April 2022 Orders were improper because the case is narrowly confined to Hoke County and not the state as a whole, the trial court engaged with non-justiciable political questions, the trial court failed to presume that the Budget Act was constitutionally compliant, and the suit was friendly and lacked genuine controversy.

¶ 95 Finally, the State Controller argued that the trial court's November 2021 Order lacked constitutional authority to order the Controller and other state officials to transfer available State funds, and therefore that this Court should affirm the trial court's April 2022 Order removing those transfer directives.

¶ 96 This case came before this Court once more for oral arguments on 31 August 2022.

II. Analysis

[1] ¶ 97 Now, this Court must assess the constitutionality of the trial court's 10 November 2021 and 26 April 2022 Orders. This Court reviews constitutional questions de novo. *Cooper v. Berger*, 370 N.C. 392, 413, 809 S.E.2d 98 (2018). Under the extraordinary circumstances of this case, we hold that the trial court's November 2021 Order properly directed certain State officials to transfer State funds in compliance with the CRP. We thus affirm the constitutional analysis and transfer directives within the November 2021 Order and vacate in part and reverse in part the April 2022 Order with further instructions on remand. To enable the trial

11. Plaintiffs and Plaintiff-Intervenors' position was supported by amici curiae professors and longtime practitioners of constitutional and educational law, the North Carolina Justice Center, the Duke Law Children's Law Clinic, the Center for Educational Equity, the Southern Poverty Law Center, and over fifty North Carolina business leaders.

12. Legislative Defendants' position was supported by amici curiae North Carolina Institute for Constitutional Law and the John Locke Foundation.

court to comply with these instructions, we stay the Court of Appeals' Writ prohibiting the trial court from issuing the November 2021 transfer directive.

¶ 98 First, we review the meaning and scope of the constitutional right at the heart of this case: the right of all North Carolina schoolchildren to the opportunity to receive a sound basic education. Second, we consider the duties and powers of the legislative and judicial branches as they relate to guarding and maintaining that constitutional right. Third, we apply this constitutional analysis to the trial court's November 2021 and April 2022 Orders. Fourth, we address Legislative Defendants' various assertions of trial court error.

A. The Constitutional Right to a Sound Basic Education

¶ 99 Our Constitution and statutes recognize certain rights. In particular, our Constitution's Declaration of Rights vests within all people of our State rights that we deem fundamental, such as the right to free elections, equal protection under law, and freedom of speech and assembly. N.C. Const. Art. I, §§ 10, 12, 14, 19; *see also Harper v. Hall*, 380 N.C. 317, 2022-NCSC-17, ¶ 159, 868 S.E.2d 499 (discussing these rights).

¶ 100 Since its inception in 1994, this case has revolved around the rights enshrined within our Constitution's "Education Provisions:" namely Article I, § 15 and Article IX, § 2, but also Article IX, §§ 6 and 7. Accordingly, we begin our analysis by reviewing the text, structure, and history of the right to a sound basic education as established in these Education Provisions. *See Harper*, 2022-NCSC-17, ¶ 121, 868 S.E.2d 499 (considering the text, history, and structure of constitutional rights to ascertain their meaning).

[2] ¶ 101 Constitutional analysis begins with the text. *State ex rel. Martin v. Preston*, 325 N.C. 438, 449, 385 S.E.2d 473 (1989). "We look to the plain meaning of [each] phrase to ascertain its intent." *Town of Boone v. State*, 369 N.C. 126, 132, 794 S.E.2d 710 (2016). To understand the meaning of the fundamental right at issue in this case, we must consider the plain text of our Constitution's Education Provisions.

[3] ¶ 102 First, Article I, § 15 of our Constitution's Declaration of Rights declares that "[t]he people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right." The plain text of this provision is not suggestive, but obligatory. It does not declare that the State *may* guard and maintain the people's right to the privilege of education, but that it is the *duty* of the State to do so. Further, the plain text of this provision places this affirmative duty on the shoulders of one entity: the State. While subsequent constitutional provisions note that the State *may* involve local units of government in school operation, Article I, § 15 makes clear that the ultimate responsibility lies with the State. Finally, the word "maintain" within this provision begins to establish that the State's affirmative duty here is not merely administrative, but financial. One definition of maintain is "[t]o support . . . financially," *Maintain, Black's Law Dictionary* (11th ed. 2019), or "to support the expense of." *Maintain, Webster's American Dictionary of the English Language* (1865). *See also Maintain, A Dictionary of the English Language* (1865) ("To bear the expense of; to support; to keep up; to supply with what is needed."). This meaning aligns with the Constitution's plain emphasis on education funding within subsequent provisions noted below.

[4] ¶ 103 Second, Article IX, § 2(1) establishes that "[t]he General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools, which shall be maintained at least nine months in every year, and wherein equal opportunities shall be provided for all students." Like Article I, § 15, the plain language of this section is obligatory; it does not declare that the General Assembly *may* provide for a system of free public schools, but that it *shall* do so. *See Mebane Graded Sch. Dist. v. Alamance Cnty.*, 211 N.C. 213, 223, 189 S.E. 873 (1937) (*Mebane*) ("The duty imposed on the State, under Art. IX of the Constitution of North Carolina, is mandatory."). This contrasts with the subsequent permissive language in Article IX, § 2(2), which

states that "[t]he General Assembly *may* assign to units of local government such responsibility for the financial support of the free public schools as it may deem appropriate[,]" and that "units of local government with financial responsibility for public education *may* use local revenues to add or to supplement any public school or post-secondary school program." (emphasis added). Here again, the plain constitutional text makes clear that the ultimate responsibility for securing the people's right to education lies with the State. And in declaring the governmental entity that is obligated to *fund* public education, the plain language of Article IX, § 2 is even more specific: "[t]he General Assembly."

¶ 104 Third, two subsequent provisions within Article IX further specify methods for funding the state's system of free public schools. Article IX, § 6 states that

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

Next, Article IX, § 7(a) states that

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

Building from Article IX, § 2, the plain text of these provisions further clarifies the Constitution's repeated emphasis on adequately funding the State's system of free public schools. Indeed, these provisions establish specific requirements for the manner in which the General Assembly may exercise its appropriation powers by declaring that such funds "*shall* be faithfully appropriated and used *exclusively* for establishing and maintaining a uniform system of free public schools." More broadly, the plain text of these provisions emphasizes the distinctive prominence of public education within our Constitution: it is first established as a positive right of the people within the Declaration of Rights, then mandated to be guarded and maintained by the State, then specifically required to be funded through taxation and otherwise by the General Assembly. This renders the fundamental right established within these provisions highly exceptional, even among other rights enumerated within the Declaration of Rights.

[5] ¶ 105 The structure of our Constitution likewise supports this prominence. As an initial matter, the location of the right to education (N.C. Const. art. I, § 15) within the Constitution's Declaration of Rights indicates its significance. "The Declaration of Rights was passed by the Constitutional Convention on 17 December 1776, the day before the [state] Constitution itself was adopted, manifesting the primacy of the Declaration in the minds of the framers." *Corum*, 330 N.C. at 782, 413 S.E.2d 276. That original "logical and chronological primacy is preserved in our present constitution, with the Declaration of Rights now incorporated in the text of the [C]onstitution itself as article I." *Harper*, 2022-NCSC-17, ¶ 122, 868 S.E.2d 499. The fundamental purpose for the adoption of the Declaration of Rights "was to provide citizens with protection from the State's encroachment upon these rights." *Corum*, 330 N.C. at 782, 413 S.E.2d 276. It is no wonder, then, that the Framers chose to enshrine the fundamental right to education within the Declaration; like the right to free elections, N.C. Const. art. I, § 10, the right to religious liberty, N.C. Const. art. I, § 13, and the right to freedom of speech and press, N.C. Const.

art. I, § 14, the right to education inherently strengthens the ability of a person and a community to safeguard their personal liberty and popular sovereignty from infringement. *See* N.C. Const. art. IX, § 1 ("Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools, libraries, and the means of education shall forever be encouraged"); *Brown v. Bd. of Educ.*, 347 U.S. 483, 493, 74 S.Ct. 686, 98 L.Ed. 873 (1954) (*Brown I*) (describing education as "the very foundation of good citizenship.").

¶ 106 Beyond the location of Article I, § 15, the structure of the North Carolina Constitution further emphasizes the paramount importance of the right to education by devoting an *entire article* to it: Article IX. For context, there are only fourteen articles in our entire Constitution, including the Declaration of Rights and those establishing our three branches of government. Within Article IX, the Constitution contains ten sections enumerating certain principles and requirements for our state's system of public education, such as those establishing the State Board of Education, N.C. Const. art. IX, § 4, and describing methods of education funding, N.C. Const. art. IX, §§ 2, 6, 7. By comparison, the articles addressing local governments and corporations contain three and two sections, respectively. *See* N.C. Const. art. VII; N.C. Const. art. VIII. In short, the Constitution's structure makes clear that the right to education is regarded with foremost significance.

¶ 107 Finally, constitutional history likewise supports this significance. *See Comm. to Elect Dan Forest v. Emps. Pol. Action Comm.*, 376 N.C. 558, 2021-NCSC-6, ¶ 15, 853 S.E.2d 698 ("Constitutional provisions should be construed in consonance with the objects and purposes in contemplation at the time of their adoption."). North Carolina constitutional history illustrates both that our citizens have long valued public education and that experience taught them the necessity of safeguarding it through our Constitution, particularly to secure the fundamental rights of marginalized communities.

¶ 108 "Throughout the colonial period, the provincial government accepted no responsibility for education." N.C. Dep't of Public Instruction, The History of Education in North Carolina, 5 (1993) (hereinafter DPI Report). Because of the absence of State funding, what few educational opportunities that did exist were largely private, religious, and limited to affluent white families. *Id.*

¶ 109 In 1776, North Carolina's original Constitution provided "[t]hat a school or schools shall be established by the Legislature, for the convenient instruction of youth, with such salaries to the masters, paid by the public." N.C. Const. of 1776 art. XLI. Nevertheless, educational opportunities remained underfunded and exclusive, and "[m]any North Carolina citizens were dissatisfied with the deplorable state of affairs and efforts were begun to remedy the situation." DPI Report at 7.

¶ 110 The 1825 enactment of the Literary Fund was one such effort. *Id.* at 8. Over time, the fund grew and, in conjunction with further legislative support, "ushered in a period of expansion and progress for North Carolina public schools." *Id.* at 9. "By the time the Civil War erupted in 1861, it was generally recognized that North Carolina had one of the best school systems in the South." *Id.* Notably, though, this system still expressly excluded Black children, who could only access educational opportunities—if at all—at freedmen schools established and funded by private groups such as the American Missionary Association. *See* John L. Bell, *Samuel Stanford Ashley, Carpetbagger and Educator*, 72 N.C. Hist. Rev. 456, 459, 461 (1995) (hereinafter Bell).

¶ 111 The Civil War "brought this progressive period in education to an abrupt halt." DPI Report at 10. First, the Literary Fund was depleted due to wartime economic instability. Bell at 476. Then, in 1866, due to this economic fallout and "fear[ ] that the federal government would force integration of [B]lack pupils into the statewide school system," the General Assembly abolished North Carolina's public school system entirely, instead leaving county governments to establish schools "at their discretion." *Id.*

¶ 112 Against this historical backdrop, North Carolina's first ever multiracial cohort

of state leaders "met in the winter of 1868 to draft a new state constitution." *Id.* at 473; *see also* Leonard Bernstein, *The Participation of Negro Delegates in the Constitutional Convention of 1868 in North Carolina*, The Journal of Negro History, Vol. 34, No. 4, 391, 394 (Oct. 1949) (describing the composition of the Constitutional Convention of 1868) (hereinafter Bernstein); John V. Orth, The North Carolina State Constitution 12 (1993) (same) (hereinafter Orth). The resulting 1868 Constitution was markedly more progressive than its predecessor, including, for instance, the expansion of property rights to women and elimination of property qualifications from political participation. *See* Orth at 15; DPI Report at 10.

¶ 113 The 1868 Constitution likewise expanded educational rights. "Seeing that the legislature could abolish the school system by law in 1866, [delegates] insisted that the guarantee of a public school education for all children of North Carolina be embedded in the [C]onstitution beyond the reach of legislative majorities." Bell at 482–83. Thus, Article I, § 27 of the 1868 Constitution established the express positive right of the people to the privilege of education and corresponding duty of the State to guard and maintain that right. *See* Orth at 52 ("[T]he right to education was intended to mark a new and more positive role for state government."). The 1868 Constitution likewise established the General Assembly's duty to fund the state's public education system, declaring that [t]he General Assembly shall provide by taxation and otherwise for a general and uniform system of Public Schools," and specified that certain funds "shall be faithfully appropriated for establishing and perfecting in this State a system of Free Public Schools, and for no other purposes or uses whatsoever." N.C. Const. of 1868 art. IX, §§ 2, 4. Although conservative legislators attempted "to add segregation amendments to the [Education Provisions,]" these were rejected. Bernstein at 398. Instead, these constitutional guarantees "made no mention of race."[13] Bell at 473. As noted above, our current State Constitution, ratified in 1971, includes substantially similar or identical language within its Education Provisions as its 1868 predecessor. *See* N.C. Const. art. I, § 15; N.C. Const. art. IX, §§ 2, 6, 7. Cumulatively, this historical context emphatically supports the paramount importance of the right to the opportunity to a sound basic education within our Constitution and of the will of the people to safeguard this right from legislative diminishment or abandonment.

[6] ¶ 114 These historical origins confirm what the text and structure make plain: that our Constitution expressly establishes the fundamental right of the people to the privilege of education, that it is the "sacred duty" of the State to safeguard that right, and that the General Assembly is constitutionally obligated to provide for our system of free public schools by taxation and otherwise. *Mebane*, 221 N.C. at 223, 19 S.E.2d 861. More specifically, the Education Provisions express a clear desire by the people to hold the executive and legislative branches accountable for ensuring that our public school system is properly maintained, financially and otherwise. Finally, "[w]e give our Constitution a liberal interpretation in favor of its citizens with respect to those provisions which were designed to safeguard the liberty and security of the citizens." *Corum*, 330 N.C. at 783, 413 S.E.2d 276.

[7] ¶ 115 In accordance with these principles, this Court has held that the Education Provisions "combine to guarantee every child of this state an opportunity to receive a sound basic education in our public schools." *Leandro I*, 346 N.C. at 345, 488 S.E.2d 249. This Court has further concluded that this right is substantive, robust, and paramount. *Id.*; *Leandro II*, 358 N.C. at 649, 599 S.E.2d 365. Today, we expressly and emphatically reaffirm the inherent substance, broad scope, and paramount importance of the fundamental right to the opportunity to a sound basic education enshrined in our Constitution as first recognized by this Court in *Leandro I* and *II*.

13. However, "a post-Reconstruction amendment in 1876 required segregated schooling ('separate but equal') . . . [until] [o]utlawed in 1954 by the U.S. Supreme Court's ruling in *Brown v. Board of Education* [and subsequently] forbidden by the 1971 Constitution." Orth at 145.

B. Legislative and Judicial Duties and Powers

[8–10] ¶ 116 When rights are violated, justice requires a remedy. N.C. Const. art. I, § 18 ("[E]very person for an injury done him ... shall have remedy by due course of law."); *see also Marbury v. Madison*, 5 U.S. 137, 163, 2 L.Ed. 60 (1803) ("[E]very right, when withheld, must have a remedy, and every injury its proper redress."). The nature of the right and the extent of the violation dictate the appropriate nature and extent of the corresponding remedy. *Corum*, 330 N.C. at 784, 413 S.E.2d 276. Accordingly, a long-standing violation of a fundamental constitutional right demands a remedy of equivalent magnitude.

¶ 117 Here, as summarized above, the trial court repeatedly concluded based on an abundance of clear and convincing evidence that the State—for many years—has continued to violate the fundamental constitutional rights of North Carolina schoolchildren across the state by failing to guard and maintain their right to the opportunity of a sound basic education. The trial court likewise repeatedly concluded that this violation disproportionately impacts historically marginalized students such as students from economically disadvantaged families, English language learners, students with learning differences, and students of color. The trial court emphasized these conclusions most recently within the November 2021 Order before us on this appeal.

¶ 118 Now, this Court must consider the scope of its authority to appropriately remedy this violation. To do so, we first analyze the constitutional duties and powers of the legislative branch as they relate to guarding and maintaining the fundamental right to a sound basic education. Second, we analyze the constitutional duties and powers of the judicial branch relating to that right. Third, we harmonize these constitutional duties and powers in light of the principles of separation of powers and checks and balances within our tripartite system of democratic governance.

1. Legislative Duties and Powers

¶ 119 Because this case primarily involves the boundaries between the legislative and judicial branches, we begin by considering the constitutional duties and powers of the legislative branch.

¶ 120 Our Constitution assigns certain positive and negative duties to the legislative branch. Positive duties are those the Constitution mandates that the legislative branch fulfill. For instance, Article II, §§ 3 and 5 respectively mandate that "[t]he General Assembly, at the first regular session convening after the return of every decennial census of population taken by order of Congress, *shall* revise the senate [and representative] districts and the apportionment of Senators [and Representatives] among those districts." (emphasis added). Likewise, Article II, § 20 establishes that each house of the General Assembly "*shall* prepare bills to be enacted into laws." (emphasis added). Contrastingly, negative duties prohibit certain legislative action. For instance, Article II, § 24 dictates that "[t]he General Assembly *shall not* enact any local private, or special act or resolution" relating to certain subjects, such as "changing the names of cities, towns, and townships." N.C. Const. art. II, § 24(b) (emphasis added).

[11–13] ¶ 121 This case considers the legislature's duties under the Education Provisions. As summarized above, these provisions create a positive duty for the legislature to fulfill its role (as part of "the State") in maintaining the people's right to education by providing by taxation and otherwise for a general and uniform system of free public schools. N.C. Const. art. I, § 15; N.C. Const. art. IX, §§ 2, 6. As established by *Leandro I*, this constitutional guarantee is not one of mere education *access*, but of education *adequacy.* 346 N.C. at 345–46, 488 S.E.2d 249. Put differently, the General Assembly is not merely responsible for ensuring that there is an operational school building in each district that lets students in its front doors, but for ensuring that once a student enters those doors, she has the opportunity to receive—at minimum—a sound basic education. *See id.* at 345, 488 S.E.2d 249 ("An education that does not serve the purpose of preparing stu-

dents to participate and compete in the society in which they live and work is devoid of substance and is constitutionally inadequate."). The history of this case has established that this duty is both substantive (for instance, ensuring through education statutes and policies that there is a competent, well-trained teacher in every classroom) and financial (ensuring that state funding is distributed in a manner that allows every school district to provide all students with the opportunity to receive a sound basic education).

[14] ¶ 122 To fulfill these constitutional duties, the legislature is granted broad powers. For instance, Article II, § 1 provides that "[t]he legislative power of the State shall be vested in the General Assembly[.]" As such, the General Assembly is broadly empowered to enact legislation to advance its policy goals, including in the realm of education. Other constitutional provisions, such as Article II, § 22, describe the procedures that the General Assembly must follow in exercising its legislative power.

¶ 123 More specifically, our Constitution grants the General Assembly extensive financial authority. For instance, Article II, § 23 provides for the General Assembly's power to enact revenue bills. Likewise, Article III, § 5(3) "defines the manner in which th[e] three-branch governmental structure should operate in the budgetary context by providing that . . . '[t]he budget as enacted by the General Assembly shall be administered by the Governor.' " *Cooper v. Berger*, 376 N.C. 22, 37, 852 S.E.2d 46 (2020). Article V § 2 delineates the General Assembly's taxation power. Finally, Article V, § 7 notes that "[n]o money shall be drawn from the State treasury but in consequence of appropriations made by law[.]" The Appropriations Clause is further operationalized by statute in N.C.G.S. § 143C-1-2 of the State Budget Act, which states that "[a] law enacted by the General Assembly that expressly appropriates funds from the State treasury is an appropriation."

¶ 124 Here, the trial court's November 2021 Order concluded that Article I, § 15 "represents an ongoing constitutional appropriation of funds sufficient to create and maintain a school system that provides each of our State's students with the constitutional minimum of a sound basic education[,] . . . [and] may therefore be deemed an appropriation 'made by law.' " By contrast, Legislative Defendants and the State Controller contend that the Appropriations Clause and the Separation of Powers Clause indicate that the trial court's subsequent transfer order is prohibited.

2. Judicial Duties and Powers

¶ 125 Next, we must likewise consider the duties and powers of the judicial branch in addressing the violation of constitutional rights.

¶ 126 Article I, § 18 of our Constitution establishes that "every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay." In accordance with this constitutional promise, this Court has expressed a "longstanding emphasis on ensuring redress for every constitutional injury." *Craig ex rel. Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 342, 678 S.E.2d 351 (2009).

[15] ¶ 127 The duty to ensure such redress belongs to the courts. Because the judicial branch "is the ultimate interpreter of our State Constitution[,] [i]t is the state judiciary that has the responsibility to protect the state constitutional rights of the citizens; this obligation to protect the fundamental rights of individuals is as old as the State." *Corum*, 330 N.C. at 783, 413 S.E.2d 276.

¶ 128 With this constitutional duty comes constitutional powers. Generally, judicial power arises from Article IV, § 1 of our Constitution, which establishes that "[t]he judicial power of the State shall . . . be vested in a Court for the Trial of Impeachments and in a General Court of Justice." The Constitution further establishes that "[t]he General Assembly shall have no power to deprive the judicial department of any power or jurisdiction that rightfully pertains to it as a coordinate department of government." N.C. Const. art. IV, § 1.

¶ 129 More specifically, the judiciary is endowed with certain inherent power. In

1991, Chief Justice Exum, writing unanimously on behalf of this Court, observed that

> [a] court's inherent power is that belonging to it by virtue of its being one of three separate, coordinate branches of government. For over a century this Court has recognized such powers as being plenary within the judicial branch—neither limited by our [C]onstitution nor subject to abridgment by the legislature. In fact, the inherent power of the judicial department is expressly protected by the constitution: "The General Assembly shall have no power to deprive the judicial department of any power or jurisdiction that rightfully pertains to it as a co-ordinate department of the government . . . ." N.C. Const. art. IV, § 1. Inherent powers are critical to the court's autonomy and to its functional existence: if the courts could be deprived by the legislature of these powers, which are essential to the direct administration of justice, they would be destroyed for all efficient and useful purposes.
>
> Generally speaking, the scope of a court's inherent power is its authority to do all things that are reasonably necessary for the proper administration of justice. . . . This Court has upheld the application of the inherent powers doctrine to a wide range of circumstances, from dealing with its attorneys[ ] to punishing a party for contempt.

Alamance, 329 N.C. at 93–94, 405 S.E.2d 125 (1991) (cleaned up).

¶ 130 "Typically, . . . [due to the Separation of Powers,] the exercise of inherent power by courts of this state has been limited to matters discretely within the judicial branch." *Id.* at 94, 405 S.E.2d 125. However,

> [t]he scope of the inherent power of a court does not, in reality, always stop neatly short of explicit, exclusive powers granted to the legislature, but occasionally must be exercised in the area of overlap between branches. The North Carolina Constitution provides: "The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." N.C. I. art. I, § 4. The perception of the separation of the three branches of government as inviolable, however, is an ideal not only unattainable but undesirable. An overlap of powers constitutes a check and preserves the tripartite balance, as two hundred years of constitutional commentary note. "Unless these [three branches of government] be so far connected and blended as to give each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained." The Federalist No. 48, at 308 (J. Madison) (Arlington House ed. 1966). This "constant check . . . preserving the mutual relations of one branch with the other . . . can best be accomplished, if not solely accomplished, by an occasional mixture of the powers of each department with that of the others, while the separate existence, and constitutional independence of each are fully provided for." 2 J. Story, Commentaries on the Constitution of the United States 22 (1833). A contemporary view notes that this area of overlap is occupied not only by the doctrine of checks and its basis in maintaining the province of each power, but also by a functional component of pragmatic necessity—termed by some commentators "incidental powers"—whereby one branch exercises some activities usually belonging to one of the other two branches in order to fully and properly discharge its duties.
>
> Like the jealous checks by one branch upon the encroachments of another, which the Framers viewed positively as the basis for government's critical balance, a functional overlap of powers should facilitate the tasks of each branch. . . . No less important to a functional balance of power is the notion of a working reciprocity and cooperativeness amongst the branches: "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635, 72 S.Ct. 863, 870, 96 L. Ed. 1153, 1199 (1952) (Jackson, J., concurring).

Id. at 96–97, 405 S.E.2d 125 (cleaned up).

[16] ¶ 131 "In the realm of appropriations," this Court has noted, "some overlap of

power between the legislative and the judicial branches is inevitable." *Id.* at 97, 405 S.E.2d 125. Accordingly, this Court has "[held] that when inaction by those exercising legislative authority threatens fiscally to undermine the integrity of the judiciary, a court may invoke its inherent power to do what is reasonably necessary for the orderly and efficient administration of justice." *Id.* at 99, 405 S.E.2d 125. Although "Article V prohibits the judiciary from taking public monies without statutory authorization[,]" when the exercise of remedial power "necessarily includes safeguarding the constitutional rights of the parties[,] ... the court has the inherent authority to direct local authorities to perform that duty." *Id.*

[17, 18] ¶ 132 However, even inherent power is not without limitation. For instance,

> doing what is reasonably necessary for the proper administration of justice means doing *no more* than is reasonably necessary. The court's exercise of its inherent power must be responsible—even cautious—and in the spirit of mutual cooperation among the three branches. The very genius of our tripartite Government is based upon the proper exercise of their respective powers together with harmonious cooperation between the three independent branches. However, if this cooperation breaks down, the Judiciary must exercise its inherent power to preserve the efficient and expeditious administration of Justice and protect it from being impaired or destroyed.
>
> The inherent power of the court must be exercised with as much concern for its potential to usurp the powers of another branch as for the usurpation it is intended to correct. It is a tool to be utilized only where other means to rectify the threat ... are unavailable or ineffectual, and its wielding must be no more forceful or invasive than the exigency of the circumstances requires.
>
> The very conception of inherent power carries with it the implication that its use is for occasions not provided for by established methods. Only when established methods fail and the court shall determine that by observing them the assistance necessary ... cannot be had, or when an emergency arises which the established methods cannot or do not instantly meet, then and not till then does occasion arise for the exercise of the inherent power.

Id. at 99–100, 405 S.E.2d 125 (cleaned up).

[19] ¶ 133 More specifically,

> the court's judicious use of its inherent power to reach towards the public purse must recognize two [further] critical limitations: first, it must bow to established procedural methods where these provide an alternative to the extraordinary exercise of its inherent power. Second, in the interests of the future harmony of the branches, the court in exercising that power must minimize the encroachment upon those with legislative authority in appearance and in fact. This includes not only recognizing any explicit, constitutional rights and duties belonging uniquely to the other branch, but also seeking the least intrusive remedy.

Id. at 100–101, 405 S.E.2d 125.

¶ 134 Here, the trial court concluded that given the extraordinary circumstance of this case, it was required to "provide a remedy [for the ongoing constitutional violation] through the exercise of its constitutional role." "Otherwise," the trial court concluded, "the State's repeated failure to meet the minimum standards for effectuating the constitutional right to obtain a sound basic education will threaten the integrity and viability of the North Carolina Constitution." By contrast, Legislative Defendants contend that the trial court's remedy violated the doctrine of separation of powers because the power to appropriate state funds is vested exclusively with the legislative branch.

3. Harmonizing Judicial and Legislative Duties and Powers

[20, 21] ¶ 135 Now, we must address the intersection of these legislative and judicial powers and duties. When considering the meaning of multiple constitutional provisions, this Court seeks to read the provisions in harmony. "It is axiomatic that the terms or requirements of a constitution cannot be in violation of the same constitution—a constitution cannot violate itself." *Leandro I*, 346 N.C. at 352, 488 S.E.2d 249. Specifically, this

case requires the interpretation of the General Assembly's powers under the Appropriations Clause in light of its duties under the Education Provisions. It likewise requires the interpretation of the judiciary's inherent power in light of the Education Provisions, the Appropriations Clause, and the Separation of Powers Clause. We address each of these constitutional crossroads in turn.

¶ 136 First, this case requires this Court to harmonize the General Assembly's powers under the Appropriations Clause in light of its duties under the Education Provisions. On the one hand, the General Assembly enjoys broad discretion over all legislative matters, including the appropriation of state funds. In conjunction with the Separation of Powers Clause, this Court has observed that "[i]n drafting the appropriations clause, the framers sought 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." *Cooper*, 376 N.C. at 37, 852 S.E.2d 46. On the other hand, this Court has repeatedly held that the General Assembly, as part of "the State," has a constitutional duty to "guard and maintain" the fundamental right of North Carolina schoolchildren to the opportunity to a sound basic education, including adequately funding our system of free public schools such that this right is maintained. *See generally Leandro I*, 346 N.C. 336, 488 S.E.2d 249; *Leandro II*, 358 N.C. 605, 599 S.E.2d 365.

[22, 23] ¶ 137 In order to harmonize these principles, we hold that our Constitution requires the General Assembly to exercise its power under the Appropriations Clause in contemporaneous compliance with its duties under the Education Provisions. Under *Leandro I*, this means that the General Assembly must exercise its appropriations powers such that every student receives the opportunity to obtain a sound basic education. In other words, the General Assembly is constitutionally required to appropriate at least enough funding to public education such that every child in every school in every district is provided with the opportunity to receive at least a sound basic education. When it does not, it violates both its own constitutional duties and the constitutional rights of North Carolina schoolchildren under the Education Provisions. To hold otherwise would allow the General Assembly to ignore these duties and rights, rendering them—and, in other contexts, other constitutional duties or fundamental rights—meaningless and not subject to judicial enforcement. This our Constitution does not allow. *See Leandro I*, 346 N.C. at 345, 488 S.E.2d 249 (concluding that plaintiffs' educational adequacy claims are not nonjusticiable political questions and that "it is the duty of this Court to address [their] constitutional challenge to the state's public education system.").

¶ 138 This principle is not novel. Since 1787, the highest Court of our state has held that because our Constitution is "the fundamental law of the land," the General Assembly may not exercise its legislative power in a manner that violates constitutional rights. *Bayard v. Singleton*, 1 N.C. (Mart.) 5, 7 (1787). Accordingly, in *Bayard*, the Court rejected a statute that abrogated the constitutional right to a trial by jury. *Id.*

¶ 139 We have applied this same principle to voting rights. In *Stephenson v. Bartlett*, for instance, this Court stated that the principle of constitutional harmony "require[d] us to construe [the legislature's power under] Article II, Sections 3(1) and 5(1) in conjunction with [the right to equal protection of the laws under] Article I, Section 19 in such a manner as to avoid internal textual conflict." 355 N.C. 354, 378, 562 S.E.2d 377 (2002). Accordingly, the Court held that

> [t]he General Assembly may consider partisan advantage and incumbency protection in the application of its discretionary redistricting decisions, but it must do so in conformity with the State Constitution. To hold otherwise would abrogate the constitutional limitations or "objective constraints" that the people of North Carolina have imposed on legislative redistricting and reapportionment in the State Constitution.

Id. at 371–72, 562 S.E.2d 377.

¶ 140 More recently, this Court reaffirmed this principle in *Harper*, 2022-NCSC-17, 868 S.E.2d 499. There we again noted that "[a]l-

though the task of redistricting is primarily delegated to the legislature, it must be performed in conformity with the State Constitution." *Id.* at ¶ 6 (cleaned up). Thus, we held that the General Assembly's "redistricting authority is subject to limitations contained in the North Carolina Constitution, including both in the provisions allocating the initial redistricting responsibility to the General Assembly and in other provisions [in our Declaration of Rights]." *Id.* at ¶ 12. In these cases and others, this Court has made clear that the General Assembly may not exercise its broad legislative power in a manner that violates fundamental constitutional rights.

¶ 141 So too here. The Education Provisions obligate the General Assembly to fund a uniform system of free public schools in which every child has the opportunity to receive a sound basic education. N.C. Const. art. I, § 15; N.C. Const. art. IX, § 2; *Leandro I*, 346 N.C. at 345, 488 S.E.2d 249. The Appropriations Clause, among other provisions, establishes the General Assembly's power to appropriate State funds. Therefore, in exercising its broad discretion within appropriations and other legislative powers, the General Assembly must fulfill its constitutional duty to maintain every child's right to the opportunity to receive a sound basic education.

¶ 142 Below, the dissent focuses exclusively on the legislature's powers while ignoring its constitutional duties. Such an approach would allow the legislature to exercise its broad powers under the Appropriations Clause (or others) in a manner that indefinitely violates the fundamental constitutional rights of the people. This interpretation would approve both constitutional dissonance and constitutional disregard in direct violation of this Court's own constitutional duties.

¶ 143 Second and accordingly, this case requires the interpretation of the judiciary's inherent power to remedy constitutional violations in light of the Education Provisions, the Appropriations Clause, and the Separation of Powers Clause. On the one hand, the Appropriations Clause states 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. The Separation of Powers Clause states that "[t]he legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." N.C. Const. art. I, § 6. As applied to the Appropriations Clause, this Court has noted that the principle of separation of powers indicates "that the legislative power is supreme over the public purse." *State v. Davis*, 270 N.C. 1, 14, 153 S.E.2d 749 (1967). More recently, this Court has stated that "[i]n light of [the Appropriations Clause], the power of the purse is the exclusive prerogative of the General Assembly." *Cooper*, 376 N.C. at 37, 852 S.E.2d 46.

¶ 144 On the other hand, the judicial branch derives inherent and inalienable authority to address the violation of constitutional rights from its very status as one of three separate and coordinate branches of our state government. *See Ex Parte McCown*, 139 N.C. 95, 105–06, 51 S.E. 957 (1905) (citing N.C. Const. art. I, § 4); *Corum*, 330 N.C. at 783, 413 S.E.2d 276 ("It is the state judiciary that has the responsibility to protect the state constitutional right of the citizens."). As a coequal part of "the State," the judiciary—like the legislative and executive branches—is constitutionally bound by Article I, § 15 to fulfill its own unique role in guarding and maintaining the right to a sound basic education. This role requires the judiciary to assess the constitutional compliance of the other branches and—if an offending branch proves unwilling or unable to remedy the deficiency—after showing due deference, invoke its inherent power to do what is reasonably necessary to restore constitutional rights "by imposing a specific remedy and instructing the recalcitrant state actors to implement it." *Leandro II*, 358 N.C. at 642, 599 S.E.2d 365.

[24] ¶ 145 In order to harmonize these principles, we hold that because the Constitution itself requires the General Assembly to adequately fund the state's system of public education, in exceedingly rare and extraordinary circumstances, a court may remedy an ongoing violation of the constitutional right to the opportunity to a sound basic education by ordering the transfer of adequate available state funds.

[25] ¶ 146 This holding is consistent with foundational constitutional principles. First, it upholds the will of the people. Above any statute or legislative prerogative, our Constitution "expresses the will of the people in this State and is, therefore, the supreme law of the land." *In re Martin*, 295 N.C. 291, 299, 245 S.E.2d 766 (1978). Accordingly, just as the General Assembly's authority over appropriations is grounded in its function as the elected voice of the people, *see Cooper*, 376 N.C. at 37, 852 S.E.2d 46, the requirement for adequate education funding embedded within the Education Provisions is fully consistent with the Framers' intent to give the people ultimate control over the state's expenditures.

¶ 147 Second, this holding upholds constitutional integrity. Allowing the legislature to indefinitely violate the constitutional right of North Carolina schoolchildren to a sound basic education would threaten the integrity and viability of the Constitution itself by nullifying its language without the people's consent, thus rendering this right—and therefore, perhaps others—meaningless and unenforceable. This Court has already forsworn this possibility: in *Leandro I*, the Court squarely rejected the State's contention that claims of education adequacy were judicially unenforceable. 346 N.C. at 344–45, 488 S.E.2d 249.

[26–28] ¶ 148 Third, this holding upholds constitutional checks and balances and the separation of powers. The North Carolina Constitution "incorporates a system of checks and balances that gives each branch some control over the others." *State ex rel. McCroy v. Berger*, 368 N.C. 633, 635, 781 S.E.2d 248 (2016). Simultaneously, "the separation of powers clause requires that, as the three branches of government carry out their duties, one branch will not prevent another branch from performing its core functions." *Id.* at 636, 781 S.E.2d 248. Although at first glance these principles may appear to be in tension—one indicating flexibility and the other rigidity—a deeper look reveals that they both support a common democratic purpose: ensuring that no single person or branch may accumulate excessive power, and thus threaten the liberty and sovereignty of the people. *See The Federalist* No. 47 (James Madison) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands ... may justly be pronounced the very definition of tyranny."). As cases arise that probe the contours of these foundational constitutional principles, this Court "must look freshly at the separation of powers provision in the North Carolina Constitution, with an eye to the actual constitutional, pragmatic, and philosophical limitations on the power granted therein." *Alamance*, 329 N.C. at 96, 405 S.E.2d 125.

¶ 149 Our fresh look is informed by old sources. In *The Federalist Papers*, James Madison stated that the separation of powers between the three branches does "not mean that these departments ought to have no *partial agency* in, or no *control* over, the action of each other." *Federalist* No. 47. Rather, the separation of powers properly dictates "that where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free Constitution are subverted." *Id.*[14] Indeed, Madison observed that "[i]f we look into the constitutions of the several states we find that, notwithstanding the emphasis and, in some instances, the unqualified terms in which [the separation of powers] has been laid down, there is not a single instance in which the several departments of power have been kept absolutely separate and distinct." *Id.* This marginal intersection of certain powers is necessary because "unless these departments be so far connected and blended as to give each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained." *Federalist* No. 48 (James Madison). In short, "the lesson the Founding Fa-

14. *See also* 2 J. Story, *Commentaries on the Constitution of the United States* 22 (1833) (observing that the "constant check ... preserv[ing] the mutual relations of one [branch] with the other ... can be best accomplished, if not solely accomplished, by an occasional mixture of the powers of each department with that of the others, which the separate existence, and constitutional independence are each fully provided for").

thers drew was that separation of powers needed to be qualified by checks and balances lest one branch become overpowerful." Orth at 4.

¶ 150 Specifically, the founders expressed concern about an overpowerful legislature. In *The Federalist* No. 48, Madison warned that because the constitutional powers of the legislative branch are "at once more extensive, and less susceptible of precise limits, it can, with greater facility, mask, under complicated and indirect measures, the encroachment which it makes on the co-ordinate departments." *Federalist* No. 48. Accordingly, Alexander Hamilton observed in *The Federalist* No. 78 that "the courts were designed to be an intermediate body between the people and the legislature in order, among other things, to keep the latter within the [constitutional] limits assigned to their authority." This role does not

> suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both, and that where the will of the legislature ... stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the later rather than the former. They ought to regulate their decisions by the fundamental laws rather than by those which are not fundamental.

Id.

¶ 151 Precedents from this Court align with these foundational authorities. This Court has long made clear that "[o]bedience to the Constitution on the part of the Legislature is no more necessary to orderly government than the exercise of the power of the Court in requiring it when the Legislature inadvertently exceeds its limitations." *State v. Harris*, 216 N.C. 746, 764, 6 S.E.2d 854 (1940). As such, for over two centuries our courts have faithfully checked legislative actions for constitutional compliance. *See Bayard*, 1 N.C. 5. "Like the jealous checks by one branch upon the encroachments of another, which the Framers viewed positively as the basis for government's critical balance, a functional overlap of powers should facilitate the tasks of each branch." *Alamance*, 329 N.C. at 97, 405 S.E.2d 125.

¶ 152 In extraordinary circumstances, this Court has held that this "functional overlap of powers" may include directing the transfer of State funds. In *Alamance*, this Court held that even within "the realm of appropriations, some overlap of power between the legislative and the judicial branches is inevitable." 329 N.C. at 97, 405 S.E.2d 125. There, the Court held "that when inaction by those exercising legislative authority threatens fiscally to undermine the integrity of the judiciary, a court may invoke its inherent power to do what is reasonably necessary for the orderly and efficient exercise of the administration of justice." *Id.* at 99, 405 S.E.2d 125. Here, we invoke our inherent authority to protect against an equally grave threat of legislative inaction: the indefinite violation of the constitutional right to the opportunity to a sound basic education.

¶ 153 Even standing apart from checks and balances, separation of power principles likewise support this holding. "[T]he separation of powers clause requires that, as the three branches of government carry out their duties, one branch will not prevent another branch from performing its core functions." *McCrory*, 368 N.C. at 636, 781 S.E.2d 248. Here, to allow the State to indefinitely fail to meet the minimum standards for effectuating the constitutional right to obtain a sound basic education would violate this maxim by preventing the judiciary from performing its core duty of interpreting our Constitution and "protecting the state constitutional rights of the citizens." *Corum*, 330 N.C. 761, 413 S.E.2d 276.

¶ 154 Below, the dissent would abandon all notions of checks and balances in favor of an absolutely rigid interpretation of the separation of powers. Such an approach would empower the legislative or executive branch to indefinitely violate the fundamental constitutional rights of the people without consequence in direct contravention of the judiciary's own constitutional "responsibility to protect the state constitutional rights of the citizens." *Corum*, 330 N.C. at 783, 413 S.E.2d 276.

[29–33] ¶ 155 Finally, this holding aligns with precedent regarding equitable remedies.

When extraordinary circumstances render it necessary and proper for a court to exercise its inherent authority, it is obligated and empowered to craft and order flexible equitable relief to remedy the violation of fundamental constitutional rights. "It is the unique role of the courts to fashion equitable remedies to protect and promote the principles of equity." *Lankford v. Wright*, 347 N.C. 115, 120, 489 S.E.2d 604 (1997) "It is a long-standing principle that 'when equitable relief is sought, courts claim the power to grant, deny, limit, or shape that relief as a matter of discretion.' " *Sara Lee Corp. v. Carter*, 351 N.C. 27, 36, 519 S.E.2d 308 (1999) (quoting *Roberts v. Madison County Realtors Ass'n*, 344 N.C. 394, 399, 474 S.E.2d 783 (1996)). "A court of equity traditionally has discretion to shape the relief in accord with its view of the equities or hardships of the case." *Roberts*, 344 N.C. at 401, 474 S.E.2d 783. "It is a fundamental premise of equitable relief that equity regards as done that which in fairness and good conscience ought to be done." *Thompson v. Sole*, 299 N.C. 484, 489, 263 S.E.2d 599 (1980). Intuitively, "[v]arious rights that are protected by our Declaration of Rights may require greater or lesser relief to rectify the violation of such rights, depending on the right violated and the facts of the particular case." *Corum*, 330 N.C. at 784, 413 S.E.2d 276.

¶ 156 The equitable remedy considered within this case is extraordinary, but not unprecedented. Indeed, precedent for this broad and flexible equitable remedial power can be found within this very litigation, in other cases from this Court, and in related cases from federal courts and other state courts.

¶ 157 First, emphasis on this Court's equitable remedial power can be found within the history of this very case. In *Leandro I*, after recognizing the constitutional right to a sound basic education, this Court summarized the process and standards through which a violation of that right may be established and how the judiciary may address such a violation. 346 N.C. at 357, 488 S.E.2d 249. Because "the administration of the public schools of the state is best left to the legislative and executive branches of government," the Court emphasized that "the courts of the state must grant every reasonable deference to [those] branches when considering whether they have established and are administering a system that provides the children of the various school districts of the state a sound basic education." *Id.*

> A clear showing to the contrary must be made before the courts may conclude that they have not. Only such a clear showing will justify a judicial intrusion into an area so clearly the province, initially at least, of the legislative and executive branches as the determination of what course of action will lead to a sound basic education.

Id.

¶ 158 However, immediately following the explanation of this procedure, this Court made expressly clear that

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

Id. (emphasis added).

¶ 159 In *Leandro II*, this Court was even more explicit. After holding that the trial court's pre-kindergarten order was premature at that early stage of the remedial process, this Court cautioned:

> [c]ertainly, 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, 599 S.E.2d 365 (emphasis added). Today, we confirm that we meant what we said in *Leandro I* and *II*.

¶ 160 Second, prior cases likewise affirm this Court's broad equitable powers to remedy the violation of rights in a wide variety of substantive and procedural contexts. In *Alamance*, for instance, this Court addressed the inaction of county officials to adequately fund the county's court facilities. 329 N.C. at 88, 405 S.E.2d 125. This Court held that "[a]lthough the statutes do not expressly pass the duty of providing adequate judicial facilities to the court in cases of default by local authorities, the court has the inherent authority [to remedy the violation by] direct[ing] local authorities to perform that duty."[15] 329 N.C. at 99, 405 S.E.2d 125. Ultimately, the Court vacated the trial court's order because "in form and in substance the order's attempted remedy went beyond requiring the Alamance County Commissioners to do their constitutional and statutory duty" and therefore "exceeded what was reasonably necessary to the administration of justice under the circumstances of th[at] case, and in so doing strained at the rational limits of the court's inherent power." *Id.* at 106–07, 405 S.E.2d 125. A more reasonable remedy, the Court explained, would be to "call attention to [the official's] statutory duty and their apparent failure to perform that duty," and "[i]f after a hearing it was determined that the commissioners had indeed failed to perform their duty, ... the court could order the commissioners to respond with a [remedial] plan ... to submit to the court within a reasonable time."[16] *Id.* at 107, 405 S.E.2d 125. If at *that* point the violation persisted, the Court implied, the trial court's more invasive remedy would have been more appropriate. *See id.* at 106–07, 405 S.E.2d 125.

¶ 161 Similarly, this Court has long recognized the judiciary's broad equitable powers to remedy constitutional violations through ordering the transfer of State funds by mandamus. In *Wilson v. Jenkins*, this Court declared that

> the [c]ourts have no power to compel, by mandamus, the Public Treasurer to pay a debt which the General Assembly has directed him not to pay, the Auditor to give a warrant upon the Treasurer which the General Assembly has directed him not to give, *unless the act of the General Assembly be void as violating the Constitution of the United States of or this State.*

72 N.C. 5, 6 (1875) (emphasis added).

¶ 162 So too in the context of ordering certain education funding. In *Hickory v. Catawba County*, this Court affirmed the trial court's use of mandamus to compel the County and the Board of County Commissioners to assume payment of school buildings and the debt of the school district. 206 N.C. 165, 170–74, 173 S.E. 56 (1934). Because "[t]he defendants are public agencies charged with the performance of duties imposed by the Constitution and by statutes[,]" the Court held that "upon their failure or refusal to discharge the required duties resort may be had to the courts to compel performance by the writ of mandamus." *Id.* at 173, 173 S.E. 56. In *Mebane Graded School District v. Alamance County*, this Court held the same. 211 N.C. 213, 189 S.E. 873 (1937). There, the Court stated that

> [u]nder legal authority, the county of Alamance has assumed almost every school debt of every school district except the Mebane District. Having assumed part, it is the duty, under the facts in this case, to assume the indebtedness of the Mebane District, and from the findings of the jury mandamus will lie to compel them to do so. Technicalities and refinements should not be seriously considered in a case like this involving a constitutional mandate, but the record should be so interpreted that substantial justice should be done. Under the

15. Here, by contrast, the General Assembly *does* have an express constitutional duty to "guard and maintain" the right to a sound basic education and to fund that right "by taxation and otherwise." N.C. Const. art. I, § 15; N.C. Const. art. IX, § 2; *see generally Leandro I*, 346 N.C. 336, 488 S.E.2d 249; *Leandro II*, 358 N.C. 605, 599 S.E.2d 365.

16. Notably, this is *exactly* what the trial court has already done in this case.

> facts in this case and the findings of the jury, it would be inequitable and unconscionable for defendants to assume part and not all of the indebtedness of the school districts of Alamance and not assume the plaintiffs' indebtedness and give them the relief demanded.

Id. at 226–27.

¶ 163 So too in a variety of other substantive and procedural contexts. In *Lankford v. Wright*, this Court concluded that in the adoption context, "a decree of equitable adoption should be granted where justice, equity, and good faith require it." 347 N.C. 115, 121, 489 S.E.2d 604 (1997). In *Sara Lee Corp.*, this Court relied on flexible equitable remedial power to conclude that "the trial court properly exercised its discretion in ordering that defendant's workers' compensation benefits be placed in a constructive trust." 351 N.C. at 37, 519 S.E.2d 308. In *White v. Worth*, this Court affirmed the trial court's mandamus ordering the State auditor and State treasurer to transfer state funds to pay the state's chief inspector in order to uphold the inspector's statutory right to such payment. 126 N.C. 570, 547–78, 36 S.E. 132 (1900). While the substantive and procedural context of these cases (and many others) are diverse, their foundational principle is unified: when addressing the violation of rights, our courts enjoy broad and flexible equitable power to ensure that the violation is justly remedied.

¶ 164 Third, federal precedents provide persuasive authority. Indeed, the Supreme Court of the United States has previously addressed the broad scope of judicial equitable remedial power in protecting the constitutional rights of marginalized students from executive and legislative violation and recalcitrance.

¶ 165 In 1954, the U.S. Supreme Court in *Brown I* declared that "in the field of public education, the doctrine of 'separate but equal' has no place." 347 U.S. at 494, 74 S.Ct. 686. In ruling that racial segregation in public schools violated the equal protection rights of Black students, the Court struck down perhaps the most visible and consequential pillar of white supremacy and racial subordination in American society. In its second ruling in the case, the Court expressly directed the federal district courts responsible for overseeing the enforcement of desegregation to engage in equitable principles:

> In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. These cases call for the exercise of these traditional attributes of equity power. At stake is the personal interests of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis. To effectuate this interest may call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in [*Brown I*]. Courts of equity may properly take into account the public interest in the elimination of such obstacles in a systemic and effective manner. But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them.

Brown v. Bd. of Educ., 349 U.S. 294, 300, 75 S.Ct. 753, 99 L.Ed. 1083 (1955) (footnotes omitted) (*Brown II*).

¶ 166 Yet disagreement there was. Immediately following *Brown I* and *Brown II*, many white state officials vigorously resisted and defied the Court's order to desegregate their public schools.[17] For several years, the federal judiciary largely deferred to these state officials. But as resistance to *Brown* continued and intensified, the U.S. Supreme Court in a series of rulings exercised its inherent authority to protect the constitutional rights of marginalized students by ordering broad and flexible equitable remedies.

¶ 167 In 1958 in *Cooper v. Aaron*, the Court addressed resistance to desegregation

17. *See generally* Mark Tushnet, Making Civil Rights Law 247–56 (1994) (documenting the "massive resistance" against *Brown*).

by executive and legislative officials in Arkansas. 358 U.S. 1 (1958). "The constitutional rights of respondents[,]" the Court declared, "are not to be sacrificed or yielded to the violence and disorder which have followed upon the actions of the Governor and the Legislature." *Id.* at 16. While it is "quite true that the responsibility for public education is primarily the concern" of state officials, the Court noted that "it is equally true that such responsibilities, like all other state activity, must be exercised consistently with federal constitutional requirements." *Id.* at 19. Only through compliance with these principles, the Court concluded, "[is] [o]ur constitutional ideal of equal justice under law . . . made a living truth." *Id.* at 20.

¶ 168 In 1964 in *Griffin v. County School Board*, the Court spoke more forcefully. 377 U.S. 218, 84 S.Ct. 1226, 12 L.Ed.2d 256. There, the Court addressed resistance to desegregation by state and local officials in Virginia, where "[t]he General Assembly . . . enacted legislation to close any public schools where white and colored children were enrolled together, to cut off state funds to such schools, [and] to pay tuition grants to children in nonsectarian private schools." *Id.* at 221, 84 S.Ct. 1226. In addressing "the question of the kind of decree necessary and appropriate to put an end to the racial discrimination practiced against these petitioners under authority of the Virginia laws[,]" the Court noted that "all of [the state official defendants] have duties which relate directly or indirectly to the financing, supervision, or operation of the schools." *Id.* at 232, 84 S.Ct. 1226. Accordingly, the Court declared that "the District Court may, if necessary to prevent further racial discrimination, *require the [applicable officials] to exercise the power that is theirs to levy taxes to raise funds adequate to reopen, operate, and maintain without racial discrimination a public school system.*" *Id.* at 233, 84 S.Ct. 1226 (emphasis added). "An order of this kind is within the court's power if required to assure these petitioners that their constitutional rights will no longer be denied them." *Id.* at 233–34, 84 S.Ct. 1226.

¶ 169 Finally, in 1971 in *Swann v. Charlotte-Mecklenburg Board of Education*, the Court further emphasized its broad and flexible power to order equitable remedies. 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554. There, after the district court deemed the school board's initial desegregation plan unacceptable, it "appointed an expert in education administration, Dr. John Finger, to prepare a desegregation plan." *Id.* at 8, 91 S.Ct. 1267. When the district court ordered the school district to implement this plan, the school board challenged the district court's equitable remedial powers, arguing that the court had gone too far in ordering the implementation of the plan. *Id.* at 16–17, 91 S.Ct. 1267.

¶ 170 On appeal, the U.S. Supreme Court unanimously affirmed the district court's expansive and adaptable authority to enact equitable remedies in the face of an ongoing constitutional violation. *Id.* at 32, 91 S.Ct. 1267. "Once a right and a violation have been shown," the Court declared, "the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Id.* at 15, 91 S.Ct. 1267. Indeed, it was only "because of th[e] total failure of the school board that the District Court was obligated to turn to other qualified sources, and Dr. Finger *was designated to assist the District Court to do what the board should have done.*" *Id.* at 25, 91 S.Ct. 1267 (emphasis added). "Thus the remedial techniques used in the District Court's order were within that court's power to provide equitable relief; implementation of the decree is well within the capacity of the school authority." *Id.* at 30, 91 S.Ct. 1267.

¶ 171 Of course, notable differences exist between the circumstance of the U.S. Supreme Court enforcing *Brown* and the circumstances here. Where the rights in *Brown* originate in the federal Constitution, the rights in this case originate in the North Carolina Constitution. Where *Brown* and its progeny remedied a denial of education *access*, this case remedies a denial of education *adequacy.* Where *Brown* and its progeny considered issues of federalism, this case considers those of the separation of powers and checks and balances between coequal branches of state government.

¶ 172 Nevertheless, the broader applicability of *Brown* and its progeny to our inquiry today arises from the fundamental alignment of the question at the heart of each case: what is the proper role of the judiciary in guarding and maintaining the constitutional rights of marginalized schoolchildren in the face of ongoing violations by state legislative and executive powers? Because of the alignment of this fundamental question, the U.S. Supreme Court's answer in the wake of *Brown* informs our answer here.

¶ 173 Fourth, rulings from other state supreme courts lend support. Many other state supreme courts have exercised broad and flexible equitable remedial powers to address ongoing violations of state constitutional education rights. In 1989, the Supreme Court of Kentucky affirmed the trial court's determination that the state's school finance system was unconstitutional and ordered the state to completely redesign it to ensure adequate funding to meet the needs of marginalized students. *See Rose v. Council for Better Educ.*, 790 S.W.2d 186, 215 (1989) ("Lest there be any doubt, the result of our decision is that Kentucky's *entire system* of common schools is unconstitutional."). In 2003, the Court of Appeals of New York (that state's highest appellate court) ordered the state to reform its school finance system to provide for a comprehensive package of foundational educational resources identified by the court. *See Campaign for Fiscal Equity, Inc. v. State*, 100 N.Y.2d 893, 930, 769 N.Y.S.2d 106, 801 N.E.2d 326 (2003) (ordering that the State "ascertain the actual cost of providing a sound basic education in New York City" and implement subsequent reforms to "address the shortcomings of the current system by ensuring ... that every school in New York City would have the resources necessary for providing the opportunity for a sound basic education").

¶ 174 Other supreme courts have likewise ordered the reallocation of state funds. In 2011, the Supreme Court of New Jersey ordered the state to provide approximately $500 million in additional education funding after violating its constitutional duty. *See Abbott v. Burke*, 206 N.J. 332, 376, 20 A.3d 1018 (2011) ("We order that funding to the Abbott districts in FY 2012 must be calculated and provided in accordance with the SFRA formula."). In 2017, the Supreme Court of Kansas determined the state's education finance system was constitutionally noncompliant and ordered the legislature to enact legislation remedying the deficiency in "both adequacy and equity." *Gannon v. State*, 306 Kan. 1170, 1173, 402 P.3d 513 (2017). The court emphasized that continued judicial deference to the legislature's constitutional violation would "make[ ] the courts vulnerable to becoming complicit actors in the deprivation of those rights." *Id.* at 1174, 402 P.3d 513. Finally, the Supreme Court of Washington in 2017 affirmed the trial court's order finding the state's education funding system to be constitutionally deficient and imposing a $100,000 daily contempt sanction on the state until compliance was achieved. *See McCleary v. State*, 2017 Wash. 2017 WL 11680212, *1 (2017) ("The court will retain jurisdiction, continue to impose daily sanctions, and reserve all enforcement options to compel compliance with its decision and orders.").

¶ 175 Of course, these cases are not binding precedent upon this Court. They arise in different jurisdictions under different facts and different constitutional language. Nevertheless, as with the federal cases noted above, they provide important national context and persuasive authority for this Court's similar ruling today.

¶ 176 Legislative Defendants and the Controller contend that declaratory relief constitutes the farthest reach of judicial power on this issue. Based on the intersection of the Appropriations Clause and the Separation of Powers Clause noted above, they argue that once a court issues such a decree, the matter is then exclusively in the hands of the voters to elect new legislators if they so choose. But compliance with our Constitution is not a mere policy choice in which legislators may align with one side or another. Indeed, the people of North Carolina have already spoken on this issue through the Constitution itself, which constitutes the supreme will of the people. There, they mandated that the State must guard and maintain the right to the opportunity to a sound basic education. *See Leandro I*, 346 N.C. 336, 488 S.E.2d 249.

* * * * *

[34, 35] ¶ 177 In summary, constitutional violations demand a just remedy. N.C. Const. art. I, § 18. As the ultimate interpreter of our State Constitution, this Court "has the responsibility to protect the state constitutional rights of the citizens." *Corum*, 330 N.C. at 783, 413 S.E.2d 276. Correspondingly, the judiciary is empowered with "inherent constitutional power to fashion a common law remedy for a violation of a particular constitutional right." *Id.* at 784, 413 S.E.2d 276. When necessary for the proper administration of justice based on the inaction of another branch, and within important limitations, that inherent judicial power may include the authority to craft a remedy "whereby one branch exercises some activities usually belonging to one of the other two branches in order to fully and properly discharge its duties." *Alamance*, 329 N.C. at 97, 405 S.E.2d 125.

¶ 178 Here, our Constitution requires the General Assembly to exercise its power under the Appropriations Clause in contemporaneous compliance with its constitutional duties under the Education Provisions. Accordingly, in exceedingly rare and extraordinary circumstances, a court may remedy an ongoing violation of the constitutional right to a sound basic education by directing the transfer of adequate available state funds. However, a court may reach for such an extraordinary remedy "only when established methods fail," and even then must "minimize the encroachment upon those with legislative authority in appearance and in fact." *Id.* This holding maintains the integrity of our Constitution, honors the principles of checks and balances and separation of powers, aligns with this Court's precedent on equitable remedial power, and is supported by federal and state rulings in similar contexts.

C. Application

¶ 179 Now, we must apply the constitutional analysis above to the two trial court orders in question on this appeal: the November 2021 Order and the April 2022 Order. We address each in turn. This Court reviews constitutional issues de novo.

1. November 2021 Order

¶ 180 We first review the trial court's 10 November 2021 Order (November 2021 Order). The November 2021 Order begins with thorough findings of fact regarding the long and extraordinary history of this case. These factual findings document the trial court's previous repeated findings of a statewide constitutional violation, the State's repeated failure to adequately remedy that violation, and the trial court's repeated deference to the executive and legislative branches to do so. The Order finds that the CRP "is the *only* remedial plan that the State Defendants have presented to the [c]ourt," and that "more than sufficient funds are available to execute the current need of the [CRP]." The Order's factual findings conclude by observing: "[i]n the seventeen years since the *Leandro II* decision, a new generation of school children, especially those at-risk and socio-economically disadvantaged, were denied their constitutional right to a sound basic education. Further and continued damage is happening now, especially to at-risk children from impoverished backgrounds, and that cannot continue."

¶ 181 The November 2021 Order subsequently makes several conclusions of law. The Order concludes that "[b]ecause the State has failed for more than seventeen years to remedy the constitutional violation as the Supreme Court ordered, this [c]ourt must provide a remedy through the exercise of its constitutional role." To continue to defer, the Order concludes, "will threaten the integrity and viability of the North Carolina Constitution by . . . nullifying [its] language without the people's consent, . . . ignoring rulings of the Supreme Court of North Carolina[,] . . . and . . . violating separation of powers." The Order further concludes that the Education Provisions constitute "an ongoing constitutional appropriation of funds sufficient to create and maintain a school system that provides each of our State's students with the constitutional minimum of a sound basic education. This constitutional provision may therefore be deemed an appropriation 'made by law.' " Finally, the Order concludes that the trial court has "minimized its encroachment on legislative authority

through the least intrusive remedy" through its seventeen years of unfettered deference in every aspect of the case, including allowing the State itself to create and implement the CRP.

¶ 182 Based on these factual findings and legal conclusions, the November 2021 Order orders the OSBM and the State Budget Director, the Office of the State Controller and the State Controller, and the Office of the State Treasurer and the State Treasurer to "take the necessary actions to transfer the total amount of funds necessary to effectuate years 2 & 3 of the [CRP] from the unappropriated balance within the General Funds to the state agents and state actors with fiscal responsibility for implementing the [CRP]." The Order then specifies the dollar amounts of three transfers to DHHS, DPI, and the UNC System. The Order directs these recipients, their agents, and all other involved State actors to administer those funds and take any other actions necessary "to guarantee the opportunity of a sound basic education consistent with, and under the times frames set out in, the [CRP], including the Appendix thereto."

[36] ¶ 183 Today, this Court affirms the constitutionality of the November 2021 Order's transfer directives. We reach this holding because, given the extraordinary circumstances of this case, the trial court acted within its inherent power to address ongoing constitutional violations through equitable remedies while minimizing its encroachment upon the legislative branch.

¶ 184 In *Leandro I*, this Court established the procedure through which a court may identify and remedy a violation of the fundamental right to a sound basic education. The Court stated that

> [T]he courts of this state must grant every reasonable deference to the legislative and executive branches when considering whether they have established and are administering a system that provides the children of the various school districts of the state a sound basic education. A clear showing to the contrary must be made before the courts may conclude that they have not. . . . [If a] court makes findings and conclusions from competent evidence to the effect that defendants in this case are denying children of the state a sound basic education, a denial of a fundamental right will have been established. It will then become incumbent upon defendants to establish that their actions denying this fundamental right are "necessary to promote a compelling governmental interest." If defendants are unable to do so, it will then be the duty of the court to enter a judgment granting declaratory relief and such other relief as necessary to correct the wrong while minimizing the encroachment upon the other branches of government.

346 N.C. at 357, 488 S.E.2d 249 (citations omitted).

¶ 185 In *Leandro II*, this Court further noted 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.

358 N.C. at 642, 599 S.E.2d 365.

¶ 186 As noted above, when the action or inaction of a coequal branch of government indefinitely violates the fundamental constitutional rights of the people, a court—after showing appropriate deference—may invoke its inherent power to do what is reasonably necessary to remedy the violation. Under extraordinary circumstances, this may include directing state actors to transfer available state funds in order to guard and maintain the right of every child to the opportunity to a sound basic education.

¶ 187 Even then, important limitations apply.

> [A] court's judicious use of its inherent power to reach towards the public purse must recognize two critical limitations: first, it must bow to established procedural methods where these provide an alternative to the extraordinary exercise of its inherent power. Second, in the interests of

> the future harmony of the branches, the court in exercising that power must minimize the encroachment upon those branches with legislative authority in appearance and in fact . . . [by] seeking the least intrusive remedy.

Alamance, 329 N.C. at 100–01, 405 S.E.2d 125.

¶ 188 Here, the trial court faithfully complied with these procedures, powers, and limitations. First, after an extensive trial in which it granted every reasonable deference to the executive and legislative branches, it determined based on an abundance of clear and convincing evidence that the State was violating its constitutional obligation to guard and maintain the right of all North Carolina schoolchildren to the opportunity to a sound basic education as defined by *Leandro I*. While the trial court focused primarily on Hoke County as a representative district, it expressly and repeatedly made findings of fact and conclusions of law regarding a statewide violation that was not isolated to Hoke County.[18] The State has never and does not contend that this statewide violation is necessary to promote a compelling governmental interest.

¶ 189 In *Leandro II*, this Court affirmed the trial court's conclusion. 358 N.C. 605, 599 S.E.2d 365. This Court's opinion limited itself to Hoke County as a representative district but directed the trial court on remand to conduct "further proceedings that include, but are not necessarily limited to, presentations of relevant evidence by the parties, and findings and conclusions of law by the trial court" regarding other districts. *Id.* at 613 n.5, 599 S.E.2d 365. Within these further proceedings, the Court emphasized, "a broader mandate may ultimately be required." *Id.* at 633 n.15, 599 S.E.2d 365. Upon remand, this Court instructed the trial court to "proceed, as necessary, in a fashion that is consistent with the tenets outlined in this opinion." *Id.* at 648, 358 N.C. 605.[19]

¶ 190 So the trial court did. For about fourteen years, the trial court presided over presentations of relevant evidence by the parties in open court and made volumes upon volumes of factual findings and conclusions of law. These repeatedly affirmed the same ultimate legal conclusion: that despite its piecemeal remedial efforts, the State remained in statewide violation of its constitutional duty to provide all students with the opportunity to receive a sound basic education.

[37] ¶ 191 True, these factual findings and legal conclusions were typically issued within documents titled "Notice of Hearing and Order" rather than just "Order." But it is well within this Court's ability and authority to properly identify factual findings and legal conclusions as such, regardless of how they are labeled by a trial court. *See, e.g., In re J.O.D.*, 374 N.C. 797, 807, 844 S.E.2d 570 (2020) (identifying findings of fact and conclusions of law as such despite trial court labels). Further, this Court already articulated in *Leandro II* that

> [i]n our view, the unique procedural posture and substantive importance of this case compel us to adopt and apply the broadened parameters of a declaratory judgment action that is premised on issues of great public interest. The children of North Carolina are our state's most valuable renewable resource. If inordinate numbers of them are wrongfully being denied their constitutional right to the opportunity for a sound basic education, our state courts cannot risk further and continued damage because the perfect civil action has proved elusive.

358 N.C. at 616, 599 S.E.2d 365. So too here regarding the perfectly formatted court pa-

18. The State itself likewise emphasized that any remedial efforts must be directed statewide because "[t]he State . . . never understood the Supreme Court or [the trial] [c]ourt to have ordered the defendants to provide students in Hoke County or any of the other plaintiff or plaintiff-intervenor school districts special treatment, services or resources which were not available to at-risk students in other LEAs across the State."

19. Contrary to the claim of the dissent below, this Court in *Leandro II* did not expressly direct the trial court to conduct additional trials. Rather, it instructed the trial court to "proceed, as necessary, in a fashion that is consistent with the tenets outlined in this opinion." *Id.*

per.[20] "Technicalities and refinements should not be seriously considered in a case like this involving a constitutional mandate, but the record should be so interpreted that substantial justice should be done." *Mebane*, 211 N.C. at 227, 189 S.E. 873. Indeed, "[f]or well over a century, North Carolina courts have abided by the foundational principles that administering equity and justice prohibits the elevation of form over substance." *M.E. v. T.J.*, 380 N.C. 539, 2022-NCSC-23, ¶ 1, 869 S.E.2d 624. To cover our eyes and plug our ears to the trial court's express and repeated findings and conclusions of a statewide *Leandro* violation because of procedural imperfections would squarely violate that prohibition. Accordingly, this Court holds that the trial court, in alignment with this Court's instructions in *Leandro II*, properly concluded based on an abundance of clear and convincing evidence that the State's *Leandro* violation was statewide.[21]

¶ 192 Next, the November 2021 Order properly concluded that the trial court showed sufficient deference to the executive and legislative branches to remedy this violation. As summarized above, this conclusion is grounded in eighteen years of clear and convincing evidence. Year after year, hearing after hearing, attempt after attempt, the trial court continued to provide the executive and legislative branches more time and space to fix the violation on their own terms. Yet year after year, hearing after hearing, attempt after attempt, they did not.

¶ 193 Over these years, the trial court made clear its increasing frustration and decreasing patience with the State's failure to remedy the violation despite its constitutional and court-ordered obligation to do so. In 2015, for instance, the trial court lamented that

> [n]o matter how many times the [c]ourt has issued Notices of Hearings and Orders regarding unacceptable academic performance, and even after the North Carolina Supreme Court plainly stated that the mandates of *Leandro* remain "in full force and effect[,]" many adults involved in education ... still seem unable to understand that **the constitutional right to have an equal opportunity to obtain a sound basic education is a right vested in <u>each and every child</u> in North Carolina regardless of their respective age or educational needs**.

The court subsequently ordered the State to "propose a definite plan of action as to how the State of North Carolina intends to correct the educational deficiencies in the student population." Three years later, the trial court expressly warned the State that

> [the] trial court has held status conference after status conference and continues to exercise tremendous judicial restraint.... *The time is drawing nigh, however, when due deference to both the legislative and executive branches must yield to the court's duty to adequately safeguard and actively enforce the constitutional mandate on which this case is premised.* It is the sincere desire of this court that the legislative and executive branches heed the call.

(Emphasis added.) Three years after that, the trial court cautioned the State that "in the event the full funds necessary to implement the [CRP] are not secured ..., the [c]ourt will hear and consider any proposals for how the [c]ourt may use its remedial powers to secure such funding." Even in the November 2021 Order itself, the trial court showed continued deference by staying 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."

¶ 194 In short, the trial court demonstrated an abundance of restraint and deference to its coequal branches in compliance with this Court's instructions in *Leandro I* and *II*. Accordingly, this Court holds that the trial court's November 2021 Order properly concluded based on an abundance of clear and convincing evidence that the trial court had

20. In fact, this Court has already recognized and proven itself able to handle the "free-wheeling nature" of the trial court's various and voluminous orders in *Leandro II*. 358 N.C. at 621, 599 S.E.2d 365.

21. For a summary of this evidence, see the Factual and Procedural History above.

shown sufficient deference to the executive and legislative branches.

[38] ¶ 195 When a constitutional violation persists after extended judicial deference, "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, 599 S.E.2d 365. As explained above, in exceedingly rare and extraordinary circumstances, a court's inherent power to remedy an ongoing violation of the constitutional right to a sound basic education includes the authority to direct the transfer of adequate available state funds to address that violation. Before doing so, however, the court must first exhaust all established alternative procedural methods. *Alamance*, 329 N.C. at 100–01, 405 S.E.2d 125. Further, a court exercising such extraordinary authority must minimize its encroachment by seeking the least intrusive remedy. *Id.*

¶ 196 Here, we hold that the trial court properly exercised its remedial authority within these limitations. First, the circumstances of this case are exceedingly rare and extraordinary. For eighteen years, the executive and legislative branches have repeatedly failed to remedy an established statewide violation of the constitutional right to the opportunity to a sound basic education. As noted by the trial court, since *Leandro II*, an entire "new generation of school children, especially those at-risk and socio-economically disadvantaged, were denied their constitutional right to a sound basic education." The court has repeatedly deferred. The State has repeatedly failed. All the while, North Carolina's schoolchildren, their families, their communities, and the state itself have suffered the incalculable negative consequences. These extraordinary circumstances demand swift and decisive remedy.

¶ 197 Second, the trial court properly exhausted all established alternative methods before directing the transfer of available State funds. For the past eighteen years, the trial court allowed the State to craft and implement its own remedies, pass new budgets, consult and engage with independent experts, establish commissions, and create its own comprehensive remedial plan. During this time, the court has stuck to more traditional judicial procedures: issuing declaratory judgments and ordering the parties to remedy the violation on their own terms. They have not. Only after exhausting these more ordinary alternatives did the trial court reach for the extraordinary measure of ordering the transfer of available State funds.

¶ 198 Third, in doing so, the trial court minimized its encroachment by seeking the least intrusive remedy that would still adequately address the constitutional violation. On its face, the November 2021 Order does not involve the legislative branch at all; it does not order the General Assembly to pass certain legislation, raise additional state funds through taxation, conduct certain legislative proceedings, or pay a daily contempt sanction, as other state courts have ordered under similar circumstances. Such remedies would have directly forced the General Assembly's hand to take certain actions, thereby exerting a higher degree of judicial influence over legislative powers.

¶ 199 Instead, the November 2021 Order opted for a less intrusive measure: directing certain executive officials responsible for transferring State funds to make certain transfers as if the General Assembly had directed the same. This remedy minimizes encroachment by implicating legislative *duties* without directing any order toward the legislature itself. To be sure, it is safe to say that everyone involved in this litigation—including this Court—would have preferred if the *legislature* had fulfilled these legislative duties. But it has not. That leaves the judiciary with the constitutional obligation to fulfill its own role in guarding and maintaining the right to a sound basic education by directing the transfer of remedial funds.[22]

¶ 200 The invasiveness of the November 2021 Order is further minimized because these funds are readily available. The trial court found based on clear, convincing, and

22. *See Swann*, 402 U.S. at 25, 91 S.Ct. 1267 ("It was because of this total failure of the school board that the District Court was obligated to turn to other qualified sources, and Dr. Finger was designated to assist the District Court to do what the board should have done.").

undisputed evidence "that more than sufficient funds are available to execute the current needs of the [CRP]." Accordingly, the November 2021 Order did not require the State to raise additional funds or to reallocate funds that had previously been allocated for other uses, which could implicate policy choices. Rather, it directs the State actors to transfer the necessary funds "from the unappropriated balance with the General Fund."[23]

¶ 201 Finally, the invasiveness of the November 2021 Order must be assessed within the broader history and context of the litigation that necessitated it. For instance, it is true that yet another declaratory judgment order—as later issued in the April 2022 Order—would have been less invasive than the November 2021 Order's transfer directive. However, given the history of this case in which the trial court issued such declaratory judgments again and again and again to no avail, issuing the same judgment one more time with crossed fingers and bated breath cannot reasonably be considered a remedy at all. Instead, the State's repeated and ongoing failure to remedy the constitutional violation after many prior such declaratory judgments required the trial court to this time do more.

¶ 202 Below, the dissent insists that affirming the November 2021 Order would allow this Court to invoke similar inherent authority in a wide variety of dissimilar contexts. This parade of horribles is—in a word—overstated. To be clear, today's ruling creates precedent for the exercise of this type of judicial remedial power in exactly one circumstance: when the recalcitrant inaction of the legislative or executive branch indefinitely violates the fundamental constitutional rights of the people after years of judicial deference.[24]

¶ 203 Finally, the dissent contends that affirming the November 2021 Order would violate the rights of the Controller. But as an executive branch official, the Controller's interests have been adequately represented throughout this litigation. A court cannot reasonably add as a party to a case every state official who may be involved in implementing a remedy; instead, the interests of those officials are represented by that agency, branch, or the State as a whole.

¶ 204 In summary, the trial court's November 2021 Order complied with its constitutional authority and limitations. We therefore affirm and reinstate the trial court's order directing certain State officials to transfer the funds required to implement years two and three of the CRP. To enable the trial court to comply with this ruling, we stay the Court of Appeals' Writ prohibiting this transfer.

2. April 2022 Order

¶ 205 We next review the trial court's 26 April 2022 Order (April 2022 Order). The April 2022 Order recalculated the State's CRP funding shortcomings in light of the 2021 Budget Act but removed the transfer directive in favor of a declaratory judgment.

¶ 206 First, April 2022 Order confirmed the State's continued failure to fully fund the CRP. The trial court found "that significant necessary services for students, as identified in the CRP, remain unfunded and/or underfunded by the [2021] Budget Act." Specifically, the court found "the Budget Act funds approximately 63% of the total cost of the programs to be conducted during year 2 and approximately 50% of the total cost of the programs to be conducted during year three." Because the CRP remains the only comprehensive remedial plan submitted to and ordered by the trial court, this finding further confirms the present continuance of the State's statewide *Leandro* violation.

¶ 207 Next, the April 2022 Order confirmed that adequate State funds are avail-

23. This is not to minimize the effort required by these State officials in properly executing the transfer of these funds, which the Court recognizes as a challenging administrative task. However, it does not implicate the same policy choices that would be involved in reallocating funds between different agencies or initiatives.

24. *See Leandro II*, 358 N.C. at 642, 599 S.E.2d 365 ("[W]hen the State fails to live up to its constitutional duties, a court is empowered to order 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.").

able. The trial court found that "the total of unappropriated funds in the State's Savings Reserve [will be] $4.25 billion after the fiscal year 2022-23 legislative-mandated transfer." Accordingly, the trial court found that "the funds transferred on a discretionary basis to the State's Saving Reserve and the State's Capital and Infrastructure Reserve during the two-year budget cycle is substantially in excess of the amount necessary to fully fund the CRP during years 2 and 3 of the CRP."

¶ 208 Based on these factual findings, the trial court concluded that "the total underfunding of CRP programs during years 2 and 3 of the CRP is $785,106,248 in the aggregate." The court concluded that "[t]aking the two-year budget as a whole, the General Fund does contain sufficient unappropriated monies to make the transfer anticipated by the 10 November Order and the lesser amount of underfunding identified above."

¶ 209 However, because the Court of Appeals' writ of prohibition "determined that the trial court had no proper basis in law to direct the transfer by state officers or departments of funds to DHHS, DPI, and the UNC System," the trial court removed those direct transfer provisions from its order. Instead, it issued a declaratory judgment by decreeing that DHHS, DPI, and the UNC System "have and recover from the State of North Carolina" the specified funds and that the funds are "owed by the State to DHHS, DPI, and the UNC system."

¶ 210 Since the trial court's April 2022 Order, the State has presented no argument that it has complied with this declaratory judgment by transferring these funds.

¶ 211 Today, we vacate in part and reverse in part the trial court's April 2022 Order. First, we vacate the trial court's calculation of the amount of funds by which each portion of the CRP is underfunded. This is not because the trial court erred in its calculations, which were diligent and precise. Rather, those calculations have been functionally mooted by the State's subsequent enactment of the 2022 Budget Act. Accordingly, on remand, we direct the trial court to recalculate the appropriate transfer amounts required for compliance with years two and three of the CRP in light of the 2022 Budget Act.

¶ 212 Second, we reverse the trial court's conclusion that it lacked the legal authority to order certain State actors to transfer the available State funds to comply with years two and three of the CRP. In accordance with the principles described above, we hold that under the extraordinary circumstances of this case, the trial court was properly empowered to do so. As such, the trial court's contrary conclusion in its April 2022 Order was grounded in an error of law and is therefore reversed.

¶ 213 Accordingly, our order to the trial court on remand is threefold. First, we order the trial court to recalculate the funding required for full compliance with years two and three of the CRP in light of the 2022 Budget Act. Second, we order the trial court to reinstate its November 2021 Order transfer directive instructing certain State actors to transfer those recalculated amounts from available State funds as an appropriation under law. To enable the trial court to do so, we stay the Court of Appeals' 30 November 2021 Writ of Prohibition. Third, we order the trial court to retain jurisdiction over the case in order to monitor compliance with its order and with future years of the CRP. In future years, the General Assembly may—and is encouraged to—choose to moot the necessity for further transfer directives from the court by substantially complying with the terms of the CRP on its own accord.

¶ 214 We recognize that the remedy decreed by the trial court's November 2021 Order and reinstated by this Court today is extraordinary. It exercises powers at the outer bounds of the reach of the judiciary and encroaches into the traditional responsibilities of our coequal branches of government. We do not do so lightly. Nevertheless, years of continued judicial deference and legislative non-compliance render it our solemn constitutional duty to do so. For our Constitution to retain its integrity and legitimacy, the fundamental rights enshrined therein must be "guarded and maintained." When other branches indefinitely abdicate this constitutional obligation, the judiciary must fill the void.

D. Legislative Defendants' Assertions of Error

¶ 215 Finally, we address Legislative Defendants' various assertions of error. On appeal, Legislative Defendants raise four primary claims of error in addition to the foundational constitutional issues addressed above, most of which are also echoed by the dissent below. First, they argue that the trial court exceeded its jurisdiction and authority by imposing a statewide remedy because this case is properly "limited to just at-risk students in Hoke County." Second, they argue that the trial court erroneously failed to presume that the 2021 Budget Act satisfied the State's constitutional obligations under *Leandro*. Third, they argue that the trial court's order engaged in a non-justiciable political question by deciding the amount of State funds to be transferred to certain State agencies. Fourth, they argue that "the trial court erred in making a constitutional determination in a friendly suit."

¶ 216 These claims unequivocally fail. As an initial matter, they are untimely. Since 2004, and especially since the enactment of N.C.G.S. § 1-72.2 in 2013, Legislative Defendants have had any number of opportunities to intervene in this litigation and thereby earnestly engage with these important issues from within the arena where the parties and the trial court sought to solve the formidable problems facing our state. Besides their single Motion to Intervene regarding Pre-K issues in 2011, they have not. Instead, Legislative Defendants have largely opted to comment upon the proceedings from the sidelines, including by publicly disparaging the trial court itself. In doing so, Legislative Defendants functionally abdicated their constitutional duties and accordingly undermined their own credibility to raise these arguments at this eleventh hour.

¶ 217 In any event, these arguments are meritless. At best, they reveal a fundamental misunderstanding of the history and present reality of this litigation. At worst, they suggest a desire for further obfuscation and recalcitrance in lieu of remedying this decades-old constitutional violation. Regardless, they will not prevent this Court from exercising its inherent authority to protect the constitutional right of North Carolina children to the opportunity to a sound basic education.

1. Scope of Violation

¶ 218 First, and most enthusiastically, Legislative Defendants assert this case is properly "limited to just at-risk students in Hoke County." As such, they argue that the trial court erred by exceeding its jurisdiction and authority by imposing a statewide remedy. Legislative Defendants contend that because this Court's ruling in *Leandro II* was expressly restricted to Hoke County, "there has never been a judgment finding a statewide violation of the right to a sound basic education." The dissent below echoes this claim.

¶ 219 To be sure, it is true that this Court's ruling in *Leandro II* was expressly limited to Hoke County as a representative district. *See* 358 N.C. at 613 n.5, 599 S.E.2d 365. However, on remand, this Court instructed the trial court to address other districts by conducting "further proceedings that include, but are not necessarily limited to, presentations of relevant evidence by the parties, and findings and conclusions of law by the trial court." *Id.* This Court further instructed the trial court to "proceed[ ] as necessary[ ] in a fashion that is consistent with the tenets outlined in this opinion." *Id.* at 648, 599 S.E.2d 365.[25]

¶ 220 On remand, the trial court did just that: it conducted further proceedings that included, but were not limited to, presentations of relevant evidence by the parties and findings and conclusions of law by the trial court regarding other districts in a fashion consistent with the tenets outlined in *Leandro I* and *II*. Based on an abundance of clear and convincing evidence, the trial court repeatedly concluded that the State's *Leandro* violation was not limited to Hoke County but was pervasive statewide. Time and time again, the trial court observed that the evidence "indicate[d] that in way too many

25. As noted above, at no point did this Court instruct the trial court to formally conduct separate trials for all of the other school districts involved in this litigation and in the state. *See id.*

school districts across the state, thousands of children in the public schools have failed to obtain, and are not now obtaining a sound basic education as defined by and required by the *Leandro* decisions."

¶ 221 As addressed above, the fact that the trial court's filings were often titled "Notice of Hearing and Order" instead of just "Order" does not render this Court suddenly incapable of understanding the trial court's express findings and conclusions. In any event, the trial court's factual finding and legal conclusion of a continued statewide *Leandro* violation were most recently repeated in its November 2021 Order, which was formally titled "Order" and formally enumerated "Findings of Fact" and "Conclusions of Law." These findings and conclusions were neither amended nor revoked—and indeed were functionally confirmed *again*—in the trial court's subsequent April 2022 Order.

¶ 222 Further, the State itself has consistently proposed and advocated for a statewide remedy. This is because its constitutional obligation applies not just toward marginalized students in Hoke County, but to every student in every district in the state. As such, it strains both reason and judicial economy to contend that separate cases with identical facts and constitutional claims must be brought by plaintiffs in all 114 of North Carolina's other school districts in order for the State to implement a remedy that applies to each of those districts. The paramount public interest of the constitutional rights at stake in this case demand a more reasonable and efficient resolution.[26]

¶ 223 Accordingly, to contend that there has never been a finding or conclusion of a *Leandro* violation beyond Hoke County reflects, at best, a fundamental misunderstanding of the history of this case and the State's constitutional obligations. Legislative Defendants' argument is unequivocally rejected.

2. Impact of the Budget Act

[39] ¶ 224 Second, Legislative Defendants assert that the trial court erroneously failed to presume that the 2021 Budget Act satisfied the State's constitutional obligations under *Leandro*. They argue that "in reducing its assessment of the Budget to a mathematical exercise and assuming that the CRP was the only means to provide a *Leandro*-compliant education, the trial court got the analysis backwards" by "start[ing] with the assumption that the Budget was insufficient, and then skipp[ing] straight to asking whether the General Assembly had provided Plaintiffs with their chosen remedy." The dissent below likewise echoes this claim.

¶ 225 This is wrong on several fronts. First, it is true that the CRP is by no means the only path toward constitutional compliance under *Leandro*. The executive and legislative branches are—and have been—granted broad deference in crafting a remedy on their own terms. However, as the trial court repeatedly observed, the CRP is currently the *only* remedial plan that the State has presented to the court in response to its January 2020, September 2020, and June 2021 Orders. Indeed, no party in this litigation, including Legislative Defendants, have presented any alternative remedial plan. As such, the trial court did not erroneously "assum[e] that the CRP was the only means to provide a *Leandro*-compliant education." Rather, it assessed the constitutional compliance of the Budget Act against the only comprehensive remedial plan that it has been presented with in the eighteen-year long remedial phase of this case.

¶ 226 Second, the trial court did not erroneously fail to presume the constitutionality of the Budget Act. The constitutionality of the Budget Act was not the question before the trial court. Rather, the trial court's task was to assess the constitutional compliance of the Budget Act against the only comprehensive remedial plan that had been presented to it by the State.

26. "In declaratory actions involving issues of significant public interest, such as those addressing alleged violations of education rights under a state constitution, courts have often broadened both standing and evidentiary parameters to the extent that plaintiffs are permitted to proceed so long as the interest sought to be protected by the complainant is arguably within the 'zone of interest' to be protected by the constitutional guaranty in question." *Leandro II,* 358 N.C. at 615, 599 S.E.2d 365.

¶ 227 In fact, a review of the record reveals that the trial court has already addressed and rejected this argument. In 2018, the State argued in a motion to dismiss "that legislation enacted by . . . [the] General Assembly now adequately addresses those criteria that our Supreme Court has decreed constitute a 'sound basic education' . . . [and] that these enactments must be presumed by this court to be constitutional." In rejecting this argument, the trial court explained that

> [t]his court indeed indulges in the presumption of constitutionality with respect to each and every one of the legislative enactments cited by the [State]. That these enactments are constitutional and seek to make available to children in this State better educational opportunities is not the issue before this court. The issue is whether the court should continue to exercise such remedial jurisdiction as may be necessary to safeguard and enforce the much more fundamental *constitutional right* of every child to have the opportunity to receive a sound basic education. Again, the evidence before this court upon the [State's] motion is wholly inadequate to demonstrate that these enactments translate into substantial compliance with the constitutional mandate of *Leandro* measured by applicable educational standards.

¶ 228 So too here. Neither the Plaintiff-parties nor the State dispute the presumed constitutionality of the passage of the 2021 Budget Act as a general procedural matter. But that was not the issue before the trial court and is not the issue before this Court. The more specific question in the context of this case is the extent to which the 2021 Budget Act remedies the State's longstanding statewide *Leandro* violation. As such, the Budget Act must be assessed against the terms of the only comprehensive remedial plan thus far presented by the parties to the court. The mere passage of a state budget—even one that enjoys a general presumption of constitutionality—is insufficient to meet that more specific burden. Accordingly, the trial court did not err in its evaluation of the 2021 Budget Act.[27]

¶ 229 Finally, it bears emphasizing that the CRP is not the "Plaintiffs['] . . . chosen remedy." The CRP was created by neither Plaintiff-parties nor the trial court, but by the State itself. It is therefore the *State's* chosen remedy, and thus far the only viable remedy presented by any party in this litigation.

3. Political Question

[40] ¶ 230 Third, Legislative Defendants argue that the trial court's November 2021 and April 2022 Orders impermissibly engaged in a non-justiciable political question by deciding the amount of State funds to be transferred to certain State agencies. Doing so, Legislative Defendants contend, requires the trial court to engage in policy-based prioritization that "is precisely the type of determination the people must make through their elected representatives."

¶ 231 This argument likewise ignores the history and prior rulings of this case. In *Leandro I*, this Court squarely rejected the State's threshold argument that courts may not assess issues of educational adequacy because they are non-justiciable political questions. 346 N.C. at 344–45, 488 S.E.2d 249. The Court held that "it is the duty of this Court to address plaintiff-parties' constitutional challenge to the state's public education system." *Id.* at 345, 488 S.E.2d 249.

¶ 232 More specifically, the trial court did not err by assessing the adequacy of the 2021 Budget Act. The court did not make its own policy determination. Rather, after concluding based on undisputed evidence that sufficient unappropriated State funds were

27. Relatedly, the dissent contends that the CRP—and thus the November 2021 Order enforcing it—unduly focuses on education funding when the real problem is implementation. To be sure, this case is not just about money; it is also about competent and qualified teachers and principals, support for high-poverty school districts, effective state assessment and accountability systems, and adequate and accessible early education opportunities, among many other programs outlined at length in the CRP. Of course, just as no one would reasonably expect the Department of Public Safety or Department of Transportation to implement their various programs and responsibilities without adequate funding, none of these educational priorities can be implemented and sustained with fidelity without adequate education funding. Minimally adequate funding is a necessary means to that end.

available, it ordered that certain funds be transferred in order to comply with the terms of the only comprehensive plan for *Leandro* compliance presented to it by the State. Put differently, the court assessed the State's compliance with *the State's own determination* of constitutional educational adequacy, not the court's. Constitutional compliance is not a policy choice; it is a mandate that this Court is obligated to protect.

4. Friendly Suit

[41] ¶ 233 Finally, Legislative Defendants argue that "the trial court erred in making a constitutional determination in a friendly suit." They argue that there is no genuine controversy in this case because after the trial court's 2018 order requiring the parties to craft a comprehensive remedial plan, "Plaintiffs, Plaintiff-Intervenors, and [the State] have worked together to obtain judicial orders mandating their desired policies." The dissent below likewise echoes this claim.

¶ 234 Again, this is wrong on several fronts. First, this argument ignores the decades of history summarized above in which this case was hotly contested and the State repeatedly asserted either that it had achieved constitutional compliance or that the trial court no longer had jurisdiction over the case. While Legislative Defendants' Hoke County argument functionally disregards everything that occurred in this litigation after 2004, their friendly suit argument functionally disregards everything before 2018. Neither approach appreciates the complete past and present reality of this case, which provide vital context for the two trial court orders in question on this appeal.

¶ 235 Further, the State's efforts to achieve constitutional compliance after 2018 do not render this suit friendly. Rather, they reflect the State's commitment—at long last—to honor its constitutional duty to guard and maintain the right of North Carolina schoolchildren to a sound basic education. If the State's Comprehensive Remedial Plan aligns with the interests of Plaintiff-parties, it is because during the remedial phase this litigation—in which parties are *encouraged* to create a collaborative solution that will settle their respective rights and duties—both the State and Plaintiff-parties seek to align with the requirements of the Constitution. A shared commitment to constitutional compliance does not render this suit friendly. Legislative Defendants' argument to the contrary is rejected.

III. Conclusion

¶ 236 The ultimate wisdom of *Leandro*, whispered through the ages from the Framers' vision in 1868 to the Plaintiffs' Complaint in 1994 to the untold and untapped potential of our schoolchildren today, is that public education is a public good. That is, when the State ensures that a child has the opportunity to receive a sound basic education, it is not only *that child* who benefits. It is not only that child's *family* that benefits. It is not only that child's *community* that benefits. Rather, when a child receives a sound basic education—one that prepares her "to participate fully in society as it exist[s] in . . . her lifetime"—*we all* benefit. *Leandro I*, 346 N.C. at 348, 488 S.E.2d 249.

[42] ¶ 237 Accordingly, our Constitution not only guarantees all children the right to the opportunity to a sound basic education, it establishes that "it is the duty of the *State* to guard and maintain that right." N.C. Const. art. I, § 15 (emphasis added). "[I]nitially, at least," it is the responsibility of the executive and legislative branches to fulfill that constitutional obligation. *Leandro I*, 346 N.C. at 357, 488 S.E.2d 249. But when those branches indefinitely "fail[ ] to live up to [their] constitutional duties . . . 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, 599 S.E.2d 365.

¶ 238 For a quarter-century, the judiciary has deferred to the executive and legislative branches to remedy this statewide constitutional violation. Yet overwhelming evidence clearly demonstrates that it persists today. In 2004, the *Leandro II* Court lamented that "the instant case commenced ten years ago," and that "[i]f in the end it yields a clearly demonstrated constitutional violation, ten

classes of students ... will have already passed through our state's school system without benefit of relief. We cannot similarly imperil *one more class* unnecessarily." *Id.* at 616, 599 S.E.2d 365 (emphasis added). Today, that figure is twenty-eight years, and twenty-eight classes of students. The *children* of the original *Leandro* plaintiffs could well have entered or graduated from high school by now, all under a well-established constitutionally inadequate education system. As noted in Plaintiffs' original 1994 Complaint, this cycle "entails enormous losses, both in dollars and in human potential, to the State and its citizens." All the while, the judiciary has continued—patiently but with increasing concern—to defer.

¶ 239 Today, that deference expires. At this point, to continue to condone delay and evasion would render this Court complicit in the constitutional violation. Ultimately, "[i]t is the state judiciary that has the responsibility to protect the state constitutional rights of the citizens; this obligation to protect the fundamental rights of individuals is as old as the State." *Corum*, 330 N.C. at 783, 413 S.E.2d 276.

¶ 240 Today, we must fulfill that obligation. To do so, this Court exercises its power "to provide relief by imposing a specific remedy and instructing the recalcitrant state actors to implement it." *Leandro II*, 358 N.C. at 642, 599 S.E.2d 365. Specifically, we reinstate the trial court's November 2021 Order directing certain State officials to transfer available state funds to implement years two and three of the Comprehensive Remedial Plan. On remand, we narrowly direct the trial court to recalculate the appropriate distributions in light of the State's 2022 Budget. Once that calculation is complete, we instruct the trial court to order the applicable State officials to transfer these funds as an appropriation under law. Accordingly, we stay the Court of Appeals' 30 November 2021 Writ of Prohibition. Finally, we order the trial court to retain jurisdiction over this matter to ensure the implementation of this order and to monitor continued constitutional compliance.

¶ 241 Given these remand instructions, this ruling will not be the final page in the *Leandro* litigation. Nevertheless, it is the sincere hope of this Court that it will serve as the start of a new chapter—one in which the parties lay down old divisions and distrust to forge a spirit of collaboration in good faith toward a common goal: constitutional compliance. The same recalcitrant approach would only yield the same inadequate outcomes. Instead, this Court calls upon the parties to imagine a future in which all North Carolina children receive the opportunity to a sound basic education, then honor their constitutional oaths by working together to make that future real. Indeed, our Constitution's Declarations of Rights is neither aspirational nor advisory; it is a mandate.

¶ 242 Until that mandate is fulfilled, the judiciary will stand ready to carry out its constitutional duties. We too comprise "the State," and we too must honor our constitutional obligations. While we recognize the primacy of the executive and legislative branches in creating and implementing our system of public education, we cannot and will not tolerate the ongoing violation of constitutional rights.

¶ 243 "Today, education is perhaps the most important function of state and local governments.... It is the very foundation of good citizenship." *Brown I*, 347 U.S. at 493, 74 S.Ct. 686. "Assuring that our children are afforded the chance to become contributing, constructive members of society is paramount. Whether the State meets this challenge remains to be determined." *Leandro II*, 358 N.C. at 649, 599 S.E.2d 365. Accordingly, this Court once more "remands to the lower court[,] and ultimately into the hands of the legislative and executive branches, one more installment in the 200-plus year effort to provide an education to the children of North Carolina." *Id.* We do so with hope that the parties will chart a new course, firmness in our resolve to uphold our Constitution, and faith that the brightest days for our schoolchildren and our state lie still ahead.

IT IS SO ORDERED.

Justice BERGER dissenting.

¶ 244 "Frequently an issue of this sort will come before the Court clad, so to speak, in sheep's clothing: the potential of the asserted

principle to effect important change in the equilibrium of power is not immediately evident, and must be discerned by a careful and perceptive analysis. But this wolf comes as a wolf." *Morrison v. Olson*, 487 U.S. 654, 699, 108 S. Ct. 2597, 2623, 101 L.Ed.2d 569 (1988) (Scalia, J., dissenting).

¶ 245 "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, selfappointed, or elective, may justly be pronounced the very definition of tyranny." *The Federalist* No. 47 (James Madison). "By tyranny, ... [Madison] means arbitrary, capricious, and oppressive rule by those possessing any two of these powers." George W. Carey & James McClellan, *Reader's Guide to The Federalist*, The Federalist, at lxx (George W. Carey & James McClellan, eds., Gideon ed. 2001). We see in this opinion the arbitrary usurpation of purely legislative power by four justices. The majority affirms the trial court order which strips the General Assembly of its constitutional power to make education policy and provide for its funding. Indeed, this wolf comes as a wolf.

¶ 246 "The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." N.C. Const. art. I, § 6. This clear and unambiguous principle "is the rock upon which rests the fabric of our government. Indeed, the whole theory of constitutional government in this State and in the United States is characterized by the care with which the separation of the departments has been preserved and by a marked jealousy [against] encroachment" by another branch. *Pers. v. Bd. of State Tax Comm'rs*, 184 N.C. 499, 502, 115 S.E. 336, 339 (1922).

¶ 247 Without question, the General Assembly, in which our constitution vests the legislative power of the State, N.C. Const. art. II, § 1, is "the policy making agency of our government[.]" *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 169, 594 S.E.2d 1, 8 (2004). The General Assembly is the policymaking agency because "[a]ll political power is vested in and derived from the people," N.C. Const. art I, § 2, and the people act through the General Assembly, *State ex rel. Ewart v. Jones*, 116 N.C. 570, 570, 21 S.E. 787, 787 (1895); *see also Pope v. Easley*, 354 N.C. 544, 546, 556 S.E.2d 265, 267 (2001) (per curiam) ("[P]ower remains with the people and is exercised through the General Assembly, which functions as the arm of the electorate."). The General Assembly possesses both plenary and express lawmaking authority, and, as provided by the text of the state constitution, the legislative branch enacts policy through statutory directives and appropriations.

¶ 248 Relevant here, the Declaration of Rights in our constitution provides that "[t]he people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right." N.C. Const. art. I, § 15. This provision within the Declaration of Rights must be considered with the related, more specific provisions in Article IX that outline the General Assembly's responsibilities with regard to public education. Placed in the working articles of the constitution, Article IX, entitled "Education," *see id.* art. IX, actually "implements the right to education as provided in Article I," *Deminski ex rel. C.E.D. v. State Bd. of Educ.*, 377 N.C. 406, 2021-NCSC-58, ¶ 14, 858 S.E.2d 788. This Court has explained that "these two provisions work in tandem," *id.*, to "guarantee every child in the state an *opportunity* to receive a sound basic education[.]" *Silver v. Halifax Cnty. Bd. of Comm'rs*, 371 N.C. 855, 862, 821 S.E.2d 755, 760 (2018) (emphasis added).

¶ 249 The state constitution explicitly recognizes that it is for the General Assembly to develop educational policy and to provide for its funding in keeping with its legislative authority. Article IX, section 2 requires that "[t]he General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools, which shall be maintained at least nine months in every year, and wherein equal opportunities shall be provided for all students." N.C. Const. art. IX, § 2. The General Assembly creates the system through policy and funds it through taxation and appropriations. The text then tasks the State Board of Education with "supervis[ing] and administer[ing]" that system with "needed rules and regulations"

that remain "subject to laws enacted by the General Assembly." N.C. Const. art. IX, § 5.

¶ 250 The "power of the purse," or the legislative authority to direct or deny appropriations, represents policy decisions made solely by the General Assembly. For that reason, our constitution 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).

¶ 251 As this Court unanimously noted just two years ago, "*the appropriations clause states in language no man can misunderstand that the legislative power is supreme over the public purse.*" *Cooper v. Berger*, 376 N.C. 22, 36–37, 852 S.E.2d 46, 58 (2020) (emphasis added); *see also Wilson v. Jenkins*, 72 N.C. 5, 6 (1875) ("The General Assembly has absolute control over the finances of the State."). By way of historical explanation, this Court stated:

> In light of this constitutional provision, the power of the purse is the exclusive prerogative of the General Assembly, with the origin of the appropriations clause dating back to the time that the original state constitution was ratified in 1776. In drafting the appropriations clause, the framers sought 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.

Cooper, 376 N.C. at 36–37, 852 S.E.2d at 58 (cleaned up). These constitutional principles remain true when the legislative branch enacts educational policy through appropriations.

¶ 252 If legislative power over appropriations is absolute, then the judicial branch has no role in this endeavor. Clear and unambiguous language that "no man can misunderstand," *id.*, should yield results that no reasonable person can question.

¶ 253 As set out in the constitutional text and this Court's precedent, the General Assembly determines and develops educational policy through statutes and appropriations. However, a review of this case's lengthy litigation reveals that the General Assembly was notably excluded. Due process requires notice and an opportunity to be heard—legislative defendants have been denied the protection of this fundamental fairness.

¶ 254 From the filing of the initial complaint until January 2011, the Attorney General represented the executive and legislative branches (the State). In 2011, the majority party of General Assembly, both House and Senate, changed. The Attorney General, then asserting a purported conflict of interest, ceased to represent the General Assembly at that time. The Attorney General noted that executive branch defendants refused to waive this conflict. The General Assembly attempted to intervene in the case, but the trial court rejected intervention because the issue in the case was not the legislature's education policy or funding, but the implementation of that policy by the executive branch.

¶ 255 Judge Howard Manning, perhaps the one individual most familiar with this case, later stated in a memorandum that educational shortcomings did not result from legislative failures:

> Our children that cannot read by the third grade are by and large doomed not to succeed by the time they get to high school. As shown by the record in this case, that is a failure of classroom instruction.
>
> . . .
>
> Reduced to essentials, in my opinion the children are not being provided the opportunity because after all the millions spent, 90% of school costs are for adult salaries and benefits, and the data show as it did years ago and up to now the educational establishment has not produced results.

In other words, Judge Manning clearly understood that the problem is not with education policy or funding; rather, the problem is with implementation and delivery by the education establishment.

¶ 256 Moreover, the focus of this litigation post-*Leandro* has been the general implementation and delivery of educational opportunities to the "at risk" children in plaintiffs' counties. *See Hoke Cnty. Bd. of Educ. v. State*, 358 N.C. 605, 612 n.1, 599 S.E.2d 365, 375 n.1 (2004) (the only issue which "faces scrutiny in the instant appeal [is] whether

the State has failed in its constitutional duty to provide Hoke County school children with the opportunity to receive a sound basic education.").[1] Despite the express directive of this Court in Hoke County, the trial court failed to conduct any other trial. Furthermore, given that the education statutes and policy changed significantly through the years, the original *Leandro* claims and resulting decision have become stale.

¶ 257 When Judge Manning withdrew for health reasons in 2016, a new judge, in collaboration with executive branch defendants and plaintiffs, dramatically changed the direction of this litigation to focus on policy and funding statewide, rather than problems with implementation and delivery in plaintiffs' counties as originally pled. In November 2021, the new judge entered an order stripping the General Assembly of its constitutional authority, setting educational policy, and judicially appropriating taxpayer monies to fund his chosen policy. Only then did the legislative defendants receive the opportunity to intervene as they sought appellate review of this judicial invasion into their constitutional powers.

¶ 258 Because of the collusive nature of this litigation, the majority today now joins in denying legislative defendants due process, the fundamental fairness owed to any party, and usurps the legislative power by crafting policy and directly appropriating funds. Further, this Court approves the deprivation of due process to other non-parties by affirming the trial court order which required certain state officials to violate their oaths and circumvent the constitutionally and statutorily required lawful method of appropriating monies from the general fund.

¶ 259 In addition, the majority takes it upon itself to resolve issues in this case without notice and in the face of this Court's order to the contrary. In March 2022, this Court entered a special order holding "in abeyance [certain issues] with no other action, including the filing of briefs, to be taken until further order of the Court." Despite the fact that no notice has been provided to any party, and briefing has not been done, this Court exerts its will by summarily deciding the matter. In so doing, the majority ignores due process.

¶ 260 Fundamentally, and contrary to what plaintiffs, executive branch defendants, and the majority would have the public believe, this case is not about North Carolina's failure to afford its children with the opportunity to receive a sound basic education. The essence of this case is power—who has the power to craft educational policy and who has the authority to fund that policy.

¶ 261 While a properly restrained judiciary has "neither FORCE nor WILL, but merely judgment," *The Federalist* No. 78 (Alexander Hamilton), we once again address the pernicious extension of judicial power by this Court at the expense of the constitutionally prescribed power of the legislature. Once again, the subversion of constitutional order is engineered by a bare majority through unprecedented and dangerous reasoning. Couched this time as its "inherent authority," the majority once again "unilaterally reassigns constitutional duties." *N.C. State Conf. of Nat'l Ass'n for the Advancement of Colored People v. Moore*, 382 N.C. 129, 2022-NCSC-99, ¶ 77, 876 S.E.2d 513 (Berger, J., dissenting).

¶ 262 Relying on a gross misapplication of our caselaw, the majority's Oppenheimer-esque reshaping of the appropriations clause and usurpation of legislative function has no apparent concern for constitutional strictures or the limits of this Court's power. The judicial branch now assumes boundless inherent authority to reach any desired result, ignoring the express boundaries set by the explicit language of our constitution and this Court's precedent. Because "[t]his power in the judicia[ry] will enable [judges] to mold the government into almost any shape they please," Brutus, Essay XI, The Essential Anti-Federalist 190 (W. B. Allen and Gordon Lloyd, eds., 2nd ed. 2002), I respectfully dissent.

1. Because the distinction is meaningful, we refer to *Hoke County Board of Education v. State* as *Hoke County,* not *Leandro II*. See discussion at *Hoke County Board of Education v. State,* 367 N.C. 156, 158 n.2, 749 S.E.2d 451, 453 n.2 (2013).

I. Factual and Procedural Background

¶ 263 The issues in this case are neither unprecedented nor extraordinary. Had the trial court below, and the majority here, understood precisely what this Court held in *Leandro* and *Hoke County*, much litigation would have been avoided. As this case is the latest chapter of a dispute this Court first considered more than twenty-four years ago, our prior decisions constitute the law of the case and are binding on the courts. *See Hayes v. City of Wilmington*, 243 N.C. 525, 536, 91 S.E.2d 673, 681–82 (1956) ("[W]hen an appellate court passes on a question and remands the cause for further proceedings, the questions there settled become the law of the case, both in subsequent proceedings in the trial court and on subsequent appeal[.]").

A. *Leandro*

¶ 264 In *Leandro v. State of North Carolina*, 346 N.C. 336, 342, 488 S.E.2d 249, 252 (1997) (*Leandro*), plaintiffs brought an action against the State and the State Board of Education seeking declaratory and injunctive relief, alleging that children in their school districts were not "receiving a sufficient education to meet the minimal standard for a constitutionally adequate education." The original plaintiffs were "students and their parents or guardians from the relatively poor school systems in Cumberland, Halifax, Hoke, Robeson, and Vance Counties and the boards of educations for those counties." *Id.* at 342, 488 S.E.2d at 252. Those plaintiffs were joined by plaintiff-intervenors, "students and their parents or guardians from the relatively large and wealthy school systems of the City of Asheville and of Buncombe, Wake, Forsyth, Mecklenburg, and Durham counties and the boards of education for those systems." *Id.* at 342, 488 S.E.2d at 252.

¶ 265 Although plaintiffs' and plaintiff-intervenors' claims differed, they were similar in one significant respect:

> Both plaintiffs and plaintiff-intervenors (hereinafter "plaintiff-parties" when referred to collectively) allege in their complaints in the case resulting in this appeal that they have a right to adequate educational opportunities which is being denied them by defendants under the current school funding system. Plaintiff-parties also allege that the North Carolina Constitution not only creates a fundamental right to an education, but it also guarantees that every child, no matter where he or she resides, is entitled to equal educational opportunities.

Id. at 342, 488 S.E.2d at 252.

¶ 266 Defendants responded to plaintiff-parties' complaints by filing a motion to dismiss, contending in part that "plaintiff-parties had failed to state any claim upon which relief could be granted." *Id.* at 344, 488 S.E.2d at 253. The trial court denied defendants' motion, and defendants timely appealed. *Id.* at 344, 488 S.E.2d at 253. The Court of Appeals reversed the trial court and dismissed all of plaintiffs' claims. *Id.* at 344, 488 S.E.2d at 253. It concluded that "the right to education guaranteed by the North Carolina Constitution is limited to one of equal access to the existing system of education and does not embrace a qualitative standard." *Id.* at 344, 488 S.E.2d at 253 (citing *Leandro v. North Carolina*, 122 N.C. App. 1, 11, 468 S.E.2d 543, 550 (1996)).

¶ 267 Plaintiff-parties petitioned this Court for discretionary review. We granted the petition to address "whether the people's constitutional right to education has any qualitative content, that is, whether the state is required to provide children with an education that meets some minimum standard of quality." *Id.* at 345, 488 S.E.2d at 254. In answering that question in the affirmative, this Court stated:

> We conclude that Article I, Section 15, and Article IX, Section 2 of the North Carolina Constitution combine to guarantee every child of this state an *opportunity* to receive a sound basic education in our public schools. For purposes of our Constitution, a "sound basic education" is one that will provide the student with at least: (1) sufficient ability to read, write, and speak the English language and a sufficient knowledge of fundamental mathematics and physical science to enable the student to function in a complex and rapidly changing society; (2) sufficient fundamental knowledge of geography, history, and basic eco-

> nomic and political systems to enable the student to make informed choices with regard to issues that affect the student personally or affect the student's community, state, and nation; (3) sufficient academic and vocational skills to enable the student to successfully engage in post-secondary education or vocational training; and (4) sufficient academic and vocational skills to enable the student to compete on an equal basis with others in further formal education or gainful employment in contemporary society.

Id. at 347, 488 S.E.2d at 255 (emphasis added).

¶ 268 Plaintiff-parties also argued that "Article IX, Section 2(1), requiring a 'general and uniform system' in which 'equal opportunities shall be provided for all students,' mandates equality in the educational programs and resources offered the children in all school districts in North Carolina." *Id.* at 348, 488 S.E.2d at 255. This Court expressly rejected this argument, stating "we are convinced that the equal opportunities clause of Article IX, Section 2(1) does not require substantially equal funding or educational advantages in all school districts." *Id.* at 349, 488 S.E.2d at 256. Thus, we affirmed the Court of Appeals' decision to dismiss this claim.

¶ 269 As is especially relevant here, this Court made it clear that plaintiff-parties' proposed constitutional requirement of "substantial equality of educational opportunities in every one of the various school districts of the state would almost certainly ensure that *no matter how much money was spent on the schools of the state*, at any given time some of those districts would be out of compliance." *Id.* at 350, 488 S.E.2d at 256–57 (emphasis added). Thus, this Court delineated between (1) a requirement for the state to provide all students with the *opportunity* to receive a sound basic education, and (2) a requirement for the state to provide the *same* opportunities to all students statewide.

¶ 270 Further, we drew a sharp distinction between the right *to* a sound basic education and the right to the *opportunity* to receive a sound basic education. This Court discussed at length the "[s]ubstantial problems [that] have been experienced in those states in which the courts have held that the state constitution guaranteed the right *to* a sound basic education." *Id.* at 350–51, 488 S.E.2d at 257 (emphasis added). We listed multiple cases from various jurisdictions involving, as is particularly relevant here, decisions of divided courts "striking down the most recent efforts of the [state] legislature and for the third time declaring a funding system for the schools of that state to be in violation of the state constitution." *Id.* (citing *Abbott v. Burke*, 149 N.J. 145, 693 A.2d 417 (1997)).[2] In addition to referencing the flood of litigation brought forth in states that guarantee a right *to* a sound basic education, this Court also noted law review articles which described "the difficulty in understanding and implementing the mandates of the courts" and "the lack of an adequate remedy" in these states. *Id.* (citing William E. Thro, *The Third Wave: The Impact of the Montana, Kentucky, and Texas Decisions on the Future of Public School Finance Reform Litigation*, 19 J.L. & Legal Educ. 219 (1990); Note, *Unfulfilled Promises: School Finance Remedies and State Courts*, 104 Harv. L. Rev. 1072, 1075–78 (1991)).

¶ 271 This Court "conclude[d] that the framers of our Constitution did not intend to set such an impractical or unattainable goal." *Id.* at 351, 488 S.E.2d at 257. Accordingly, we held that "Article IX, Section 2(1) of the North Carolina Constitution requires that all children have the *opportunity* for a sound basic education, but it *does not require* that equal educational opportunities be afforded students in all of the school districts of the state." *Id.* (emphasis added).

¶ 272 This Court was acutely aware of the potential dangers of its holding in *Leandro*. We defined the opportunity to receive a sound basic education with "some trepida-

2. The majority cites to a continuation of *Abbott v. Burke* as an example to justify its "extraordinary" remedy. It is extraordinary that the majority cites to cases and theories that have been *expressly* disavowed by this Court. Further, the citations to cases from Kansas and Washington make little sense as neither of those cases involve the judicial exercise of legislative authority over the public purse.

tion[ ]" because "judges are not experts in education and are not particularly able to identify in detail those curricula best designed to ensure that a child receives a sound basic education." *Id.* at 354, 488 S.E.2d at 259. Recognizing the General Assembly's crucial role in this issue, this Court stated:

> We acknowledge that 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. The members of the General Assembly are popularly elected to represent the public for the purpose of making just such decisions. The legislature, unlike the courts, is not limited to addressing only cases and controversies brought before it by litigants. The legislature can properly conduct public hearings and committee meetings at which it can hear and consider the views of the general public as well as educational experts and permit the full expression of all points of view as to what curricula will best ensure that every child of the state has the opportunity to receive a sound basic education.

Id. at 355, 488 S.E.2d at 259.

¶ 273 As is clear from our opinion, this Court was well aware of the murky waters it entered in *Leandro*. We took care to provide examples of what factors should be considered by trial courts and what weight should be given to such factors. This Court held that "[e]ducational goals and standards adopted by the legislature," "the level of performance of the children of the state and its various districts on standard achievement tests[,]" and "the level of the state's general educational expenditures and per-pupil expenditures[ ]" were all relevant factors. *Id.* at 355, 488 S.E.2d at 259–60. We noted that one factor alone was not determinative.

¶ 274 Additionally, we directly addressed the basis of the trial court's order at issue before us today—whether courts of this state may rely solely on expenditures as a remedy to an alleged violation of this right. In answering no, the Court stated:

> We agree with the observation of the United States Supreme Court that
>
> The very complexity of the problems of financing and managing a statewide public school system suggests that there will be more than one constitutionally permissible method of solving them, and that within the limits of rationality, the legislature's efforts to tackle the problems should be entitled to respect. *On even the most basic questions in this area the scholars and educational experts are divided.* Indeed, one of the major sources of controversy concerns the extent to which there is a demonstrable correlation between educational expenditures and the quality of education . . . .

Id. at 355–56, 488 S.E.2d at 260 (cleaned up) (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42–43, 93 S. Ct. 1278, 1301–02, 36 L.Ed.2d 16 (1973)).

¶ 275 This Court went further regarding the flawed notion of any reliable causal relationship between increased expenditures and educational outcomes:

> More recently, one commentator has concluded that "available evidence suggests that substantial increases in funding produce only modest gains in most schools." The Supreme Court of the United States recently found such suggestions to be supported by the actual experience of the Kansas City, Missouri schools over several decades. The Supreme Court expressly noted that despite massive court-ordered expenditures in the Kansas City schools which had provided students there with school "facilities and opportunities not available anywhere else in the county," the Kansas City students had not come close to reaching their potential, and "learner outcomes" of those students were "at or below national norms at many grade levels."

Id. (quoting William H. Clune, *New Answers to Hard Questions Posed by Rodriguez: Ending the Separation of School Finance and Educational Policy by Bridging the Gap Between Wrong and Remedy*, 24 Conn. L. Rev. 721, 726 (1992) and *Missouri v. Jenkins*, 515 U.S. 70, 70, 115 S. Ct. 2038, 2040, 132 L.Ed.2d 63 (1995)).

¶ 276 This Court was gravely concerned with preventing judicial interference in the legislative realm. To that end, before reversing the decision of the Court of Appeals and remanding the case to Wake County Superior Court, we provided guidance to future courts:

> In conclusion, we reemphasize our recognition of the fact that *the administration of the public schools of the state is best left to the legislative and executive branches of government.* Therefore, the courts of the state *must grant every reasonable deference to the legislative and executive branches* when considering whether they have established and are administering a system that provides the children of the various school districts of the state a sound basic education. *A clear showing to the contrary* must be made before the courts conclude that they have not. *Only such a clear showing will justify a judicial intrusion* into an area so clearly the province, initially at least, of the legislative and executive branches as the determination of what course of action will lead to a sound basic education.

Id. at 357, 488 S.E.2d at 261 (emphasis added).

¶ 277 Thus, this Court in *Leandro* explicitly stated that: (1) there are multiple methods of ensuring children's opportunity to receive a sound basic education; (2) the legislature's efforts to do so are entitled to great deference; (3) any reliance on a correlation between educational spending and education quality is suspect at best; and (4) a clear showing that children's opportunity to receive a sound basic education has been violated must be made before a court takes any action.

B. *Hoke County*

¶ 278 Seven years after deciding *Leandro*, we again addressed children's opportunity to receive a sound basic education in *Hoke County Board of Education v. State*, 358 N.C. 605, 599 S.E.2d 365 (2004) (*Hoke County*). At the conclusion of *Leandro*, this Court had remanded the case to Wake County Superior Court to decide the following claims:

> (1) [W]hether the State ha[d] failed to meet its constitutional obligation to provide an opportunity for a sound basic education to plaintiff parties; (2) whether the State has failed to meet its statutory obligation, pursuant to Chapter 115C of the General Statutes, to provide the opportunity for a sound basic education to plaintiff parties; and (3) whether the State's supplemental school funding system is unrelated to legitimate educational objectives and, as a consequence, is arbitrary and capricious, resulting in a denial of equal protection of the laws for plaintiff-intervenors.

Id. at 612, 599 S.E.2d at 374–75. This Court noted the issues were further refined because "[t]he issue of whether the State has failed in its statutory duty to provide Hoke County school children with a sound basic education has been subsumed ... by the constitutional question[,]" and the supplemental funding issue was not ripe. *Id.* In so stating, we recognized that education policy as set forth in the relevant statutes was consistent with the constitution.

¶ 279 Upon remand, "two of the trial court's initial decisions limited the scope of the case[.]" *Id.* at 613, 599 S.E.2d at 375. First, the trial court, with the consent of the parties, bifurcated the case into two separate actions—one addressing the claims of the plaintiffs from rural school districts and one addressing the claims of the plaintiff-intervenors from larger urban districts. *Id.* Because of this bifurcation, and because plaintiff-intervenors' trial had not yet been held, "our consideration of the case [wa]s properly limited to those issues raised in the rural districts' trial." *Id.* Second, "the trial court ruled that the evidence presented in the rural districts' trial should be further limited to claims as they pertain to a single district." *Id.* Hoke County was "designated as the representative plaintiff district," and the "evidence in the case w[as] restricted to its effect on Hoke County." *Id.*

¶ 280 Then, to determine the Hoke County claims, the trial court held a trial which "lasted approximately fourteen months and resulted in over fifty boxes of exhibits and transcripts, an eight-volume record on appeal, and a memorandum of decision that

exceeds 400 pages." *Id.* at 610, 599 S.E.2d at 373.

¶ 281 This procedural posture had a significant effect on the impact of our holdings in *Hoke County*. As this Court made abundantly clear at the outset, "our consideration of this case is properly limited to the issues relating *solely* to Hoke County as raised at trial." *Id.* (emphasis added). As the case before us today is a continuation of *Hoke County*, and because *Hoke County* constitutes the law of this case, we are bound by this Court's previous language:

> [B]ecause this Court's examination of the case is premised on evidence as it pertains to Hoke County in particular, *our holding mandates cannot be construed to extend to the other four rural districts named in the complaint.* With regard to the claims of named plaintiffs from the other four rural districts, the case is remanded to the trial court for further proceedings that include, but are not necessarily limited to, *presentation of relevant evidence by the parties, and findings and conclusions of law by the trial court.*

Id. n.5, 599 S.E.2d 365 (emphasis added).

¶ 282 What this means in plain language is that our decision in *Hoke County* concerned *only* Hoke County and that no part of that decision attempted to determine whether any other county was failing to provide students with the opportunity to a sound basic education. Consistent with our holding in *Leandro*, a "judicial intrusion" into any other county's system would require an adversarial hearing complete with the presentation of relevant evidence and findings of fact. The evidence and factual findings would then need to support the conclusion of law that a "clear showing" had been made that the county was denying children the opportunity to a sound basic education. *See Leandro*, 346 N.C. at 357, 488 S.E.2d at 261. Absent any separate trial for another county, the assertion that the trial court's order reviewed in *Hoke County* addressed any county other than Hoke County is plainly wrong and blatantly contradicts the clear language of this Court.

¶ 283 Not only did our decision in *Hoke County* only address the Hoke County claims, but we also noted that the trial court's order was limited to claims involving "at-risk" students in Hoke County. Accordingly, we stated that:

> As a consequence, while we must limit our review of the trial court's order to its conclusions concerning 'at-risk' students, we cannot and do not offer any opinion as to whether non 'at-risk' students in Hoke County are either obtaining a sound basic education or being afforded their rightful opportunity by the State to obtain such an education.

Hoke County, 358 N.C. at 634, 599 S.E.2d at 388.

¶ 284 After these express limitations, we first examined whether the evidence established "a clear showing" supporting "the trial court's conclusion that the constitutional mandate of *Leandro* has been violated in the Hoke County School System . . . ." *Id.* at 623, 599 S.E.2d at 381 (cleaned up). We next reviewed two categories of evidence presented at trial.

¶ 285 First, we reviewed the trial court's consideration of evidence of "comparative standardized test score data[,] . . . student graduation rates, employment potential, [and] post-secondary education success" for Hoke County and its comparison of that data to data regarding North Carolina students statewide. *Id.* We determined that evidence of this type fell "under the umbrella term of 'outputs,' a term used by educators that, in sum, measures student performance." *Id.* Second, we reviewed the trial court's use of evidence of "deficiencies pertaining to the educational offerings in Hoke County schools" and "deficiencies pertaining to the educational administration of Hoke County schools." *Id.* We determined that evidence of this type fell "under the umbrella term of 'inputs,' a term used by educators that, in sum, describes what the State and local boards provide to students attending public schools." *Id.*

¶ 286 This Court examined: (1) whether these types of evidence were relevant in determining Hoke County's *Leandro* compliance; and, if so, (2) whether the evidence presented supported the trial court's deter-

mination that *Leandro*'s mandate was being violated in Hoke County.

¶ 287 We first determined that the trial court was correct in using various standardized test scores to compare the proficiency of Hoke County students to that of other students in North Carolina. The trial court determined that the comparison "clearly show[ed] Hoke County students are failing to achieve [grade-level] proficiency in numbers far beyond the state average." *Id.* at 625, 599 S.E.2d at 383. Further,

> [i]n analyzing the test score data and the opinions of those who testified about them, the trial court noted that the score statistics showed that throughout the 1990s, Hoke County students in all grades trailed their statewide counterparts for proficiency by a considerable margin. For example, in 1997–98, only 46.9% of Hoke students scored at Level III or above in algebra while the state average was 61.6%. Similar disparities occurred in other high school subjects such as Biology, English, and American History. Other test data reflected commensurate results in lower grades. For example, in grades 3–8, Hoke County students trailed the state average in each grade, with gaps ranging from 11.7% to 15.1%.

Id. at 625–26, 599 S.E.2d at 383.

¶ 288 A wide range of tests confirmed that Hoke County students were deficient when compared to statewide averages. The trial court made extensive detailed findings of fact that this deficiency was confirmed by evidence regarding Hoke County graduation rates, dropout rates, employment rates and prospects, and post-secondary education performance. *Id.* at 625–30, 599 S.E.2d at 382–386. We stated that

> [i]n the realm of "outputs" evidence, we hold that the trial court properly concluded that the evidence demonstrates that over the past decade, an inordinate number of Hoke County students have consistently failed to match the academic performance of their statewide public school counterparts and that such failure, measured by their performance while attending Hoke County schools, their dropout rates, their graduation rates, their need for remedial help, their inability to compete in the job markets, and their inability to compete in collegiate ranks, constitute a clear showing that they have failed to obtain a Leandro-comporting education.

Id. at 630, 599 S.E.2d at 386.

¶ 289 We then addressed "inputs," asking whether the evidence supported the trial court's conclusion that the defendants were responsible for the deficiency of Hoke County students in comparison to other students statewide. First, and most relevant to the current appeal, this Court affirmed the trial court's conclusion that the statewide education policy and funding were constitutionally sound.

> In sum, the trial court found that the State's general curriculum, teacher certifying standards, funding allocation systems, and education accountability standards met the basic requirements for providing students with an opportunity to receive a sound basic education. As a consequence, the trial court concluded that "the bulk of the core" of the State's "Educational Delivery System ... is sound, valid and meets the constitutional standards enumerated by *Leandro*."

Id. at 632, 599 S.E.2d at 387. Simply stated, we held that the General Assembly's statutory schemes creating and funding our education system complied with our state constitution as interpreted in *Leandro*.

¶ 290 Despite the trial court's conclusion on this issue, it determined that neither the State, nor the Hoke County School System, were "strategically allocating the available resources to see that at-risk children have the equal opportunity to obtain a sound basic education." *Id.* at 635, 599 S.E.2d at 388, 358 N.C. 605.[3] We summarized the trial court's remedial action as such:

3. The "available resources" are the funds appropriated by the General Assembly in the State Budget. The failure to "strategically allocate[ ]" these available funds is a failure on the part of the State Board of Education—not the General Assembly. *See* N.C.G.S. § 115C-408(a) ("The [State] Board shall have general supervision and administration of the educational funds provided by the State ...."). As the trial court stated, "the funds presently appropriated and otherwise

> Although the trial court explained that it was leaving the "nuts and bolts" of the educational resources assessment in Hoke County to the other branches of government, it ultimately provided general guidelines for a *Leandro*-compliant resource allocation system, including the requirements: (1) that "every classroom be staffed with a competent, 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." Finally, the trial court ordered the State to keep the court advised of its remedial actions through written reports filed with the trial court every ninety days.

Id. at 636, 599 S.E.2d at 389 (emphasis added).

¶ 291 Notably, the trial court "refused to step in and direct the 'nuts and bolts' of the reassessment effort." *Id.* at 638, 599 S.E.2d at 390. The trial court "deferred to the expertise of the executive and legislative branches" because it "acknowledg[ed] that the state's courts are ill-equipped to conduct, or even to participate directly in, any reassessment effort." *Id.* This Court explicitly approved of such deference in affirming the trial court's order:

> [W]e note that the trial court also demonstrated admirable restraint by refusing to dictate how existing problems should be approached and resolved. Recognizing that education concerns were the shared province of the legislative and executive branches, the trial court instead afforded the two branches an unimpeded chance, "initially at least," to correct constitutional deficiencies *revealed at trial.* In our view, the trial court's approach to the issue was sound and its order reflects both *findings of fact that were supported by the evidence* and *conclusions that were supported by ample and adequate findings of fact.* As a consequence, we affirm those portions of the trial court's order that conclude that there has been a clear showing of the denial of the established right of *Hoke County students* to gain their opportunity for a sound basic education and those portions of the order that require the State to *assess* its education-related allocations to the county's schools so as to correct any deficiencies that presently prevent the county from offering its students the opportunity to obtain a *Leandro*-conforming education.

Id. at 638, 599 S.E.2d at 390–91 (emphasis added).

¶ 292 This Court entered two additional holdings. First, we reversed the trial court's decision that it could specifically determine the age for school eligibility. This Court held the issue was nonjusticiable, stating that "[o]ur reading of the constitutional and statutory provisions leads us to conclude that the determination of the proper age for school children has indeed been squarely placed in the hands of the General Assembly." *Id.* at 639, 599 S.E.2d at 391. We noted that an issue is nonjusticiable when either "the Constitution commits an issue, as here, to one branch of government," or "satisfactory and manageable criteria or standards do not exist for judicial determination of the issue." *Id.* (citing *Baker v. Carr*, 369 U.S. 186, 210, 82 S. Ct. 691, 706, 7 L.Ed.2d 663 (1962)). This Court determined that the issue of the proper age for school children met both tests for non-justiciability. *Id.* In addition, we affirmed the trial court's decision to consider all available resources, including those provided by the federal government, when evaluating our state's educational system. *Id.* at 645–47, 599 S.E.2d at 395–96.

¶ 293 This Court's clear and deliberate language established several crucial points that should control our determination of the instant case. First and foremost, education policy and funding are legislative responsibilities, while the executive is tasked with ad-

available are not being effectively and strategically *applied* so as to meet the [ ] principles from *Leandro*." (emphasis added).

ministration of the education system. *Id.* at 643, 599 S.E.2d at 393. Second, our holding in *Hoke County* was based on review of a 400-page, detailed order, which resulted from the trial court receiving evidence over a fourteen-month period on whether at-risk students in Hoke County were receiving the opportunity to a sound basic education. The trial court determined that the educational opportunities provided by Hoke County were deficient when it compared Hoke County to their contemporaries across the state. Finally, our holding in *Hoke County* was expressly limited to Hoke County.

¶ 294 We concluded our opinion by directing the trial court to conduct proceedings, consistent with the strictures above, monitoring Hoke County compliance and holding trials. Executive branch agencies were required to propose methods to reallocate existing resources to address the deficiencies in Hoke County. In addition, the trial court was to hold trials "involving either other rural school districts or [the five] urban school districts, . . . in a fashion that is consistent with the tenets outlined in this opinion." *Id.* at 648, 599 S.E.2d at 397.

¶ 295 Thus, this case as refined by our opinions in *Leandro* and *Hoke County* did not present a statewide claim that the education system in North Carolina was deficient, and there has never been any such holding. To the contrary, the Court approved the use of statewide averages to help determine if students in a particular county were underperforming.[4]

C. Post-*Hoke County*

¶ 296 Following our decision in *Hoke County*, this matter was remanded to Wake County Superior Court for further proceedings under Judge Howard E. Manning, Jr. Unfortunately, none of the trials required by this Court's decision occurred between July 2004 and October 7, 2016, when Judge Manning had to withdraw. While no trial occurred and no formal order was rendered—unlike the trial that led to *Hoke County*—there were various hearings and reports during this twelve-year period which the majority erroneously claims amounted to a trial and order. A careful reading of the record reveals that there was no trial and the trial court made no findings of fact or conclusions of law amounting to an appealable order. We address the four trial court filings highlighted by the majority.

¶ 297 On September 9, 2004, the trial court entered one of several filings entitled "Notice of Hearing and Order Re: Hearings." In that filing, the Court "noticed" hearings to occur on October 7 and 25, 2004, and "ordered" the parties to attend. The trial court recounted some of the history of the case, including excerpts from this Court's then recent *Hoke County* decision. In reviewing certain data, the trial court made the following observation:

> This Court believes that DPI and the State Board of Public Instruction are heading down the right track towards assessing problems, developing common sense solutions and providing LEAS with guidance and assistance in developing cost-effective, targeted solutions that can be measured for success and accountability.
>
> Now that the appeal is over and Leandro II is in full force and effect, it is time for the DPI and State Board to outline and present its plans as to how it will continue to proceed to ensure that the children of

4. In reviewing the trial court's conclusion that at-risk students in Hoke County were denied the opportunity to a sound basic education, this Court explicitly approved of Judge Manning's use of a comparative analysis in which Hoke County was measured against other counties in this state. This use of better-performing counties as measuring sticks was only possible because students in these other counties were receiving a *Leandro* conforming education, and this fact is reflected in Judge Manning's determinations regarding funding adequacy and implementation inadequacy.

No such analysis could conceivably support Judge Lee and the education establishment's assertion that students in all counties in this state are being denied the opportunity to a sound basic education—without at least one *Leandro* compliant county, the measuring stick evaporates. Put another way, the existence of *Leandro* compliant counties for which comparison is possible defeats any suggestion that there is a statewide violation.

North Carolina will be afforded the opportunity to a sound basic education.

¶ 298 On February 9, 2005, certain Mecklenburg County parents and students (Penn Intervenors), represented by current Justice Anita Earls, filed a complaint seeking to intervene and raising education and race-based claims. On August 19, 2005, the trial court allowed intervention solely for the education claim and denied participation concerning any race-based claims.

¶ 299 Thereafter, on September 30, 2005, Justice Earls filed an amended complaint on behalf of the Penn Intervenors, which further developed the education claim allowed by the trial court and sought to add additional plaintiffs.[5] On May 4, 2006, all of the original intervening parties, except the Charlotte-Mecklenburg Board of Education, voluntarily dismissed their claims.

¶ 300 The next trial court filing referenced by the majority was again entitled "Notice of Hearing Order Re: Hearing." The "order" again simply ordered the parties to appear at the noticed hearing. The trial court noted that the hearing was "non-adversarial" and explained its purpose was to provide executive branch defendants the "opportunity to report to the court concerning the actions that the Executive Branch will take with regard to the Halifax County Public School system." The trial court made the following observations concerning Halifax County Schools:

> The bottom line is that Halifax County Public School children are suffering from a breakdown in system leadership, school leadership and a breakdown in classroom instruction by and large from elementary school through high school.
>
> . . .
>
> Financial data furnished by DPI shows that the cost to the taxpayers to provide school level expenditures, the majority of which are salaries and benefits, has exceeded $75,000,000.00 for the past three years.
>
> . . .
>
> With all of this expense being paid to the adults whose responsibility it is to provide an equal opportunity to obtain a sound basic education to each and every child in the Halifax County Public School system, there seems to be little trickle down benefit to the children entrusted to the adults in these schools.
>
> . . .
>
> [I]t is time for the State to exert itself and exercise command and control over the Halifax County Public Schools beginning in the school year 2009-2010, nothing more and nothing less.
>
> . . .
>
> [T]he Court is providing the Executive Branch the opportunity, initially at least, to exercise its constitutional authority over the Halifax County School system to remedy the academic disaster which is occurring there[.]
>
> . . .
>
> The Court will entertain no excuses or whining by the adults in the educational establishment in Halifax County about how it's the children's fault, not theirs, for failing to provide the academic environment where children can obtain a sound basic education. If these children had Leandro compliant school leadership and teachers, they could learn and obtain a sound basic education rather than fail and drop out of school doomed to a lifetime of poverty and its multiple damages.

¶ 301 Subsequently, on May 5, 2014, the trial court entered a filing entitled "Report from the Court Re: The Reading Problem." In it, the trial court observed that the goal of N.C.G.S. § 115C-83.1 et. seq. was "on all fours with the Leandro I definition of a sound basic education." After citing with approval the legislative enhancements to education, the trial court placed the blame for students' reading shortfalls squarely on principals and teachers.

> The bottom line is that the principals that sit in the office, fail to analyze the assessment data a[t] their fingertips and do not

5. That claim remains part of this case, and Justice Earls' former clients participated in this appeal.

> become proactive in seeing the K-3 assessment system is being properly and effectively used by all teachers to drive individualized instruction in literacy, are not performing at a level that is expected to provide their students and faculty with the leadership needed to be successful and have all children obtain a sound basic education and proficiency in reading. This principal is not a Leandro compliant principal.

Similarly, teachers who fail to utilize the assessment tools properly "are not Leandro compliant."

¶ 302 The trial court issued this summary observation directed to school principals and teachers:

> Bottom line requirement: Do the formative assessment and use the information to meet the needs of the individual child. Do not put the data in the folder and continue on with the instruction for the entire class on one level. (What about this do you not understand?)

¶ 303 The final trial court filing relied on by the majority was another "Notice of Hearing and Order Re: Hearing" dated March 17, 2015. In that filing, the trial court expressed concern that the State Board of Education and the Department of Public Instruction were diminishing educational standards.

> Regardless of whatever excuse or reason reducing or eliminating academic standards and assessments may be based on, including education leaders and parent pressure, politics or an unconditional desire to reduce children's equal opportunities to obtain a sound basic education, the reduction of academic standards and elimination of assessments and EOC and EOG tests would be a direct violation of the Leandro mandate regarding assessments and testing to determine whether each child is obtaining a sound basic education.
>
> The bottom line is that in 2014, the SBE and DPI through their actions in redefining achievement levels, has begun to nibble away at accountability and academic standards[.]

¶ 304 Judge Manning further noted:

> As a result of today's heightened awareness and available data relating to individual school and student academic achievement in each classroom, the natural reaction by the affected adults who are in education, is to seek a way to eliminate the source of the data that holds them accountable. The only way out from under the microscope of accountability is to eliminate the assessments and the tests themselves.
>
> Helping non[-]Leandro compliant teachers and principals escape from public scrutiny and accountability by eliminating is invalid, simply wrong and in violation of the children's rights[.]
>
> Teaching to the test is a "red herring" phrase to draw attention away from the real problem – a failure of basic classroom instruction.

¶ 305 Judge Manning's filings reflect his summary of the proceedings in the trial court. Notably, in a memorandum he provided the trial court judge who succeeded him, Judge Manning stated:

> Our children that cannot read by the third grade are by and large doomed not to succeed by the time they get to high school. As shown by the record in this case, that is a failure of classroom instruction.
>
> . . .
>
> Reduced to essentials, in my opinion the children are not being provided the opportunity because after all the millions spent, 90% of school costs are for adult salaries and benefits, and the data show as it did years ago and up to now the educational establishment has not produced results.

¶ 306 Judge Manning, who presided over this case for almost 20 years, reiterated time and time again that the problem is not education policy or funding. The problem is a failure of the educational establishment and classroom instruction, i.e., implementation and delivery.

¶ 307 During the twelve years between this Court's decision in *Hoke County* and the case's reassignment to Judge Lee, the record reveals that Judge Manning entered sixteen Notices of Hearings and Orders re: Hear-

ings, four Court Memos Confirming Hearing Date and Time, one Memorandum of Decision and Order Re: Pre-Kindergarten Services for At-Risk Four Year Olds,[6] and one Report from the Court Re: The Reading Problems. The record demonstrates that, contrary to this Court's express direction, no trials were conducted for any other school districts or counties, and the parties have failed to point this Court to anything in the record indicating that any such trials ever occurred. Moreover, at oral argument in this case, the parties were unable to direct this Court to any order finding a statewide violation. *See* Oral Argument at 36:20, *Hoke Cnty. Bd. of Educ. v. State of North Carolina*, No. 425A21-2, https://www.youtube.com/watch?v=NOuFCf2rYdY.

¶ 308 Significant to a proper analysis by this Court of the current appeal, on August 15, 2011, the General Assembly sought to intervene in this action. Prior to 2011, the General Assembly, the Governor, and other executive branch entities involved in formulating education policy were all of the same political party. However, as a result of the 2010 midterm elections, the majority in the State House and Senate changed parties.

¶ 309 The Attorney General notified the legislature that it would no longer represent the General Assembly's interests in the case. The Attorney General noted a conflict of interest between the General Assembly and the remaining State defendants, and that neither the Governor nor the Department of Public Instruction would waive the conflict. Thereafter, the General Assembly moved to intervene.

¶ 310 In denying the General Assembly's motion to intervene, the trial court acknowledged that the "obligation[ ] to establish and maintain public schools is the 'shared province of the executive and legislative branches,' " but specifically declined to "put[ ] itself, or the judiciary, in the middle of this political dispute." The trial court denied the motion to intervene, in part because it recognized that the case concerned implementation of policy, and, therefore, focused on executive branch defendants. Thus, the legislative defendants were denied an opportunity to participate in this litigation.

¶ 311 This case again reached this Court in 2013. *See Hoke Cnty. Bd. of Educ. v. State*, 367 N.C. 156, 749 S.E.2d 451 (2013). There, we vacated an actual order entered by the trial court finding unconstitutional certain limitations on access to early childhood education. *Id.* at 159–60, 749 S.E.2d at 454–55. Because the General Assembly had revised the contested statute, we held the case should be dismissed as moot with the orders of the Court of Appeals and the trial court vacated. *Id.* at 160, 749 S.E.2d at 455.

¶ 312 Of note, Justice Earls filed an amicus brief in this matter on behalf of an organization she had founded, the Southern Coalition for Social Justice. Justice Earls argued that the trial court had the constitutional authority to order remedial relief by the legislative branch, just as the majority holds today. *See* New Brief of *Amici Curiae*, at 11, *Hoke Cnty. Bd. of Educ. v. State*, 367 N.C. 156, 749 S.E.2d 451 (2013) (No. 5PA12-2). In the brief, she contended that when "the other branches refuse to fulfill [constitutional] obligations, our state courts are not only empowered, but are obligated, to act to ensure the constitutional rights of North Carolinians are not compromised." Interestingly, she made various arguments in the brief similar to those now adopted by the majority, citing many of the same cases and using some of the same quotes. *Compare* New Brief of *Amici Curiae*, at 11–13, *Hoke Cnty.*, 367 N.C. 156, 749 S.E.2d 451 (No. 5PA12-2) *and supra* ¶¶ 162–71.[7]

6. This amounted to the only actual court order, and it was vacated on appeal as discussed herein. *See Hoke Cnty. Bd. of Educ. v. State,* 367 N.C. 156, 749 S.E.2d 451 (2013).

7. Justice Earls also signed an amicus brief in this case in December 2004 while representing the UNC School of Law Center for Civil Rights. *See* Memorandum of Law as *Amici Curiae,* at 15, *Hoke Cnty. Bd. of Educ. v. State,* No. 95-CVS-1158 (N.C. Wake County Sup. Ct. Dec 3, 2004). There, her brief criticized executive branch defendants for not seeking significantly more money from the General Assembly and urging immediate court action. Subsequently, the Center for Civil Rights moved to participate as if it represented a party and also began to represent new plaintiffs seeking to intervene in this action.

¶ 313 At the time of Judge Manning's medical retirement, the remaining plaintiffs in this matter were the original five rural counties, the Charlotte-Mecklenburg Board of Education, and certain students from Mecklenburg County (the Penn Intervenors). The state defendants were executive branch defendants who were represented by the Attorney General. The General Assembly was not represented and was not a participant in the action due to the prior denial of its motion to intervene.

¶ 314 After being appointed, Judge David Lee took the litigation in a far different direction, appointing a third-party consultant to make education policy and funding decisions. This was done despite this Court's explicit holding in *Hoke County* that the state's education policy and its funding met constitutional standards. *See Hoke County*, 358 N.C. at 387, 599 S.E.2d at 632. The trial court did not limit its directives to the specific plaintiffs or their specific claims; rather, the trial court greatly expanded the scope of this litigation while knowing that the branch designated by the constitution to make education policy and funding decisions was not a party to the proceedings.

¶ 315 The following occurred after Judge Lee was assigned to preside over this case on October 7, 2016:

(1) July 24, 2017: The State Board of Education filed a Motion for Relief from Judge Manning's 2002 Judgment, based on its assertion that "the factual and legal landscapes have significantly changed," and that "the original claims, as well as the resultant trial court findings and conclusions, are divorced from the current laws and circumstances."

(2) February 1, 2018: Judge Lee entered a Case Management and Scheduling Order noting that "the Plaintiff parties [including Penn-Intervenors] and the State have jointly nominated, for the Court's consideration and appointment, an independent, non-party consultant to develop detailed, comprehensive, written recommendations for specific actions necessary to achieve sustained compliance with constitutional mandates articulated in this case."

(3) March 13, 2018: Judge Lee denied the State Board of Education's Motion for Relief from Judgment.

(4) March 13, 2018: Judge Lee entered a consent order appointing WestEd as an "independent, non-party consultant" to assist with the case.

(5) December 2019: WestEd submits its plan for North Carolina.

(6) January 21, 2020: The parties, including the State Board of Education, enter a consent order that "[b]ased upon WestEd's findings, research, and recommendations and the evidence of record in this case, the Court and parties conclude that a definite plan of action for the provision of the constitutional *Leandro* rights must ensure a system of education," that, at a minimum, included seven components described in the order. The order required the parties to submit a status report on the "specific actions that State Defendants must implement in 2020 to begin to address the issues identified by WestEd."

(7) June 15, 2020: Parties submitted a Joint Report to the Court on remedial steps the State planned to take in the next year.

(8) September 1, 2020: Judge Lee entered a consent order, noting that the parties agreed that the steps outlined in the June 15, 2020 Joint Report "are the necessary and appropriate actions needed in Fiscal Year 2021 to begin to adequately address the constitutional violations in providing the opportunity for a sound basic education to all children in North Carolina." The Court ordered defendants to implement the remedial actions in the Joint Plan by June 30, 2021, and required the parties to develop a Comprehensive Remedial Plan (CRP) by December 31, 2020.

(9) March 15, 2021: State defendants submitted a Comprehensive Remedial Plan to the Court.

(10) June 11, 2021: Judge Lee entered an order providing that the "actions, programs, policies, and resources propounded by and agreed to [by] the State Defendants, and described in the Comprehensive Remedial Plan are necessary to remedy the continuing constitutional violations and to provide the opportunity for a sound basic education. . . ." Judge Lee ordered that the "Comprehensive Remedial Plan shall be implemented in full" and set forth deadlines for doing so.

(11) August 6, 2021: The State filed its first progress report on the status of implementing the Comprehensive Remedial Plan.

(12) September 8, 2021: Judge Lee held a hearing on the status of implementing the Comprehensive Remedial Plan.

(13) September 22, 2021: Judge Lee entered an order on the First Progress report filed by the State. He noted that the parties had not yet secured full funding for the first two years of the Comprehensive Remedial Plan but noted that the State "has available fiscal resources needed to implement Years 2 and 3 of the" Plan. Judge Lee ordered that another hearing be held on October 18, 2021 "to inform the Court of the State's progress in securing the full funds necessary to implement the" CRP. Judge Lee noted that "in the event full funds necessary to implement the CRP are not secured by that date, the Court will hear and consider any proposals for how the Court may use its remedial powers to secure funding."

(14) October 18, 2021: Judge Lee entered an order finding that the CRP had not, as of that date, been fully funded by "an appropriations bill." Judge Lee gave the parties until November 8, 2021, to submit memoranda of law what on remedial steps the court could take.

(15) November 10, 2021: Judge Lee entered the order requiring relevant State actors to transfer over a billion dollars from the General Fund to appropriate State agencies to fund years 2 and 3 of the CRP. Judge Lee stayed the order for 30 days.

(16) November 18, 2021: The General Assembly passed the Budget Act of 2021. The budget appropriated $10.6 billion in FY 2021-2022 and $10.9 billion in FY 2022-2023 for K-12 education. These figures do not include over $3.6 billion dollars in federal coronavirus funding for North Carolina school districts. The budget was signed by the Governor.

(17) November 30, 2021: Judge Lee entered an order noticing a hearing for December 13, 2021, for the State "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." Judge Lee also ordered that his November 10, 2021 transfer order be stayed for ten days after the December 13, 2021 hearing.

(18) December 7, 2021: The State appealed from the November 10, 2021 order.

(19) December 8, 2021: The intervening legislative defendants filed a notice of appeal from the November 10, 2021 order.

¶ 316 As is evident from the timeline above, after the case was reassigned to Judge Lee, no trials or adversarial hearings took place to determine whether a statewide violation of *Leandro* existed. The State Board of Education raised this exact issue before the trial court as part of its Motion for Relief filed July 10, 2017. The State Board of Education requested that the trial court "relinquish [remedial] jurisdiction," in part because "[f]or over a decade, the Superior Court has retained and exercised jurisdiction in this case, [but] this Superior Court has not

[ ] held a trial as to any other plaintiff school board." Further, the State Board of Education noted the current direction of the case far

> "exceed[ed] the jurisdiction established by the original pleadings in this action." The State Board of Education recognized numerous statutory and administrative changes since the Hoke County decision. It stated that "[t]he cumulative effect of these changes is that the State's current educational system is so far removed from the factual landscape giving rise to the complaint, trial, and 2002 Judgment that the superior court is now retaining jurisdiction over a 'future school system' which was not the subject of the original action."

¶ 317 On March 13, 2018, eight months after the State Board filed its motion, Judge Lee denied the motion without addressing these crucial issues. In a footnote to the order, Judge Lee indicated that all of the parties were now working together; the proceedings were now taking on a radically different character. The record reflects that the parties entered into three consent orders, with the first occurring on March 13, 2018.[8] In this first consent order, the trial court, upon the parties' request, appointed a San Francisco-based consulting company, WestEd, to serve as an "independent non-party consultant." According to a Case Management and Scheduling Order dated February 1, 2018, WestEd's role was to recommend "specific actions" that the state should take:

a. To provide a competent, well-trained teacher in every classroom in every public school in North Carolina;

b. To provide a well-trained, competent principal for every public school in North Carolina; and

c. To identify the resources necessary to ensure that all children in public school, including those at risk, have an *equal* opportunity to obtain a sound basic education, as defined in *Leandro I*.[9] (emphasis added).

¶ 318 In December 2019, WestEd released its "Action Plan for North Carolina."[10] This report became the basis for two further consent orders between the parties—a Consent Order Regarding Need for Remedial, Systemic Actions for the Achievement of *Leandro* compliance, filed January 21, 2020, and a Consent Order on Leandro Remedial Action for Fiscal Year 2021, filed September 11, 2020.

¶ 319 In addition, WestEd's report formed the basis for the "Comprehensive Remedial Plan." The CRP resulted from the trial court's order for "State Defendants, in consultation with Plaintiffs to develop and present a Comprehensive Remedial Plan to be fully implemented by the end of 2028 . . . ." There is no doubt that the CRP was crafted by the parties, as "State Defendants ha[d] regularly consulted with the plaintiff-parties in the development of the Comprehensive Remedial Plan." The CRP contains hundreds of action steps for the state to complete over the course of eight years, which would require billions of dollars in taxpayer money to fund. On June 7, 2021, the trial court entered its Order on Comprehensive Remedial Plan and directed that "the Comprehensive Remedial Plan shall be implemented in full and in

8. Notably, as discussed further below, the legislature was not a party to the case at this point because its motion to intervene was denied in 2011. Therefore, both its interests and, commensurately, the interests of the taxpayers, voters, and people of this State, were not represented.

9. It is notable that the trial court misconstrued our holding in *Leandro*. As discussed above, this Court expressly rejected the contention that our constitution requires all students to have ''an *equal* opportunity to obtain a sound basic education.'' *See Leandro*, 346 N.C. at 350, 488 S.E.2d at 256–57 (emphasis added) (''A constitutional requirement to provide substantial equality of educational opportunities . . . would almost certainly ensure that no matter how much money was spent on the schools of the state, at any given time some of those districts would be out of compliance.'').

10. On the first page of its report, WestEd wrongly asserted that this Court's decision in *Leandro* ''affirmed that the state has a constitutional responsibility to provide every student with an *equal opportunity* for a sound basic education and that the state was failing to meet that responsibility.'' (Emphasis added.) This is simply wrong. This Court has never affirmed a *Leandro* violation outside of Hoke County, let alone a violation occurring on a statewide basis.

accordance with the timelines set forth therein . . . ."

¶ 320 The CRP includes definitions of "responsible parties" who must implement the plan's "action steps." While our state constitution provides that the General Assembly has exclusive authority to allocate taxpayer money, the General Assembly is consistently identified by WestEd as a responsible party for each of these action steps. However, the General Assembly was never joined as a necessary party by the trial court, nor was it consulted during the development of the CRP. As previously noted, the legislature had moved to intervene in this case in 2011, but the trial court denied its motion to intervene.

¶ 321 Following the trial court's June 7, 2021 order directing that the CRP be implemented in full, the trial court entered an order on November 10, 2021, in which it ordered that:

> The Office of State Budget and Management and the current State Budget Director ("OSBM"), the Office of the State Controller and the current State Comptroller ("Controller"), and the Office of the State Treasurer and the current State Treasurer ("Treasurer") shall 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 as follows:
>
> (a) Department of Health and Human Services ("DHHS"): $189,800,000.00
>
> (b) Department of Public Instruction ("DPI"): $1,522,053,000.00
>
> (c) University of North Carolina System: $41,300,000.00

¶ 322 In addition to ordering the transfer of more than $1.7 billion in state funds, the trial court also ordered that "OSBM, the Controller, and the Treasurer, are directed to treat the foregoing funds as an appropriation from the General Fund . . . ."

¶ 323 The day before Judge Lee entered the November 10 order, Judge Manning sent a memorandum to the General Assembly, the Governor, and the Superintendent of Public Instruction. Judge Lee was copied on the memorandum, which stated:

> At the present time there is a media-induced frenzy about the Leandro judge proposing to enter an order requiring the General Assembly to appropriate over $1 billion for the educational establishment. As the press is licking its lips for 15 minutes on the 6:00 news, I will refer all to the following decisions from our Supreme Court and other decisions relating specifically to the power of the Judicial Branch.
>
> You might enjoy reading *Able Outdoor, Inc. v. Harrelson* 341 N.C. 167 [459 S.E.2d 626] (1995) by Justice Webb (a Democrat) as follows:
>
> *We hold, however, that the Court of Appeals erred in affirming Judge Cashwell's orders allowing execution against the State. In Smith v. State, 289 N.C. 303 [222 S.E.2d 412] (1976), we held that . . . if a plaintiff is successful in establishing his claim, he cannot obtain execution to enforce the judgment. We said '[t]he judiciary will have performed its function to the* ***limit*** *of its constitutional powers. Satisfaction will depend upon the manner in which the General Assembly discharges its constitutional duties.' Pursuant to Smith, we do* ***not believe*** *the Judicial Branch of our State government has the power to enforce an execution against the Executive Branch.*
>
> You should also read the following decisions attached to this memorandum, which also declare the limits of the Court's power to execute or require the Legislative and Executive branches of government to appropriate money.
>
> Finally, Leandro requires that the children, not the educational establishment, have the Constitutional right to the equal opportunity to obtain a sound, basic education. This has not and is not happening now as the little children are not being taught to read and write because of a failure in classroom instruction as required by Leandro. 358 NC 624, 625, 626 ("First, that every classroom be staffed with a competent, certified, well-trained teacher

> who is teaching the standard course of study by implementing effective educational methods that provide differentiated individualized instruction, assessment and remediation to the students in that classroom.").
>
> This is not happening now.
>
> Our children that cannot read by the third grade are by and large doomed not to succeed by the time they get to high school. As shown by the record in this case, that is a failure of classroom instruction. This conclusion is supported further by the Report from the Court: The Reading Problem (2014) as well as annual statewide academic performance data, including ACT statewide results for 2020–21 and several years before.
>
> Reduced to essentials, in my opinion the children are not being provided the opportunity because after all the millions spent, 90% of school costs are for adult salaries and benefits, and the data shows as it did years ago and up to now the educational establishment has not produced results.

'*A Failure of Classroom Instruction.' Read Retired Judge's Memo on NC School Funding*, The News & Observer (Nov. 10, 2021, 6:36 PM), https://www.newsobserver.com/news/local/education/article255713686.html.[11]

¶ 324 Eight days after the trial court entered the November 10 order, the General Assembly passed, and the Governor signed, the Current Operations and Appropriations Act of 2021, 2021 N.C. Sess. L. 180 (State Budget).

¶ 325 The State appealed to the Court of Appeals.[12] It was at this point that Legislative Intervenors intervened as of right pursuant to N.C.G.S. § 1-72.2(b) and also filed a Notice of Appeal.[13]

¶ 326 The State Controller, who was not a party to this action, also petitioned the Court of Appeals for a writ of prohibition, temporary stay, and writ of supersedeas, arguing that the trial court lacked jurisdiction over the Controller and that the November 10 order violated our state constitution. On November 30, 2021, the Court of Appeals issued a writ of prohibition restraining the trial court from enforcing the transfer provisions of its November 10 order and stated that "[u]nder our Constitutional system, that trial court lacks the power to impose that judicial order."

¶ 327 Following the Court of Appeals' issuance of the writ of prohibition, multiple parties, including the State, filed petitions and notices of appeal in this Court, seeking review of the decision of the Court of Appeals and bypass review of issues arising from the November 10 order. On March 21, 2022, this Court allowed defendant State of North Carolina's and plaintiffs' petitions for bypass review (425A21-2) but held in abeyance the direct appeal of review of the writ of prohibition (425A21-1). However, this matter was first remanded to Wake County Superior Court "for the purpose of allowing the trial court to determine what effect, if any, the enactment of the State Budget has upon the nature and extent of the relief that the trial court granted . . . ." Judge Michael Robinson was assigned the task of overseeing the proceedings on remand.[14]

11. History and common sense tell us that increased funding alone is not a silver bullet. By way of example, a young baseball player can have the best bat, glove, batting gloves, cleats, and helmet money can buy. Mom and dad can fork out a fortune for top-notch hitting and pitching coaches, showcase teams, and field time. But, if these coaches prioritize teaching the young player to cook or play a musical instrument, you will see little improvement in the sport of baseball.

The same is true with educating children. Schools can have the best teachers along with state-of-the-art programs, equipment, and materials, but educational outcomes will not improve if use of available resources does not prioritize reading, writing, and arithmetic.

12. This appeal is curious, as the November 10 order attempted to fund a plan that the State defendants crafted. Counsel for the State could not provide an answer when asked why the State had appealed and stated "I don't think the State disagreed with the adoption of that plan."

13. It is notable that not only could the legislative defendants not intervene as of right prior to the passage of the State Budget, but their prior motion to intervene was denied in 2011.

14. The matter was assigned to Judge Robinson because Judge Lee "had reached the mandatory retirement age for judges in January." *David Lee, Judge who Oversaw School Funding Case, Dies at 72*, North State Journal, Oct. 12, 2022, at A5.

¶ 328 On remand, Judge Robinson concluded "that the 10 November order should be amended to remove a directive that State officers or employees transfer funds from the State Treasury to fully fund the CRP" but also concluded that "the State of North Carolina has failed to comply with the trial court's prior order to fully fund years 2 and 3 of the CRP." In addition, Judge Robinson concluded that because the State Budget in fact funded portions of CRP programs:

> The Order should be further amended to determine specifically that the additional amounts that are due to DHHS, DPI, and the UNC System for undertaking the programs called for in years 2 and 3 of the CRP should be modified and amended as follows:
>
> a. The amount to be provided to DHHS should be reduced from $189,800,000 to $142,900,000
>
> b. The amount to be provided to DPI should be reduced from $1,522,053,000 to [$]608,006,248
>
> c. The amount to be provided to the UNC System should be reduced from $41,300,000 to $34,200,000.

¶ 329 With a proper understanding of the history and current posture of this case, our analysis is set forth below.

II. Analysis

A. Collusion

¶ 330 The courts of this state "have no jurisdiction to determine matters purely speculative, enter anticipatory judgments, declare social status, [or] deal with theoretical problems . . . ." *Little v. Wachovia Bank & Trust Co.*, 252 N.C. 229, 243, 113 S.E.2d 689, 700 (1960), *overruled on other grounds by Citizens Nat'l Bank v. Grandfather Home for Children, Inc.*, 280 N.C. 354, 185 S.E.2d 836 (1972). When an issue has not been "drawn into focus by [court] proceedings," any decision of our courts would "be to render an unnecessary advisory opinion." *Wise v. Harrington Grove Cmty. Ass'n, Inc.*, 357 N.C. 396, 408, 584 S.E.2d 731, 740 (2003) (citing *City of Greensboro v. Wall*, 247 N.C. 516, 519, 101 S.E.2d 413, 416 (1958)). "It is no part of the function of the courts, in the exercise of the judicial power vested in them by the Constitution, to give advisory opinions . . . ." *Poore v. Poore*, 201 N.C. 791, 792, 161 S.E. 532, 533 (1931).

¶ 331 Because "*[c]lear and sound judicial decisions*" can only be reached when adverse parties and their legal theories "*are tested by fire in the crucible of actual controversy*," suits lacking adversity are properly barred from our courts. *State ex rel. Edmisten v. Tucker*, 312 N.C. 326, 345, 323 S.E.2d 294, 307 (1984) (emphasis in original) (quoting *City of Greensboro v. Wall*, 247 N.C. at 520, 101 S.E.2d at 416). "So-called friendly suits, where, regardless of form, all parties seek the same result, are quicksands of the law." *City of Greensboro v. Wall*, 247 N.C. at 520, 101 S.E.2d at 416.

¶ 332 Our State's long-standing judicial policy to decline consideration of issues not drawn into focus by adversarial court proceedings is in harmony with the approach of the Supreme Court of the United States. "[F]ederal courts will not entertain friendly suits, or those which are feigned or collusive in nature." *Flast v. Cohen*, 392 U.S. 83, 100, 88 S. Ct. 1942, 1953, 20 L.Ed.2d 947 (1968) (cleaned up). As stated by the Supreme Court in 1850 when voiding a judgment of the Circuit Court of the United States for the District of Maine:

> The court is satisfied, upon examining the record in this case . . . that there is no real dispute between the plaintiff and defendant. On the contrary, it is evident that their interest in question brought here for decision is one and the same, and not adverse; and that in these proceedings the plaintiff and defendant are attempting to procure the opinion of this court upon a question of law, in the decision of which they have a common interest opposed to that of other persons, who are not parties to this suit, who had no knowledge of it while it was pending in the Circuit Court, and no opportunity of being heard there in defence of their rights. And their conduct is the more objectionable, because they have brought up the question upon a statement of facts agreed on between themselves, without the knowledge of the parties with whom they were in truth in

> dispute, and upon a judgment pro forma entered by their mutual consent, without any actual judicial decision by the court.

Lord v. Veazie, 49 U.S. 251, 254, 12 L.Ed. 1067 (1850).

¶ 333 As stated by Justice Brewer for the Supreme Court in 1892:

> Whenever, in pursuance of an honest and actual antagonistic assertion of rights by one individual against another, there is presented a question involving the validity of any act of any legislature, state or federal, and the decision necessarily rests on the competency of the legislature to so enact, the court must, in the exercise of its solemn duties, determine whether the act be constitutional or not; but such an exercise of power is the ultimate and supreme function of courts. It is legitimate only in the last resort, and as a necessity in the determination of real, earnest, and vital controversy between individuals. It never was the thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act.

Chicago & G.T. Ry. Co. v. Wellman, 143 U.S. 339, 345, 12 S. Ct. 400, 402, 36 L.Ed. 176 (1892).

¶ 334 As stated by the Supreme Court per curiam in 1943:

> Such a suit is collusive because it is not in any real sense adversary. It does not assume the honest and actual antagonistic assertion of rights to be adjudicated—a safeguard essential to the integrity of the judicial process, and one which we have held to be indispensable to adjudication of constitutional questions by this Court. Whenever in the course of litigation such a defect in the proceedings is brought to the court's attention, it may set aside any adjudication thus procured and dismiss the cause without entering judgment on the merits. It is the court's duty to do so where, as here, the public interest has been placed at hazard by the amenities of parties to a suit conducted under the domination of only one of them.

U.S. v. Johnson, 319 U.S. 302, 305, 63 S. Ct. 1075, 1076–77, 87 L.Ed. 1413 (1943) (cleaned up).

¶ 335 Here, the trial court disregarded both this Court's precedent and the long-standing guidance of the Supreme Court of the United States by judicially sanctioning a collusive suit between friendly parties. While this case originally "was filed as a declaratory judgment action pursuant to section 1-253 of the General Statutes," *Hoke County*, 358 N.C. at 617, 599 S.E.2d at 378, the Uniform Declaratory Judgment Act nevertheless "preserves inviolate the ancient and sound juridic concept that the inherent function of judicial tribunals is to adjudicate genuine controversies between antagonistic litigants . . . ." *Lide v. Mears*, 231 N.C. 111, 118, 56 S.E.2d 404, 409 (1949). Further, "an action for a declaratory judgment will lie only in a case in which there is an actual or real existing controversy *between parties having adverse interests in the matter in dispute.*" *Id.* (emphasis added).

¶ 336 An examination of the record in this case leaves no doubt that although the parties' interests may have once been adverse, any such adversity dissipated years ago. As early as February 1, 2018, the trial court's Case Management and Scheduling Order noted that "[t]he Plaintiff Parties and the State have jointly nominated . . . an independent, non-party consultant," i.e., WestEd, "to develop detailed, comprehensive, written recommendations for specific actions" to remedy the purported statewide violations of *Leandro*.

¶ 337 This Case Management and Scheduling Order was followed by multiple consent orders, including a Consent Order Regarding Need for Remedial, Systematic Actions For the Achievement of *Leandro* Compliance. In this consent order, the trial court stated "the parties to this case . . . are in agreement that the time has come" to proceed with WestEd's recommendations. This consent order also reveals that, despite executive branch defendants' alignment with plaintiff-parties, the trial court was only "hopeful that the parties, with the help of the Governor, can obtain the support necessary from the General Assembly."

¶ 338 This was all done to the exclusion of the one entity that controlled what the parties wanted to accomplish—the General Assembly. Put another way, executive branch bureaucrats and government actors, sanctioned by the court, agreed to a process that called for the expenditure of taxpayer money without consultation from the branch of government to which that duty is constitutionally committed. The trial court's denial of the General Assembly's motion to intervene in 2011, and the majority's dismissal of legislative defendants' arguments today, raise the grave specter of executive and judicial collusion designed to subvert our constitutional framework and, by extension, the will of the people. It is only when "the judiciary remains truly distinct from both the legislature and the Executive" that liberty is safeguarded. *The Federalist* No. 78 (Alexander Hamilton).[15]

¶ 339 Here, counsel for executive branch defendants admitted at oral argument that the General Assembly had no "insight" into the crafting of the remedy because "the General Assembly was not a party." Oral Argument at 58:24, *Hoke Cnty. Bd. of Educ. v. State of North Carolina*, No. 425A21-2, https://www.youtube.com/watch?v=NOuFCf2rYdY. Further, counsel readily admitted that executive branch defendants "certainly wanted plaintiffs to be involved in th[e] process" of crafting the remedy because executive branch defendants "wanted to have *dominion*[16] over the issue ... and so getting sign-off from plaintiffs ensured that the trial court would adopt this program." Oral Argument at 59:15, *Hoke Cnty. Bd. of Educ. v. State of North Carolina*, No. 425A21-2, https://www.youtube.com/watch?v=NOuFCf2rYdY. (emphasis added).

¶ 340 Thus, this case presents a situation in which the parties' interests are aligned, and "[s]uch a suit is collusive because it is not in any real sense adversary." *U.S. v. Johnson*, 319 U.S. at 305, 63 S. Ct. at 1076–77. The legal issues involved in this case have been "determined" through entry of consent orders by outcome-aligned parties, not "tested by fire in the crucible of actual controversy." *City of Greensboro v. Wall*, 247 N.C. at 520, 101 S.E.2d at 417. The colluding parties agreed upon a remedy, one which directly involved the General Assembly, without ever seeking input from that third party. In so doing, they have attempted to "procure the opinion of" this Court "in the decision of

15. It appears that the majority attempts to support its plundering of legislative authority by arguing that our Founding Fathers contemplated an ephemeral separation of powers. Such an interpretation is not just revisionist history; it is plainly wrong. We could spend much time discussing the majority's misuse of selections from the Federalist Papers to justify judicial intrusion into the legislative arena. Discussion here, however, is intentionally limited.

The Founding Fathers understood that ''maintaining in practice the necessary partition of power among the several departments'' was the primary protection against tyranny. *The Federalist* No. 51 (James Madison). To more clearly understand the founders' view of separation of powers, however, one must also appreciate the concern expressed by anti-federalist writers, to which the federalists responded, over the blending of functions in the Constitution. *See* The Dissent of the Minority of the Convention of Pennsylvania, The Essential Anti-Federalist, Allen and Lloyed (2002) at 43. For example, the United States Constitution explicitly provides for the Senate's involvement in executive appointments and treaties, and its role in the trial of impeachments. Any encroachment upon the power of another branch was *expressly granted by the Constitution*, and, as Hamilton stated in *The Federalist* Nos. 65 and 66, involved not separation of powers concerns, but essential checks on power. *See* George W. Carey & James McClellan, *Reader's Guide to The Federalist*, The Federalist, at lxxvii (George W. Carey & James McClellan, eds., Gideon ed. 2001).

Commandeering the appropriations clause through the judiciary's supposed ''inherent authority'' is a usurpation of a constitutionally committed function, not an essential check on power expressly granted by the constitution. As Madison stated in *The Federalist* No. 51, ''[i]n framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to controul the governed; and in the next place, oblige it to controul itself.'' There can be no rational argument that our Founding Fathers, the Constitution of the United States, or the Constitution of the State of North Carolina contemplated meaningless barriers which permit the aggrandizement of judicial power as accomplished by this Court's lack of restraint and control. After all, ''the judiciary is beyond comparison the weakest of the three departments of power.'' *The Federalist* No. 78 (Alexander Hamilton).

16. Dominion is defined by Webster's Dictionary as ''supreme authority'' or ''absolute ownership.''

which they have a common interest opposed to that of other persons, who are not parties to this suit," and based upon "a statement of facts agreed on between themselves . . . upon a judgment pro forma entered by their mutual consent." *Lord v. Veazie*, 49 U.S. 251, 254, 12 L.Ed. 1067 (1850).

¶ 341 Further, it bears repeating that these collusive orders were entered without a trial on the merits to determine the validity of the actual plaintiffs' claims. A statewide violation was simply assumed without a trial or final order. The trial court erred in permitting this suit to continue after it became clear that the parties were working in concert to bypass the General Assembly and achieve their mutual goals via consent orders. As discussed further below, this collusion between plaintiffs, executive branch defendants, and the trial court grossly violated the General Assembly's due process rights. In addition, the trial court further erred in attempting to achieve the parties' collusive efforts by imposing an unconstitutional remedy in its November 10 order.

B. Separation of Powers

1. The Trial Court

¶ 342 Even if this case had not been transformed into a friendly suit, the trial court would still lack authority to impose its chosen remedy for four clear reasons. First, the trial court ignored this Court's explicit holdings that a remedy may be imposed only after the evidence establishes a clear showing of a *Leandro* violation. Second, the trial court violated the legislative defendants' right to due process, which requires that the General Assembly be joined as a necessary party when the essence of the case is whether the current education policy and funding are constitutionally adequate. Third, even if the trial court had properly held a trial with all parties in which such a clear showing established a statewide violation of *Leandro*, any judicial remedy ordering the transfer of state funds violates our constitution. Finally, even if a proper trial had been conducted, and even if the trial court's order did not otherwise offend our constitution, the trial court lacked jurisdiction to enter an order against the State Controller who was not a party.

a. A Remedy Without a Violation

¶ 343 As we made clear in *Hoke County*, our "examination of the case [wa]s premised on evidence as it pertain[ed] to Hoke County in particular." *Hoke County*, 358 N.C. at 613 n.5, 599 S.E.2d at 375 n.5. "[O]ur holding mandates" in that case "cannot be construed to extend to the other four rural districts named in the complaint." *Id.* Thus, the establishment of alleged *Leandro* violations in any other district beyond Hoke County would require further proceedings that must include "presentation of relevant evidence by the parties, and findings and conclusions of law by the trial court." *Id.*

¶ 344 Further, the trial court's remedy goes far beyond that justified by the pleadings in this case. The remaining plaintiffs are the five Boards of Education in Hoke, Halifax, Robeson, Cumberland, and Vance counties and students from each county. The remaining intervening plaintiffs are the Charlotte-Mecklenburg Board of Education and some Mecklenburg County students and parents. In none of their surviving pleadings do they purport to represent all of the students of the State, or even all counties. To the contrary, they allege that they represent children in their own counties. This Court's decision in *Leandro*, affirming the dismissal of most of the original claims, significantly narrowed the remaining issue. As we said:

> This litigation started primarily as a challenge to the educational funding mechanism imposed by the General Assembly that resulted in disparate funding outlays among low wealth counties and their more affluent counterparts. With the *Leandro* decision, however, the thrust of this litigation turned from a funding issue to one requiring the analysis of the qualitative educational services provided to the respective plaintiffs and plaintiff-intervenors.

Hoke County, 358 N.C. at 609, 599 S.E.2d at 373. In other words, the issue became the methods chosen by school administrators to provide the classroom instruction that was needed should a deficiency be shown as to students in a particular county.

¶ 345 The proper standards for proving such alleged violations have been twice stat-

ed by this Court. First, the trial court "must grant every reasonable deference to the legislative and executive branches when considering whether they have established and are administering a system that provides ... a sound basic education." *Id.* at 622–23, 599 S.E.2d at 381 (quoting *Leandro*, 346 N.C. at 357, 488 S.E.2d at 261). Second, plaintiffs must prove their allegations by making "a clear showing to the contrary," i.e., plaintiffs must make a clear showing that the strictures of *Leandro* are being violated in their districts. *Id.* (quoting *Leandro*, 346 N.C. at 357, 488 S.E.2d at 261). Finally, the imposition of a remedy is expressly barred absent such a clear showing, as "[o]nly such a clear showing will justify a judicial intrusion[.]" *Id.* (quoting *Leandro*, 346 N.C. at 357, 488 S.E.2d at 261).

¶ 346 It is notable that, in *Hoke County*, the trial court's determination that at-risk students were not receiving the opportunity to a sound basic education was premised on fourteen months of adversarial hearings. That ultimate determination was reached in a 400-page Order that recounted these hearings.

¶ 347 Here, the record is devoid of any proceedings in which the trial court concluded as a matter of law that plaintiffs had presented relevant evidence establishing a clear showing of *Leandro* violations in other districts beyond Hoke County. There was no trial establishing a violation in any other county and certainly no trial establishing a statewide violation. If it took the trial court fourteen months and a 400-page Order to determine that a subsection of students in one county were not receiving the opportunity to a sound basic education, then surely a clear showing of a statewide violation would require exponentially more. The fact that the record below fails to establish a similar in-depth adversarial hearing for *any* other county, and contains no trace of the kind of monumental undertaking needed to demonstrate a statewide violation, speaks volumes. Absent such a clear showing of a statewide violation, the trial court lacked authority to impose *any* remedy.[17]

¶ 348 The majority ignores this. By failing to hold an actual *trial* for any other county in the last fourteen years, the trial court judges failed to abide by this Court's express directions in *Hoke County*. The majority apparently imagines the existence of trial court orders from nonexistent trials. The majority's focus on the title of the trial court's routine scheduling "Notice of Hearing and Orders" completely misses the mark. A *trial* is required for appellate review of this extremely fact-intensive issue because an appellate court requires a record from which it may *meaningfully* review the trial court's findings and conclusions. Certainly, given the significance of the subject matter of this case and the separation of powers concerns, this Court should require at least a standard record of a trial and a final order.

¶ 349 The record in this case is not the record of an adversarial trial. It is the record of trial court judges accepting studies and statistics, taking them at face value without any real inquiry into their veracity, and then opining about the condition of this State's education system.[18] If the General Assembly

17. One could argue that this Court's finding of a statewide violation, despite the failure of any party to plead such a claim, raises jurisdictional concerns. There has never been a finding in the trial court that violations through implementation and delivery occurred outside of Hoke or Halifax counties. Without the presence of the other unrepresented counties, the remaining plaintiffs and plaintiff intervenors may lack standing to plead a statewide violation, and the trial court therefore may lack jurisdiction to consider such a claim.

18. Each year, U.S. News ranks "how well states are educating their students." North Carolina is ranked seventh out of fifty states overall and fifteenth out of fifty states with respect to Pre-K to 12th grade education. Brett Ziegler, *Education Rankings*, U.S. News, https://www.usnews.com/news/best-states/rankings/education (last visited Oct. 24, 2022). One wonders how the trial court and the San Francisco based consulting firm's diminished view of our education system can be so inconsistent. U.S. News, whose rankings of North Carolina's universities are celebrated, concludes that North Carolina has one of the best K-12 education systems in the country. A cynic could argue that WestEd's mercenary report only utilized data from 44 of North Carolina's one hundred counties. But, this is the type of information that is best tested in an actual trial instead of blindly accepted by the parties and court that hired the consultant.

had been allowed to intervene, then perhaps there would be a record which reflects facts derived from the crucible of an adversarial trial.

¶ 350 It is judicial malpractice for the majority to suddenly ignore the importance of court orders when it comes to appellate review. The majority simply declares that the trial court "properly concluded based on an abundance of clear and convincing evidence that the State's *Leandro* violation was statewide." The majority declines to explain *what* this evidence was, when it was produced, or how the majority knows it is reliable enough to form the basis of an explosive change in constitutional order and massive transfer of taxpayer monies to fund a program crafted by a San Francisco based consulting firm. Fundamentally, this Court cannot determine whether a "clear showing" has been made establishing a statewide *Leandro* violation because the lack of an adversarial trial renders our review purely speculative.

¶ 351 As but one example, it would have been inconceivable for this Court to review the proceedings in *Harper v. Hall*, 380 N.C. 317, 2022-NCSC-17, 868 S.E.2d 499, if the trial court had failed to hold an adversarial hearing and instead merely accepted at face value the arguments and evidence presented by the legislative defendants in that case. So too here. Issues of constitutional magnitude require facts and arguments to be "tested by fire in the crucible of actual controversy." *City of Greensboro v. Wall*, 247 N.C. at 520, 101 S.E.2d at 417. These requirements cannot be cast aside for political or judicial expediency.

¶ 352 However, even if the trial court had properly conducted a trial in which a statewide violation of *Leandro* had been established, the trial court would still lack the authority to impose *this* remedy. The problem arises not only because the trial court imposed a remedy without first establishing a violation, but because the chosen remedy clearly violates our constitution.

b. The Limitation on Judicial Power

¶ 353 Separation of powers is fundamental to our republican system of self-governance, and our constitution accordingly provides that "[t]he legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." N.C. Const. art. I, § 6. This division of governmental power acknowledges that "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." *The Federalist* No. 47 (James Madison).

¶ 354 In *Hoke County*, this Court acknowledged the separation of these various powers and recognized the outer boundaries of our judicial power. We stated:

> The state's legislative and executive branches have been endowed by their creators, the people of North Carolina, with the authority to establish and maintain a public school system that ensures all the state's children will be given their chance to get a proper, that is, a *Leandro*-conforming, education. As a consequence of such empowerment, those two branches have developed a shared history and expertise in the field that dwarfs that of this and any other Court. While we remain the ultimate arbiters of our state's Constitution, and vigorously attend to our duty of protecting the citizenry from abridgments and infringements of its provisions, we simultaneously *recognize our limitations in providing specific remedies for violations committed by other government branches* in service to a subject matter, such as public school education, that is within their primary domain.

358 N.C. at 644–45, 599 S.E.2d at 395 (emphasis added).

¶ 355 "The legislative power of the State shall be vested in the General Assembly[.]" N.C. Const. art. II, § 1. This Court has long acknowledged that one of the many powers designated exclusively to the legislative branch is the power to spend public funds. *See Wilson v. Jenkins*, 72 N.C. 5, 6 (1875) ("The General Assembly has absolute control over the finances of the State."); *see also Shaffer v. Jenkins*, 72 N.C. 275, 279 (1875) ("[T]he money in the Treasury is within the exclusive control of the General Assembly.").

¶ 356 "No money shall be drawn from the State Treasury but in consequence of appropriations made by law[.]" N.C. Const. art. V, § 7. The interpretation of this clause has never before been a matter of debate in this Court. In fact, Justice Ervin recently stated for the Court that:

> In light of this constitutional provision, the power of the purse is the exclusive prerogative of the General Assembly, with the origin of the appropriations clause dating back to the time that the original state constitution was ratified in 1776. In drafting the appropriations clause, the framers sought 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. As a result, the appropriations clause states in language no man can misunderstand that the legislative power is supreme over the public purse.

Cooper v. Berger, 376 N.C. 22, 37, 852 S.E.2d 46, 58 (2020) (cleaned up).

¶ 357 In the realm of educational funding, the constitution is even more explicit. "The General Assembly shall provide by taxation and otherwise for a general and uniform system of free public school ...." N.C. Const. art. IX, § 2(1). The constitution provides two funding mechanisms to supplement state tax revenue on a county level.

¶ 358 County school funds are supplied by "the clear proceeds of all penalties and forfeitures and of all fines collected in the several counties for any breach of the penal laws of the State, [which] shall belong to and remain in the several counties, and shall be faithfully appropriated and used exclusively for maintaining free public schools." N.C. Const. art IX, § 7(a). In addition, "the clear proceeds of all civil penalties, forfeitures, and fines which are collected by State agencies ... shall be faithfully appropriated by the General Assembly, on a per pupil basis, to the counties, to be used exclusively for maintaining public schools." N.C. Const. art. IX, § 7(b). In contrast, the "State school fund" is ultimately funded by "so much of the revenue of the State as may be set apart for that purpose ... [and] faithfully appropriated and used exclusively for establishing and maintaining a uniform system of free public schools." N.C. Const. art. IX, § 6.[19]

¶ 359 Of course, the "revenue" contemplated by Article IX's funding provisions must primarily be "provided by taxation ...." N.C. Const. art. IX, § 2(1). On this point, the constitution is clear. "Only the General Assembly shall have the power to classify property for taxation, which power shall be exercised only on a State-wide basis and shall not be delegated." N.C. Const. art. V, § 2(2).

¶ 360 The constitution commits these dual powers—the power to raise state funds for education, and the power to spend state funds on education—exclusively to the General Assembly.[20] That is why this Court recognized its "limitations in providing specific remedies for violations committed by other government branches in service to a subject matter, such as public school education, that is within their primary domain." *Hoke County*, 358 N.C. at 645, 599 S.E.2d at 395. Such limitations are a necessary consequence of our constitutional structure that separates government functions to preserve government by the people.

¶ 361 Without such limitations, there would be no conceivable constraints to this Court's power. Consider the situation in which the state found itself in 2009, when Governor Perdue "ordered a half-percent pay cut for all state employees and teachers" to try and reduce a "$3 billion-plus shortfall for the [ ] fiscal year." *Governor Cuts Pay, Calls for Furloughs for State Employees*, WRAL

19. The constitution also provides that the State school fund shall be funded by "the proceeds of all lands that have been or hereafter may be granted by the United States to this State ...; all moneys, stocks, bonds, and other property belonging to the State for purpose of public education; the net proceeds of all sales of the swamp lands belonging to the State; and all other grants, gifts, and devises that have been or hereafter may be made to the State [ ] and not otherwise appropriated by the State ...." N.C. Const. art. IX, § 6.

20. While the General Assembly is primarily responsible for *funding* education, the State Board of Education "ha[s] general supervision and administration of the educational funds provided by the State ...." N.C.G.S. § 115C-408(a).

News (Apr. 28, 2009, 7:02 PM), https://www.wral.com/news/local/story/5037937/. If this Court had determined that such a pay cut violated children's right to the opportunity to a sound basic education, could this Court have exercised its power to increase education funding by raising taxes? Could this Court rewrite the State Budget and reappropriate funds from other programs to fund education?

¶ 362 No, our constitution says. The constitution commands all branches of our government to stay within their spheres of power, and this command must be heeded with extreme obedience by the judiciary. As this Court is the final arbiter on what our constitution says, the people of this state must be ever wary of a court which declares "rare" or "extraordinary" the repeated usurpation of constitutional power.

¶ 363 Here, the trial court ignored both the clear language of the appropriations clause and this Court's binding precedent establishing the General Assembly's exclusive power to draw funds from the State Treasury. Rather than following our constitution, the trial court invented two novel theories to justify its unconstitutional exercise of legislative power.

¶ 364 First, the trial court determined that assumption of legislative duties was not barred by the appropriations clause because "Article I, Section 15 of the North Carolina Constitution represents an ongoing constitutional appropriation of funds" and constitutes an appropriation "made by law." This conclusion is a legal fiction created out of whole cloth and has no support in either our constitution or our directly on-point precedent. As discussed in more detail further below, the separation of powers clause and the legislative powers clause do not provide for any exceptions. These constitutional provisions do not merely encompass "some" or "most" of the legislative powers—they encompass *all* legislative powers.

¶ 365 The entire text of Article I, section 15 provides that "[t]he people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right." The plain language of this section makes no mention of educational funding, and to read in such non-existent language is an amendment of our constitution by judicial fiat.

¶ 366 "Our constitution clearly states that amending the constitution is a duty designated to the General Assembly and the people of this State." *Moore*, 2022-NCSC-99, ¶ 152, 876 S.E.2d 513 (Berger, J., dissenting). A trial court may not exercise this power. Neither may a trial court judge choose to "interpret" a constitutional provision in a manner that contradicts this Court's holdings.

¶ 367 In addition to its unconstitutional interpretation of Article I, section 15, the trial court stated that it could order the transfer of state funds as an exercise of its "inherent and equitable powers." This is nonsense. This usurpation of legislative authority is blatantly unconstitutional and threatens the very foundation of our republican form of self-governance.

> It is the proud boast of our democracy that we have "a government of laws and not of men." Many Americans are familiar with that phrase; not many know its derivation. It comes from Part the First, Article XXX, of the Massachusetts Constitution of 1870, which reads in full as follows:
>
> "In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: The executive shall never exercise the legislative and judicial powers, or either of them: The judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men."

Morrison v. Olson, 487 U.S. 654, 697, 108 S. Ct. 2597, 2622, 101 L.Ed.2d 569 (1988) (Scalia, J., dissenting).

¶ 368 The majority's response to our adherence to this fundamental requirement is simply that we have a "rigid interpretation of separation of powers." Indeed, we do, because separation of powers is not a suggestion. It is an inexorable command upon which the entire notion of government by the people either stands or falls. As this Court has stated:

> [T]he relief sought could not be obtained in any event without the exercise of legisla-

> tive functions, and the plaintiff's fatal error is found in the assumption that such functions may be exercised by the courts, notwithstanding the constitutional separation of the several departments of the government. The Declaration of Rights provides: "The legislative, executive, and supreme judicial powers of the government ought to be forever separate and distinct from each other."
>
> As to the wisdom of this provision there is practically no divergence of opinion—it is the rock upon which rests the fabric of our government. Indeed, the whole theory of constitutional government in this state and in the United States is characterized by the care with which the separation of the departments has been preserved and by a marked jealousy of encroachment by one upon the other. . . .
>
> The courts have absolutely no authority to control or supervise the power vested by the Constitution in the General Assembly as a co-ordinate branch of government. They concede . . . that their jurisdiction is limited to interpreting and declaring the law as it is written. It is only when the Legislature transcends the bounds prescribed by the Constitution, and the question of the constitutionality of a law is directly and necessarily involved, that the courts may say, "Hitherto thou shalt come, but no further."

Pers. v. Bd. of State Tax Comm'rs, 184 N.C. 499, 502–04, 115 S.E. 336, 339 (1922).

¶ 369 The majority justifies its assault on legislative authority in part by purporting to rely on *In re Alamance County Court Facilities*, 329 N.C. 84, 405 S.E.2d 125 (1991). It is clear, however, this case does not support the majority's position; it undermines it. *Alamance County*'s discussion of inherent judicial power destroys the majority's own argument. A thorough discussion of this case is warranted.

¶ 370 The Alamance County Superior Court convened a grand jury to inspect the Alamance County court facilities and jail. *Id.* at 89, 405 S.E.2d at 126. The grand jury reported that there were "numerous courthouse and jail defects" and recommended that the courthouse, which was constructed in 1924, be "remodeled and converted to other uses, [and] that a new courthouse be built[.]" *Id.* Following the grand jury's report, the trial court scheduled a hearing "to make inquiry as to the adequacy of the Court Facilities" in Alamance County, and the sheriff served the five Alamance County Commissioners with notice of the hearing. *Id.* Four of the Commissioners made various motions to either dismiss the case or demand a jury trial. *Id.* at 89, 405 S.E.2d at 127, 329 N.C. 84. However, the trial court "struck these motions, stating that the movants were not parties to the action and thus were without standing." *Id.*

¶ 371 At the hearing, the trial court reiterated the grand jury's findings regarding the Alamance County court facilities, which included:

> [C]itation to the statutory duties of the Clerk of Court to secure and preserve court documents, to statutory provisions requiring secrecy of grand jury proceedings, to statutory requisites that counties in which a district court has been established provide courtrooms and judicial facilities, and to the open courts provision—all of which were potentially violated by the condition of pertinent facilities in Alamance County. In addition, the findings stated that the right to a jury trial assured in Article I, §§ 24 and 25 of the N.C. Constitution was jeopardized where jury and grand jury deliberations were not dependably private and secure and that litigants' due process rights were similarly at risk for lack of areas where they could confer confidentiality with their attorneys.

Id. at 89–90, 405 S.E.2d at 127.

¶ 372 Additionally, the trial court stated that the county's failure to provide adequate court facilities violated the constitutional limitation under Article IV, section 1 of the North Carolina Constitution, which prohibits the General Assembly from "depriving the judicial department of any power or jurisdiction rightfully pertaining to it as a coordinate department of government." *Id.* at 90, 405 S.E.2d at 127. This prohibition extended to Alamance County, since it was delegated the legislative responsibility of providing adequate court facilities. *See id.*

¶ 373 The trial court determined that it possessed jurisdiction over the matter, in part, because of its "inherent power necessary for the existence of the Court, necessary to the orderly and efficient exercise of its jurisdiction, and necessary for this Court to do justice." *Id.* at 90, 405 S.E.2d at 127. In its order, the court concluded that the inadequacies of the court facilities "thwart[ed] the effective assistance of counsel to litigants in violation of the law of the land, jeopardize[d] the right to trial by jury in civil and criminal cases, and . . . constituted a clear and present danger to persons present at criminal judicial proceedings as well as the public at large." *Id.*

¶ 374 Based upon these inadequacies and their effects, the trial court directed the county, "acting through its commissioners," to provide new facilities and modify the existing courthouse. *Id.* at 91, 405 S.E.2d at 128. Specifically, the trial court found that the county "was financially able to provide adequate judicial facilities" because there were "undesignated unreserved funds of $15,655,778.00 . . . with which the commissioners could begin construction of a new courthouse." *Id.* The trial court then ordered the county to "immediately" provide adequate facilities that met the Court's approved design features. *Id.* at 91 – 92, 405 S.E.2d at 128.

¶ 375 For example, the trial court determined that the adequate facilities must include a Superior Court courtroom of at least 1600 square feet with a minimum of two bathrooms, a Superior Court jury deliberation room of at least 300 square feet, a room for the Superior Court Court Reporter that was at least 80 square feet, and a Superior Court Judge's Chambers "consisting of a conference area of at least 160 square feet, minimum, and a toilet of 40 square feet, minimum," among other similar requirements. *Id.* at 91, 405 S.E.2d at 128.

¶ 376 Members of the Alamance County Board of Commissioners petitioned this Court for a writ of supersedeas, which this Court granted. *Id.* at 92, 405 S.E.2d at 128. In reviewing the superior court's order, this Court described the issues presented as "whether this case presents the circumstances under which a court's 'inherent power' may be invoked and whether the superior court here followed proper procedures in the exercise of its power." *Id.* at 93, 405 S.E.2d at 128–29.

¶ 377 The majority's "analysis" of *Alamance County* quotes most of this Court's discussion of inherent power, and all of it need not be repeated here. However, some of this Court's precise language is ignored by the majority. This language clearly recognizes the constitutional limits of a court's inherent authority and is worthy of emphasis.

¶ 378 The judiciary's "inherent power" is "plenary *within the judicial branch*," which means that constitutional provisions—like the Apportionments Clause at issue here, "do not curtail the inherent power of the judiciary, plenary *within its branch*, but serve to delineate the boundary between the branches, beyond which each is powerless to act." *Id.* at 93, 95, 405 S.E.2d at 129–30 (emphasis added).

¶ 379 However, this Court noted that in the specific circumstances of *Alamance County*, where the superior court was literally unable to properly fulfill its constitutional duties *within the judicial branch*, that boundary may be stretched to protect the judiciary's ability to exercise its *own* constitutionally committed powers. "In the realm of appropriations, some overlap of power between the legislative and the judicial branches is inevitable, for one branch is exclusively responsible for raising the funds that *sustain the other and preserve its autonomy.*" *Id.* at 97, 405 S.E.2d at 131 (emphasis added).

¶ 380 Thus, this Court announced its limited holding that "when inaction by those exercising legislative authority threatens *fiscally* to undermine the integrity of the judiciary, a court may invoke its inherent power to do what is reasonably necessary for 'the orderly and efficient exercise of the administration of justice.' " *Id.* at 99, 405 S.E.2d at 132 (emphasis added) (quoting *Beard v. N.C. State Bar*, 320 N.C. 126, 129, 357 S.E.2d 694, 696 (1987)). In other words, when legislative inaction renders judicial branch facilities inadequate "to serve the functioning of the judiciary within the borders of those

political subdivisions," the judiciary may take limited action *only* to ensure that the facilities are adequate to perform the court's constitutional duties. *Id.*

¶ 381 And, in part of this Court's holding the majority selectively omits, "[e]ven in the name of its inherent power, the judiciary may not arrogate a duty reserved by the constitution exclusively to another body." *Id.*

¶ 382 Moreover, following its general discussion of inherent power, this Court asked whether, "[u]nder the circumstances, [ ] an *ex parte* order *implicitly* mandating the expenditure of public funds for *judicial facilities* [was] reasonably necessary for the proper administration of justice?" *Id.* at 103, 405 S.E.2d at 135 (emphasis added).

¶ 383 In answering this question in the negative, this Court first noted that:

> The means chosen by a court to compel county commissioners to furnish suitable court facilities is of critical importance to the question whether the court has unreasonably exercised its inherent power, for it signals the extent of the judiciary's intrusion on the county's legislative authority. The efficacy of mandatory writs or injunctions, unlike *ex parte* orders and contempt proceedings, rests less on the expansive exercise of judicial power than on the statutory and constitutional duties of those against whom they are issued. Their use thus avoids to some extent the arrogance of power palpable in an *ex parte* order. Moreover, they compel the performance of the ministerial duty imposed by law, but give the defaulting officials room to exercise discretionary decisions regarding how that duty may best be fulfilled.

Id. at 104–05, 405 S.E.2d at 135–36.

¶ 384 This Court also emphasized that because the superior court's order in *Alamance County* "stopped short of ordering the commissioners to release funds," it also stopped short of "leaving the constitutional sphere of its inherent powers." *Id.* at 106, 405 S.E.2d at 137. Nevertheless, the "*ex parte* nature of the order overreached the minimal encroachment onto the powers of the legislative branch that must mark a court's judicious use of its inherent power," because "[n]o procedure or practice of the courts, however, even those exercised pursuant to their inherent powers, may abridge a person's substantive rights." *Id.* at 106–07, 405 S.E.2d at 137. This remedy was a misuse of the judiciary's inherent authority. Thus, this Court held that the superior court's order "must be, and is VACATED." *Id.* at 108, 405 S.E.2d at 138.

¶ 385 Thus, *Alamance County* does not support the unconstitutional judicial assumption of the legislative spending power.[21] *Alamance County* instead reaffirms the following fundamental principles:

¶ 386 First, the judiciary's "inherent power" applies only to matters within the judicial branch. Second, a legislative failure to fiscally support the judicial branch, when such failure threatens the judiciary's existence, may justify a *limited* exercise of "inherent power" to preserve the judiciary. Third, even under such circumstances, that limited exercise of "inherent power" may not assume legislative powers, such as the spending power, as doing so would depart from the court's

21. As with *Alamance County,* the other cases on which the majority relies do not justify its extreme remedy. *See Wilson v. Jenkins,* 72 N.C. 5, 10 (1875) (affirming a trial court's denial of the plaintiff's request for a writ of mandamus to compel the State Treasurer to pay certain coupons on state bonds because "[t]he General Assembly has absolute control over the finances of the State" and "[t]he Public Treasurer and Auditor are mere ministerial officers, bound to obey the orders of the General Assembly"); *White v. Worth,* 126 N.C. 570, 36 S.E. 132, 136 (1900) (relying heavily on *Hoke v. Henderson,* 15 N.C. 1 (1833), a case that was expressly overruled in 1903 by *Mial v. Ellington,* 134 N.C. 131, 46 S.E.2d 961, 46 S.E. 961 (1903)). *See also Hickory v. Catawba Cnty.,* 206 N.C. 165, 173–74, 173 S.E. 56, 60–61 (1934) (affirming a trial court's writ of mandamus that required Catawba County to assume payment for a local school building as required by the constitution and General Statutes but did not require the spending of specific funds for specific expenditures), *Mebane Graded Sch. Dist. v. Alamance Cnty.,* 211 N.C. 213, 226–27, 189 S.E.2d 873, 882, 189 S.E. 873 (1937) (affirming a trial court's writ of mandamus that required Alamance County to assume the debt of its local school district but did not direct the spending of specific funds for specific expenditures). These cases in no way support the majority's proposition that this Court's precedent sanctions the judicial exercise of legislative power.

"constitutional sphere of its inherent powers." Finally, even if the exercise of limited inherent power is justified by such a threatened underfunding of the judiciary, and even if the court does *not* order a state actor to spend funds, any such court action must be vacated if the action is carried out via an *ex parte* order, as such an order violates the substantive rights of the relevant state actor.

¶ 387 Thus, faithfully applying *Alamance County* to this case renders the decision a simple one. The trial court's order must be vacated because: (1) its exercise of "inherent power" does not relate to matters within the judicial branch; (2) its exercise of "inherent power" is not justified by a legislative failure which threatens the judiciary's existence; (3) its exercise of "inherent power" departs from the judiciary's "constitutional sphere" because it assumes the legislative spending power; and (4) its exercise of "inherent power" was carried out via an *ex parte* order that violated the substantive rights of the State Controller and the General Assembly.

¶ 388 This straightforward analysis did not make its way in the majority's nearly one-hundred-and-forty-page opinion, and the majority summarily dismisses the State Controller's arguments with a conclusory statement that his rights were not violated. The trial court's order must be vacated for violating the Controller's substantive rights, and the failure to properly discuss the Controller's arguments demonstrates a hastily crafted opinion by the majority.

¶ 389 As this Court has stated, the power to transfer state funds is a power designated exclusively to the legislative branch. *See Cooper v. Berger*, 376 N.C. at 37, 852 S.E.2d at 58 ("[T]he appropriations clause states in language no man can misunderstand that the legislative power is supreme over the public purse."). In fact, we announced this fundamental truth nearly one hundred and fifty years ago:

> If the Legislature by way of contract, has specifically appropriated a certain fund, to a certain debt, or to a certain individual, or class of individuals, and the State Treasurer having that fund in his hands, refuses to apply it according to the law, he may be compelled to do so by judicial process.
>
> If any case goes farther than this, we conceive that it cannot be supported on principal, and that it *oversteps the just line of demarcation between the legislative and judicial powers.*

Shaffer v. Jenkins, 72 N.C. 275, 280 (1875) (emphasis added).

¶ 390 The inherent remedial and equitable powers of our courts may be vast, but "[e]ven in the name of its inherent power, the judiciary may not arrogate a duty reserved by the constitution exclusively to another body," nor may the judiciary "abridge a person's substantive rights." *Alamance County,* 329 N.C. at 99, 107, 405 S.E.2d at 133, 137.[22]

c. Due Process

¶ 391 "No rule of procedure or practice shall abridge substantive rights or abrogate or limit the right of trial by jury." N.C. Const. art. IX, § 13(2). One of the substantive rights enjoyed by the people of this state is found in Article I, section 19 of our constitution, which provides in relevant part that "[n]o person shall be taken . . . in any manner deprived of his life, liberty, or property, but by the law of the land."

¶ 392 "Procedural due process restricts governmental actions and decisions which 'deprive individuals of "liberty" or "property" interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.' " *Peace v. Emp't Sec. Comm'n*,

22. While the majority attempts to cabin its exercise of ''inherent authority'' as an ''extraordinary remedy,'' *supra* ¶ 178, this newfound power may be wielded by any future majority of this Court. Moving forward, now that the constitutional boundaries enshrining separation of powers are demolished, any four members of this Court could invoke ''inherent authority'' to exercise powers constitutionally committed to other branches as they desire. If this Court can exercise power under the appropriations clause, it could also invoke its ''inherent authority'' to deem ratified a vetoed budget or increase statutory court fines because they fund the education system under Article IX, section 7. Further, any majority could increase judicial branch salaries The abuse of such power is exactly why our constitution demands that the legislative, executive, and judicial powers ''shall be forever separate and distinct from each other.'' N.C. Const. art. I, § 6.

349 N.C. 315, 321, 507 S.E.2d 272, 277 (1998) (quoting *Matthews v. Eldridge*, 424 U.S. 319, 322, 96 S. Ct. 893, 901, 47 L.Ed.2d 18 (1976)). "The fundamental premise of procedural due process protection is notice and the opportunity to be heard." *Id.* at 322, 507 S.E.2d at 278 (citing *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542, 105 S. Ct. 1487, 1493, 84 L.Ed.2d 494 (1985)).

¶ 393 The State Controller's authority to transfer or spend funds is set forth in Chapter 143C of our General Statutes, which ensures that "[i]n accordance with Section 7 of Article V of the North Carolina Constitution, no money shall be drawn from the State treasury but in consequence of appropriations made by law." N.C.G.S. § 143C-1-2(a) (2021). "This Chapter establishes procedures for the following: (1) [p]reparing the recommended State budget[;] (2) [e]nacting the State budget[;] [and] (3) [a]dministering the State budget." N.C.G.S. § 143C-1-1(c).

¶ 394 Chapter 143C includes penalties for violating the procedures contained therein. In relevant part, "[i]t is a Class 1 misdemeanor for a person to knowingly and willfully ... (1) [w]ithdraw funds from the State treasury for any purpose not authorized by an act of appropriation." N.C.G.S. § 143C-10-1(a). Further, "[a]n appointed officer or employee of the State ... forfeits his office or employment upon conviction of an offense under this section." N.C.G.S. § 143C-10-1(c).

¶ 395 Here, as is evident from Chapter 143C of our General Statutes, the State Controller would be subject both to a Class 1 misdemeanor and termination of employment were he to comply with the November 10 order. As the State Controller was never made a party to the proceedings in the trial court, was never given notice of the proceedings, and was never afforded an opportunity to be heard in these proceedings, the trial court had no jurisdiction to enter an order that affected the State Controller's substantive rights in this manner. As the Court of Appeals correctly noted in its order granting the State Controller's petition for a writ of prohibition, "the trial court's conclusion that it may order petitioner to pay unappropriated funds from the State Treasury is constitutionally impermissible and beyond the power of the trial court."

¶ 396 In addition to violating the State Controller's due process rights, the trial court also violated the due process rights of the General Assembly.[23] The majority makes much of the fact that the General Assembly was not represented in this suit until after the Nov. 10 order—but rather than recognizing the obvious due process concerns, the majority insists that the General Assembly itself is to blame. Such an interpretation ignores factual and legal realities.

¶ 397 As discussed in much detail above, neither the proceedings under Judge Manning that led to our decision in *Hoke County*, nor the proceedings under Judge Manning that followed, implicated the General Assembly or its constitutionally committed functions. Judge Manning consistently found, and this Court agreed, that the legislative funding mechanisms and education policies were sound and complied with our constitution. In fact, when the General Assembly *did* move to intervene in this case because it was no longer represented by the Attorney General, Judge Manning denied its motion specifically because the issue was never that the General Assembly's funding mechanisms or education policies were inadequate—the issue was, and remains, the implementation and delivery of these policies and the application of these funds by the education establishment.

¶ 398 The majority would apparently prefer that the General Assembly renewed its motion to intervene on a regular basis, despite Judge Manning's denial and despite the absence of any issue implicating the General Assembly's authority or actions. However, the *status quo* was radically altered once Judge Lee took over the case and this became a collusive suit. The consent order entered by Judge Lee appointing WestEd fundamentally changed the nature of the proceedings. This was an egregious error that necessitated input from the General Assembly.

23. In addition, it is arguable the trial court also violated the due process rights of all counties not represented in this suit, yet nonetheless responsible for any implementation or funding under WestEd's CRP.

¶ 399 At this point, or, at the very latest, when he received the WestEd report naming the General Assembly as the primary "responsible party," Judge Lee erred by failing to join the General Assembly as a necessary party. *See* N.C.G.S. § 1A-1, Rule 19(a) and (d); see *also Gaither Corp. v. Skinner*, 238 N.C. 254, 256, 77 S.E.2d 659, 661 (1953) ("Necessary or indispensable parties are those whose interests are such that no decree can be rendered which will not affect them, and therefore the court cannot proceed until they are brought in.").

¶ 400 The trial court's failure to join the General Assembly in this matter created a situation where the people of this State, acting through their elected representatives, were not afforded notice and the opportunity to be heard. Rather than allow the General Assembly, which is the policymaking branch of our government, to defend its heretofore adjudged adequate educational funding policies, Judge Lee delegated the task of policymaking to an out-of-state third party. In delegating this crucial task to WestEd, Judge Lee effectively usurped legislative authority by appointing a special master—not unlike the special masters appointed in redistricting. To delegate such authority to an out-of-state third party, to fail to join the General Assembly as an obviously necessary party, and to attempt to enforce what was, in essence, an *ex parte* order that exercises a power constitutionally committed exclusively to the General Assembly, is to abandon all pretense of judicial propriety.

¶ 401 Thus, the trial court erred in multiple ways. Because the trial court never conducted a trial and never concluded as a matter of law that plaintiffs had made a clear showing of a statewide *Leandro* violation, the trial court never had jurisdiction to impose any remedy in this case. Further, even if such a conclusion had been reached after a trial, the trial court's chosen remedy far exceeds the judiciary's inherent power and violates our constitution. Finally, the transfer provisions of the November 10 order cannot be permitted to stand because they violated the State Controller's substantive rights and arguably denied the General Assembly due process of law.

¶ 402 Accordingly, the transfer provisions of the trial court's November 10 order were properly struck by Judge Robinson on remand. However, Judge Robinson nevertheless also erred on remand.

¶ 403 Although the trial court on remand properly considered the Court of Appeals' writ of prohibition and properly struck the transfer provisions, it nevertheless erred in upholding the CRP as an appropriate remedy.

2. The Trial Court on Remand

¶ 404 After granting the State's bypass petition, this Court remanded this case to Judge Robinson "for the purpose of allowing the trial court to determine what effect, if any, the enactment of the State Budget ha[d] upon the nature and effect of the relief that the trial court granted." Thus, the trial court's proper role on remand was to consider how the passage of the State Budget, a valid law passed by the General Assembly, affected the trial court's conclusion that the CRP was the appropriate remedy for the alleged statewide violation of *Leandro*. Because the trial court on remand failed to properly analyze the effect of this valid legislative act, it erred in concluding that the CRP was an appropriate remedy.

¶ 405 When reviewing whether a valid legislative act violates a constitutional right, "we presume that laws enacted by the General Assembly are constitutional, and we will not declare a law invalid unless we determine that it is unconstitutional beyond a reasonable doubt." *Cooper*, 376 N.C. at 33, 852 S.E.2d at 56. "All power which is not expressly limited by the people in our State Constitution remains with the people, and an act of the people through their representatives in the legislature is valid unless prohibited by that Constitution." *State ex rel. Martin v. Preston*, 325 N.C. 438, 448–49, 385 S.E.2d 473, 478 (1989) (citing *McIntyre v. Clarkson*, 254 N.C. 510, 515, 119 S.E.2d 888, 891 (1961)).

¶ 406 Thus, to comport with our precedent, the trial court on remand was required to afford the State Budget a presumption of constitutionality. In this context, that re-

quired the trial court to presume the State Budget comported with *Leandro* and provided students statewide an opportunity to receive a sound basic education. Only a clear showing by plaintiffs that the State Budget and the programs within failed to provide this opportunity would trigger the trial court's consideration of the CRP as a remedy as directed by this Court.

¶ 407 Instead of following established framework for analyzing constitutional challenges to legislative acts, the trial court on remand stated:

> The Court also declines to determine, as Legislative Intervenors urge, that the Budget Act as passed presumptively comports with the constitutional guarantee for a sound basic education. To make a determination on the compliance of the Budget Act with the constitutional right to a sound basic education would involve extensive expert discovery and evidentiary hearings. This Court does not believe that the Supreme Court's Remand Order intended the undersigned, in a period of 30 days, or, as extended, 37 days, to perform such a massive undertaking.

In other words, the haste with which this Court was determined to act prevented proper consideration and resolution of the issues by the trial court.

¶ 408 Setting aside the fact the trial court on remand mischaracterized the right announced in *Leandro*, which was the right to the *opportunity* to receive a sound basic education, the trial court on remand got the analysis backwards. Affording the State Budget the presumption of *Leandro* conformity requires no extensive expert discovery and evidentiary hearings—hence the word "presumption." The need for expert discovery, evidentiary hearings, findings of fact, and conclusions of law arises precisely to overcome this presumption. The "massive undertaking" required is the burden plaintiffs bear to make a clear showing that the State Budget resulted in a statewide violation of *Leandro*. As plaintiffs have not yet met this burden, the trial court on remand should have vacated the November 10 order and allowed plaintiffs to bring claims actually challenging the State Budget.

¶ 409 Instead, the trial court on remand erred by seemingly affording the CRP, not the State Budget, this presumption of *Leandro* conformity. The trial court on remand used the CRP as a *Leandro* benchmark and analyzed whether the State Budget funded each of the CRP's measures. In so doing, it not only got the analysis backwards but also ignored our guidance in *Leandro* that "there will be more than one constitutionally permissible method of solving" statewide public school issues, 346 N.C. at 356, 488 S.E.2d at 260, and our holding in *Hoke County* that any remedy for an alleged violation must "correct the failure with minimal encroachment on the other branches of government." 358 N.C. at 373–74, 599 S.E.2d at 610.

¶ 410 The majority merely brushes away this Court's directly on point and well-established precedent. Bafflingly, the majority states that "[n]either the Plaintiff-parties nor the State dispute the presumed constitutionality of the passage of the 2021 Budget Act as a general procedural matter." *Supra* ¶ 228. What then, is this case about? Surely the majority must concede, at the very least, that if the State Budget is *constitutional*, then it does not violate the *constitutional* right of children to have the opportunity to receive a sound basic education. The majority simply cannot have its cake and eat it too. Either the State Budget is constitutional, and there is no statewide violation of *Leandro*, or there *is* a statewide violation of *Leandro* because the State Budget fails to afford children the opportunity to a sound basic education.

¶ 411 This case, when boiled down to its irreducible core, must be about the state failing to provide *Leandro* conforming expenditures. That is why the CRP requires the transfer of such vast amounts of taxpayer dollars. The only way for the state to provide educational expenditures is through the State Budget. Thus, plaintiff-parties challenge *must* be related to the adequacy of the State Budget's ability to provide constitutional, i.e., *Leandro* conforming, educational expenditures.

¶ 412 However, according to the majority, "that was not the issue before the trial court

and is not the issue before this Court." *Supra* ¶ 228. Rather than analyzing the State Budget in accordance with our long-standing precedent of presumptive constitutionality, i.e., *Leandro* conformity, the majority decrees that "the Budget Act must be assessed against the terms of the only comprehensive remedial plan thus far presented by the parties to the court." *Supra* ¶ 229.

¶ 413 Again, nonsense. Shall every legislative act now be compared not to our constitution, but to whatever "plan" or "standard" that friendly parties agree to and present to a trial court? The majority's position is a perversion of this Court's proper role. Because the trial court on remand failed to afford the State Budget the presumption of *Leandro* conformity, its analysis and decision were error.

¶ 414 Finally, this Court not only sanctions due process violations but exacerbates the error by, on its own initiative, deciding the appeal in 425A21-1. The Court had previously held this direct appeal in abeyance while we considered discretionary review in 425A21-2. Now, without briefing or argument, the majority summarily decides the issue it had previously held in abeyance, and for which there exists a right to appeal based upon the dissent in the Court of Appeals. *See* N.C.G.S. § 7A-30. Once again, the majority wields its unbounded power in the face of fundamental fairness and basic legal tenets.

¶ 415 As stated only a few months ago:

> The majority restructures power constitutionally designated to the legislature, plainly violates the principles of non-justiciability, and wrests popular sovereignty from the people.
>
> When does judicial activism undermine our republican form of government guaranteed in Article IV, Section 4 of the United States Constitution such that the people are no longer the fountain of power? At what point does a court, operating without any color of constitutional authority, implicate a deprivation of rights and liberties secured under the Fourteenth Amendment?

Moore, 2022-NCSC-99, ¶¶ 153–54, 876 S.E.2d 513 (Berger, J., dissenting).

III. Conclusion

¶ 416 Today's decision is based on a process that was grossly deficient. Hearings were not held as required by our decision in *Hoke County*. The rush to find a statewide violation in the absence of input by the legislature, the collusive nature of this case, the ordering of relief not requested by the parties in their pleadings or permitted by our prior decisions, and the blatant usurpation of legislative power by this Court is violative of any notion of republican government and fundamental fairness. The trial court orders dated November 10, 2021 and April 26, 2022 should be vacated, and this matter should be remanded for a remedial hearing on the Hoke County claims as required by our decision in *Hoke County*. In addition, because there have never been hearings held or orders entered as to any other county, those matters must be addressed separately as per our decision in *Hoke County*.

¶ 417 Under no circumstance, however, should this Court take the astonishing step of proclaiming that "inherent authority" permits the judiciary to ordain itself as superlegislators. This action is contrary to our system of government, destructive of separation of powers, and the very definition of tyranny as understood by our Founding Fathers.

Chief Justice NEWBY and Justice BARRINGER join in this dissenting opinion.