No. 425A21-1 TENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

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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 Court of Appeals
P21-511

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MOTION BY LEGISLATIVE INTERVENORS FOR LEAVE TO BRIEF ADDITIONAL ISSUES AND TO CONFIRM REINSTATEMENT OF WRIT OF PROHIBITION, AND CONDITIONAL PETITION FOR CERTIORARI

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INDEX

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Rules

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MOTION BY LEGISLATIVE INTERVENORS

FOR LEAVE TO BRIEF ADDITIONAL ISSUES AND TO CONFIRM REINSTATEMENT OF WRIT OF PROHIBITION,

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"), pursuant to N.C. R. App. P. 37 and this Court's Order dated 4 November 2022, in which the Court, on its own motion, (i) consolidated this appeal with case no. 425A21-2, and (ii) stayed 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 consolidated this case (425A21-1) with the parties' direct appeals from the 21 November 2021 transfer order (425A21-2) and stayed, but did not vacate, the writ of prohibition. 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)).

Following this directive, Legislative Intervenors now ask that the Court (i) 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*, and (ii) confirm that, pursuant to the express terms of the Court's 4 November 2022 order, the writ of prohibition is automatically reinstated pending the Court's consideration of those issues. 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 as well.

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,[1] 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

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[1] 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*").

Remedial Plan ("CRP"). (R p 1632).[2] 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 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 the 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

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[2] 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.

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 Arrowwood 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.[3]

On 7 December 2021, the Attorney General appealed Judge Lee's 10 November 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.[4]

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

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[3] Legislative Intervenors initially opposed Plaintiffs' and Plaintiff-Intervenors' petitions for *certiorari*. However, because the Supreme Court has now heard and ruled upon the related case without resolving all issues presented in this case, Legislative Intervenors no longer oppose those petitions, but instead ask that the petitions be granted and that, to the extent necessary, the Court grant *certiorari* to review the additional issues listed below.

[4] 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.

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, 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)).[5]

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' petitions for discretionary review or *certiorari*. The case thus remains pending before this Court, with the writ of prohibition stayed "*pending any further filings in 42521A-1 pertaining to issues not already addressed in the opinion filed [in 425A21-2].*" (*Id.* (emphasis added)).

ARGUMENT

The Court's decision to stay—rather than vacate—the writ of prohibition pending any further filings reflects 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

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[5] The Court also dismissed the State's motion to consolidate "as moot." (*Id.*)

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 the issues presented below.

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.[6] 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

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[6] 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.")))

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 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,[7] 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

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[7] 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).

"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 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.[8] As of today, nearly $2.2 billion of that money (approximately 37%) remains unspent.[9] Hoke County Public Schools, alone, has been received more than $40 million, with $14 million still unspent.[10] 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 QUESTIONS THAT REQUIRE RESOLUTION FROM 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. By staying, rather than vacating, the writ of

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8 *See* COVID Funds, North Carolina Department of Public Instruction, Financial and Business Services, available at https://tinyurl.com/35tb83ns (last visited, February 7, 2023).

9 *Id.*

10 *Id.*

prohibition, the Court has left in place conflicting—and indeed irreconcilable—appellate orders that give contrary directives to the trial court on the same issue.

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 both the text of the Appropriations Clause[11] 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").

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[11] 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.

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 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—even though it chose to leave the writ in place by "staying" its effect rather than vacating it. Allowing the parties to brief the issues here, as contemplated by the majority's opinion, 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 corresponding decision to leave the writ of prohibition in place by "staying" its effect, has 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:[12]

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;*

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[12] 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 8 February 2023, but have not received a response at the time of filing indicating whether they oppose or consent to the motion.

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 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.

6. Confirm, pursuant to the Court's order of 4 November 2022, that the writ of prohibition has been reinstated, and the stay lifted, automatically upon the filing of this request. (*See* 4 November 2021 Order (425A21-1) ("[W]e 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.") (emphasis added))).

Respectfully submitted, this the 8th day of February, 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 had personally signed it.

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VERIFICATION

The undersigned counsel for Petitioner Legislative Intervenors, after being duly sworn, says:

The contents of the foregoing 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: 2-08-2023

Mark F. Foster III

Name: Mark F. Foster III

My Commission Expires: October 27, 2026

MARK F. FOSTER, III NOTARY PUBLIC MECKLENBURG COUNTY, N.C.

CERTIFICATE OF SERVICE

The undersigned certifies that on 8 February 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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