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' REPLY BRIEF REGARDING ISSUES ON REMAND

INTRODUCTION

Plaintiffs, the Penn-Intervenors, and the Department of Justice (DOJ) ignore the plain language of the November Order. As the Order itself makes clear, it was issued to remedy a situation—the absence of a budget—that no longer exists. Enforcing it now would require the Court to intrude even further into the Legislative Power and affirmatively disregard the Budget Act.

The Supreme Court remanded this case for the Court to determine "what effect, if any, the enactment of the State Budget has upon the ***nature and extent*** of the relief" granted in the November Order. (ECF 1 at 2 (emphasis added)). That analysis necessarily includes the the Budget Act's effect on the Court's authority to issue the Order at all. That is not "relitigating" the case, nor is it asking the Court to decide issues that are solely for appeal. It is simply asking the Court to follow the Supreme Court's directive and consider the fundamentally changed circumstances now before it.

I. THE DEPARTMENT OF JUSTICE ONLY REPRESENTS THE EXECUTIVE BRANCH AND THUS CANNOT SPEAK FOR, OR CONCEDE ISSUES ON BEHALF OF, "THE STATE."

As a threshold matter, it is important to clarify the relationship of the parties. In its filings, DOJ purports to concede various matters on behalf of "the State." Plaintiffs then rely on those statements to argue the State has "conceded," "acknowledged," or "admitted" various facts or arguments. (Pls' Br. (ECF 20) at 5, 9, 10); (Penn-Intervenors' Br. (ECF 25) at 6, 7, 15, 16).

The governing statutes, however, make clear DOJ represents only the Executive Branch in this case. As noted previously, the General Assembly intervened

after Judge Lee issued the November Order. N.C.G.S. §1-72.2 explicitly provides that, in cases involving challenges to acts of the General Assembly, "the State" constitutes "both" the Governor (represented by the Attorney General) *and the General Assembly* (represented by counsel of its choosing). *Id.* N.C.G.S. §120.32.6, in turn, provides that in any action challenging an act of the General Assembly, "the General Assembly shall be deemed to be the State of North Carolina to the extent provided in G.S. 1-72.2(a)."

This distinction is critical for understanding the threat this case poses to the separation of powers. The Executive agencies, whose leadership is appointed by the Governor and whom DOJ represents, stand to receive significant funding under the November Order (in an up-front, lump sum, without the usual controls imposed by the Budget Act). By conceding various points in this litigation, the Executive can make an "end-run" around the budget process and secure funding for its desired policy initiatives without having to obtain legislative appropriations as required under Art. V, §7.

The fact the Executive stands to gain in this non-adversarial posture may explain why it is willing to represent that funds are "available" even though they have already been appropriated by the General Assembly or are subject to statutory reserves. It may also explain why DOJ appears to have abandoned its position in *Richmond County*, where the State argued "neither the executive nor the judicial

branch may take or expend public monies without statutory authorization" because "only the General Assembly possesses the power to allocate funds to public entities."[1]

II. THE ADOPTION OF THE BUDGET ACT ELIMINATES THE STATED BASIS FOR THE COURTS' NOVEMBER 10 ORDER.

In order to avoid the implications of the Budget Act, Plaintiffs, Penn-Intervenors (and even DOJ) argue that the adoption of the Budget Act did not have any effect on the Court's authority to compel the transfers in the November Order. The Order itself reveals they are wrong.

Judge Lee expressly premised his November Order on the assumption that "***as of the date of [the] Order, no budget has passed***." (November Order at 11 (emphasis added)).

It was only in the face of such alleged "inaction" that Judge Lee reasoned he could invoke the Court's "inherent authority" or rely on Art. I, §15 of the State Constitution as a supposed "ongoing constitutional appropriation." To that end, Judge Lee made clear he would not have the same authority 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***." (November Order at 16 (emphasis added)).[2] The adoption of the Budget Act thus renders the assumptions underlying Judge Lee's November Order moot.

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[1] *See* Defendant-Appellants' Brief, *Richmond Cnty. Bd. of Educ. v. Cowell, et al.*, No. COA-17-112 at 8, 10 (N.C. Ct. App. 24 March 2017) (attached hereto as **Appendix A**).

[2] This comports with the well-established rule that a Plaintiff can recover on a direct claim under the State Constitution "only in the absence of an adequate state

The adoption of the Budget Act also greatly increases the potential injury to separation of powers if the November Order is enforced. The Budget Act establishes a comprehensive budget for FY2021-22 and 2022-23. It thus reflects the choices of the People, through their elected representatives, regarding how best to balance myriad competing priorities and constitutional obligations—such as how much to allocate to education, which education initiatives are likely to prove effective and which are not; how much to allocate to other priorities, such as transportation, healthcare, law enforcement, prisons, and COVID-relief; how much to reserve to ensure the State can respond to future emergencies and natural disasters; and how much to leave unappropriated. Enforcing the November Order now would require the Court to disregard the duly enacted Budget—which is a law passed by the General Assembly in an exercise of its core constitutional functions (and signed into law by the Governor).

The Supreme Court has warned that "[t]he clearest violation of separation of powers occurs when one branch exercises power that the constitution vests exclusively in another branch." *McCrory v. Berger*, 368 N.C. 633, 645 (2016). And it has also held the Constitution vests the power to make appropriations exclusively in the General Assembly. *Cooper v. Berger*, 376 N.C. 22, 37 (2020) (Ervin, J.) ("In light of [the Appropriations Clause], "[t]he power of the purse is the exclusive prerogative

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remedy." *Corum v. Univ. of N.C.*, 330 N.C. 761, 782 (1992); *Phillips v. Gray*, 163 N.C.App. 52, 58, *disc. review denied*, 358 N.C. 545 (2004); *see also*, *Copper v. Denlinger*, 363 N.C. 784 (2010). It also comports with the rule that "'[e]ven in the name of its inherent power, the judiciary may not arrogate a duty reserved by the constitution exclusively to another body.'" *Richmond Cty*, 254 N.C. App. at 426 (quoting *Alamance Cnty.*, 239 N.C. at 99).

of the General Assembly…."); N.C. Const. Art. V, §7 and Art. III, §5(3) ("The budget as enacted by the General Assembly shall be administered by the Governor.")

The November Order asserts (incorrectly) judicial authority to order the disbursement of funds from the state treasury for education in the absence of a legislative appropriation. However, the question of the Court's authority to act in the absence of a budget is no longer relevant. Enforcing any part of the November Order after the passage of the Budget Act would require the Court to order disbursements that directly contravene a duly enacted budget—and extraordinary measure for which there is no legal support.

III. PLAINTIFFS MISREAD *RICHMOND COUNTY*.

Plaintiffs and the DOJ misread *Richmond County*. As the parties have explained, that case involved claims by a local board of education against the State for violating Art. IX, §7, which requires that "all fines and forfeitures collected in the several counties for any breach of the penal laws of the State, shall belong to several counties, and shall be faithfully appropriated and used exclusively for maintaining the free public schools." 254 N.C. App. at 423. Although the State was ordered to pay back the fees it collected, it did not do so because the money had already been spent. *Id.* at 425.

When the case again came to the Court of Appeals, it explained that, if the money had not been spent, the court could order the State to return the proceeds of the fines at issue. *Id.* at 427-28. However, since "the money was gone," the court could not order the State to transfer "new money from the State treasury—money not obtained from the improper equipment fees, but from the taxpayers and other sources

of general revenue." *Id.* at 428. Doing so, the Court explained, would require the court to "step into the shoes" of the General Assembly and exercise its exclusive power to make appropriations under the Appropriations Clause. *Id.* at 429.

Plaintiffs contend the Court can order the State to transfer funds from the Treasury because they (erroneously) believe there are sufficient, "unreserved funds in the General Fund [that] have not been allocated or appropriated to any other entity." (Pls' Br. at 11). Not only is that mistaken as a matter of fact (Trogdon Aff. ¶¶37-47), but that is exactly the opposite of what *Richmond County* holds. Money in the General Fund is "obtained . . . from the taxpayers and other sources of general revenue." *Id.* at 428; *see also* N.C.G.S.§143C-1-4. It is not money from a specific, identifiable source that must be deposited into a certain account and spent for a specific purpose. It is thus akin to the "new money" at issue in *Richmond County*, which the Court held could not be withdrawn from the State Treasury except in accordance with a statutory appropriation. *See* 254 N.C. App. at 427.

In any event, this is not an effort to "relitigate" the November Order. Legislative-Intervenors are not asking the trial court to reach any determination about whether that Order was proper at the time it was entered. However, now that the November Order has been superseded and this case remanded, this Court must follow the controlling decisions of our appellate courts, including *Richmond County,* in fashioning any further remedy.

IV. THE STATE BUDGET DOES NOT LEAVE SUFFICIENT, UNAPPROPRIATED, UNRESERVED MONEYS IN THE GENERAL FUND TO MEET THE NOVEMBER ORDER.

Whether intentional or not, Plaintiffs and DOJ persistently misrepresent the amount of unappropriated, unreserved revenue remaining after the adoption of the Budget Act.

First, Plaintiffs and DOJ cite the wrong figures. As Mr. Trogdon, Director of the General Assembly's non-partisan Fiscal Research Division, explains in his affidavit, the proper (and only) way to tell how much unappropriated, unreserved money remains available under the State Budget is to look at an Availability Statement. (Trogdon Aff. (ECF 27) ¶¶23-25, 45-46). Despite this, Plaintiffs (and DOJ) point to the amount of cash-on-hand reflected in the Controller's daily Cash Reports. But "the numbers in the [Controller's] Cash Reports do not take into account whether money has been appropriated." (*Id.* at ¶46). Instead, those Reports provide a snapshot of the following figures:

- "Total Cash Balance" is the gross amount of all cash held in the General Fund, including *both unreserved and reserved revenue*;
- "Reserved Cash Balance" is the portion of cash subject to a specific reserve under the State Budget Act; and
- "Unreserved Cash Balance" is the cash available to finance or pay for appropriated expenditures. But, "[b]ecause the unreserved cash balance indicates the amount of cash on hand to finance or pay for appropriations, this number is *not 'net of appropriations*."

(ECF 18 at 7-8) (emphasis added).

The Availability Statements show there are no longer sufficient, unappropriated, unreserved revenues to satisfy the November Order following

adoption of the Budget Act. While the Budget Act anticipates a General Fund balance at the conclusion of FY2021-22, that money has been included in the budget for FY2022-23. Thus, at time of the Budget Act, it was projected there would be only $128 million in unreserved revenue at the end of FY2022-23. More recent projections (current as of March 28), show there will be a balance of only $104,638 in unappropriated, unreserved revenue at the end of FY2022-23.[3]

IV. PLAINTIFFS' ARGUMENTS REGARDING "LAW OF THE CASE" ARE UNAVAILING.

In a last-ditch effort to claim the November Order survives the Budget Act, Penn-Intervenors argue that various issues, including their assertion that the CRP must be instituted in its entirety, represent "law of the case." This contention, however, depends on a misapplication of the law on which it relies. First, the cases the Penn-Intervenors cite all stand for the proposition that decisions by *appellate* courts represent law of the case in later trial court proceedings. *See Reagan v. WASCO, LLC*, 269 N.C.App. 292 (2020) (binding nature of prior decision by Court of Appeals); *State v. Todd*, 249 N.C.App. 170 (2016) (same); *Freedman v. Payne,* 253 N.C.App. 282 (2017); ("Once a panel of the *Court of Appeals* has decided a question…[it] becomes law of the case.").

More importantly, the "law of the case" doctrine does not prohibit courts from modifying orders in response to changed circumstances, *Brewer v. Garner*, 267 N.C.

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[3] Plaintiffs also claim the Court can require the State to transfer money held in the Savings Reserve. But the court rejected that very argument in *Richmond County*. *See* 254 N.C. App. at 428 (requiring the Executive Branch Officials to disburse money out of the Contingency Reserve would be "no less offensive to the Separation of Powers Clause than commanding the legislature to appropriate the money."); N.C.G.S. §143C-4-2(b) and (b1) (requiring majority vote of General Assembly to disburse funds from Savings Reserve).

219, 220 (1966), nor does it apply to issues that have been specifically remanded to the trial court for reconsideration. *Steeves v. Scotland Cty. Bd. of Health*, 152 N.C. App. 400, 404–05 (2002). Finally, the mere fact a party did not appeal an interlocutory order does not mean it becomes law of the case. *Kirkpatrick v. Nags Head*, 213 N.C. App. 132, 138 (2011); *Stanford v. Paris*, 364 N.C. 306, 312 (2010).

The November Order expressly incorporates the Court's findings and conclusions from its previous, intermediate orders. (November Order at 3,n.1). Similarly, the Court could not have determined whether the Budget Act, which is presumptively valid, is sufficient to provide students a sound basic education at the time the November Order was issued. What is law of the case, however, are the Supreme Court's admonitions that (i) there "will be more than one constitutionally permissible method" of providing a sound basic education, *Leandro* I, 346 N.C. at 354, and (ii) any remedy the Court imposes must be "no more than is reasonably necessary" to correct the alleged violation. *Leandro II*, 358 N.C. at 610.

Thus, even if the Court were to determine it still has authority to order the transfers required by the November Order (which it does not), it should decline to do so until Plaintiffs have an opportunity carry their burden by showing that the Budget Act is constitutionally deficient and that the remaining items under the CRP are, in fact, necessary to provide a sound basic education.

CONCLUSION

For each of the foregoing reasons, as well as those in Legislative-Intervenors' opening brief, the Court should conclude that Budget Act superseded and nullified the November Order.

This the 11th day of April, 2022.

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CERTIFICATE OF COMPLIANCE

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

This, the 11th day of April, 2022.

/s/ Matthew F. Tilley
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CERTIFICATE OF SERVICE

The undersigned certifies that on April 11, 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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