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 ON REMAND

Intervenor-Defendants Philip E. Berger, in his official capacity as President *Pro Tempore* of the Senate, and Timothy K. Moore, in his official capacity as Speaker of the House of Representatives, ("Legislative Intervenors"), submit this brief in accordance with the Court's Briefing Order, (ECF 5), and Supplemental Briefing Order, (ECF 6).

SUMMARY

The Supreme Court remanded this matter to the Superior Court for the purpose of determining the effect of the 2021 Current Operations and Appropriations Act, 2021 N.C. Sess. L. 180 (the "Budget Act") on the order that the Honorable W. David Lee entered on November 10, 2021 (the "November Order")—eight days before the governor signed the Budget Act into law—requiring the disbursement of $1.7 billion from the state treasury to fund specific elements of a remedial plan to improve public education.

The Budget Act superseded and nullified the November Order in its entirety. As explained in greater detail below, the assumptions underlying the November Order no longer apply. Specifically, Judge Lee made clear that he believed the extraordinary measures imposed by his Order were justified only because, at the time it was entered, no budget had passed. The adoption of the Budget Act before the November Order became effective eliminated that justification. Further, the November Order assumes there are sufficient unappropriated sums in the state treasury to fund the additional items covered by the Comprehensive Remedial Plan ("CRP") that Plaintiffs and the Executive Branch submitted to the Court. With the adoption of the Budget, that assumption is no longer accurate (if it ever was.)

In its Supplemental Briefing Order, this Court also raised several additional questions (ECF 6.) Summary responses to those questions, which are explained in greater detail below, follow:

1. **The amount of funds appropriated in the Budget Act that directly fund the programs and initiatives called for in the Comprehensive Remedial Plan**

As set forth in Exhibits D and E to the affidavit of Mark Trogdon, Director of the General Assembly's non-partisan Fiscal Research Division ("FRD"), the Budget Act provides approximately $1.17 billion toward programs called for in the CRP, with $640 million appropriated in FY2021-22 and another $529 million in FY2022-23. These figures do not account for the unprecedented sums the General Assembly has allocated to K-12 education to fund initiatives beyond those in the CRP.

2. **The amount remaining in the General Fund gross and net of appropriations in the Budget Act**

The Budget Act appropriates $25.92 billion in total net revenues in FY2021-22, and $26.98 billion in FY2022-23. Budget Act §2.1(a).

Based on the most current projections (dated March 28, 2022), there is only $104,638 in projected unreserved, unappropriated revenue remaining at the conclusion of the biennium. (Trogdon Aff. ¶39, Ex.B.)

3. The effect of the Budget Act's appropriations on the Court's ability to order the Legislature to transfer funds to the Departments of Health and Human Services and Public Instruction and the University of North Carolina System

Under *Cooper v. Berger*, 376 N.C. 22 (2020), *Richmond County Bd. of Educ. v. Cowell*, 254 N.C. App. 422 (2017), and the Appropriations Clause of the North Carolina Constitution (N.C. CONST. art. V, § 7(1)), the judicial branch lacks authority—even in the absence of a budget—"to order the legislature to appropriate funds or to order the executive branch to pay out money that has not been appropriated." *Richmond Cty.*, 254 N.C. App. at 426. And even if the decision in *In re Alamance County Court Facilities*, 329 N.C. 84 (1991) could be extended to authorize judicial intervention to appropriate state money any time there is legislative inaction (even though *Alamance County* speaks only to a situation where legislative inaction effectively prevents another branch of government from operating), that reasoning would no longer apply because the legislature has taken action by passing the Budget Act.

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Plaintiffs no doubt hope the Court will treat the Supreme Court's remand as little more than an arithmetical exercise, calculating what portions of the CRP are "missing" from the Budget Act and amending the November Order to require "missing" items be funded.

That analysis, however, oversimplifies the question this Court has been asked to answer. It assumes (1) the Court could order the disbursement of state funds at all; (2) every aspect of the plan incorporated into the November Order is necessary,

and indeed the *only way*, to provide a constitutionally compliant education; and (3) the education funding in the Budget Act is merely a subset of the funding required under the November Order. Each of those assumptions is wrong.

First, as noted above, if the Court ever had the authority to order the disbursement of State funds, it certainly does not have the authority to order disbursements that conflict with the duly enacted Budget Act.

Second, because they have not challenged the Budget Act—which as an act of the General Assembly is presumptively constitutional—Plaintiffs have not presented evidence that any of the remaining items are necessary as required by *Leandro II*.

Third, the Budget Act reflects the product of a year-long legislative process, at a time when the Legislature has had to respond to rapidly-changing circumstances affecting students' needs as the COVID-19 pandemic has progressed. Accordingly, although the Budget Act includes unprecedented appropriations for K-12 and early childhood education, those appropriations are not identical to those in the CRP—indeed the Budget includes numerous measures the CRP never anticipated.

These complexities highlight the more fundamental point that evaluating the Budget Act by holding it up against the November Order is like running a race from the wrong starting line. The touchstone against which the Budget Act must be compared is not the November Order, but rather the constitutional requirement to provide a sound basic education set forth in *Leandro I* and *Leandro II*—a measure that focuses on the delivery of educational services in the classroom, and not merely the level of funding State agencies receive. The relevant question—if there remains one at all—is whether the educational *programs* (not appropriations) authorized by

the Budget Act are sufficient to provide the sound basic education required under the North Carolina Constitution. That question has not yet been presented to any Court. Rather than continuing to use a 28-year-old lawsuit (which only challenged conditions in particular counties) as a proxy for ongoing judicial supervision of the State's entire public education system, any questions about the sufficiency of the current educational appropriations should be raised and answered on their own merits.

PROCEDURAL HISTORY

While this case has a long, complicated history, the events relevant to the issue on remand occurred only recently.

First, on 10 November 2021, Judge Lee entered an Order directing State officials to disburse unappropriated funds from the State's General Fund to finance Years 2 and 3 of the CRP, that the Executive Branch and Plaintiffs jointly proposed and asked be made the subject of a consent order. (November Order at 3 (incorporating the findings and conclusions from the Court's prior orders) and 19-20 (ordering transfers from the Treasury)). At the conclusion of the Order, Judge Lee directed that it be stayed for 30 days "to preserve the *status quo*." (*Id*. at 20.) Eight days later, the Governor signed the Budget Act into law.

On 24 November 2021, the State Controller, Linda Combs, petitioned the Court of Appeals for a writ of prohibition enjoining enforcement of the November Order. In her petition, she argued the November Order (i) violated the State Constitution by purporting to direct the distribution of funds from the Treasury without an appropriation made by law, as required under Article V, Section 7; and (ii) put her in

an impossible dilemma by forcing her to choose whether to disburse funds in accordance with the duly-enacted Budget Act or the Court's directive. (ECF 10.1.)

On 30 November 2021, the Court of Appeals granted the petition and entered a writ of prohibition restraining enforcement of the Court's November Order. (ECF 10.4 at 2.) In doing so, the Court of Appeals held the November Order was unconstitutional because "'[a]ppropriating 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.'" (*Id.* at 1 (quoting *Richmond County Bd. of Educ. v. Cowell*, 254 N.C. App. 422 (2017) and *Cooper v. Berger*, 376 N.C. 22, 47 (2020).) The Court further explained that the November Order's treatment of Article I, Section 15 as an "ongoing constitutional appropriation of funds" would render the Appropriations Clause "meaningless" and "devastate the clear separation of powers between the Legislative and Judicial branches. . . ." (*Id.*)

Shortly before the Court of Appeals issued its writ of prohibition on 30 November 2021, Judge Lee issued a notice of hearing, setting a conference to "determine what, if any, modifications may be required to its November Order in light of the Appropriations Act and/or other matters properly before the Court." (30 November 2021 Order at 2.) Judge Lee extended the stay so the Order would not go into effect until he could hold the conference.

On 7 December 2021, the State (through the Department of Justice) appealed the November Order. Given the irreconcilable conflict between Judge Lee's Order and the Budget Act adopted by the General Assembly, Legislative-Intervenors filed a

notice of intervention the next day pursuant to N.C. Gen. Stat. § 1-72.2(b), which empowers the General Assembly to intervene "as a party in any judicial proceeding challenging a North Carolina statute or provision of the North Carolina Constitution." At the same time, Legislative-Intervenors appealed the November Order.

In February, the Department of Justice filed a Petition with the Supreme Court seeking to bypass the Court of Appeals. (ECF 9.1.)

Legislative-Intervenors opposed the Bypass Petition on the grounds that (i) "passage of the Budget Act rendered the Trial Court's Order moot"; (ii) "adoption of the Budget Act means that there is no longer enough unappropriated money in the General Fund to meet the trial court's $1.7 billion-dollar directive"; (iii) implementing the Order would "completely displac[e] the role of the Legislature" because either the courts, or executive branch officials, would have to pick and choose which appropriations to fund; and (iv) because no party had challenged the Budget Act, there had been no determination that such an extraordinary intrusion in the Legislative power was indeed necessary to provide a sound basic education. (Legislative-Intervenors' Response (ECF 9.3 at 13-16.) Legislative-Intervenors thus explained that the Supreme Court should not take the case because "the most likely result from this appeal [will] be a remand to the trial court." (*Id*. at 18.)[1]

Consistent with Legislative-Intervenors' arguments, the Supreme Court granted the Bypass Petition on 18 March 2022, and simultaneously remanded the

[1] Neither DOJ, nor any of the Plaintiffs, mentioned the existence of the Budget Act in their filings with the Supreme Court.

case to this 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 the extent*** of the relief that the trial court granted" in the November Order. (ECF 13 (emphasis added).)

As explained below, the adoption of Budget Act invalidated the assumptions underlying the November Order, and thus superseded, nullified, and rendered moot the November Order.

ANALYSIS

I. THE NOVEMBER ORDER IS PREDICATED ON THE ASSUMPTION THAT THERE WAS NO BUDGET

Judge Lee based his order on the assumption that judicial action was necessary, because "as of the date of [the] Order, no budget has passed." (November Order at 11.) He reasoned that, in the absence of legislative action through the adoption of a budget to fund a sound basic education, the Court could order the disbursement of unappropriated funds pursuant to Article I Section 15 of the North Carolina Constitution (which the Order characterized as an "ongoing constitutional appropriation") and the Court's inherent power. (November Order at 13, 22). However, the moment Governor Cooper signed the Budget Act into law, he rendered the assumption that judicial action was necessary—and the conclusions that flowed from it—invalid.

Indeed, Judge Lee made clear that he believed he could take the extreme (and unprecedented) step of ordering transfers from the Treasury only because the State had not adopted a budget:

> '***When inaction by those exercising 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.'

(November Order at 13 (quoting *Alamance Cty.*, 329 N.C. at 99) (internal alterations omitted) (emphasis added).)[2] At the same time, Judge Lee made clear the remedy he sought to impose would not be justified if a budget was adopted, explaining: "***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***." (*Id.* at 16 (emphasis added).)

Only eight days after entry of the Order, the Governor—for the first time in his administration—signed into law a budget bill passed by the General Assembly. *See* 2021 N.C. Sess.L. 180. In other words, the legislative and executive branches "fulfill[ed] [their] constitutional role through the normal (statutory) budget process." (November Order at 16.) Thus, "there is no need for judicial intervention to effectuate the constitutional right." (*Id.*)

In other words, according to the plain language of Judge Lee's own Order, the Budget Act superseded and nullified the extraordinary remedy he sought to impose and rendered his Order moot. Indeed, the very condition Judge Lee sought to

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[2] In *Alamance County*, the Supreme Court noted courts have inherent authority to do what is reasonably necessary in the face of "inaction by those exercising legislative authority," 329 N.C. at 99. However, the inaction in that case (which involved a county, not the Legislature) was a failure to provide any facility for the judiciary. Thus, at most, the case stands for the proposition that the Legislature cannot deprive *another branch of government* of the minimum funds it needs to operate. The issue here is obviously different.

remedy—the lack of a State Budget—no longer exists.

A. The State Constitution Prohibits the Judiciary from Ordering Appropriations of State Funds.

The Supreme Court has consistently held "appropriating money from the State treasury is a power vested *exclusively in the legislative branch*" and that the judicial branch "lack[s] the authority to 'order State officials to draw money from the State treasury.'" *Cooper v. Berger*, 376 N.C. at 47 (Ervin, J.) (quoting *Richmond Cty.*, 254 N.C. App. at 423)).[3] Under the Constitution, "the power of the purse is the exclusive prerogative of the General Assembly." *Id.* And, accordingly, "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. *Richmond Cty.*, 254 N.C. App. at 426; *see also Alamance Cty.,* 329 N.C. at 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 (1967) ("[T]he appropriations clause states in language no man can misunderstand that the legislative power is supreme over the public purse").

These rules flow directly from text of the State Constitution. The "Appropriations Clause" found in Article V, Section 7, provides, "No money shall be

[3] Accordingly, Legislative-Interveners do not concede the judiciary can transfer funds out of the Treasury, even when faced with supposed legislative "inaction" (which is no longer the case here), whether under the novel theory of an "ongoing constitutional appropriation" or under the Court's inherent authority. However, any question about the scope of the judiciary's authority in the face of legislative inaction was rendered moot by the passage of the Budget Act.

drawn by the State treasury *but in consequence of appropriations made by law*." N.C. CONST. art V, §7(1) (emphasis added). As the Supreme Court has explained, our founders intended the Appropriations Clause "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. Indeed, the legislative branch's exclusive power over the purse was intended to be one of the principal checks over the other branches of government, including the judiciary. *See* John V. Orth & Paul Martin Newby, THE NORTH CAROLINA STATE CONSTITUTION, 154 (2d ed. 2013) (noting that early Americans were "acutely aware of the long struggle between the English Parliament and the Crown over the control of public finance and were determined to secure the power of the purse for their elected representatives"); Hamilton, A., *The Federalist*, No. 78 ("The judiciary, on the contrary, has no influence over the sword or the purse.")

As the Supreme Court has explained, "[t]he clearest violation of the separation of powers clause occurs when one branch exercises power that the constitution vests exclusively in another branch." *McCrory v. Berger*, 368 N.C. 633, 645 (2016). This case involves just such violation, because the power to appropriate funds is one the constitution commits exclusively to the General Assembly in its role as elected representatives of the people. N.C. CONST. art. V, § 7(1).

Indeed, in *Richmond County,* the Court of Appeals rejected an effort to order transfers from the State Treasury under circumstances virtually identical to those here. As the Supreme Court later explained in an opinion adopting *Richmond County's* reasoning, the case holds that "'appropriating 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.'" *Cooper*, 376 N.C. 22 (Ervin, J.); *see also Richmond Cty.*, 254 N.C. App. at 423 ("Under the Separation of Powers Clause in our state constitution, no court has the power to order the legislature to appropriate funds or to order the executive branch to pay out money that has not been appropriated.")[4]

Richmond County makes clear that, while judiciary has the power to find a constitutional violation, and can issue injunctions or monetary judgments to remedy those violations, it cannot order the State to expend funds from the Treasury:

> Under long-standing precedent from our Supreme Court, ***the judicial branch cannot order the State to pay money from the treasury to satisfy this judgment***…. As our Supreme Court explained in a similar case, ***having entered a money judgment against the State, the judiciary has "performed its function to the limit of its constitutional powers."*** From here, satisfaction of that money judgment "will depend upon the manner in which the General Assembly discharges its constitutional duties."

254 N.C. App. at 424 (quoting *Smith v. North Carolina*, 289 N.C. 303, 321 (1976)) (emphasis added); *see also id.* at 429 ("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."); *North Carolina v. Davis*, 270 N.C. 1, 13 (1967) ("Moneys paid into the hands of the State Treasurer by virtue of a State law become public funds for which the Treasurer is responsible and *may be disbursed only in accordance with legislative authority*.") (emphasis added); *Robinson v. Barfield*, 6 N.C. 391 (1818)

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[4] In ruling on the writ of prohibition in this case, the Court of Appeals noted that the Supreme Court has "quoted and relied" on the relevant language in *Richmond County*. (ECF 10.4 at 1)

("The Legislature acts because the judicial power is incompetent to give relief."); *cf. Able Outdoor, Inc. v. Harrelson*, 341 N.C. 167, 172 ("We do not believe the Judicial Branch of our State government has the power to enforce an execution against the Executive Branch.").

This is even truer when doing so would contravene a duly enacted budget. While Judge Lee's Order relied on DOJ's representation that, as of August 2021, the State had a reserve balance of $8 billion and more than $5 billion in forecasted revenues in excess of the "existing base budget," (November Order at 9), a Budget has now been adopted that appropriates most, if not all of those funds. Thus, as Judge Lee acknowledged, his November Order can no longer direct state officials to transfer money, because "when the courts enter a judgment against the State, and no funds already are available to satisfy that judgment, the judicial branch has no power to order State officials to draw money from the State treasury to satisfy it." *Richmond Cty.*, 254 N.C. App. at 427.

In short, the November Order seeks to remedy a circumstance that no longer exists. Enforcing it now would require the Court to intrude even further into the Legislative power by ordering the transfer of State funds in the face of, and in a manner that directly contradicts, duly enacted legislative appropriations.[5]

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[5] This is not the first time in the *Leandro* litigation that intervening legislation has rendered a remedy imposed by the trial court moot. *See Hoke County Bd. of Educ. v. North Carolina*, 367 N.C. 156, 158-59 (2013) ("*Leandro III*") (concluding that subsequent legislation repealing amendments render the trial court's order attempting to enjoin them "moot").

II. IMPLEMENTING THE NOVEMBER ORDER AFTER ADOPTION OF THE BUDGET ACT WOULD CAUSE EVEN GREATER DAMAGE TO THE SEPARATION OF POWERS

Enforcing the November Order in the face of the Budget Act would cause even greater damage to the separation of powers than when the Order was originally entered. First, implementing the Order now would require the Court to completely displace the Legislature's exclusive authority to make appropriations, because there are no longer sufficient monies to fund both the Order and the duly enacted Budget. Second, as held in *Richmond County*, ordering the State to invade its emergency reserves would be "no less offensive to the separation of powers" than ordering the transfer of general, unreserved revenue.

A. There Are No Longer Sufficient, Unappropriated, Unreserved Funds to Meet the November Order.

Based on the evidence submitted by the State defendants, there appears to be no dispute that there are no longer sufficient, unappropriated general funds in the State budget to meet the November Order's directive. As Mr. Trogdon explains in his affidavit, the State budget is based on projections that show the amount of unappropriated, unreserved revenues that are "available" for appropriation during each fiscal year of the biennium. (Trogdon Aff. ¶23.) This starts with the Consensus Revenue Forecast, which is prepared jointly by analysts from the Executive Branch's Office of State Budget and Management ("OSBM") and the non-partisan Legislative staff at the FRD. (*Id.* ¶20.) Those projections then serve as the basis for further, updated Availability Statements, which the State Budget Act requires to be

incorporated into every appropriations bill. (*Id.* ¶23); *see also* N.C. Gen. Stat. §143C-5-3.

When the Budget Act was adopted, it was projected there would be an unappropriated, unreserved remaining balance of approximately $2.49 billion in the General Fund at the conclusion of FY 2021-22. *See* Budget Act §2.2(a) (General Fund Availability). However, that does not mean this money is available to be spent. The Budget anticipates the balance from FY2021-22 will be used to fund appropriations during FY 2022-23. *Id.*; (Trogdon Aff. ¶¶37, 39.) That would leave only $128 million in available revenue for FY 2022-23 based on projections as of the time of the act. *Id.* More recent projections show there will be even less remaining at the end of the FY2022-23. According to OSBM, whose projections are drawn from an Availability Statement published in December 2021, there will only be $22 million in unappropriated, unreserved revenue at the conclusion of FY2022-23. (Walker Aff. ¶8; Trogdon Aff. ¶41.) The most up-to-date projections from FRD, dated as of March 28th, estimate that there is only $104,638 in unreserved, unappropriated revenue available to be spent over the biennium. (Trogdon Aff. Ex.B.)

The fact that there are no longer sufficient revenues to comply with both the Budget Act and the November Order means enforcing the Order would cause an even greater intrusion into legislative power. The 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.*

Implementing the Order would thus require the courts, or executive-branch officials, to pick-and-choose which appropriations in the Budget to honor and which

to disregard—essentially nullifying the Budget Act passed by the Legislature and second guessing the balance struck between education and numerous other competing priorities, such as Medicaid, transportation, disaster relief, and public safety, just to name a few. Further, the General Assembly would be forced to identify spending reductions or tax increases in the following budget cycle because the Court would have spent money the State does not have. Such would be among the "clearest violations" of the separation of powers. *McCrory*, 368 N.C. at 645 ("The clearest violation of the separation of powers clause occurs when one branch exercises power that the constitution vests exclusively in another branch.").[6]

Plaintiffs (and perhaps the Executive Branch officials who stand to receive the funding under the November Order) will likely argue there is no risk to the State, or separation of powers, because the State has "enough" money. That is wrong as a legal matter—the Appropriations Clause does not include an exception permitting Courts to transfer money out of the treasury without approval of the General Assembly so long as there is a surplus.

It is also wrong on the facts. In its affidavit, OSBM states that, according to the Controller's daily cash report, the State had an unreserved cash balance of $4.79 billion on March 25, 2022. (Walker Aff. ¶9.) But, the State's daily cash balance does ***not*** show the amount of *unappropriated* revenue available under the Budget.

[6] Causing a revenue shortfall would also have severe implications for the State. In past shortfalls caused by economic downturns, the State has been forced to reduce allotments to State agencies; restrict hiring, travel, maintenance, and other expenses, and even furlough State employees, *including teachers*. *See* "Governor cuts pay, calls for furloughs for State employees," WRAL.com, *available at*, https://tinyurl.com/2p88tvbf (28 April 2009).

Instead, it shows the cash the State has on hand at any single point in time to pay *appropriated expenses*. (Trogdon Aff. ¶¶44-47.) The State's cash balance also fluctuates dramatically over the course of the year, and even day-to-day, as taxes are collected and major expenses (such as payroll) are paid. (*Id.* at ¶45.) It is thus the wrong measure. Using cash on hand to determine the amount of unappropriated revenue remaining under the Budget would be the same as looking at your bank balance in January to see if you can afford a trip in December—without considering what expenses you will have to pay, and what money you will earn, over the course of the year. The number has little meaning.

B. The State Constitution Prohibits the Judiciary from Ordering Transfers from the State's Emergency Reserves.

Second, OSBM notes that the Budget includes transfers to replenish the State's Savings Reserve (commonly known as the "Rainy Day Fund"), which is established under the Budget Act. (Walker Aff. ¶8); *see also* N.C. Gen. Stat. §143C-4-2 ("Savings Reserve"). But this does not mean money in the Savings Reserve is "available" to satisfy the November Order, nor does it mean the Court can tap the reserve without violating the separation of powers. Under the Budget Act, moneys held in reserve can be expended "only for the purposes for which the reserve is established" and can only be released pursuant to the procedures set forth in its governing statute. N.C. Gen. Stat. §143C-4-8. Indeed, the statute governing the Savings Reserve expressly requires a further vote of the General Assembly (and in some cases a two-thirds majority) to approve expenditures. N.C. Gen. Stat. §143C-4-2(b)-(b1).

Just as important, the Court of Appeals already rejected the notion that courts can order transfers out of the State's emergency reserves in *Richmond County*. There, plaintiffs argued the court should order the State to transfer money out of the Contingency and Emergency Reserve to repay fines and forfeitures that should have flowed to them under the State Constitution. *See* N.C. CONST. art. IX, §7 (requiring the proceeds of penalties and forfeitures to be used exclusively for public schools). Unlike the Savings Reserve, expenditures from the Contingency Reserve can be approved by the Council of State. N.C. Gen. Stat. §143-4-4. The court nevertheless rejected that argument and held that an order "commanding members of the Council of State and other executive branch officials to approve payment from this type of discretionary emergency fund is no less offensive to the Separation of Powers Clause than commanding the legislature to appropriate the money." *Richmond Cty.*, 254 N.C. App. at 428-29**.**

The same is true here. The Savings Reserve is one of the only reliable, large sources of funds the State has to address shortfalls in economic downturns or respond to natural disasters.[7] Accordingly, the Budget Act limits its use to emergency situations, such revenue shortfalls and natural disasters. While those statutes also permit the General Assembly to expend funds to "pay costs imposed by a court or administrative order," N.C. Gen. Stat. §143C-4-2(b), the same was true of the Contingency Reserve at issue in *Richmond County*. *See* 254 N.C. App. at 429

[7] Indeed, since 2016, the General Assembly has had to expend $1.12 billion from the Savings Reserve to fund ten separate disaster relief packages. *See* 2016 N.C. S.L. 2016-124; 2017 N.C. S.L. 119; 2018 N.C. S.L. 5; 2018 N.C. S.L.. 134; 2018 N.C. S.L. 136; 2019 N.C. S.L. 250; 2020 N.C. S.L. 97.

(observing that N.C. Gen. Stat. §143C-4-4 permits the Council of State to use the contingency reserve for expenditures required by a court). The Court nevertheless held that the decision to use those funds constituted a nonjusticiable political question. *Id.; see also, Leandro II*, 358 N.C. at 639 (explaining that issues constitute nonjusticiable, political questions "'(1) when the Constitution commits an issue, as here, to one branch of government; *or* (2) when satisfactory and manageable criteria or standards do not exist for judicial determination of the issue.'" (quoting *Baker v. Carr*, 369 U.S. 186, 210 (1962) (emphasis added))). There are simply no "judicially manageable standards" to decide how much to transfer to the reserve or when to access it. Doing so would require the Court to weigh the State's current needs against the risk of future emergencies to determine which must be addressed, in what amount, and in what order. That is not a legal analysis. Instead, it is precisely the type of determination the people must make through their elected representatives.

III. PLAINTIFFS HAVE NOT CHALLENGED THE BUDGET ACT, AND THERE IS NO EVIDENCE TO SHOW THAT THE REMAINING ITEMS IN THE CRP ARE NECESSARY TO REMEDY A CONSTRUCTIONAL VIOLATION

With the passage of the Budget Act, the November Order purports to answer a question that no longer pertains; namely, how money should be appropriated to ensure that North Carolina public schools provide a sound basic education in the absence of a budget. With the budget now enacted, the Court's answer to that question is reduced to an advisory opinion on a hypothetical issue. At this point, there is no evidence before the Court to show that the Budget Act is somehow insufficient to provide the children in their school districts with a sound basic

education, much less that the remaining measures in the CRP are necessary following the Budget's adoption. The question of the Budget Act's sufficiency to support a sound basic education has not even been raised.

The Supreme Court has repeatedly admonished in the course of this litigation that, when fashioning a remedy, the Court must do "*no more than is reasonably necessary*" to correct the alleged constitutional violation. *See Hoke Cty Bd. of Educ. v. State*, 358 N.C. 605, 610 (2004) ("*Leandro II")* (holding that any relief granted must "correct the failure with minimal encroachment on the other branches of government"); *see also Alamance County*, 329 N.C. at 99 (holding that, in remedying an alleged constitutional violation, the court must "do *no more* than is reasonably necessary" (emphasis in original)).

Moreover, when assessing legislation such as the Budget Act, courts must "begin with a presumption that the laws duly enacted by the General Assembly are valid" and can only reach a contrary conclusion if a law's "unconstitutionality is demonstrated beyond a reasonable doubt." *Cooper,* 376 N.C. at 33; *Leandro II*, 358 N.C. at 622-23 ("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.").

Despite this, Plaintiffs insist that the CRP represents the *only* way to provide a sound basic education to children in the Plaintiff school districts, and that anything other than their chosen remedy simply will not do.

The Supreme Court, however, rejected that exact argument at the outset of this case. In *Leandro* I, the Court explained that "[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 354 (emphasis added). Therefore, "within the limits of rationality, the legislature's efforts to tackle the problems should be entitled to respect." *Id.* Stated simply, the legislative process provides a better forum to make such determinations:

> 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 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 hearing and committee meetings at which it can hear and consider the views of the general public as well as education 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 354-55 (emphasis added); *see also id.* at 357 ("We reemphasize. . . that the administration of the public schools of the state is best left to the legislative and executive branches of government.") *See also Hart v. North Carolina*, 386 N.C. 122, 126 (Holding that decisions over education policy should be left to the General Assembly and courts—like the legislative and executive branches—should only operate "within their constitutionally defined spheres.")

In *Leandro II*, the Supreme Court again warned:

> The courts of the state *must* grant every reasonable deference to the legislative and executive branches when considering whether they have established and are

> administrating a system that provides the children of various school districts of the state a sound basic education, and a clear showing to the contrary must be made before the courts may conclude that they have not.

358 N.C. at 622-23.

Indeed, every time the trial court has attempted to dictate a specific remedy in this case, the Supreme Court has rejected it. Following the trial in this matter, Judge Manning entered orders directing that the State to (1) expand the provision of pre-kindergarten services to at-risk children in Hoke County; and (2) lower the age of compulsory education. The Court in *Leandro II* held that both of those orders were in error both because (1) decisions over education constituted nonjusticiable political questions that are committed to the General Assembly; and (2) there was insufficient evidence to show that such remedies were "either the only qualifying means or even the only known qualifying means" to ensure children receive a sound basic education. *Leandro II*, 358 N.C. at 639-44.

In contrast to the limited remedies the Court rejected in *Leandro II*, the CRP purports to dictate virtually every aspect of educational policy (and spending), over an 8-year period—prescribing measures that address everything from teacher recruitment and training, to educational performance measures, curriculum content, staffing models, teacher compensation, revision of the State's educational finance system and funding formulas, expansion of pre-K programs, and early college courses. According to OSBM, the CRP includes more than 40 action items that require funding in Years 2 and 3 of the plan alone.

Yet, despite the sweeping nature of the CRP, Plaintiffs insist that the Court should assume what *Leandro I* and *II* requires them to prove. To do so, they point to Judge Lee's conclusion that the CRP "is the only remedial plan" that had been presented to the Court, and that the parties "have presented no alternative remedial plan." (November Order at 9.) That is perhaps by design. The November Order shows DOJ and Plaintiffs *worked together* to recommend that the Court appoint WestEd to serve as an educational consultant for the express purpose of working with the Governor's newly-appointed Commission on Access to a Sound Basic Education. (November Order at 5). DOJ then continued to work with Plaintiffs to draft and submit a series of consent orders, which ultimately led to the entry of the November Order. Rather than advocate for, or seek to protect, the General Assembly's powers under the Appropriations Clause (or, for that matter, the autonomy of executive branch agencies involved in K-12 education), DOJ represented that the plan was "necessary" and persistently complained that it could not implement it because the General Assembly had not appropriated the money to do so.[8]

Because of this, the Court never had an opportunity to look behind the parties' representations to determine if the measures DOJ and Plaintiffs proposed were, in fact, necessary, or were instead a political effort to secure funding for their preferred policies outside the legislative process. Plaintiffs have also never presented the Court

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[8] "Persons directly and adversely affected by the decision may be expected to analyze and bring to the attention of the court all facets of a legal problem. Clear and sound judicial decisions may be expected when specific legal problems are tested by fire in the crucible of actual controversy. Socalled 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. 516, 520 (1958).

with any evidence to assess whether there are less intrusive alternatives than ordering the transfer of funds out of the State treasury. And because they have never challenged the Budget Act—which, as an act of the General Assembly, is presumptively valid—they have never offered any evidence to show that the Budget Act is somehow insufficient to provide a sound basic education or that the remaining items under the CRP are the "only qualifying means" to do so.

In short, Plaintiffs have not—at least at this juncture—carried their burden to show continued implementation of the November Order is necessary to remedy an alleged constitutional violation. The General Assembly has responded to their remedial plan the only way it can—through a vote of the entire body—and has passed a Budget that must, until proven otherwise, be presumed to be sufficient to satisfy the State's constitutional obligations.

IV. THE BUDGET MORE THAN ADEQUATELY FUNDS A SOUND, BASIC EDUCATION.

Although Plaintiffs may seek to do so, determining whether the Budget Act fulfills the State's constitutional obligation to provide a sound basic education cannot be reduced to the simple arithmetic of determining which portions of the CRP are funded and which are not. Indeed, the Supreme Court held in *Leandro I* that "[c]ourts should not rely upon the single factor of school funding levels in determining whether a state is failing in its constitutional obligation to provide a sound basic education to its children." 346 N.C. at 356.

Moreover, because the Budget Act is the product of the democratic, legislative process—and thus reflects input from the public, educational experts, and a

committee process that "permit[s] the full expression of all points of view"[9]—the measures it adopts do not directly overlap with those in the CRP. While the Budget Act appropriates $21.5 billion in net general funds over the biennium for K-12 public education—approximately 41% of the total general fund appropriations in the biennial budget—it does not contain allocations identical to the CRP submitted by Plaintiffs and the Executive Branch.

The General Assembly's analysis of the amounts funded under the CRP are included as **Exhibit D** to Mr. Trogdon's affidavit.

As Mr. Trogdon explains, the General Assembly largely agrees with the figures presented by OSBM regarding which of the CRP's items have been funded. (Trogdon Aff. ¶50). Nevertheless, there are instances where OSBM has failed to take into account monies the General Assembly has appropriated to fund given measures. For instance, OSBM's analysis fails to account for $206 million in federal block grants that the General Assembly has appropriated to DHHS to assist with early childhood education—a figure that exceeds the CRP's request of $20 million over the biennium *tenfold*. (Trogdon Aff. ¶50.c.i.) OSBM has also failed to include at least $50 million in federal block grants that the General Assembly has appropriated for the CRP's proposed "real-time early childhood workforce data system," (Trogdon Aff. ¶50.c.ii.), as well as another $400,000 appropriated to provide career technical education (Trogdon Aff. ¶50.c.iii.)

Importantly, the Budget Act also funds measures that seek to achieve the same goals as those in the CRP, just through different means—such as providing

[9] *Leandro I*, 346 N.C. at 354

$100 million in new, recurring funding to school districts in low-wealth counties in order to attract and retain high-quality teachers and administrators, *see* Budget Act §7.3, and paying $1,000 signing bonuses to recruit teachers in small and low-wealth counties. *See id.* §7A.5.

In addition, the Budget Act includes extensive appropriations to K-12 education that come from outside the General Fund. These include:

(i) $86.6 million for school business systems modernization;

(ii) $148.5 million from the Education Lottery for needs-based public school capital projects; and

(iii) $80 million, also from the Education Lottery, for the Public School Building Repair and Renovations Fund.

(Trogdon Aff. ¶52.)

The General Assembly also appropriated $247 million from the American Rescue Plan Act Child Care and Development Block Grant, $150 million for lead and asbestos remediation in public school and childcare facilities, and $20 million for start-up and capital grants for pre-K classrooms and childcare centers. (*Id.* ¶53).

Finally, local school districts have received unprecedented sums through COVID-relief programs. According to information maintained by NCDPI, local school districts have been provided more than $*5.8 billion in additional federal and State funding*. This is such a sum of money that 64% of those funds remained unspent as of February 28, 2022.[10]

[10] *See* COVID Funds, North Carolina Department of Public Instruction, Financial and Business Services, available at https://tinyurl.com/35tb83ns (last visited, April 6, 2022).

In short, focusing only on those items in the CRP, while ignoring the substantial sums the General Assembly has appropriated to measures that were not included in that plan—based on the pre-COVID WestEd report—does not provide the full context with respect to the total amount of education spending appropriated by the enacted budget. Accordingly, the General Assembly has provided a list of all changes to K-12 and early childhood appropriations made in the Budget Act, attached to Mr. Trogdon's Affidavit as **Exhibit E**.

CONCLUSION

Disagreements among the elected officials and branches of State government over how to educate the State's children are nothing new. They are fueled not just by political divisions, but sincere differences of opinion about what is best for the State's children and how to improve its educational system. As the Supreme Court has recognized, there is no single path to this worthy destination, nor is there a magical sum of money that is, by definition, constitutionally "enough." There is, however, a constitutionally-mandated process for resolving such disagreements and determining a path forward. It is the legislative process. Only that process provides an opportunity for the people to be heard and to decide—through their elected representatives—how to spend the State's money and provide the State's children with a *Leandro*-compliant education. The State Constitution does not permit the judiciary to take that power from the people and reassign it to the courts—or worse, a small group of unelected lawyers. The Court should refuse to second-guess the judgment of the State's elected officials by enforcing the November Order now that

the Budget Act has been adopted, particularly in the absence of any evidence that it somehow fails to meet the requirements of the State Constitution.

This the 8th day of April, 2022.

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CERTIFICATE OF COMPLIANCE

Pursuant to BCR 7.8, this brief contains no more than 7,500 words (exclusive of case caption, any index, table of contents, table of authorities, signature blocks, or any required certificates) as reported by the word processing software used to prepare this brief.

This, the 8th day of April, 2022.

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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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