IN THE SUPREME COURT OF NORTH CAROLINA

2022-NCSC-108

No. 425A21-2

Filed 4 November 2022

HOKE COUNTY BOARD OF EDUCATION, *et al.*;

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION; and

RAFAEL PENN, *et al.*,

v.

STATE OF NORTH CAROLINA;

STATE BOARD OF EDUCATION;

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION; and

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

Appeal pursuant to N.C.G.S. § 7A-31(b) from the 10 November 2021 order by Judge W. David Lee in Superior Court, Wake County, and from the 26 April 2022 order of Judge Michael L. Robinson in Superior Court, Wake County. On 21 March 2022, pursuant to N.C.G.S. § 7A-31(a) and Rule 15(e) of the North Carolina Rules of Appellate Procedure, the Supreme Court allowed the State's petition for discretionary review prior to determination by the Court of Appeals. Heard in the Supreme Court on 31 August 2022.

Parker Poe Adams & Bernstein, LLP, by Melanie Black Dubis, Scott E. Bayzle and Catherine G. Clodfelter; and Armstrong Law, PLLC, by H. Lawrence Armstrong for Hoke County Board of Education, et al.

Lawyers Committee for Civil Rights Under Law, by Christopher A. Brook, David Hinojosa, and Michael P. Robotti, for Penn Rafael, et al.

Joshua Stein, Attorney General, by Amar Majmundar, Senior Deputy Attorney General, W. Swain Wood, First Assistant Attorney General, Ryan Park, Solicitor General, Sripriya Narasimha, Deputy General Counsel, and South A. Moore, Assistant General Counsel, for the State.

Joshua Stein, Attorney General, by Matthew Tulchin, Special Deputy Attorney General, Tiffany Y. Lucas, Deputy General Counsel, for the State Board of Education.

Womble Bond Dickinson (U.S.) LLP, by Matthew F. Tilley, Russ Ferguson, W. Clark Goodman, and Michael A. Intersoll, for Philip E. Berger, et al.

Higgins Benjamin, PLLC, by Robert N. Hunter, Jr., for Nels Roseland, Controller of the State of North Carolina.

Jane R. Wettach and John Charles Boger, for Professors and Long-Time Practitioners of Constitutional and Educational Law, amici curiae.

Duke Children's Law Clinic, by Peggy D. Nicholson and Crystal Grant; Education Law Center, by David Sciarra, for Duke Children's Law Clinic, Center for Educational Equity, Southern Poverty Law Center, and Constitutional and Education Law Scholars, amici curiae.

Elizabeth Lea Troutman, Eric M. David, Daniel F.E. Smith, Kasi W. Robinson, Richard Glazier, and Matthew Ellinwood, for North Carolina Justice Center, amicus curiae.

John R. Wester, Adam K. Doerr, Erik R. Zimmerman, Emma W. Perry, Patrick H. Hill, and William G. Hancock, for North Carolina Business Leaders, amici curiae.

Jeanette K. Doran, for North Carolina Institute for Constitutional Law and John Locke Foundation, amici curiae.

Justice BERGER dissenting.

¶ 244 "Frequently an issue of this sort will come before the Court clad, so to speak, in sheep's clothing: the potential of the asserted principle to effect important change in the equilibrium of power is not immediately evident, and must be discerned by a careful and perceptive analysis. But this wolf comes as a wolf." *Morrison v. Olson*, 487 U.S. 654, 699, 108 S. Ct. 2597, 2623 (1988) (Scalia, J., dissenting).

¶ 245 "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, selfappointed, or elective, may justly be pronounced the very definition of tyranny." *The Federalist* No. 47 (James Madison). "By tyranny, . . . [Madison] means arbitrary, capricious, and oppressive rule by those possessing any two of these powers." George W. Carey & James McClellan, *Reader's Guide to The Federalist*, The Federalist, at lxx (George W. Carey & James McClellan, eds., Gideon ed. 2001). We see in this opinion the arbitrary usurpation of purely legislative power by four justices. The majority affirms the trial court order which strips the General Assembly of its constitutional power to make education policy and provide for its funding. Indeed, this wolf comes as a wolf.

¶ 246 "The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." N.C. Const. art. I, § 6. This clear and unambiguous principle "is the rock upon which rests the fabric of our government. Indeed, the whole theory of constitutional government in this

State and in the United States is characterized by the care with which the separation of the departments has been preserved and by a marked jealousy [against] encroachment" by another branch. *Pers. v. Bd. of State Tax Comm'rs*, 184 N.C. 499, 502, 115 S.E. 336, 339 (1922).

¶ 247 Without question, the General Assembly, in which our constitution vests the legislative power of the State, N.C. Const. art. II, § 1, is "the policy making agency of our government[.]" *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 169, 594 S.E.2d 1, 8 (2004). The General Assembly is the policymaking agency because "[a]ll political power is vested in and derived from the people," N.C. Const. art I, § 2, and the people act through the General Assembly, *State ex rel. Ewart v. Jones*, 116 N.C. 570, 570, 21 S.E. 787, 787 (1895); *see also Pope v. Easley*, 354 N.C. 544, 546, 556 S.E.2d 265, 267 (2001) (per curiam) ("[P]ower remains with the people and is exercised through the General Assembly, which functions as the arm of the electorate."). The General Assembly possesses both plenary and express lawmaking authority, and, as provided by the text of the state constitution, the legislative branch enacts policy through statutory directives and appropriations.

¶ 248 Relevant here, the Declaration of Rights in our constitution provides that "[t]he people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right." N.C. Const. art. I, § 15. This provision within the Declaration of Rights must be considered with the related, more specific provisions

in Article IX that outline the General Assembly's responsibilities with regard to public education. Placed in the working articles of the constitution, Article IX, entitled "Education," *see id.* art. IX, actually "implements the right to education as provided in Article I," *Demenski ex rel. C.E.D. v. State Bd. of Educ.*, 377 N.C. 406, 2021-NCSC-58, ¶ 14. This Court has explained that "these two provisions work in tandem," *id.*, to "guarantee every child in the state an *opportunity* to receive a sound basic education[.]" *Silver v. Halifax Cnty. Bd. of Comm'rs*, 371 N.C. 855, 862, 821 S.E.2d 755, 760 (2018) (emphasis added).

¶ 249 The state constitution explicitly recognizes that it is for the General Assembly to develop educational policy and to provide for its funding in keeping with its legislative authority. Article IX, section 2 requires that "[t]he General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools, which shall be maintained at least nine months in every year, and wherein equal opportunities shall be provided for all students." N.C. Const. art. IX, § 2. The General Assembly creates the system through policy and funds it through taxation and appropriations. The text then tasks the State Board of Education with "supervis[ing] and administer[ing]" that system with "needed rules and regulations" that remain "subject to laws enacted by the General Assembly." N.C. Const. art. IX, § 5.

¶ 250 The "power of the purse," or the legislative authority to direct or deny appropriations, represents policy decisions made solely by the General Assembly. For that reason, our constitution provides that "[n]o money shall be drawn from the State treasury but in consequence of appropriations made by law[.]" N.C. Const. art. V, § 7(1).

¶ 251 As this Court unanimously noted just two years ago, "*the appropriations clause states in language no man can misunderstand that the legislative power is supreme over the public purse*." *Cooper v. Berger*, 376 N.C. 22, 36–37, 852 S.E.2d 46, 58 (2020) (emphasis added); *see also Wilson v. Jenkins*, 72 N.C. 5, 6 (1875) ("The General Assembly has absolute control over the finances of the State."). By way of historical explanation, this Court stated:

> In light of this constitutional provision, the power of the purse is the exclusive prerogative of the General Assembly, with the origin of the appropriations clause dating back to the time that the original state constitution was ratified in 1776. In drafting the appropriations clause, the framers sought to ensure that the people, through their elected representatives in the General Assembly, had full and exclusive control over the allocation of the state's expenditures.

Cooper, 376 N.C. at 36–37, 852 S.E.2d at 58 (cleaned up). These constitutional principles remain true when the legislative branch enacts educational policy through appropriations.

¶ 252 If legislative power over appropriations is absolute, then the judicial branch has no role in this endeavor. Clear and unambiguous language that "no man can misunderstand," *id.*, should yield results that no reasonable person can question.

¶ 253 As set out in the constitutional text and this Court's precedent, the General Assembly determines and develops educational policy through statutes and appropriations. However, a review of this case's lengthy litigation reveals that the General Assembly was notably excluded. Due process requires notice and an opportunity to be heard—legislative defendants have been denied the protection of this fundamental fairness.

¶ 254 From the filing of the initial complaint until January 2011, the Attorney General represented the executive and legislative branches (the State). In 2011, the majority party of General Assembly, both House and Senate, changed. The Attorney General, then asserting a purported conflict of interest, ceased to represent the General Assembly at that time. The Attorney General noted that executive branch defendants refused to waive this conflict. The General Assembly attempted to intervene in the case, but the trial court rejected intervention because the issue in the case was not the legislature's education policy or funding, but the implementation of that policy by the executive branch.

¶ 255 Judge Howard Manning, perhaps the one individual most familiar with this case, later stated in a memorandum that educational shortcomings did not result from legislative failures:

> Our children that cannot read by the third grade are by and large doomed not to succeed by the time they get to high school. As shown by the record in this case, that is a failure of classroom instruction.
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> . . .
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> Reduced to essentials, in my opinion the children are not being provided the opportunity because after all the millions spent, 90% of school costs are for adult salaries and benefits, and the data show as it did years ago and up to now the educational establishment has not produced results.

In other words, Judge Manning clearly understood that the problem is not with education policy or funding; rather, the problem is with implementation and delivery by the education establishment.

¶ 256 Moreover, the focus of this litigation post-*Leandro* has been the general implementation and delivery of educational opportunities to the "at risk" children in plaintiffs' counties. *See Hoke Cnty. Bd. of Educ. v. State*, 358 N.C. 605, 612 n.1, 599 S.E.2d 365, 375 n.1 (2004) (the only issue which "faces scrutiny in the instant appeal [is] whether the State has failed in its constitutional duty to provide Hoke County

school children with the opportunity to receive a sound basic education.").[1] Despite the express directive of this Court in Hoke County, the trial court failed to conduct any other trial. Furthermore, given that the education statutes and policy changed significantly through the years, the original *Leandro* claims and resulting decision have become stale.

¶ 257 When Judge Manning withdrew for health reasons in 2016, a new judge, in collaboration with executive branch defendants and plaintiffs, dramatically changed the direction of this litigation to focus on policy and funding statewide, rather than problems with implementation and delivery in plaintiffs' counties as originally pled. In November 2021, the new judge entered an order stripping the General Assembly of its constitutional authority, setting educational policy, and judicially appropriating taxpayer monies to fund his chosen policy. Only then did the legislative defendants receive the opportunity to intervene as they sought appellate review of this judicial invasion into their constitutional powers.

¶ 258 Because of the collusive nature of this litigation, the majority today now joins in denying legislative defendants due process, the fundamental fairness owed to any party, and usurps the legislative power by crafting policy and directly appropriating funds. Further, this Court approves the deprivation of due process to other non-

[1] Because the distinction is meaningful, we refer to *Hoke County Board of Education v. State* as *Hoke County*, not *Leandro II*. See discussion at *Hoke County Board of Education v State*, 367 N.C. 156, 158 n.2, 749 S.E.2d 451, 453 n.2 (2013).

parties by affirming the trial court order which required certain state officials to violate their oaths and circumvent the constitutionally and statutorily required lawful method of appropriating monies from the general fund.

¶ 259 In addition, the majority takes it upon itself to resolve issues in this case without notice and in the face of this Court's order to the contrary. In March 2022, this Court entered a special order holding "in abeyance [certain issues] with no other action, including the filing of briefs, to be taken until further order of the Court." Despite the fact that no notice has been provided to any party, and briefing has not been done, this Court exerts its will by summarily deciding the matter. In so doing, the majority ignores due process.

¶ 260 Fundamentally, and contrary to what plaintiffs, executive branch defendants, and the majority would have the public believe, this case is not about North Carolina's failure to afford its children with the opportunity to receive a sound basic education. The essence of this case is power—who has the power to craft educational policy and who has the authority to fund that policy.

¶ 261 While a properly restrained judiciary has "neither FORCE nor WILL, but merely judgment," *The Federalist* No. 78 (Alexander Hamilton), we once again address the pernicious extension of judicial power by this Court at the expense of the constitutionally prescribed power of the legislature. Once again, the subversion of constitutional order is engineered by a bare majority through unprecedented and

dangerous reasoning. Couched this time as its "inherent authority," the majority once again "unilaterally reassigns constitutional duties." *N.C. State Conf. of Nat'l Ass'n for the Advancement of Colored People v. Moore*, 2022-NCSC-99, ¶ 77 (Berger, J., dissenting).

¶ 262 Relying on a gross misapplication of our caselaw, the majority's Oppenheimer-esque reshaping of the appropriations clause and usurpation of legislative function has no apparent concern for constitutional strictures or the limits of this Court's power. The judicial branch now assumes boundless inherent authority to reach any desired result, ignoring the express boundaries set by the explicit language of our constitution and this Court's precedent. Because "[t]his power in the judicia[ry] will enable [judges] to mold the government into almost any shape they please," Brutus, Essay XI, The Essential Anti-Federalist 190 (W. B. Allen and Gordon Lloyd, eds., 2nd ed. 2002), I respectfully dissent.

I. Factual and Procedural Background

¶ 263 The issues in this case are neither unprecedented nor extraordinary. Had the trial court below, and the majority here, understood precisely what this Court held in *Leandro* and *Hoke County*, much litigation would have been avoided. As this case is the latest chapter of a dispute this Court first considered more than twenty-four years ago, our prior decisions constitute the law of the case and are binding on the courts. *See Hayes v. City of Wilmington*, 243 N.C. 525, 536, 91 S.E.2d 673, 681–82 (1956)

("[W]hen an appellate court passes on a question and remands the cause for further proceedings, the questions there settled become the law of the case, both in subsequent proceedings in the trial court and on subsequent appeal[.]").

A. *Leandro*

¶ 264 In *Leandro v. State of North Carolina*, 346 N.C. 336, 342, 488 S.E.2d 249, 252 (1997) (*Leandro*), plaintiffs brought an action against the State and the State Board of Education seeking declaratory and injunctive relief, alleging that children in their school districts were not "receiving a sufficient education to meet the minimal standard for a constitutionally adequate education." The original plaintiffs were "students and their parents or guardians from the relatively poor school systems in Cumberland, Halifax, Hoke, Robeson, and Vance Counties and the boards of educations for those counties." *Id*. at 342, 488 S.E.2d at 252. Those plaintiffs were joined by plaintiff-intervenors, "students and their parents or guardians from the relatively large and wealthy school systems of the City of Asheville and of Buncombe, Wake, Forsyth, Mecklenburg, and Durham counties and the boards of education for those systems." *Id*. at 342, 488 S.E.2d at 252.

¶ 265 Although plaintiffs' and plaintiff-intervenors' claims differed, they were similar in one significant respect:

> Both plaintiffs and plaintiff-intervenors (hereinafter "plaintiff-parties" when referred to collectively) allege in their complaints in the case resulting in this appeal that they have a right to adequate educational opportunities

> which is being denied them by defendants under the current school funding system. Plaintiff-parties also allege that the North Carolina Constitution not only creates a fundamental right to an education, but it also guarantees that every child, no matter where he or she resides, is entitled to equal educational opportunities.

Id. at 342, 488 S.E.2d at 252.

¶ 266 Defendants responded to plaintiff-parties' complaints by filing a motion to dismiss, contending in part that "plaintiff-parties had failed to state any claim upon which relief could be granted." *Id*. at 344, 488 S.E.2d at 253. The trial court denied defendants' motion, and defendants timely appealed. *Id*. at 344, 488 S.E.2d at 253. The Court of Appeals reversed the trial court and dismissed all of plaintiffs' claims. *Id*. at 344, 488 S.E.2d at 253. It concluded that "the right to education guaranteed by the North Carolina Constitution is limited to one of equal access to the existing system of education and does not embrace a qualitative standard." *Id*. at 344, 488 S.E.2d at 253 (citing *Leandro v. North Carolina*, 122 N.C. App. 1, 11, 468 S.E.2d 543, 550 (1996)).

¶ 267 Plaintiff-parties petitioned this Court for discretionary review. We granted the petition to address "whether the people's constitutional right to education has any qualitative content, that is, whether the state is required to provide children with an education that meets some minimum standard of quality." *Id*. at 345, 488 S.E.2d at 254. In answering that question in the affirmative, this Court stated:

> We conclude that Article I, Section 15, and Article IX,

> Section 2 of the North Carolina Constitution combine to guarantee every child of this state an *opportunity* to receive a sound basic education in our public schools. For purposes of our Constitution, a "sound basic education" is one that will provide the student with at least: (1) sufficient ability to read, write, and speak the English language and a sufficient knowledge of fundamental mathematics and physical science to enable the student to function in a complex and rapidly changing society; (2) sufficient fundamental knowledge of geography, history, and basic economic and political systems to enable the student to make informed choices with regard to issues that affect the student personally or affect the student's community, state, and nation; (3) sufficient academic and vocational skills to enable the student to successfully engage in post-secondary education or vocational training; and (4) sufficient academic and vocational skills to enable the student to compete on an equal basis with others in further formal education or gainful employment in contemporary society.

Id. at 347, 488 S.E.2d at 255 (emphasis added).

¶ 268 Plaintiff-parties also argued that "Article IX, Section 2(1), requiring a 'general and uniform system' in which 'equal opportunities shall be provided for all students,' mandates equality in the educational programs and resources offered the children in all school districts in North Carolina." *Id*. at 348, 488 S.E.2d at 255. This Court expressly rejected this argument, stating "we are convinced that the equal opportunities clause of Article IX, Section 2(1) does not require substantially equal funding or educational advantages in all school districts." *Id*. at 349, 488 S.E.2d at 256. Thus, we affirmed the Court of Appeals' decision to dismiss this claim.

¶ 269 As is especially relevant here, this Court made it clear that plaintiff-parties'

proposed constitutional requirement of "substantial equality of educational opportunities in every one of the various school districts of the state would almost certainly ensure that *no matter how much money was spent on the schools of the state*, at any given time some of those districts would be out of compliance." *Id.* at 350, 488 S.E.2d at 256–57 (emphasis added). Thus, this Court delineated between (1) a requirement for the state to provide all students with the *opportunity* to receive a sound basic education, and (2) a requirement for the state to provide the *same* opportunities to all students statewide.

¶ 270 Further, we drew a sharp distinction between the right *to* a sound basic education and the right to the *opportunity* to receive a sound basic education. This Court discussed at length the "[s]ubstantial problems [that] have been experienced in those states in which the courts have held that the state constitution guaranteed the right *to* a sound basic education." *Id.* at 350–51, 488 S.E.2d at 257 (emphasis added). We listed multiple cases from various jurisdictions involving, as is particularly relevant here, decisions of divided courts "striking down the most recent efforts of the [state] legislature and for the third time declaring a funding system for the schools of that state to be in violation of the state constitution." *Id.* (citing *Abbot v. Burke*, 149 N.J. 145, 693 A.2d 417 (1997)).[2] In addition to referencing the flood of

[2] The majority cites to a continuation of *Abbott v. Burke* as an example to justify its "extraordinary" remedy. It is extraordinary that the majority cites to cases and theories that have been *expressly* disavowed by this Court. Further, the citations to cases from Kansas and

litigation brought forth in states that guarantee a right *to* a sound basic education, this Court also noted law review articles which described "the difficulty in understanding and implementing the mandates of the courts" and "the lack of an adequate remedy" in these states. *Id*. (citing William E. Thro, *The Third Wave: The Impact of the Montana, Kentucky, and Texas Decisions on the Future of Public School Finance Reform Litigation*, 19 J.L. & Legal Educ. 219 (1990); Note, *Unfulfilled Promises: School Finance Remedies and State Courts*, 104 Harv. L. Rev. 1072, 1075–78 (1991)).

¶ 271 This Court "conclude[d] that the framers of our Constitution did not intend to set such an impractical or unattainable goal." *Id*. at 351, 488 S.E.2d at 257. Accordingly, we held that "Article IX, Section 2(1) of the North Carolina Constitution requires that all children have the *opportunity* for a sound basic education, but it *does not require* that equal educational opportunities be afforded students in all of the school districts of the state." *Id*. (emphasis added).

¶ 272 This Court was acutely aware of the potential dangers of its holding in *Leandro*. We defined the opportunity to receive a sound basic education with "some trepidation[ ]" because "judges are not experts in education and are not particularly able to identify in detail those curricula best designed to ensure that a child receives

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Washington make little sense as neither of those cases involve the judicial exercise of legislative authority over the public purse.

a sound basic education." *Id.* at 354, 488 S.E.2d at 259. Recognizing the General Assembly's crucial role in this issue, this Court stated:

> We acknowledge that the legislative process provides a better forum than the courts for discussing and determining what educational programs and resources are most likely to ensure that each child of the state receives a sound basic education. The members of the General Assembly are popularly elected to represent the public for the purpose of making just such decisions. The legislature, unlike the courts, is not limited to addressing only cases and controversies brought before it by litigants. The legislature can properly conduct public hearings and committee meetings at which it can hear and consider the views of the general public as well as educational experts and permit the full expression of all points of view as to what curricula will best ensure that every child of the state has the opportunity to receive a sound basic education.

Id. at 355, 488 S.E.2d at 259.

¶ 273 As is clear from our opinion, this Court was well aware of the murky waters it entered in *Leandro*. We took care to provide examples of what factors should be considered by trial courts and what weight should be given to such factors. This Court held that "[e]ducational goals and standards adopted by the legislature," "the level of performance of the children of the state and its various districts on standard achievement tests[,]" and "the level of the state's general educational expenditures and per-pupil expenditures[ ]" were all relevant factors. *Id.* at 355, 488 S.E.2d at 259–60. We noted that one factor alone was not determinative.

¶ 274 Additionally, we directly addressed the basis of the trial court's order at issue

before us today—whether courts of this state may rely solely on expenditures as a remedy to an alleged violation of this right. In answering no, the Court stated:

> We agree with the observation of the United States Supreme Court that
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> > The very complexity of the problems of financing and managing a statewide public school system suggests that there will be more than one constitutionally permissible method of solving them, and that within the limits of rationality, the legislature's efforts to tackle the problems should be entitled to respect. *On even the most basic questions in this area the scholars and educational experts are divided*. Indeed, one of the major sources of controversy concerns the extent to which there is a demonstrable correlation between educational expenditures and the quality of education . . . .

Id. at 355–56, 488 S.E.2d at 260 (cleaned up) (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42–43, 93 S. Ct. 1278, 1301–02 (1973)).

¶ 275 This Court went further regarding the flawed notion of any reliable causal relationship between increased expenditures and educational outcomes:

> More recently, one commentator has concluded that "available evidence suggests that substantial increases in funding produce only modest gains in most schools." The Supreme Court of the United States recently found such suggestions to be supported by the actual experience of the Kansas City, Missouri schools over several decades. The Supreme Court expressly noted that despite massive court-ordered expenditures in the Kansas City schools which had provided students there with school "facilities and opportunities not available anywhere else in the county," the Kansas City students had not come close to reaching their potential, and "learner outcomes" of those students were "at or below national norms at many grade levels."

Id. (quoting William H. Clune, *New Answers to Hard Questions Posed by Rodriguez: Ending the Separation of School Finance and Educational Policy by Bridging the Gap Between Wrong and Remedy*, 24 Conn. L. Rev. 721, 726 (1992) and *Missouri v. Jenkins*, 515 U.S. 70, 70 115 S. Ct. 2038, 2040 (1995)).

¶ 276 This Court was gravely concerned with preventing judicial interference in the legislative realm. To that end, before reversing the decision of the Court of Appeals and remanding the case to Wake County Superior Court, we provided guidance to future courts:

> In conclusion, we reemphasize our recognition of the fact that *the administration of the public schools of the state is best left to the legislative and executive branches of government*. Therefore, the courts of the state *must grant every reasonable deference to the legislative and executive branches* when considering whether they have established and are administering a system that provides the children of the various school districts of the state a sound basic education. *A clear showing to the contrary* must be made before the courts conclude that they have not. *Only such a clear showing will justify a judicial intrusion* into an area so clearly the province, initially at least, of the legislative and executive branches as the determination of what course of action will lead to a sound basic education.

Id. at 357, 488 S.E.2d at 261 (emphasis added).

¶ 277 Thus, this Court in *Leandro* explicitly stated that: (1) there are multiple methods of ensuring children's opportunity to receive a sound basic education; (2) the legislature's efforts to do so are entitled to great deference; (3) any reliance on a correlation between educational spending and education quality is suspect at best;

and (4) a clear showing that children's opportunity to receive a sound basic education has been violated must be made before a court takes any action.

B. *Hoke County*

¶ 278 Seven years after deciding *Leandro*, we again addressed children's opportunity to receive a sound basic education in *Hoke County Board of Education v. State*, 358 N.C. 605, 599 S.E.2d 365 (2004) (*Hoke County*). At the conclusion of *Leandro*, this Court had remanded the case to Wake County Superior Court to decide the following claims:

> (1) [W]hether the State ha[d] failed to meet its constitutional obligation to provide an opportunity for a sound basic education to plaintiff parties; (2) whether the State has failed to meet its statutory obligation, pursuant to Chapter 115C of the General Statutes, to provide the opportunity for a sound basic education to plaintiff parties; and (3) whether the State's supplemental school funding system is unrelated to legitimate educational objectives and, as a consequence, is arbitrary and capricious, resulting in a denial of equal protection of the laws for plaintiff-intervenors.

Id. at 612, 599 S.E.2d at 374–75. This Court noted the issues were further refined because "[t]he issue of whether the State has failed in its statutory duty to provide Hoke County school children with a sound basic education has been subsumed . . . by the constitutional question[,]" and the supplemental funding issue was not ripe. *Id.* In so stating, we recognized that education policy as set forth in the relevant statutes was consistent with the constitution.

¶ 279 Upon remand, "two of the trial court's initial decisions limited the scope of the case[.]" *Id*. at 613, 599 S.E.2d at 375. First, the trial court, with the consent of the parties, bifurcated the case into two separate actions—one addressing the claims of the plaintiffs from rural school districts and one addressing the claims of the plaintiff-intervenors from larger urban districts. *Id*. Because of this bifurcation, and because plaintiff-intervenors' trial had not yet been held, "our consideration of the case [wa]s properly limited to those issues raised in the rural districts' trial." *Id*. Second, "the trial court ruled that the evidence presented in the rural districts' trial should be further limited to claims as they pertain to a single district." *Id*. Hoke County was "designated as the representative plaintiff district," and the "evidence in the case w[as] restricted to its effect on Hoke County." *Id*.

¶ 280 Then, to determine the Hoke County claims, the trial court held a trial which "lasted approximately fourteen months and resulted in over fifty boxes of exhibits and transcripts, an eight-volume record on appeal, and a memorandum of decision that exceeds 400 pages." *Id*. at 610, 599 S.E.2d at 373.

¶ 281 This procedural posture had a significant effect on the impact of our holdings in *Hoke County*. As this Court made abundantly clear at the outset, "our consideration of this case is properly limited to the issues relating *solely* to Hoke County as raised at trial." *Id*. (emphasis added). As the case before us today is a continuation of *Hoke County*, and because *Hoke County* constitutes the law of this

case, we are bound by this Court's previous language:

> [B]ecause this Court's examination of the case is premised on evidence as it pertains to Hoke County in particular, *our holding mandates cannot be construed to extend to the other four rural districts named in the complaint*. With regard to the claims of named plaintiffs from the other four rural districts, the case is remanded to the trial court for further proceedings that include, but are not necessarily limited to, *presentation of relevant evidence by the parties, and findings and conclusions of law by the trial court*.

Id. n.5 (emphasis added).

¶ 282 What this means in plain language is that our decision in *Hoke County* concerned *only* Hoke County and that no part of that decision attempted to determine whether any other county was failing to provide students with the opportunity to a sound basic education. Consistent with our holding in *Leandro*, a "judicial intrusion" into any other county's system would require an adversarial hearing complete with the presentation of relevant evidence and findings of fact. The evidence and factual findings would then need to support the conclusion of law that a "clear showing" had been made that the county was denying children the opportunity to a sound basic education. *See Leandro*, 346 N.C. at 357, 488 S.E.2d at 261. Absent any separate trial for another county, the assertion that the trial court's order reviewed in *Hoke County* addressed any county other than Hoke County is plainly wrong and blatantly contradicts the clear language of this Court.

¶ 283 Not only did our decision in *Hoke County* only address the Hoke County claims,

but we also noted that the trial court's order was limited to claims involving "at-risk" students in Hoke County. Accordingly, we stated that:

> As a consequence, while we must limit our review of the trial court's order to its conclusions concerning 'at-risk' students, we cannot and do not offer any opinion as to whether non 'at-risk' students in Hoke County are either obtaining a sound basic education or being afforded their rightful opportunity by the State to obtain such an education.

Hoke County, 358 N.C. at 634, 599 S.E.2d at 388.

¶ 284 After these express limitations, we first examined whether the evidence established "a clear showing" supporting "the trial court's conclusion that the constitutional mandate of *Leandro* has been violated in the Hoke County School System . . . ." *Id.* at 623, 599 S.E.2d at 381 (cleaned up). We next reviewed two categories of evidence presented at trial.

¶ 285 First, we reviewed the trial court's consideration of evidence of "comparative standardized test score data[,] . . . student graduation rates, employment potential, [and] post-secondary education success" for Hoke County and its comparison of that data to data regarding North Carolina students statewide. *Id.* We determined that evidence of this type fell "under the umbrella term of 'outputs,' a term used by educators that, in sum, measures student performance." *Id.* Second, we reviewed the trial court's use of evidence of "deficiencies pertaining to the educational offerings in Hoke County schools" and "deficiencies pertaining to the educational

administration of Hoke County schools." *Id.* We determined that evidence of this type fell "under the umbrella term of 'inputs,' a term used by educators that, in sum, describes what the State and local boards provide to students attending public schools." *Id.*

¶ 286 This Court examined: (1) whether these types of evidence were relevant in determining Hoke County's *Leandro* compliance; and, if so, (2) whether the evidence presented supported the trial court's determination that *Leandro*'s mandate was being violated in Hoke County.

¶ 287 We first determined that the trial court was correct in using various standardized test scores to compare the proficiency of Hoke County students to that of other students in North Carolina. The trial court determined that the comparison "clearly show[ed] Hoke County students are failing to achieve [grade-level] proficiency in numbers far beyond the state average." *Id.* at 625, 599 S.E.2d at 383. Further,

> [i]n analyzing the test score data and the opinions of those who testified about them, the trial court noted that the score statistics showed that throughout the 1990s, Hoke County students in all grades trailed their statewide counterparts for proficiency by a considerable margin. For example, in 1997–98, only 46.9% of Hoke students scored at Level III or above in algebra while the state average was 61.6%. Similar disparities occurred in other high school subjects such as Biology, English, and American History. Other test data reflected commensurate results in lower grades. For example, in grades 3–8, Hoke County students trailed the state average in each grade, with gaps ranging

> from 11.7% to 15.1%.

Id. at 625–26, 599 S.E.2d at 383.

¶ 288 A wide range of tests confirmed that Hoke County students were deficient when compared to statewide averages. The trial court made extensive detailed findings of fact that this deficiency was confirmed by evidence regarding Hoke County graduation rates, dropout rates, employment rates and prospects, and post-secondary education performance. *Id*. at 625–30, 599 S.E.2d at 382–386. We stated that

> [i]n the realm of "outputs" evidence, we hold that the trial court properly concluded that the evidence demonstrates that over the past decade, an inordinate number of Hoke County students have consistently failed to match the academic performance of their statewide public school counterparts and that such failure, measured by their performance while attending Hoke County schools, their dropout rates, their graduation rates, their need for remedial help, their inability to compete in the job markets, and their inability to compete in collegiate ranks, constitute a clear showing that they have failed to obtain a Leandro-comporting education.

Id. at 630, 599 S.E.2d at 386.

¶ 289 We then addressed "inputs," asking whether the evidence supported the trial court's conclusion that the defendants were responsible for the deficiency of Hoke County students in comparison to other students statewide. First, and most relevant to the current appeal, this Court affirmed the trial court's conclusion that the statewide education policy and funding were constitutionally sound.

> In sum, the trial court found that the State's general

> curriculum, teacher certifying standards, funding allocation systems, and education accountability standards met the basic requirements for providing students with an opportunity to receive a sound basic education. As a consequence, the trial court concluded that "the bulk of the core" of the State's "Educational Delivery System ... is sound, valid and meets the constitutional standards enumerated by *Leandro*."

Id. at 632, 599 S.E.2d at 387. Simply stated, we held that the General Assembly's statutory schemes creating and funding our education system complied with our state constitution as interpreted in *Leandro*.

¶ 290 Despite the trial court's conclusion on this issue, it determined that neither the State, nor the Hoke County School System, were "strategically allocating the available resources to see that at-risk children have the equal opportunity to obtain a sound basic education." *Id*. at 635, 599 S.E.2d at 388.[3] We summarized the trial court's remedial action as such:

> Although the trial court explained that it was leaving the "nuts and bolts" of the educational resources assessment in Hoke County to the other branches of government, it ultimately provided general guidelines for a *Leandro*-compliant resource allocation system, including the requirements: (1) that "every classroom be staffed with a competent, well-trained teacher"; (2) "that every school be

[3] The "available resources" are the funds appropriated by the General Assembly in the State Budget. The failure to "strategically allocate[]" these available funds is a failure on the part of the State Board of Education—not the General Assembly. *See* N.C.G.S. § 115C-408(a) ("The [State] Board shall have general supervision and administration of the educational funds provided by the State . . . ."). As the trial court stated, "the funds presently appropriated and otherwise available are not being effectively and strategically *applied* so as to meet the [ ] principles from *Leandro*." (emphasis added).

> led by a well-trained competent principal"; and (3) "that every school be provided, in the most cost effective manner, the resources necessary to support the effective instructional program within that school so that the educational needs of all children, including *at-risk* children, to have the equal opportunity to obtain a sound basic education, can be met." Finally, the trial court ordered the State to keep the court advised of its remedial actions through written reports filed with the trial court every ninety days.

Id. at 636, 599 S.E.2d at 389 (emphasis added).

¶ 291 Notably, the trial court "refused to step in and direct the 'nuts and bolts' of the reassessment effort." *Id*. at 638, 599 S.E.2d at 390. The trial court "deferred to the expertise of the executive and legislative branches" because it "acknowledg[ed] that the state's courts are ill-equipped to conduct, or even to participate directly in, any reassessment effort." *Id*. This Court explicitly approved of such deference in affirming the trial court's order:

> [W]e note that the trial court also demonstrated admirable restraint by refusing to dictate how existing problems should be approached and resolved. Recognizing that education concerns were the shared province of the legislative and executive branches, the trial court instead afforded the two branches an unimpeded chance, "initially at least," to correct constitutional deficiencies *revealed at trial*. In our view, the trial court's approach to the issue was sound and its order reflects both *findings of fact that were supported by the evidence* and *conclusions that were supported by ample and adequate findings of fact*. As a consequence, we affirm those portions of the trial court's order that conclude that there has been a clear showing of the denial of the established right of *Hoke County students* to gain their opportunity for a sound basic education and

> those portions of the order that require the State to *assess* its education-related allocations to the county's schools so as to correct any deficiencies that presently prevent the county from offering its students the opportunity to obtain a *Leandro*-conforming education.

Id. at 638, 599 S.E.2d at 390–91 (emphasis added).

¶ 292 This Court entered two additional holdings. First, we reversed the trial court's decision that it could specifically determine the age for school eligibility. This Court held the issue was nonjusticiable, stating that "[o]ur reading of the constitutional and statutory provisions leads us to conclude that the determination of the proper age for school children has indeed been squarely placed in the hands of the General Assembly." *Id*. at 639, 599 S.E.2d at 391. We noted that an issue is nonjusticiable when either "the Constitution commits an issue, as here, to one branch of government," or "satisfactory and manageable criteria or standards do not exist for judicial determination of the issue." *Id*. (citing *Baker v. Carr*, 369 U.S. 186, 210, 82 S. Ct. 691, 706 (1962)). This Court determined that the issue of the proper age for school children met both tests for nonjusticiability. *Id*. In addition, we affirmed the trial court's decision to consider all available resources, including those provided by the federal government, when evaluating our state's educational system. *Id*. at 645–47, 599 S.E.2d at 395–96.

¶ 293 This Court's clear and deliberate language established several crucial points that should control our determination of the instant case. First and foremost,

education policy and funding are legislative responsibilities, while the executive is tasked with administration of the education system. *Id.* at 643, 599 S.E.2d at 393. Second, our holding in *Hoke County* was based on review of a 400-page, detailed order, which resulted from the trial court receiving evidence over a fourteen-month period on whether at-risk students in Hoke County were receiving the opportunity to a sound basic education. The trial court determined that the educational opportunities provided by Hoke County were deficient when it compared Hoke County to their contemporaries across the state. Finally, our holding in *Hoke County* was expressly limited to Hoke County.

¶ 294 We concluded our opinion by directing the trial court to conduct proceedings, consistent with the strictures above, monitoring Hoke County compliance and holding trials. Executive branch agencies were required to propose methods to reallocate existing resources to address the deficiencies in Hoke County. In addition, the trial court was to hold trials "involving either other rural school districts or [the five] urban school districts, . . . in a fashion that is consistent with the tenets outlined in this opinion." *Id.* at 648, 599 S.E.2d at 397.

¶ 295 Thus, this case as refined by our opinions in *Leandro* and *Hoke County* did not present a statewide claim that the education system in North Carolina was deficient, and there has never been any such holding. To the contrary, the Court approved the use of statewide averages to help determine if students in a particular county were

underperforming.[4]

C. Post-*Hoke County*

¶ 296 Following our decision in *Hoke County*, this matter was remanded to Wake County Superior Court for further proceedings under Judge Howard E. Manning, Jr. Unfortunately, none of the trials required by this Court's decision occurred between July 2004 and October 7, 2016, when Judge Manning had to withdraw. While no trial occurred and no formal order was rendered—unlike the trial that led to *Hoke County*—there were various hearings and reports during this twelve-year period which the majority erroneously claims amounted to a trial and order. A careful reading of the record reveals that there was no trial and the trial court made no findings of fact or conclusions of law amounting to an appealable order. We address the four trial court filings highlighted by the majority.

¶ 297 On September 9, 2004, the trial court entered one of several filings entitled "Notice of Hearing and Order Re: Hearings." In that filing, the Court "noticed"

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[4] In reviewing the trial court's conclusion that at-risk students in Hoke County were denied the opportunity to a sound basic education, this Court explicitly approved of Judge Manning's use of a comparative analysis in which Hoke County was measured against other counties in this state. This use of better-performing counties as measuring sticks was only possible because students in these other counties were receiving a *Leandro* conforming education, and this fact is reflected in Judge Manning's determinations regarding funding adequacy and implementation inadequacy.

No such analysis could conceivably support Judge Lee and the education establishment's assertion that students in all counties in this state are being denied the opportunity to a sound basic education—without at least one *Leandro* compliant county, the measuring stick evaporates. Put another way, the existence of *Leandro* compliant counties for which comparison is possible defeats any suggestion that there is a statewide violation.

hearings to occur on October 7 and 25, 2004, and "ordered" the parties to attend. The trial court recounted some of the history of the case, including excerpts from this Court's then recent *Hoke County* decision. In reviewing certain data, the trial court made the following observation:

> This Court believes that DPI and the State Board of Public Instruction are heading down the right track towards assessing problems, developing common sense solutions and providing LEAS with guidance and assistance in developing cost-effective, targeted solutions that can be measured for success and accountability.
>
> Now that the appeal is over and Leandro II is in full force and effect, it is time for the DPI and State Board to outline and present its plans as to how it will continue to proceed to ensure that the children of North Carolina will be afforded the opportunity to a sound basic education.

¶ 298 On February 9, 2005, certain Mecklenburg County parents and students (Penn Intervenors), represented by current Justice Anita Earls, filed a complaint seeking to intervene and raising education and race-based claims. On August 19, 2005, the trial court allowed intervention solely for the education claim and denied participation concerning any race-based claims.

¶ 299 Thereafter, on September 30, 2005, Justice Earls filed an amended complaint on behalf of the Penn Intervenors, which further developed the education claim

allowed by the trial court and sought to add additional plaintiffs.[5] On May 4, 2006, all of the original intervening parties, except the Charlotte-Mecklenburg Board of Education, voluntarily dismissed their claims.

¶ 300 The next trial court filing referenced by the majority was again entitled "Notice of Hearing Order Re: Hearing." The "order" again simply ordered the parties to appear at the noticed hearing. The trial court noted that the hearing was "non-adversarial" and explained its purpose was to provide executive branch defendants the "opportunity to report to the court concerning the actions that the Executive Branch will take with regard to the Halifax County Public School system." The trial court made the following observations concerning Halifax County Schools:

> The bottom line is that Halifax County Public School children are suffering from a breakdown in system leadership, school leadership and a breakdown in classroom instruction by and large from elementary school through high school.
>
> . . .
>
> Financial data furnished by DPI shows that the cost to the taxpayers to provide school level expenditures, the majority of which are salaries and benefits, has exceeded $75,000,000.00 for the past three years.
>
> . . .
>
> With all of this expense being paid to the adults whose responsibility it is to provide an equal opportunity to obtain

[5] That claim remains part of this case, and Justice Earls' former clients participated in this appeal.

> a sound basic education to each and every child in the Halifax County Public School system, there seems to be little trickle down benefit to the children entrusted to the adults in these schools.
>
> . . .
>
> [I]t is time for the State to exert itself and exercise command and control over the Halifax County Public Schools beginning in the school year 2009-2010, nothing more and nothing less.
>
> . . .
>
> [T]he Court is providing the Executive Branch the opportunity, initially at least, to exercise its constitutional authority over the Halifax County School system to remedy the academic disaster which is occurring there[.]
>
> . . .
>
> The Court will entertain no excuses or whining by the adults in the educational establishment in Halifax County about how it's the children's fault, not theirs, for failing to provide the academic environment where children can obtain a sound basic education. If these children had Leandro compliant school leadership and teachers, they could learn and obtain a sound basic education rather than fail and drop out of school doomed to a lifetime of poverty and its multiple damages.

¶ 301 Subsequently, on May 5, 2014, the trial court entered a filing entitled "Report from the Court Re: The Reading Problem." In it, the trial court observed that the goal of N.C.G.S. § 115C-83.1 et. seq. was "on all fours with the Leandro I definition of a sound basic education." After citing with approval the legislative enhancements to education, the trial court placed the blame for students' reading shortfalls squarely

on principals and teachers.

> The bottom line is that the principals that sit in the office, fail to analyze the assessment data a[t] their fingertips and do not become proactive in seeing the K-3 assessment system is being properly and effectively used by all teachers to drive individualized instruction in literacy, are not performing at a level that is expected to provide their students and faculty with the leadership needed to be successful and have all children obtain a sound basic education and proficiency in reading. This principal is not a Leandro compliant principal.

Similarly, teachers who fail to utilize the assessment tools properly "are not Leandro compliant."

¶ 302 The trial court issued this summary observation directed to school principals and teachers:

> Bottom line requirement: Do the formative assessment and use the information to meet the needs of the individual child. Do not put the data in the folder and continue on with the instruction for the entire class on one level. (What about this do you not understand?)

¶ 303 The final trial court filing relied on by the majority was another "Notice of Hearing and Order Re: Hearing" dated March 17, 2015. In that filing, the trial court expressed concern that the State Board of Education and the Department of Public Instruction were diminishing educational standards.

> Regardless of whatever excuse or reason reducing or eliminating academic standards and assessments may be based on, including education leaders and parent pressure, politics or an unconditional desire to reduce children's equal opportunities to obtain a sound basic education, the

> reduction of academic standards and elimination of assessments and EOC and EOG tests would be a direct violation of the Leandro mandate regarding assessments and testing to determine whether each child is obtaining a sound basic education.
>
> The bottom line is that in 2014, the SBE and DPI through their actions in redefining achievement levels, has begun to nibble away at accountability and academic standards[.]

¶ 304 Judge Manning further noted:

> As a result of today's heightened awareness and available data relating to individual school and student academic achievement in each classroom, the natural reaction by the affected adults who are in education, is to seek a way to eliminate the source of the data that holds them accountable. The only way out from under the microscope of accountability is to eliminate the assessments and the tests themselves.
>
> Helping non[-]Leandro compliant teachers and principals escape from public scrutiny and accountability by eliminating is invalid, simply wrong and in violation of the children's rights[.]
>
> Teaching to the test is a "red herring' phrase to draw attention away from the real problem – a failure of basic classroom instruction.

¶ 305 Judge Manning's filings reflect his summary of the proceedings in the trial court. Notably, in a memorandum he provided the trial court judge who succeeded him, Judge Manning stated:

> Our children that cannot read by the third grade are by and large doomed not to succeed by the time they get to high school. As shown by the record in this case, that is a failure of classroom instruction.

. . .

> Reduced to essentials, in my opinion the children are not being provided the opportunity because after all the millions spent, 90% of school costs are for adult salaries and benefits, and the data show as it did years ago and up to now the educational establishment has not produced results.

¶ 306 Judge Manning, who presided over this case for almost 20 years, reiterated time and time again that the problem is not education policy or funding. The problem is a failure of the educational establishment and classroom instruction, i.e., implementation and delivery.

¶ 307 During the twelve years between this Court's decision in *Hoke County* and the case's reassignment to Judge Lee, the record reveals that Judge Manning entered sixteen Notices of Hearings and Orders re: Hearings, four Court Memos Confirming Hearing Date and Time, one Memorandum of Decision and Order Re: Pre-Kindergarten Services for At-Risk Four Year Olds,[6] and one Report from the Court Re: The Reading Problems. The record demonstrates that, contrary to this Court's express direction, no trials were conducted for any other school districts or counties, and the parties have failed to point this Court to anything in the record indicating that any such trials ever occurred. Moreover, at oral argument in this case, the

[6] This amounted to the only actual court order, and it was vacated on appeal as discussed herein. *See Hoke Cnty. Bd. of Educ. v. State*, 367 N.C. 156, 749 S.E.2d 451 (2013).

parties were unable to direct this Court to any order finding a statewide violation. *See* Oral Argument at 36:20, *Hoke Cnty. Bd. of Educ. v. State of North Carolina*, No. 425A21-2, https://www.youtube.com/watch?v=NOuFCf2rYdY.

¶ 308 Significant to a proper analysis by this Court of the current appeal, on August 15, 2011, the General Assembly sought to intervene in this action. Prior to 2011, the General Assembly, the Governor, and other executive branch entities involved in formulating education policy were all of the same political party. However, as a result of the 2010 midterm elections, the majority in the State House and Senate changed parties.

¶ 309 The Attorney General notified the legislature that it would no longer represent the General Assembly's interests in the case. The Attorney General noted a conflict of interest between the General Assembly and the remaining State defendants, and that neither the Governor nor the Department of Public Instruction would waive the conflict. Thereafter, the General Assembly moved to intervene.

¶ 310 In denying the General Assembly's motion to intervene, the trial court acknowledged that the "obligation[ ] to establish and maintain public schools is the 'shared province of the executive and legislative branches,' " but specifically declined to "put[ ] itself, or the judiciary, in the middle of this political dispute." The trial court denied the motion to intervene, in part because it recognized that the case concerned implementation of policy, and, therefore, focused on executive branch defendants.

Thus, the legislative defendants were denied an opportunity to participate in this litigation.

¶ 311 This case again reached this Court in 2013. *See Hoke Cnty. Bd. of Educ. v. State*, 367 N.C. 156, 749 S.E.2d 451 (2013). There, we vacated an actual order entered by the trial court finding unconstitutional certain limitations on access to early childhood education. *Id.* at 159–60, 749 S.E.2d at 454–55. Because the General Assembly had revised the contested statute, we held the case should be dismissed as moot with the orders of the Court of Appeals and the trial court vacated. *Id.* at 160, 749 S.E.2d at 455.

¶ 312 Of note, Justice Earls filed an amicus brief in this matter on behalf of an organization she had founded, the Southern Coalition for Social Justice. Justice Earls argued that the trial court had the constitutional authority to order remedial relief by the legislative branch, just as the majority holds today. *See* New Brief of *Amici Curiae*, at 11, *Hoke Cnty. Bd. of Educ. v. State*, 367 N.C. 156 (2013) (No. 5PA12-2). In the brief, she contended that when "the other branches refuse to fulfill [constitutional] obligations, our state courts are not only empowered, but are obligated, to act to ensure the constitutional rights of North Carolinians are not compromised." Interestingly, she made various arguments in the brief similar to those now adopted by the majority, citing many of the same cases and using some of the same quotes. *Compare* New Brief of *Amici Curiae*, at 11–13*, Hoke Cnty.*, 367 N.C.

156 (No. 5PA12-2) *and supra* ¶¶ 162–71.[7]

¶ 313 At the time of Judge Manning's medical retirement, the remaining plaintiffs in this matter were the original five rural counties, the Charlotte-Mecklenburg Board of Education, and certain students from Mecklenburg County (the Penn Intervenors). The state defendants were executive branch defendants who were represented by the Attorney General. The General Assembly was not represented and was not a participant in the action due to the prior denial of its motion to intervene.

¶ 314 After being appointed, Judge David Lee took the litigation in a far different direction, appointing a third-party consultant to make education policy and funding decisions. This was done despite this Court's explicit holding in *Hoke County* that the state's education policy and its funding met constitutional standards. *See Hoke County*, 358 N.C. at 387, 599 S.E.2d at 632. The trial court did not limit its directives to the specific plaintiffs or their specific claims; rather, the trial court greatly expanded the scope of this litigation while knowing that the branch designated by the constitution to make education policy and funding decisions was not a party to the proceedings.

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[7] Justice Earls also signed an amicus brief in this case in December 2004 while representing the UNC School of Law Center for Civil Rights. *See* Memorandum of Law as *Amici Curiae*, at 15, *Hoke Cnty. Bd. of Educ. v. State*, No. 95-CVS-1158 (N.C. Wake County Sup. Ct. Dec 3, 2004). There, her brief criticized executive branch defendants for not seeking significantly more money from the General Assembly and urging immediate court action. Subsequently, the Center for Civil Rights moved to participate as if it represented a party and also began to represent new plaintiffs seeking to intervene in this action.

¶ 315 The following occurred after Judge Lee was assigned to preside over this case on October 7, 2016:

(1) July 24, 2017: The State Board of Education filed a Motion for Relief from Judge Manning's 2002 Judgment, based on its assertion that "the factual and legal landscapes have significantly changed," and that "the original claims, as well as the resultant trial court findings and conclusions, are divorced from the current laws and circumstances."

(2) February 1, 2018: Judge Lee entered a Case Management and Scheduling Order noting that "the Plaintiff parties [including Penn-Intervenors] and the State have jointly nominated, for the Court's consideration and appointment, an independent, non-party consultant to develop detailed, comprehensive, written recommendations for specific actions necessary to achieve sustained compliance with constitutional mandates articulated in this case."

(3) March 13, 2018: Judge Lee denied the State Board of Education's Motion for Relief from Judgment.

(4) March 13, 2018: Judge Lee entered a consent order appointing WestEd as an "independent, non-party consultant" to assist with the case.

(5) December 2019: WestEd submits its plan for North Carolina.

(6) January 21, 2020: The parties, including the State Board of Education, enter a consent order that "[b]ased upon WestEd's findings, research, and recommendations and the evidence of record in this case, the Court and parties conclude that a definite plan of action for the provision of the constitutional *Leandro* rights must ensure a system of education," that, at a minimum, included seven components described in the order. The order required the parties to submit a status report on the "specific actions that State Defendants must implement in 2020 to begin to address the issues identified by WestEd."

(7) June 15, 2020: Parties submitted a Joint Report to the Court on remedial steps the State planned to take in the next year.

(8) September 1, 2020: Judge Lee entered a consent order, noting that the parties agreed that the steps outlined in the June 15, 2020 Joint Report "are the necessary and appropriate actions needed in Fiscal Year 2021 to begin to adequately address the constitutional violations in providing the opportunity for a sound basic education to all children in North Carolina." The Court ordered defendants to implement the remedial actions in the Joint Plan by June 30, 2021, and required the parties to develop a Comprehensive Remedial Plan (CRP) by December 31, 2020.

(9) March 15, 2021: State defendants submitted a Comprehensive Remedial Plan to the Court.

(10) June 11, 2021: Judge Lee entered an order providing that the "actions, programs, policies, and resources propounded by and agreed to [by] the State Defendants, and described in the Comprehensive Remedial Plan are necessary to remedy the continuing constitutional violations and to provide the opportunity for a sound basic education . . . ." Judge Lee ordered that the "Comprehensive Remedial Plan shall be implemented in full" and set forth deadlines for doing so.

(11) August 6, 2021: The State filed its first progress report on the status of implementing the Comprehensive Remedial Plan.

(12) September 8, 2021: Judge Lee held a hearing on the status of implementing the Comprehensive Remedial Plan.

(13) September 22, 2021: Judge Lee entered an order on the First Progress report filed by the State. He noted that the parties had not yet secured full funding for the first two years of the Comprehensive Remedial Plan but noted that the State "has available fiscal resources needed to implement Years 2 and 3 of the" Plan. Judge Lee ordered that another hearing be held on October 18, 2021 "to inform the Court of the State's progress in securing the full funds necessary to implement the" CRP. Judge Lee noted that "in the event full funds necessary to implement the CRP are not secured by that date, the Court will hear and consider any proposals for how the Court may use its remedial powers to secure funding."

(14) October 18, 2021: Judge Lee entered an order finding that the CRP had not, as of that date, been fully funded by "an appropriations bill." Judge

Lee gave the parties until November 8, 2021, to submit memoranda of law what on remedial steps the court could take.

(15) November 10, 2021: Judge Lee entered the order requiring relevant State actors to transfer over a billion dollars from the General Fund to appropriate State agencies to fund years 2 and 3 of the CRP. Judge Lee stayed the order for 30 days.

(16) November 18, 2021: The General Assembly passed the Budget Act of 2021. The budget appropriated $10.6 billion in FY 2021-2022 and $10.9 billion in FY 2022-2023 for K-12 education. These figures do not include over $3.6 billion dollars in federal coronavirus funding for North Carolina school districts. The budget was signed by the Governor.

(17) November 30, 2021: Judge Lee entered an order noticing a hearing for December 13, 2021, for the State "to inform the Court of the specific components of the Comprehensive Remedial Plan for years 2 & 3 that are funded by the Appropriations Act and those that are not." Judge Lee also ordered that his November 10, 2021 transfer order be stayed for ten days after the December 13, 2021 hearing.

(18) December 7, 2021: The State appealed from the November 10, 2021 order.

(19) December 8, 2021: The intervening legislative defendants filed a notice of appeal from the November 10, 2021 order.

¶ 316 As is evident from the timeline above, after the case was reassigned to Judge Lee, no trials or adversarial hearings took place to determine whether a statewide violation of *Leandro* existed. The State Board of Education raised this exact issue before the trial court as part of its Motion for Relief filed July 10, 2017. The State Board of Education requested that the trial court "relinquish [remedial] jurisdiction," in part because "[f]or over a decade, the Superior Court has retained and exercised jurisdiction in this case, [but] this Superior Court has not [ ] held a trial as to any

other plaintiff school board." Further, the State Board of Education noted the current direction of the case far

> "exceed[ed] the jurisdiction established by the original pleadings in this action." The State Board of Education recognized numerous statutory and administrative changes since the Hoke County decision. It stated that "[t]he cumulative effect of these changes is that the State's current educational system is so far removed from the factual landscape giving rise to the complaint, trial, and 2002 Judgment that the superior court is now retaining jurisdiction over a 'future school system' which was not the subject of the original action."

¶ 317 On March 13, 2018, eight months after the State Board filed its motion, Judge Lee denied the motion without addressing these crucial issues. In a footnote to the order, Judge Lee indicated that all of the parties were now working together; the proceedings were now taking on a radically different character. The record reflects that the parties entered into three consent orders, with the first occurring on March 13, 2018.[8] In this first consent order, the trial court, upon the parties' request, appointed a San Francisco-based consulting company, WestEd, to serve as an "independent non-party consultant." According to a Case Management and Scheduling Order dated February 1, 2018, WestEd's role was to recommend "specific actions" that the state should take:

[8] Notably, as discussed further below, the legislature was not a party to the case at this point because its motion to intervene was denied in 2011. Therefore, both its interests and, commensurately, the interests of the taxpayers, voters, and people of this State, were not represented.

> a. To provide a competent, well-trained teacher in every classroom in every public school in North Carolina;
>
> b. To provide a well-trained, competent principal for every public school in North Carolina; and
>
> c. To identify the resources necessary to ensure that all children in public school, including those at risk, have an *equal* opportunity to obtain a sound basic education, as defined in *Leandro I*.[9] (emphasis added).

¶ 318 In December 2019, WestEd released its "Action Plan for North Carolina."[10] This report became the basis for two further consent orders between the parties—a Consent Order Regarding Need for Remedial, Systemic Actions for the Achievement of *Leandro* compliance, filed January 21, 2020, and a Consent Order on Leandro Remedial Action for Fiscal Year 2021, filed September 11, 2020.

¶ 319 In addition, WestEd's report formed the basis for the "Comprehensive Remedial Plan." The CRP resulted from the trial court's order for "State Defendants, in consultation with Plaintiffs to develop and present a Comprehensive Remedial

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[9] It is notable that the trial court misconstrued our holding in *Leandro*. As discussed above, this Court expressly rejected the contention that our constitution requires all students to have "an *equal* opportunity to obtain a sound basic education." *See Leandro*, 346 N.C. at 350, 488 S.E.2d at 256–57 (emphasis added) ("A constitutional requirement to provide substantial equality of educational opportunities . . . would almost certainly ensure that no matter how much money was spent on the schools of the state, at any given time some of those districts would be out of compliance.").

[10] On the first page of its report, WestEd wrongly asserted that this Court's decision in *Leandro* "affirmed that the state has a constitutional responsibility to provide every student with an *equal opportunity* for a sound basic education and that the state was failing to meet that responsibility." (Emphasis added.) This is simply wrong. This Court has never affirmed a *Leandro* violation outside of Hoke County, let alone a violation occurring on a statewide basis.

Plan to be fully implemented by the end of 2028 . . . ." There is no doubt that the CRP was crafted by the parties, as "State Defendants ha[d] regularly consulted with the plaintiff-parties in the development of the Comprehensive Remedial Plan." The CRP contains hundreds of action steps for the state to complete over the course of eight years, which would require billions of dollars in taxpayer money to fund. On June 7, 2021, the trial court entered its Order on Comprehensive Remedial Plan and directed that "the Comprehensive Remedial Plan shall be implemented in full and in accordance with the timelines set forth therein . . . ."

¶ 320 The CRP includes definitions of "responsible parties" who must implement the plan's "action steps." While our state constitution provides that the General Assembly has exclusive authority to allocate taxpayer money, the General Assembly is consistently identified by WestEd as a responsible party for each of these action steps. However, the General Assembly was never joined as a necessary party by the trial court, nor was it consulted during the development of the CRP. As previously noted, the legislature had moved to intervene in this case in 2011, but the trial court denied its motion to intervene.

¶ 321 Following the trial court's June 7 2021 order directing that the CRP be implemented in full, the trial court entered an order on November 10, 2021, in which it ordered that:

> The Office of State Budget and Management and the current State Budget Director ("OSBM"), the Office of the

> State Controller and the current State Comptroller ("Controller"), and the Office of the State Treasurer and the current State Treasurer ("Treasurer") shall take the necessary actions to transfer the total amount of funds necessary to effectuate years 2 & 3 of the Comprehensive Remedial Plan, from the unappropriated balance within the General Fund to the state agents and state actors with fiscal responsibility for implementing the Comprehensive Remedial Plan as follows:
>
> (a) Department of Health and Human Services ("DHHS"): $189,800,000.00
>
> (b) Department of Public Instruction ("DPI"): $1,522,053,000.00
>
> (c) University of North Carolina System: $41,300,000.00

¶ 322 In addition to ordering the transfer of more than $1.7 billion in state funds, the trial court also ordered that "OSBM, the Controller, and the Treasurer, are directed to treat the foregoing funds as an appropriation from the General Fund . . . ."

¶ 323 The day before Judge Lee entered the November 10 order, Judge Manning sent a memorandum to the General Assembly, the Governor, and the Superintendent of Public Instruction. Judge Lee was copied on the memorandum, which stated:

> At the present time there is a media-induced frenzy about the Leandro judge proposing to enter an order requiring the General Assembly to appropriate over $1 billion for the educational establishment. As the press is licking its lips for 15 minutes on the 6:00 news, I will refer all to the following decisions from our Supreme Court and other decisions relating specifically to the power of the Judicial Branch.
>
> You might enjoy reading Able Outdoor, Inc. v. Harrelson 341 N.C. 167 (1995) by Justice Webb (a Democrat) as

follows:

We hold, however, that the Court of Appeals erred in affirming Judge Cashwell's orders allowing execution against the State. In Smith v. State, 289 NC 303 (1976), we held that . . . if a plaintiff is successful in establishing his claim, he cannot obtain execution to enforce the judgment. We said '[t]he judiciary will have performed its function to the ***limit*** *of its constitutional powers. Satisfaction will depend upon the manner in which the General Assembly discharges its constitutional duties.' Pursuant to Smith, we do* ***not believe*** *the Judicial Branch of our State government has the power to enforce an execution against the Executive Branch.*

You should also read the following decisions attached to this memorandum, which also declare the limits of the Court's power to execute or require the Legislative and Executive branches of government to appropriate money.

Finally, Leandro requires that the children, not the educational establishment, have the Constitutional right to the equal opportunity to obtain a sound, basic education. This has not and is not happening now as the little children are not being taught to read and write because of a failure in classroom instruction as required by Leandro. 358 NC 624, 625, 626 ("First, that every classroom be staffed with a competent, certified, well-trained teacher who is teaching the standard course of study by implementing effective educational methods that provide differentiated individualized instruction, assessment and remediation to the students in that classroom.").

This is not happening now.

Our children that cannot read by the third grade are by and large doomed not to succeed by the time they get to high school. As shown by the record in this case, that is a failure of classroom instruction. This conclusion is supported further by the Report from the Court: The Reading Problem (2014) as well as annual statewide academic

> performance data, including ACT statewide results for 2020–21 and several years before.
>
> Reduced to essentials, in my opinion the children are not being provided the opportunity because after all the millions spent, 90% of school costs are for adult salaries and benefits, and the data shows as it did years ago and up to now the educational establishment has not produced results.

'A Failure of Classroom Instruction.' Read Retired Judge's Memo on NC School Funding, The News & Observer (Nov. 10, 2021, 6:36 PM), https://www.newsobserver.com/news/local/education/article255713686.html. [11]

¶ 324 Eight days after the trial court entered the November 10 order, the General Assembly passed, and the Governor signed, the Current Operations and Appropriations Act of 2021, 2021 N.C. Sess. L. 180 (State Budget).

¶ 325 The State appealed to the Court of Appeals.[12] It was at this point that Legislative Intervenors intervened as of right pursuant to N.C.G.S. § 1-72.2(b) and

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[11] History and common sense tell us that increased funding alone is not a silver bullet. By way of example, a young baseball player can have the best bat, glove, batting gloves, cleats, and helmet money can buy. Mom and dad can fork out a fortune for top-notch hitting and pitching coaches, showcase teams, and field time. But, if these coaches prioritize teaching the young player to cook or play a musical instrument, you will see little improvement in the sport of baseball.

The same is true with educating children. Schools can have the best teachers along with state-of-the-art programs, equipment, and materials, but educational outcomes will not improve if use of available resources does not prioritize reading, writing, and arithmetic.

[12] This appeal is curious, as the November 10 order attempted to fund a plan that the State defendants crafted. Counsel for the State could not provide an answer when asked why the State had appealed and stated "I don't think the State disagreed with the adoption of that plan."

also filed a Notice of Appeal.[13]

¶ 326 The State Controller, who was not a party to this action, also petitioned the Court of Appeals for a writ of prohibition, temporary stay, and writ of supersedeas, arguing that the trial court lacked jurisdiction over the Controller and that the November 10 order violated our state constitution. On November 30, 2021, the Court of Appeals issued a writ of prohibition restraining the trial court from enforcing the transfer provisions of its November 10 order and stated that "[u]nder our Constitutional system, that trial court lacks the power to impose that judicial order."

¶ 327 Following the Court of Appeals' issuance of the writ of prohibition, multiple parties, including the State, filed petitions and notices of appeal in this Court, seeking review of the decision of the Court of Appeals and bypass review of issues arising from the November 10 order. On March 21, 2022, this Court allowed defendant State of North Carolina's and plaintiffs' petitions for bypass review (425A21-2) but held in abeyance the direct appeal of review of the writ of prohibition (425A21-1). However, this matter was first remanded to Wake County Superior Court "for the purpose of allowing the trial court to determine what effect, if any, the enactment of the State Budget has upon the nature and extent of the relief that the trial court granted . . . ." Judge Michael Robinson was assigned the task of overseeing the proceedings on

[13] It is notable that not only could the legislative defendants not intervene as of right prior to the passage of the State Budget, but their prior motion to intervene was denied in 2011.

remand.[14]

¶ 328 On remand, Judge Robinson concluded "that the 10 November order should be amended to remove a directive that State officers or employees transfer funds from the State Treasury to fully fund the CRP" but also concluded that "the State of North Carolina has failed to comply with the trial court's prior order to fully fund years 2 and 3 of the CRP." In addition, Judge Robinson concluded that because the State Budget in fact funded portions of CRP programs:

> The Order should be further amended to determine specifically that the additional amounts that are due to DHHS, DPI, and the UNC System for undertaking the programs called for in years 2 and 3 of the CRP should be modified and amended as follows:
>
> a. The amount to be provided to DHHS should be reduced from $189,800,000 to $142,900,000
>
> b. The amount to be provided to DPI should be reduced from $1,522,053,000 to [$]608,006,248
>
> c. The amount to be provided to the UNC System should be reduced from $41,300,000 to $34,200,000.

¶ 329 With a proper understanding of the history and current posture of this case, our analysis is set forth below.

II. Analysis

A. Collusion

[14] The matter was assigned to Judge Robinson because Judge Lee "had reached the mandatory retirement age for judges in January." *David Lee, Judge who Oversaw School Funding Case, Dies at 72*, North State Journal, Oct. 12, 2022, at A5.

¶ 330 The courts of this state "have no jurisdiction to determine matters purely speculative, enter anticipatory judgments, declare social status, [or] deal with theoretical problems . . . ." *Little v. Wachovia Bank & Trust Co.*, 252 N.C. 229, 243, 113 S.E.2d 689, 700 (1960), *overruled on other grounds by Citizens Nat'l Bank v. Grandfather Home for Children, Inc.*, 280 N.C. 354, 185 S.E.2d 836 (1972). When an issue has not been "drawn into focus by [court] proceedings," any decision of our courts would "be to render an unnecessary advisory opinion." *Wise v. Harrington Grove Cmty. Ass'n, Inc.*, 357 N.C. 396, 408, 584 S.E.2d 731, 740 (2003) (citing *City of Greensboro v. Wall*, 247 N.C. 516, 519, 101 S.E.2d 413, 416 (1958)). "It is no part of the function of the courts, in the exercise of the judicial power vested in them by the Constitution, to give advisory opinions . . . ." *Poore v. Poore*, 201 N.C. 791, 792, 161 S.E. 532, 533 (1931).

¶ 331 Because "*[c]lear and sound judicial decisions*" can only be reached when adverse parties and their legal theories "*are tested by fire in the crucible of actual controversy*," suits lacking adversity are properly barred from our courts. *State ex rel. Edmisten v. Tucker*, 312 N.C. 326, 345, 323 S.E.2d 294, 307 (1984) (emphasis in original) (quoting *City of Greensboro v. Wall*, 247 N.C. at 520, 101 S.E.2d at 416). "So-called friendly suits, where, regardless of form, all parties seek the same result, are quicksands of the law." *City of Greensboro v. Wall*, 247 N.C. at 520, 101 S.E.2d at 416.

¶ 332 Our State's long-standing judicial policy to decline consideration of issues not drawn into focus by adversarial court proceedings is in harmony with the approach of the Supreme Court of the United States. "[F]ederal courts will not entertain friendly suits, or those which are feigned or collusive in nature." *Flast v. Cohen*, 392 U.S. 83, 100, 88 S. Ct. 1942, 1953 (1968) (cleaned up). As stated by the Supreme Court in 1850 when voiding a judgment of the Circuit Court of the United States for the District of Maine:

> The court is satisfied, upon examining the record in this case . . . that there is no real dispute between the plaintiff and defendant. On the contrary, it is evident that their interest in question brought here for decision is one and the same, and not adverse; and that in these proceedings the plaintiff and defendant are attempting to procure the opinion of this court upon a question of law, in the decision of which they have a common interest opposed to that of other persons, who are not parties to this suit, who had no knowledge of it while it was pending in the Circuit Court, and no opportunity of being heard there in defence of their rights. And their conduct is the more objectionable, because they have brought up the question upon a statement of facts agreed on between themselves, without the knowledge of the parties with whom they were in truth in dispute, and upon a judgment pro forma entered by their mutual consent, without any actual judicial decision by the court.

Lord v. Veazie, 49 U.S. 251, 254 (1850).

¶ 333 As stated by Justice Brewer for the Supreme Court in 1892:

> Whenever, in pursuance of an honest and actual antagonistic assertion of rights by one individual against another, there is presented a question involving the

> validity of any act of any legislature, state or federal, and the decision necessarily rests on the competency of the legislature to so enact, the court must, in the exercise of its solemn duties, determine whether the act be constitutional or not; but such an exercise of power is the ultimate and supreme function of courts. It is legitimate only in the last resort, and as a necessity in the determination of real, earnest, and vital controversy between individuals. It never was the thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act.

Chicago & G.T. Ry. Co. v. Wellman, 143 U.S. 339, 345, 12 S. Ct. 400, 402 (1892).

¶ 334 As stated by the Supreme Court per curiam in 1943:

> Such a suit is collusive because it is not in any real sense adversary. It does not assume the honest and actual antagonistic assertion of rights to be adjudicated—a safeguard essential to the integrity of the judicial process, and one which we have held to be indispensable to adjudication of constitutional questions by this Court. Whenever in the course of litigation such a defect in the proceedings is brought to the court's attention, it may set aside any adjudication thus procured and dismiss the cause without entering judgment on the merits. It is the court's duty to do so where, as here, the public interest has been placed at hazard by the amenities of parties to a suit conducted under the domination of only one of them.

U.S. v. Johnson, 319 U.S. 302, 305, 63 S. Ct. 1075, 1076–77 (1943) (cleaned up).

¶ 335 Here, the trial court disregarded both this Court's precedent and the long-standing guidance of the Supreme Court of the United States by judicially sanctioning a collusive suit between friendly parties. While this case originally "was filed as a declaratory judgment action pursuant to section 1-253 of the General

Statutes," *Hoke County*, 358 N.C. at 617, 599 S.E.2d at 378, the Uniform Declaratory Judgment Act nevertheless "preserves inviolate the ancient and sound juridic concept that the inherent function of judicial tribunals is to adjudicate genuine controversies between antagonistic litigants . . . ." *Lide v. Mears*, 231 N.C. 111, 118, 56 S.E.2d 404, 409 (1949). Further, "an action for a declaratory judgment will lie only in a case in which there is an actual or real existing controversy *between parties having adverse interests in the matter in dispute*." *Id.* (emphasis added).

¶ 336 An examination of the record in this case leaves no doubt that although the parties' interests may have once been adverse, any such adversity dissipated years ago. As early as February 1, 2018, the trial court's Case Management and Scheduling Order noted that "[t]he Plaintiff Parties and the State have jointly nominated . . . an independent, non-party consultant," i.e., WestEd, "to develop detailed, comprehensive, written recommendations for specific actions" to remedy the purported statewide violations of *Leandro*.

¶ 337 This Case Management and Scheduling Order was followed by multiple consent orders, including a Consent Order Regarding Need for Remedial, Systematic Actions For the Achievement of *Leandro* Compliance. In this consent order, the trial court stated "the parties to this case . . . are in agreement that the time has come" to proceed with WestEd's recommendations. This consent order also reveals that, despite executive branch defendants' alignment with plaintiff-parties, the trial court

was only "hopeful that the parties, with the help of the Governor, can obtain the support necessary from the General Assembly."

¶ 338 This was all done to the exclusion of the one entity that controlled what the parties wanted to accomplish—the General Assembly. Put another way, executive branch bureaucrats and government actors, sanctioned by the court, agreed to a process that called for the expenditure of taxpayer money without consultation from the branch of government to which that duty is constitutionally committed. The trial court's denial of the General Assembly's motion to intervene in 2011, and the majority's dismissal of legislative defendants' arguments today, raise the grave specter of executive and judicial collusion designed to subvert our constitutional framework and, by extension, the will of the people. It is only when "the judiciary remains truly distinct from both the legislature and the Executive" that liberty is safeguarded. *The Federalist* No. 78 (Alexander Hamilton).[15]

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[15] It appears that the majority attempts to support its plundering of legislative authority by arguing that our Founding Fathers contemplated an ephemeral separation of powers. Such an interpretation is not just revisionist history; it is plainly wrong. We could spend much time discussing the majority's misuse of selections from the Federalist Papers to justify judicial intrusion into the legislative arena. Discussion here, however, is intentionally limited.

The Founding Fathers understood that "maintaining in practice the necessary partition of power among the several departments" was the primary protection against tyranny. *The Federalist* No. 51 (James Madison). To more clearly understand the founders' view of separation of powers, however, one must also appreciate the concern expressed by anti-federalist writers, to which the federalists responded, over the blending of functions in the Constitution. *See* The Dissent of the Minority of the Convention of Pennsylvania, The Essential Anti-Federalist, Allen and Lloyed (2002) at 43. For example, the United States Constitution explicitly provides for the Senate's involvement in executive appointments and

¶ 339 Here, counsel for executive branch defendants admitted at oral argument that the General Assembly had no "insight" into the crafting of the remedy because "the General Assembly was not a party." Oral Argument at 58:24, *Hoke Cnty. Bd. of Educ. v. State of North Carolina*, No. 425A21-2, https://www.youtube.com/watch?v=NOuFCf2rYdY. Further, counsel readily admitted that executive branch defendants "certainly wanted plaintiffs to be involved in th[e] process" of crafting the remedy because executive branch defendants "wanted to have *dominion*[16] over the issue . . . and so getting sign-off from plaintiffs ensured that the trial court would adopt this program." Oral Argument at 59:15, *Hoke Cnty. Bd. of Educ. v. State of North Carolina*, No. 425A21-2, https://www.youtube.com/watch?v=NOuFCf2rYdY. (emphasis added).

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treaties, and its role in the trial of impeachments. Any encroachment upon the power of another branch was *expressly granted by the Constitution*, and, as Hamilton stated in *The Federalist* Nos. 65 and 66, involved not separation of powers concerns, but essential checks on power. *See* George W. Carey & James McClellan, *Reader's Guide to The Federalist*, The Federalist, at lxxvii (George W. Carey & James McClellan, eds., Gideon ed. 2001).

Commandeering the appropriations clause through the judiciary's supposed "inherent authority" is a usurpation of a constitutionally committed function, not an essential check on power expressly granted by the constitution. As Madison stated in *The Federalist* No. 51, "[i]n framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to controul the governed; and in the next place, oblige it to controul itself." There can be no rational argument that our Founding Fathers, the Constitution of the United States, or the Constitution of the State of North Carolina contemplated meaningless barriers which permit the aggrandizement of judicial power as accomplished by this Court's lack of restraint and control. After all, "the judiciary is beyond comparison the weakest of the three departments of power." *The Federalist* No. 78 (Alexander Hamilton).

[16] Dominion is defined by Webster's Dictionary as "supreme authority" or "absolute ownership."

¶ 340 Thus, this case presents a situation in which the parties' interests are aligned, and "[s]uch a suit is collusive because it is not in any real sense adversary." *U.S. v. Johnson*, 319 U.S. at 305, 63 S. Ct. at 1076–77. The legal issues involved in this case have been "determined" through entry of consent orders by outcome-aligned parties, not "tested by fire in the crucible of actual controversy." *City of Greensboro v. Wall*, 247 N.C. at 520, 101 S.E.2d at 417. The colluding parties agreed upon a remedy, one which directly involved the General Assembly, without ever seeking input from that third party. In so doing, they have attempted to "procure the opinion of" this Court "in the decision of which they have a common interest opposed to that of other persons, who are not parties to this suit," and based upon "a statement of facts agreed on between themselves . . . upon a judgment pro forma entered by their mutual consent." *Lord v. Veazie*, 49 U.S. 251, 254 (1850).

¶ 341 Further, it bears repeating that these collusive orders were entered without a trial on the merits to determine the validity of the actual plaintiffs' claims. A statewide violation was simply assumed without a trial or final order. The trial court erred in permitting this suit to continue after it became clear that the parties were working in concert to bypass the General Assembly and achieve their mutual goals via consent orders. As discussed further below, this collusion between plaintiffs, executive branch defendants, and the trial court grossly violated the General Assembly's due process rights. In addition, the trial court further erred in attempting

to achieve the parties' collusive efforts by imposing an unconstitutional remedy in its November 10 order.

B. Separation of Powers

1. The Trial Court

¶ 342 Even if this case had not been transformed into a friendly suit, the trial court would still lack authority to impose its chosen remedy for four clear reasons. First, the trial court ignored this Court's explicit holdings that a remedy may be imposed only after the evidence establishes a clear showing of a *Leandro* violation. Second, the trial court violated the legislative defendants' right to due process, which requires that the General Assembly be joined as a necessary party when the essence of the case is whether the current education policy and funding are constitutionally adequate. Third, even if the trial court had properly held a trial with all parties in which such a clear showing established a statewide violation of *Leandro*, any judicial remedy ordering the transfer of state funds violates our constitution. Finally, even if a proper trial had been conducted, and even if the trial court's order did not otherwise offend our constitution, the trial court lacked jurisdiction to enter an order against the State Controller who was not a party.

a. A Remedy Without a Violation

¶ 343 As we made clear in *Hoke County*, our "examination of the case [wa]s premised on evidence as it pertain[ed] to Hoke County in particular." *Hoke County*, 358 N.C.

at 613 n.5, 599 S.E.2d at 375 n.5. "[O]ur holding mandates" in that case "cannot be construed to extend to the other four rural districts named in the complaint." *Id.* Thus, the establishment of alleged *Leandro* violations in any other district beyond Hoke County would require further proceedings that must include "presentation of relevant evidence by the parties, and findings and conclusions of law by the trial court." *Id.*

¶ 344 Further, the trial court's remedy goes far beyond that justified by the pleadings in this case. The remaining plaintiffs are the five Boards of Education in Hoke, Halifax, Robeson, Cumberland, and Vance counties and students from each county. The remaining intervening plaintiffs are the Charlotte-Mecklenburg Board of Education and some Mecklenburg County students and parents. In none of their surviving pleadings do they purport to represent all of the students of the State, or even all counties. To the contrary, they allege that they represent children in their own counties. This Court's decision in *Leandro*, affirming the dismissal of most of the original claims, significantly narrowed the remaining issue. As we said:

> This litigation started primarily as a challenge to the educational funding mechanism imposed by the General Assembly that resulted in disparate funding outlays among low wealth counties and their more affluent counterparts. With the *Leandro* decision, however, the thrust of this litigation turned from a funding issue to one requiring the analysis of the qualitative educational services provided to the respective plaintiffs and plaintiff-intervenors.

Hoke County, 358 N.C. at 609, 599 S.E.2d at 373. In other words, the issue became the methods chosen by school administrators to provide the classroom instruction that was needed should a deficiency be shown as to students in a particular county.

¶ 345 The proper standards for proving such alleged violations have been twice stated by this Court. First, the trial court "must grant every reasonable deference to the legislative and executive branches when considering whether they have established and are administering a system that provides . . . a sound basic education." *Id*. at 622–23, 599 S.E.2d at 381 (quoting *Leandro*, 346 N.C. at 357, 488 S.E.2d at 261). Second, plaintiffs must prove their allegations by making "a clear showing to the contrary," i.e., plaintiffs must make a clear showing that the strictures of *Leandro* are being violated in their districts. *Id*. (quoting *Leandro*, 346 N.C. at 357, 488 S.E.2d at 261). Finally, the imposition of a remedy is expressly barred absent such a clear showing, as "[o]nly such a clear showing will justify a judicial intrusion[.]" *Id*. (quoting *Leandro*, 346 N.C. at 357, 488 S.E.2d at 261).

¶ 346 It is notable that, in *Hoke County*, the trial court's determination that at-risk students were not receiving the opportunity to a sound basic education was premised on fourteen months of adversarial hearings. That ultimate determination was reached in a 400-page Order that recounted these hearings.

¶ 347 Here, the record is devoid of any proceedings in which the trial court concluded as a matter of law that plaintiffs had presented relevant evidence establishing a clear

showing of *Leandro* violations in other districts beyond Hoke County. There was no trial establishing a violation in any other county and certainly no trial establishing a statewide violation. If it took the trial court fourteen months and a 400-page Order to determine that a subsection of students in one county were not receiving the opportunity to a sound basic education, then surely a clear showing of a statewide violation would require exponentially more. The fact that the record below fails to establish a similar in-depth adversarial hearing for *any* other county, and contains no trace of the kind of monumental undertaking needed to demonstrate a statewide violation, speaks volumes. Absent such a clear showing of a statewide violation, the trial court lacked authority to impose *any* remedy.[17]

¶ 348 The majority ignores this. By failing to hold an actual *trial* for any other county in the last fourteen years, the trial court judges failed to abide by this Court's express directions in *Hoke County*. The majority apparently imagines the existence of trial court orders from nonexistent trials. The majority's focus on the title of the trial court's routine scheduling "Notice of Hearing and Orders" completely misses the mark. A *trial* is required for appellate review of this extremely fact-intensive issue

[17] One could argue that this Court's finding of a statewide violation, despite the failure of any party to plead such a claim, raises jurisdictional concerns. There has never been a finding in the trial court that violations through implementation and delivery occurred outside of Hoke or Halifax counties. Without the presence of the other unrepresented counties, the remaining plaintiffs and plaintiff intervenors may lack standing to plead a statewide violation, and the trial court therefore may lack jurisdiction to consider such a claim.

because an appellate court requires a record from which it may *meaningfully* review the trial court's findings and conclusions. Certainly, given the significance of the subject matter of this case and the separation of powers concerns, this Court should require at least a standard record of a trial and a final order.

¶ 349 The record in this case is not the record of an adversarial trial. It is the record of trial court judges accepting studies and statistics, taking them at face value without any real inquiry into their veracity, and then opining about the condition of this State's education system.[18] If the General Assembly had been allowed to intervene, then perhaps there would be a record which reflects facts derived from the crucible of an adversarial trial.

¶ 350 It is judicial malpractice for the majority to suddenly ignore the importance of court orders when it comes to appellate review. The majority simply declares that the trial court "properly concluded based on an abundance of clear and convincing evidence that the State's *Leandro* violation was statewide." The majority declines to

[18] Each year, U.S. News ranks "how well states are educating their students." North Carolina is ranked seventh out of fifty states overall and fifteenth out of fifty states with respect to Pre-K to 12th grade education. Brett Ziegler, *Education Rankings*, U.S. News, https://www.usnews.com/news/best-states/rankings/education (last visited Oct. 24, 2022). One wonders how the trial court and the San Francisco based consulting firm's diminished view of our education system can be so inconsistent. U.S. News, whose rankings of North Carolina's universities are celebrated, concludes that North Carolina has one of the best K-12 education systems in the country. A cynic could argue that WestEd's mercenary report only utilized data from 44 of North Carolina's one hundred counties. But, this is the type of information that is best tested in an actual trial instead of blindly accepted by the parties and court that hired the consultant.

explain *what* this evidence was, when it was produced, or how the majority knows it is reliable enough to form the basis of an explosive change in constitutional order and massive transfer of taxpayer monies to fund a program crafted by a San Francisco based consulting firm. Fundamentally, this Court cannot determine whether a "clear showing" has been made establishing a statewide *Leandro* violation because the lack of an adversarial trial renders our review purely speculative.

¶ 351 As but one example, it would have been inconceivable for this Court to review the proceedings in *Harper v. Hall*, 380 N.C. 317, 2022-NCSC-17, if the trial court had failed to hold an adversarial hearing and instead merely accepted at face value the arguments and evidence presented by the legislative defendants in that case. So too here. Issues of constitutional magnitude require facts and arguments to be "tested by fire in the crucible of actual controversy." *City of Greensboro v. Wall*, 247 N.C. at 520, 101 S.E.2d at 417. These requirements cannot be cast aside for political or judicial expediency.

¶ 352 However, even if the trial court had properly conducted a trial in which a statewide violation of *Leandro* had been established, the trial court would still lack the authority to impose *this* remedy. The problem arises not only because the trial court imposed a remedy without first establishing a violation, but because the chosen remedy clearly violates our constitution.

b. The Limitation on Judicial Power

¶ 353 Separation of powers is fundamental to our republican system of self-governance, and our constitution accordingly provides that "[t]he legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." N.C. Const. art. I, § 6. This division of governmental power acknowledges that "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, selfappointed, or elective, may justly be pronounced the very definition of tyranny." *The Federalist* No. 47 (James Madison).

¶ 354 In *Hoke County*, this Court acknowledged the separation of these various powers and recognized the outer boundaries of our judicial power. We stated:

> The state's legislative and executive branches have been endowed by their creators, the people of North Carolina, with the authority to establish and maintain a public school system that ensures all the state's children will be given their chance to get a proper, that is, a *Leandro*-conforming, education. As a consequence of such empowerment, those two branches have developed a shared history and expertise in the field that dwarfs that of this and any other Court. While we remain the ultimate arbiters of our state's Constitution, and vigorously attend to our duty of protecting the citizenry from abridgments and infringements of its provisions, we simultaneously *recognize our limitations in providing specific remedies for violations committed by other government branches* in service to a subject matter, such as public school education, that is within their primary domain.

358 N.C. at 644–45, 599 S.E.2d at 395 (emphasis added).

¶ 355 "The legislative power of the State shall be vested in the General Assembly[.]"

N.C. Const. art. II, § 1. This Court has long acknowledged that one of the many powers designated exclusively to the legislative branch is the power to spend public funds. *See Wilson v. Jenkins*, 72 N.C. 5, 6 (1875) ("The General Assembly has absolute control over the finances of the State."); *see also Shaffer v. Jenkins*, 72 N.C. 275, 279 (1875) ("[T]he money in the Treasury is within the exclusive control of the General Assembly.").

¶ 356 "No money shall be drawn from the State Treasury but in consequence of appropriations made by law[.]" N.C. Const. art. V, § 7. The interpretation of this clause has never before been a matter of debate in this Court. In fact, Justice Ervin recently stated for the Court that:

> In light of this constitutional provision, the power of the purse is the exclusive prerogative of the General Assembly, with the origin of the appropriations clause dating back to the time that the original state constitution was ratified in 1776. In drafting the appropriations clause, the framers sought to ensure that the people, through their elected representatives in the General Assembly, had full and exclusive control over the allocation of the state's expenditures. As a result, the appropriations clause states in language no man can misunderstand that the legislative power is supreme over the public purse.

Cooper v. Berger, 376 N.C. 22, 37, 852 S.E.2d 46, 58 (2020) (cleaned up).

¶ 357 In the realm of educational funding, the constitution is even more explicit. "The General Assembly shall provide by taxation and otherwise for a general and uniform system of free public school . . . ." N.C. Const. art. IX, § 2(1). The constitution

provides two funding mechanisms to supplement state tax revenue on a county level.

¶ 358 County school funds are supplied by "the clear proceeds of all penalties and forfeitures and of all fines collected in the several counties for any breach of the penal laws of the State, [which] shall belong to and remain in the several counties, and shall be faithfully appropriated and used exclusively for maintaining free public schools." N.C. Const. art IX, § 7(a). In addition, "the clear proceeds of all civil penalties, forfeitures, and fines which are collected by State agencies . . . shall be faithfully appropriated by the General Assembly, on a per pupil basis, to the counties, to be used exclusively for maintaining public schools." N.C. Const. art. IX, § 7(b). In contrast, the "State school fund" is ultimately funded by "so much of the revenue of the State as may be set apart for that purpose . . . [and] faithfully appropriated and used exclusively for establishing and maintaining a uniform system of free public schools." N.C. Const. art. IX, § 6.[19]

¶ 359 Of course, the "revenue" contemplated by Article IX's funding provisions must primarily be "provided by taxation . . . ." N.C. Const. art. IX, § 2(1). On this point, the constitution is clear. "Only the General Assembly shall have the power to classify

[19] The constitution also provides that the State school fund shall be funded by "the proceeds of all lands that have been or hereafter may be granted by the United States to this State . . . ; all moneys, stocks, bonds, and other property belonging to the State for purpose of public education; the net proceeds of all sales of the swamp lands belonging to the State; and all other grants, gifts, and devises that have been or hereafter may be made to the State [ ] and not otherwise appropriated by the State . . . ." N.C. Const. art. IX, § 6.

property for taxation, which power shall be exercised only on a State-wide basis and shall not be delegated." N.C. Const. art. V, § 2(2).

¶ 360 The constitution commits these dual powers—the power to raise state funds for education, and the power to spend state funds on education—exclusively to the General Assembly.[20] That is why this Court recognized its "limitations in providing specific remedies for violations committed by other government branches in service to a subject matter, such as public school education, that is within their primary domain." *Hoke County*, 358 N.C. at 645, 599 S.E.2d at 395. Such limitations are a necessary consequence of our constitutional structure that separates government functions to preserve government by the people.

¶ 361 Without such limitations, there would be no conceivable constraints to this Court's power. Consider the situation in which the state found itself in 2009, when Governor Perdue "ordered a half-percent pay cut for all state employees and teachers" to try and reduce a "$3 billion-plus shortfall for the [ ] fiscal year." *Governor Cuts Pay, Calls for Furloughs for State Employees*, WRAL News (Apr. 28, 2009, 7:02 PM), https://www.wral.com/news/local/story/5037937/. If this Court had determined that such a pay cut violated children's right to the opportunity to a sound basic education, could this Court have exercised its power to increase education funding by raising

[20] While the General Assembly is primarily responsible for *funding* education, the State Board of Education "ha[s] general supervision and administration of the educational funds provided by the State . . . ." N.C.G.S. § 115C-408(a).

taxes? Could this Court rewrite the State Budget and reappropriate funds from other programs to fund education?

¶ 362 No, our constitution says. The constitution commands all branches of our government to stay within their spheres of power, and this command must be heeded with extreme obedience by the judiciary. As this Court is the final arbiter on what our constitution says, the people of this state must be ever wary of a court which declares "rare" or "extraordinary" the repeated usurpation of constitutional power.

¶ 363 Here, the trial court ignored both the clear language of the appropriations clause and this Court's binding precedent establishing the General Assembly's exclusive power to draw funds from the State Treasury. Rather than following our constitution, the trial court invented two novel theories to justify its unconstitutional exercise of legislative power.

¶ 364 First, the trial court determined that assumption of legislative duties was not barred by the appropriations clause because "Article I, Section 15 of the North Carolina Constitution represents an ongoing constitutional appropriation of funds" and constitutes an appropriation "made by law." This conclusion is a legal fiction created out of whole cloth and has no support in either our constitution or our directly on-point precedent. As discussed in more detail further below, the separation of powers clause and the legislative powers clause do not provide for any exceptions. These constitutional provisions do not merely encompass "some" or "most" of the

legislative powers—they encompass *all* legislative powers.

¶ 365 The entire text of Article I, section 15 provides that "[t]he people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right." The plain language of this section makes no mention of educational funding, and to read in such non-existent language is an amendment of our constitution by judicial fiat.

¶ 366 "Our constitution clearly states that amending the constitution is a duty designated to the General Assembly and the people of this State." *Moore*, 2022-NCSC-99, ¶ 152 (Berger, J., dissenting). A trial court may not exercise this power. Neither may a trial court judge choose to "interpret" a constitutional provision in a manner that contradicts this Court's holdings.

¶ 367 In addition to its unconstitutional interpretation of Article I, section 15, the trial court stated that it could order the transfer of state funds as an exercise of its "inherent and equitable powers." This is nonsense. This usurpation of legislative authority is blatantly unconstitutional and threatens the very foundation of our republican form of self-governance.

> It is the proud boast of our democracy that we have "a government of laws and not of men." Many Americans are familiar with that phrase; not many know its derivation. It comes from Part the First, Article XXX, of the Massachusetts Constitution of 1870, which reads in full as follows:
>
> "In the government of this Commonwealth, the legislative

> department shall never exercise the executive and judicial powers, or either of them: The executive shall never exercise the legislative and judicial powers, or either of them: The judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men."

Morrison v. Olson, 487 U.S. 654, 697, 108 S. Ct. 2597, 2622 (1988) (Scalia, J., dissenting).

¶ 368 The majority's response to our adherence to this fundamental requirement is simply that we have a "rigid interpretation of separation of powers." Indeed, we do, because separation of powers is not a suggestion. It is an inexorable command upon which the entire notion of government by the people either stands or falls. As this Court has stated:

> [T]he relief sought could not be obtained in any event without the exercise of legislative functions, and the plaintiff's fatal error is found in the assumption that such functions may be exercised by the courts, notwithstanding the constitutional separation of the several departments of the government. The Declaration of Rights provides: "The legislative, executive, and supreme judicial powers of the government ought to be forever separate and distinct from each other."
>
> As to the wisdom of this provision there is practically no divergence of opinion—it is the rock upon which rests the fabric of our government. Indeed, the whole theory of constitutional government in this state and in the United States is characterized by the care with which the separation of the departments has been preserved and by a marked jealousy of encroachment by one upon the other. . . .

> The courts have absolutely no authority to control or supervise the power vested by the Constitution in the General Assembly as a co-ordinate branch of government. They concede . . . that their jurisdiction is limited to interpreting and declaring the law as it is written. It is only when the Legislature transcends the bounds prescribed by the Constitution, and the question of the constitutionality of a law is directly and necessarily involved, that the courts may say, "Hitherto thou shalt come, but no further."

Pers. v. Bd. of State Tax Comm'rs, 184 N.C. 499, 502–04, 115 S.E. 336, 339 (1922).

¶ 369 The majority justifies its assault on legislative authority in part by purporting to rely on *In re Alamance County Court Facilities*, 329 N.C. 84, 405 S.E.2d 125 (1991). It is clear, however, this case does not support the majority's position; it undermines it. *Alamance County*'s discussion of inherent judicial power destroys the majority's own argument. A thorough discussion of this case is warranted.

¶ 370 The Alamance County Superior Court convened a grand jury to inspect the Alamance County court facilities and jail. *Id.* at 89, 405 S.E.2d at 126. The grand jury reported that there were "numerous courthouse and jail defects" and recommended that the courthouse, which was constructed in 1924, be "remodeled and converted to other uses, [and] that a new courthouse be built[.]" *Id.* Following the grand jury's report, the trial court scheduled a hearing "to make inquiry as to the adequacy of the Court Facilities" in Alamance County, and the sheriff served the five Alamance County Commissioners with notice of the hearing. *Id.* Four of the Commissioners made various motions to either dismiss the case or demand a jury

trial. *Id*. at 89, 405 S.E.2d at 127. However, the trial court "struck these motions, stating that the movants were not parties to the action and thus were without standing." *Id*.

¶ 371 At the hearing, the trial court reiterated the grand jury's findings regarding the Alamance County court facilities, which included:

> [C]itation to the statutory duties of the Clerk of Court to secure and preserve court documents, to statutory provisions requiring secrecy of grand jury proceedings, to statutory requisites that counties in which a district court has been established provide courtrooms and judicial facilities, and to the open courts provision—all of which were potentially violated by the condition of pertinent facilities in Alamance County. In addition, the findings stated that the right to a jury trial assured in Article I, §§ 24 and 25 of the N.C. Constitution was jeopardized where jury and grand jury deliberations were not dependably private and secure and that litigants' due process rights were similarly at risk for lack of areas where they could confer confidentiality with their attorneys.

Id. at 89–90, 405 S.E.2d at 127.

¶ 372 Additionally, the trial court stated that the county's failure to provide adequate court facilities violated the constitutional limitation under Article IV, section 1 of the North Carolina Constitution, which prohibits the General Assembly from "depriving the judicial department of any power or jurisdiction rightfully pertaining to it as a coordinate department of government." *Id.* at 90, 405 S.E.2d at 127. This prohibition extended to Alamance County, since it was delegated the legislative responsibility of providing adequate court facilities. *See id.*

¶ 373 The trial court determined that it possessed jurisdiction over the matter, in part, because of its "inherent power necessary for the existence of the Court, necessary to the orderly and efficient exercise of its jurisdiction, and necessary for this Court to do justice." *Id*. at 90, 405 S.E.2d at 127. In its order, the court concluded that the inadequacies of the court facilities "thwart[ed] the effective assistance of counsel to litigants in violation of the law of the land, jeopardize[ed] the right to trial by jury in civil and criminal cases, and . . . constituted a clear and present danger to persons present at criminal judicial proceedings as well as the public at large." *Id*.

¶ 374 Based upon these inadequacies and their effects, the trial court directed the county, "acting through its commissioners," to provide new facilities and modify the existing courthouse. *Id*. at 91, 405 S.E.2d at 128. Specifically, the trial court found that the county "was financially able to provide adequate judicial facilities" because there were "undesignated unreserved funds of $15,655,778.00 . . . with which the commissioners could begin construction of a new courthouse." *Id.* The trial court then ordered the county to "immediately" provide adequate facilities that met the Court's approved design features. *Id.* at 91–92, 405 S.E.2d at 128.

¶ 375 For example, the trial court determined that the adequate facilities must include a Superior Court courtroom of at least 1600 square feet with a minimum of two bathrooms, a Superior Court jury deliberation room of at least 300 square feet, a room for the Superior Court Court Reporter that was at least 80 square feet, and a

Superior Court Judge's Chambers "consisting of a conference area of at least 160 square feet, minimum, and a toilet of 40 square feet, minimum," among other similar requirements. *Id.* at 91, 405 S.E.2d at 128.

¶ 376 Members of the Alamance County Board of Commissioners petitioned this Court for a writ of supersedeas, which this Court granted. *Id.* at 92, 405 S.E.2d at 128. In reviewing the superior court's order, this Court described the issues presented as "whether this case presents the circumstances under which a court's 'inherent power' may be invoked and whether the superior court here followed proper procedures in the exercise of its power." *Id.* at 93, 405 S.E.2d at 128–29.

¶ 377 The majority's "analysis" of *Alamance County* quotes most of this Court's discussion of inherent power, and all of it need not be repeated here. However, some of this Court's precise language is ignored by the majority. This language clearly recognizes the constitutional limits of a court's inherent authority and is worthy of emphasis.

¶ 378 The judiciary's "inherent power" is "plenary *within the judicial branch*," which means that constitutional provisions—like the Apportionments Clause at issue here, "do not curtail the inherent power of the judiciary, plenary *within its branch*, but serve to delineate the boundary between the branches, beyond which each is powerless to act." *Id.* at 93, 95, 405 S.E.2d at 129–30 (emphasis added).

¶ 379 However, this Court noted that in the specific circumstances of *Alamance*

County, where the superior court was literally unable to properly fulfill its constitutional duties *within the judicial branch*, that boundary may be stretched to protect the judiciary's ability to exercise its *own* constitutionally committed powers. "In the realm of appropriations, some overlap of power between the legislative and the judicial branches is inevitable, for one branch is exclusively responsible for raising the funds that *sustain the other and preserve its autonomy*." *Id.* at 97, 405 S.E.2d at 131 (emphasis added).

¶ 380 Thus, this Court announced its limited holding that "when inaction by those exercising legislative authority threatens *fiscally* to undermine the integrity of the judiciary, a court may invoke its inherent power to do what is reasonably necessary for 'the orderly and efficient exercise of the administration of justice.' " *Id.* at 99, 405 S.E.2d at 132 (emphasis added) (quoting *Beard v. N.C. State Bar*, 320 N.C. 126, 129, 357 S.E.2d 694, 696 (1987)). In other words, when legislative inaction renders judicial branch facilities inadequate "to serve the functioning of the judiciary within the borders of those political subdivisions," the judiciary may take limited action *only* to ensure that the facilities are adequate to perform the court's constitutional duties. *Id.*

¶ 381 And, in part of this Court's holding the majority selectively omits, "[e]ven in the name of its inherent power, the judiciary may not arrogate a duty reserved by the constitution exclusively to another body." *Id.*

¶ 382 Moreover, following its general discussion of inherent power, this Court asked whether, "[u]nder the circumstances, [ ] an *ex parte* order *implicitly* mandating the expenditure of public funds for *judicial facilities* [was] reasonably necessary for the proper administration of justice?" *Id*. at 103, 405 S.E.2d at 135 (emphasis added).

¶ 383 In answering this question in the negative, this Court first noted that:

> The means chosen by a court to compel county commissioners to furnish suitable court facilities is of critical importance to the question whether the court has unreasonably exercised its inherent power, for it signals the extent of the judiciary's intrusion on the county's legislative authority. The efficacy of mandatory writs or injunctions, unlike *ex parte* orders and contempt proceedings, rests less on the expansive exercise of judicial power than on the statutory and constitutional duties of those against whom they are issued. Their use thus avoids to some extent the arrogance of power palpable in an *ex parte* order. Moreover, they compel the performance of the ministerial duty imposed by law, but give the defaulting officials room to exercise discretionary decisions regarding how that duty may best be fulfilled.

Id. at 104–05, 405 S.E.2d at 135–36.

¶ 384 This Court also emphasized that because the superior court's order in *Alamance County* "stopped short of ordering the commissioners to release funds," it also stopped short of "leaving the constitutional sphere of its inherent powers." *Id*. at 106, 405 S.E.2d at 137. Nevertheless, the "*ex parte* nature of the order overreached the minimal encroachment onto the powers of the legislative branch that must mark a court's judicious use of its inherent power," because "[n]o procedure or practice of

the courts, however, even those exercised pursuant to their inherent powers, may abridge a person's substantive rights." *Id*. at 106–07, 405 S.E.2d at 137. This remedy was a misuse of the judiciary's inherent authority. Thus, this Court held that the superior court's order "must be, and is VACATED." *Id*. at 108, 405 S.E.2d at 138.

¶ 385 Thus, *Alamance County* does not support the unconstitutional judicial assumption of the legislative spending power.[21] *Alamance County* instead reaffirms the following fundamental principles:

¶ 386 First, the judiciary's "inherent power" applies only to matters within the judicial branch. Second, a legislative failure to fiscally support the judicial branch, when such failure threatens the judiciary's existence, may justify a *limited* exercise of "inherent power" to preserve the judiciary. Third, even under such circumstances,

[21] As with *Alamance County*, the other cases on which the majority relies do not justify its extreme remedy. *See Wilson v. Jenkins*, 72 N.C. 5, 10 (1875) (affirming a trial court's denial of the plaintiff's request for a writ of mandamus to compel the State Treasurer to pay certain coupons on state bonds because "[t]he General Assembly has absolute control over the finances of the State" and "[t]he Public Treasurer and Auditor are mere ministerial officers, bound to obey the orders of the General Assembly"); *White v. Worth*, 126 N.C. 570, 36 S.E. 132, 136 (1900) (relying heavily on *Hoke v. Henderson*, 15 N.C. 1 (1833), a case that was expressly overruled in 1903 by *Mial v. Ellington*, 134 N.C. 131, 46 S.E.2d 961 (1903)). *See also Hickory v. Catawba Cnty.*, 206 N.C. 165, 173–74, 173 S.E. 56, 60–61 (1934) (affirming a trial court's writ of mandamus that required Catawba County to assume payment for a local school building as required by the constitution and General Statutes but did not require the spending of specific funds for specific expenditures), *Mebane Graded Sch. Dist. v. Alamance Cnty.*, 211 N.C. 213, 226–27, 189 S.E.2d 873, 882 (1937) (affirming a trial court's writ of mandamus that required Alamance County to assume the debt of its local school district but did not direct the spending of specific funds for specific expenditures). These cases in no way support the majority's proposition that this Court's precedent sanctions the judicial exercise of legislative power.

that limited exercise of "inherent power" may not assume legislative powers, such as the spending power, as doing so would depart from the court's "constitutional sphere of its inherent powers." Finally, even if the exercise of limited inherent power is justified by such a threatened underfunding of the judiciary, and even if the court does *not* order a state actor to spend funds, any such court action must be vacated if the action is carried out via an *ex parte* order, as such an order violates the substantive rights of the relevant state actor.

¶ 387 Thus, faithfully applying *Alamance County* to this case renders the decision a simple one. The trial court's order must be vacated because: (1) its exercise of "inherent power" does not relate to matters within the judicial branch; (2) its exercise of "inherent power" is not justified by a legislative failure which threatens the judiciary's existence; (3) its exercise of "inherent power" departs from the judiciary's "constitutional sphere" because it assumes the legislative spending power; and (4) its exercise of "inherent power" was carried out via an *ex parte* order that violated the substantive rights of the State Controller and the General Assembly.

¶ 388 This straightforward analysis did not make its way in the majority's nearly one-hundred-and-forty-page opinion, and the majority summarily dismisses the State Controller's arguments with a conclusory statement that his rights were not violated. The trial court's order must be vacated for violating the Controller's substantive rights, and the failure to properly discuss the Controller's arguments demonstrates a

hastily crafted opinion by the majority.

¶ 389 As this Court has stated, the power to transfer state funds is a power designated exclusively to the legislative branch. *See Cooper v. Berger*, 376 N.C. at 37, 852 S.E.2d at 58 ("[T]he appropriations clause states in language no man can misunderstand that the legislative power is supreme over the public purse."). In fact, we announced this fundamental truth nearly one hundred and fifty years ago:

> If the Legislature by way of contract, has specifically appropriated a certain fund, to a certain debt, or to a certain individual, or class of individuals, and the State Treasurer having that fund in his hands, refuses to apply it according to the law, he may be compelled to do so by judicial process.
>
> If any case goes farther than this, we conceive that it cannot be supported on principal, and that it *oversteps the just line of demarcation between the legislative and judicial powers*.

Shaffer v. Jenkins, 72 N.C. 275, 280 (1875) (emphasis added).

¶ 390 The inherent remedial and equitable powers of our courts may be vast, but "[e]ven in the name of its inherent power, the judiciary may not arrogate a duty reserved by the constitution exclusively to another body," nor may the judiciary "abridge a person's substantive rights." *Alamance County,* 329 N.C. at 99, 107, 405 S.E.2d at 133, 137.[22]

[22] While the majority attempts to cabin its exercise of "inherent authority" as an "extraordinary remedy," *supra* ¶ 178, this newfound power may be wielded by any future majority of this Court. Moving forward, now that the constitutional boundaries enshrining separation of powers are demolished, any four members of this Court could invoke "inherent

c. Due Process

¶ 391 "No rule of procedure or practice shall abridge substantive rights or abrogate or limit the right of trial by jury." N.C. Const. art. IX, § 13(2). One of the substantive rights enjoyed by the people of this state is found in Article I, section 19 of our constitution, which provides in relevant part that "[n]o person shall be taken . . . in any manner deprived of his life, liberty, or property, but by the law of the land."

¶ 392 "Procedural due process restricts governmental actions and decisions which 'deprive individuals of "liberty" or "property" interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.'" *Peace v. Emp't Sec. Comm'n*, 349 N.C. 315, 321, 507 S.E.2d 272, 277 (1998) (quoting *Matthews v. Eldridge*, 424 U.S. 319, 322, 96 S. Ct. 893, 901 (1976)). "The fundamental premise of procedural due process protection is notice and the opportunity to be heard." *Id.* at 322, 507 S.E.2d at 278 (citing *Cleveland Bd. of Educ. V. Loudermill*, 470 U.S. 532, 542, 105 S. Ct. 1487, 1493 (1985)).

¶ 393 The State Controller's authority to transfer or spend funds is set forth in Chapter 143C of our General Statutes, which ensures that "[i]n accordance with

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authority" to exercise powers constitutionally committed to other branches as they desire. If this Court can exercise power under the appropriations clause, it could also invoke its "inherent authority" to deem ratified a vetoed budget or increase statutory court fines because they fund the education system under Article IX, section 7. Further, any majority could increase judicial branch salaries The abuse of such power is exactly why our constitution demands that the legislative, executive, and judicial powers "shall be forever separate and distinct from each other." N.C. Const. art. I, § 6.

Section 7 of Article V of the North Carolina Constitution, no money shall be drawn from the State treasury but in consequence of appropriations made by law." N.C.G.S. § 143C-1-2(a) (2021). "This Chapter establishes procedures for the following: (1) [p]reparing the recommended State budget[;] (2) [e]nacting the State budget[;] [and] (3) [a]dministering the State budget." N.C.G.S. § 143C-1-1(c).

¶ 394 Chapter 143C includes penalties for violating the procedures contained therein. In relevant part, "[i]t is a Class 1 misdemeanor for a person to knowingly and willfully . . . (1) [w]ithdraw funds from the State treasury for any purpose not authorized by an act of appropriation." N.C.G.S. § 143C-10-1(a). Further, "[a]n appointed officer or employee of the State . . . forfeits his office or employment upon conviction of an offense under this section." N.C.G.S. § 143C-10-1(c).

¶ 395 Here, as is evident from Chapter 143C of our General Statutes, the State Controller would be subject both to a Class 1 misdemeanor and termination of employment were he to comply with the November 10 order. As the State Controller was never made a party to the proceedings in the trial court, was never given notice of the proceedings, and was never afforded an opportunity to be heard in these proceedings, the trial court had no jurisdiction to enter an order that affected the State Controller's substantive rights in this manner. As the Court of Appeals correctly noted in its order granting the State Controller's petition for a writ of prohibition, "the trial court's conclusion that it may order petitioner to pay

unappropriated funds from the State Treasury is constitutionally impermissible and beyond the power of the trial court."

¶ 396 In addition to violating the State Controller's due process rights, the trial court also violated the due process rights of the General Assembly.[23] The majority makes much of the fact that the General Assembly was not represented in this suit until after the Nov. 10 order—but rather than recognizing the obvious due process concerns, the majority insists that the General Assembly itself is to blame. Such an interpretation ignores factual and legal realities.

¶ 397 As discussed in much detail above, neither the proceedings under Judge Manning that led to our decision in *Hoke County*, nor the proceedings under Judge Manning that followed, implicated the General Assembly or its constitutionally committed functions. Judge Manning consistently found, and this Court agreed, that the legislative funding mechanisms and education policies were sound and complied with our constitution. In fact, when the General Assembly *did* move to intervene in this case because it was no longer represented by the Attorney General, Judge Manning denied its motion specifically because the issue was never that the General Assembly's funding mechanisms or education policies were inadequate—the issue was, and remains, the implementation and delivery of these policies and the

[23] In addition, it is arguable the trial court also violated the due process rights of all counties not represented in this suit, yet nonetheless responsible for any implementation or funding under WestEd's CRP.

application of these funds by the education establishment.

¶ 398 The majority would apparently prefer that the General Assembly renewed its motion to intervene on a regular basis, despite Judge Manning's denial and despite the absence of any issue implicating the General Assembly's authority or actions. However, the *status quo* was radically altered once Judge Lee took over the case and this became a collusive suit. The consent order entered by Judge Lee appointing WestEd fundamentally changed the nature of the proceedings. This was an egregious error that necessitated input from the General Assembly.

¶ 399 At this point, or, at the very latest, when he received the WestEd report naming the General Assembly as the primary "responsible party," Judge Lee erred by failing to join the General Assembly as a necessary party. *See* N.C.G.S. §1A-1, Rule 19(a) and (d); see *also Gaither Corp. v. Skinner*, 238 N.C. 254, 256, 77 S.E.2d 659, 661 (1953) ("Necessary or indispensable parties are those whose interests are such that no decree can be rendered which will not affect them, and therefore the court cannot proceed until they are brought in.").

¶ 400 The trial court's failure to join the General Assembly in this matter created a situation where the people of this State, acting through their elected representatives, were not afforded notice and the opportunity to be heard. Rather than allow the General Assembly, which is the policymaking branch of our government, to defend its heretofore adjudged adequate educational funding policies, Judge Lee delegated

the task of policymaking to an out-of-state third party. In delegating this crucial task to WestEd, Judge Lee effectively usurped legislative authority by appointing a special master—not unlike the special masters appointed in redistricting. To delegate such authority to an out-of-state third party, to fail to join the General Assembly as an obviously necessary party, and to attempt to enforce what was, in essence, an *ex parte* order that exercises a power constitutionally committed exclusively to the General Assembly, is to abandon all pretense of judicial propriety.

¶ 401 Thus, the trial court erred in multiple ways. Because the trial court never conducted a trial and never concluded as a matter of law that plaintiffs had made a clear showing of a statewide *Leandro* violation, the trial court never had jurisdiction to impose any remedy in this case. Further, even if such a conclusion had been reached after a trial, the trial court's chosen remedy far exceeds the judiciary's inherent power and violates our constitution. Finally, the transfer provisions of the November 10 order cannot be permitted to stand because they violated the State Controller's substantive rights and arguably denied the General Assembly due process of law.

¶ 402 Accordingly, the transfer provisions of the trial court's November 10 order were properly struck by Judge Robinson on remand. However, Judge Robinson nevertheless also erred on remand.

¶ 403 Although the trial court on remand properly considered the Court of Appeals'

writ of prohibition and properly struck the transfer provisions, it nevertheless erred in upholding the CRP as an appropriate remedy.

2. The Trial Court on Remand

¶ 404 After granting the State's bypass petition, this Court remanded this case to Judge Robinson "for the purpose of allowing the trial court to determine what effect, if any, the enactment of the State Budget ha[d] upon the nature and effect of the relief that the trial court granted." Thus, the trial court's proper role on remand was to consider how the passage of the State Budget, a valid law passed by the General Assembly, affected the trial court's conclusion that the CRP was the appropriate remedy for the alleged statewide violation of *Leandro*. Because the trial court on remand failed to properly analyze the effect of this valid legislative act, it erred in concluding that the CRP was an appropriate remedy.

¶ 405 When reviewing whether a valid legislative act violates a constitutional right, "we presume that laws enacted by the General Assembly are constitutional, and we will not declare a law invalid unless we determine that it is unconstitutional beyond a reasonable doubt." *Cooper*, 376 N.C. at 33, 852 S.E.2d at 56. "All power which is not expressly limited by the people in our State Constitution remains with the people, and an act of the people through their representatives in the legislature is valid unless prohibited by that Constitution." *State ex rel. Martin v. Preston*, 325 N.C. 438, 448–49, 385 S.E.2d 473, 478 (1989) (citing *McIntyre v. Clarkson*, 254 N.C. 510, 515,

119 S.E.2d 888, 891 (1961)).

¶ 406 Thus, to comport with our precedent, the trial court on remand was required to afford the State Budget a presumption of constitutionality. In this context, that required the trial court to presume the State Budget comported with *Leandro* and provided students statewide an opportunity to receive a sound basic education. Only a clear showing by plaintiffs that the State Budget and the programs within failed to provide this opportunity would trigger the trial court's consideration of the CRP as a remedy as directed by this Court.

¶ 407 Instead of following established framework for analyzing constitutional challenges to legislative acts, the trial court on remand stated:

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

In other words, the haste with which this Court was determined to act prevented proper consideration and resolution of the issues by the trial court.

¶ 408 Setting aside the fact the trial court on remand mischaracterized the right announced in *Leandro*, which was the right to the *opportunity* to receive a sound basic education, the trial court on remand got the analysis backwards. Affording the State

Budget the presumption of *Leandro* conformity requires no extensive expert discovery and evidentiary hearings—hence the word "presumption." The need for expert discovery, evidentiary hearings, findings of fact, and conclusions of law arises precisely to overcome this presumption. The "massive undertaking" required is the burden plaintiffs bear to make a clear showing that the State Budget resulted in a statewide violation of *Leandro*. As plaintiffs have not yet met this burden, the trial court on remand should have vacated the November 10 order and allowed plaintiffs to bring claims actually challenging the State Budget.

¶ 409 Instead, the trial court on remand erred by seemingly affording the CRP, not the State Budget, this presumption of *Leandro* conformity. The trial court on remand used the CRP as a *Leandro* benchmark and analyzed whether the State Budget funded each of the CRP's measures. In so doing, it not only got the analysis backwards but also ignored our guidance in *Leandro* that "there will be more than one constitutionally permissible method of solving" statewide public school issues, 346 N.C. at 356, 488 S.E.2d at 260, and our holding in *Hoke County* that any remedy for an alleged violation must "correct the failure with minimal encroachment on the other branches of government." 358 N.C. at 373–74, 588 S.E.2d at 610.

¶ 410 The majority merely brushes away this Court's directly on point and well-established precedent. Bafflingly, the majority states that "[n]either the Plaintiff-parties nor the State dispute the presumed constitutionality of the passage of the

2021 Budget Act as a general procedural matter." *Supra* ¶ 228. What then, is this case about? Surely the majority must concede, at the very least, that if the State Budget is *constitutional*, then it does not violate the *constitutional* right of children to have the opportunity to receive a sound basic education. The majority simply cannot have its cake and eat it too. Either the State Budget is constitutional, and there is no statewide violation of *Leandro*, or there *is* a statewide violation of *Leandro* because the State Budget fails to afford children the opportunity to a sound basic education.

¶ 411 This case, when boiled down to its irreducible core, must be about the state failing to provide *Leandro* conforming expenditures. That is why the CRP requires the transfer of such vast amounts of taxpayer dollars. The only way for the state to provide educational expenditures is through the State Budget. Thus, plaintiff-parties challenge *must* be related to the adequacy of the State Budget's ability to provide constitutional, i.e., *Leandro* conforming, educational expenditures.

¶ 412 However, according to the majority, "that was not the issue before the trial court and is not the issue before this Court." *Supra* ¶ 228. Rather than analyzing the State Budget in accordance with our long-standing precedent of presumptive constitutionality, i.e., *Leandro* conformity, the majority decrees that "the Budget Act must be assessed against the terms of the only comprehensive remedial plan thus far presented by the parties to the court." *Supra* ¶ 229.

¶ 413 Again, nonsense. Shall every legislative act now be compared not to our constitution, but to whatever "plan" or "standard" that friendly parties agree to and present to a trial court? The majority's position is a perversion of this Court's proper role. Because the trial court on remand failed to afford the State Budget the presumption of *Leandro* conformity, its analysis and decision were error.

¶ 414 Finally, this Court not only sanctions due process violations but exacerbates the error by, on its own initiative, deciding the appeal in 425A21-1. The Court had previously held this direct appeal in abeyance while we considered discretionary review in 425A21-2. Now, without briefing or argument, the majority summarily decides the issue it had previously held in abeyance, and for which there exists a right to appeal based upon the dissent in the Court of Appeals. *See* N.C.G.S. § 7A-30. Once again, the majority wields its unbounded power in the face of fundamental fairness and basic legal tenets.

¶ 415 As stated only a few months ago:

> The majority restructures power constitutionally designated to the legislature, plainly violates the principles of non-justiciability, and wrests popular sovereignty from the people.
>
> When does judicial activism undermine our republican form of government guaranteed in Article IV, Section 4 of the United States Constitution such that the people are no longer the fountain of power? At what point does a court, operating without any color of constitutional authority, implicate a deprivation of rights and liberties secured under the Fourteenth Amendment?

Moore, 2022-NCSC-99, ¶¶ 153–54 (Berger, J., dissenting).

III. Conclusion

¶ 416 Today's decision is based on a process that was grossly deficient. Hearings were not held as required by our decision in *Hoke County*. The rush to find a statewide violation in the absence of input by the legislature, the collusive nature of this case, the ordering of relief not requested by the parties in their pleadings or permitted by our prior decisions, and the blatant usurpation of legislative power by this Court is violative of any notion of republican government and fundamental fairness. The trial court orders dated November 10, 2021 and April 26, 2022 should be vacated, and this matter should be remanded for a remedial hearing on the Hoke County claims as required by our decision in *Hoke County*. In addition, because there have never been hearings held or orders entered as to any other county, those matters must be addressed separately as per our decision in *Hoke County*.

¶ 417 Under no circumstance, however, should this Court take the astonishing step of proclaiming that "inherent authority" permits the judiciary to ordain itself as super-legislators. This action is contrary to our system of government, destructive of separation of powers, and the very definition of tyranny as understood by our Founding Fathers.

Chief Justice NEWBY and Justice BARRINGER join in this dissenting opinion.