

STATE OF NORTH CAROLINA  
COUNTY OF WAKE

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

HOKE COUNTY BOARD OF  
EDUCATION, et al.,  
  
Plaintiffs,  
  
and  
  
CHARLOTTE-MECKLENBURG BOARD  
OF EDUCATION,  
  
Plaintiff-Intervenor,  
  
and  
  
RAFAEL PENN, et al.,  
  
Plaintiff-Intervenors,  
  
v.  
  
STATE OF NORTH CAROLINA and the  
STATE BOARD OF EDUCATION,  
  
Defendants,  
  
and  
  
CHARLOTTE-MECKLENBURG BOARD  
OF EDUCATION,  
  
Realigned Defendant,  
  
and  
  
PHILIP E. BERGER, in his official  
capacity as President Pro Tempore of the  
North Carolina Senate, and TIMOTHY K.  
MOORE, in his official capacity as  
Speaker of the North Carolina House of  
Representatives,  
  
Intervenor-Defendants.

**PENN-INTERVENORS' BRIEF IN  
RESPONSE TO  
SUPPLEMENTAL BRIEFING  
ORDER**

## **I. Introduction**

The Charlotte-Mecklenburg Branch of the North Carolina State Conference of the NAACP, Rafael Penn, Clifton Jones, Donna Jenkins Dawson, and Tyler Anthony Hough-Jenkins (“Penn-Intervenors”) respectfully submit this brief in response to the North Carolina Supreme Court’s 21 March 2022 remand order and this Court’s 25 March 2022 supplemental briefing order. Those orders directed briefing on what effect, if any, the 2021 Appropriations Act, 2021 N.C. Sess. Laws 180 (“State Budget”), had on the Court’s 11 November 2021 order (“November Order”). The November Order directed state authorities to transfer sufficient funds to fully cover the costs needed to implement years two and three of the Comprehensive Remedial Plan (“CRP”), which is constitutionally required to protect North Carolina students’ right to a sound basic education. But before the November Order took effect due to a court-imposed 30-day stay, the General Assembly passed the State Budget, which partially funded the CRP and raised the question of the State Budget’s effect on the November Order that is now before this Court.

According to the analysis performed by the North Carolina Office of State Budget and Management Office (“State Budget Analysis”) and submitted to the parties and the Court on 04 April 2022, the State Budget failed to fund more than one-third (37%) of the cost for year two of the CRP and more than one-half (51%) of the cost for year three of the CRP. Thus, other than changing the math, the State Budget has no effect on the November Order. Under the State Budget, the State has once again failed to live up to its constitutional duty to provide the students of North Carolina with a sound basic education. The State Budget funds only a fraction of

years two and three of the constitutionally required CRP. The State Budget reflects particularly significant shortcomings for at-risk students. Most concerning for Penn-Intervenors, it lacks any funding or provides only partial funding for students with disabilities, low-income students, and English learners. Similarly, it provides little to no funding for critical initiatives for low-property-wealth districts that are necessary to meet the needs of their at-risk students, including funding for community schools, grow-your-own teacher programs, and expansion of high-quality prekindergarten programs.

Fortunately, for North Carolina's students, as reflected in the State Budget Analysis, more than sufficient unallocated funds—**over \$4.25 billion**—remain available in the State's General Fund to fully fund years two and three of the CRP. Thus, the November Order remains valid and enforceable, except that the transfer amounts in the November Order will need to be modified to reflect the State Budget's partial CRP funding. Based on the State Budget Analysis, the Court should find that the transfer amounts in the November Order (at 19) should be revised and reduced as follows, and it should issue an order consistent therewith:

- The transfer to the Department of Health and Human Services should be reduced from \$189,800,000 to \$168,441,761;
- The transfer to the Department of Public Instruction should be reduced from \$1,522,053,000 to \$593,628,196;
- The transfer to the University of North Carolina System should be reduced from \$41,300,000 to \$32,758,000.
- In net effect, this would reduce the total transfer amount from \$1.75 billion to \$794,827,957.

See Walker Affidavit, Ex. 3 at 2 (aggregation of “underfunded” amounts for each governmental entity in years two and three). The Court should further find and conclude that the State has more than enough unallocated funds in the General Fund, including \$4.25 billion in the Savings Reserve, to fully fund that transfer, and that *Richmond Cnty. Board of Education v. Cowell*, 254 N.C. App. 422 (2017), is not implicated in that transfer.

## **II. Background on Proceedings**

### **A. The State’s Failure to Provide a Sound Basic Education**

Penn-Intervenors include students who are among the hundreds of thousands of at-risk students<sup>1</sup> across North Carolina currently deprived of the opportunity for a sound basic education—a fundamental right guaranteed by the North Carolina Constitution and this Court’s decision in *Leandro v. State* (“*Leandro I*”), 346 N.C. 336, 354, 488 S.E.2d 249, 259 (1997). See N.C. Const. art. I, § 15 (“The people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right.”); *id.* art. IX, § 2(1) (“The General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools . . .”). In 2004, the North Carolina Supreme Court unanimously held that the State of North Carolina, including its legislative and executive branches, was denying students the right “to

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<sup>1</sup> An “at-risk” student is one who holds or demonstrates at least one of the following characteristics: “(1) member of a low-income family; (2) participate[s] in free or reduced-cost lunch programs; (3) [has] parents with a low-level education; (4) show[s] limited proficiency in English; (5) [is] a member of a racial or ethnic minority group; (6) live[s] in a home headed by a single parent or guardian.” *Hoke Cnty. Bd. of Educ. v. State* (“*Leandro II*”), 358 N.C. 605, 636 n.16, 599 S.E.2d 365, 389 n.16 (2004).

gain their opportunity for a sound basic education” and affirmed a trial court order requiring the State to examine its allocations to schools and to correct any deficiencies that prevent the schools from offering their students “the opportunity to obtain a *Leandro*-conforming education.” *Leandro II*, 358 N.C. at 638, 599 S.E. 391.

Eleven years later, the Superior Court lamented State Defendants’ “dismal” progress, and ordered them to “propose a definite plan of action as to how the State of North Carolina intends to correct the educational deficiencies in the student population.” 17 March 2015 Order 2, 14, *Hoke Cnty. Bd. of Educ. et al. v. State*, No. 95-CVS-1158 (N.C. Super. Ct.). Upon receiving State Defendants’ proposed—and “wholly inadequate”—plan, the Superior Court warned, “The time is drawing nigh . . . when due deference to both the legislative and executive branches of government must yield to the court’s duty to adequately safeguard and actively enforce the constitutional mandate on which this case is premised.” 13 March 2018 Order at 5, 7, *Hoke Cnty. Bd. of Educ. et al. v. State*, No. 95-CVS-1158 (N.C. Super. Ct. Mar. 13, 2018) (“13 March 2018 Order”).

## **B. The Comprehensive Remedial Plan**

Deferring to the other branches of government—and following a thorough review of the state of education in North Carolina by a third-party independent education consultant—the Court ordered the State of North Carolina and State Board of Education (collectively, “State Defendants”) to work “expeditiously and without delay” to create and fully implement a system of education and educational reforms that will provide the opportunity for a sound basic education to all North Carolina children.

November Order at 4-5. After waiting seventeen years for a remedy, in March 2021, Penn-Intervenors were heartened when the State Defendants submitted the CRP to resolve the constitutional violations that plagued generations of North Carolina schoolchildren. See 11 June 2021 Order, *Hoke Cnty. Bd. of Educ. et al. v. State*, No. 95-CVS-1158 (N.C. Super. Ct.) (“June Order”).

On June 11, 2021, the Superior Court ordered the State Defendants to implement the CRP “in full and in accordance with the timelines set forth therein.” *Id.* at 7. All parties agreed the CRP included the “necessary and appropriate actions that must be implemented to address the continuing constitutional violations.” *Id.* at 5. The Court specifically held: “[T]he actions, programs, policies, and resources propounded by and agreed to [by] State Defendants, and described in the [CRP], are necessary . . . to provide the opportunity for a sound basic education to all public school children in North Carolina.” *Id.* at 7. State Defendants “presented no alternative” to the CRP. November Order at 9. Nor did they appeal the order.

At the time of the June Order, the Governor’s proposed 2021-2023 biennium budget was pending in the North Carolina General Assembly. If passed, the budget would have “fund[ed] and implement[ed] the first two years of the [CRP].” June Order at 6. It therefore appeared that, after nearly two decades, the State was poised to start implementing the CRP to remedy the constitutional violations suffered by generations of North Carolina schoolchildren.

### C. The November 10 Order

But as of November 10, that hope had faded; “no budget [had] passed despite significant unspent funds and known constitutional violations.” November Order at 11. The Court held two status conferences in September and October 2021, urging the State Defendants to begin implementing the CRP, but the General Assembly failed to take any action to fund the CRP or otherwise. November Order at 9, 18-19. Thus, as part of its duties, the Court stepped in to uphold the State Constitution. Pursuant to its inherent, constitutional, and equitable powers, it ordered state authorities to transfer \$1.75 billion, “the total amount of funds necessary to effectuate years 2 & 3 [of] the [CRP], from the unappropriated balance within the General Fund to the state agents and . . . actors with fiscal responsibility for implementing” the CRP. *Id.* at 19.

In reaching this conclusion, the Court noted that the State had “represented to this Court” that the CRP contains “necessary and appropriate actions that *must* be implemented to address the continuing constitutional violations.” November Order at 9 (emphasis in original; quotation marks omitted). The State “further represented” that “full implementation of each year of the [CRP] was required” to correct the constitutional violations. *Id.* The CRP was not a “‘menu’ of options,” but rather a “comprehensive set of fiscal, programmatic and strategic steps necessary to achieve outcomes for students required by our State Constitution.” *Id.* The Court concluded that the State had “more than sufficient funds available to execute the needs of the [CRP],” with more than \$8 billion in the State’s reserve balance and more than \$5

billion in forecasted revenues. *Id.* Thus, having granted the legislative and executive branches “every reasonable deference” over the previous 17 years—including most recently by deferring to the State in the “collaborative development of the CRP during the previous three years”—the Court concluded that it must act to prevent the constitutional rights of North Carolina’s students from being rendered “meaningless.” *Id.* at 10, 16.

#### **D. The State’s Ongoing Failure to Fully Fund the CRP**

Rather than ordering the immediate transfer of the funds, the Court again deferred to the other branches of government. It stayed the November Order for 30 days, “to permit the other branches of government to take further action consistent with the findings and conclusions of this Order.” *Id.* at 20. Instead of taking the necessary action to live up to its constitutional duty, while the November Order was stayed, the General Assembly enacted a half measure. It passed the State Budget; but, as discussed in more detail below, it only funded a fraction of years two and three of the CRP.

The State’s failure to fully fund the CRP evidently was due not to a lack of funding, but to recalcitrance. Indeed, the Court has found that the State’s failure to provide the necessary funding was “consistent with the antagonism demonstrated by legislative leaders towards these proceedings, the constitutional rights of North Carolina children, and this Court’s authority.” November Order at 11.

At every juncture, the judiciary has deferred to the legislative and executive branches in formulating, funding, and implementing a constitutionally sound public



education system. See *Leandro I*, 346 N.C. at 357, 488 S.E.2d at 261 (stating that only “a clear showing” that the legislative and executive branches have failed to provide a sound basic education “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” (emphasis in original)); *Leandro II*, 358 N.C. at 638, 599 S.E.2d at 391 (stating that the Superior Court had “demonstrated admirable restraint by refusing to dictate how existing problems should be approached and resolved,” “instead afford[ing] the two branches an unimpeded chance, ‘initially at least,’ to correct constitutional deficiencies revealed at trial” (quoting *Leandro I*, 346 N.C. at 357, 488 S.E.2d at 261)); November Order at 15 (waiting twenty-four years after *Leandro I* and seventeen years after *Leandro II* to order the transfer of funds from the State Treasury to fund the CRP).

And, at every juncture, the State has failed to comply with orders of the Court and to uphold the rights of North Carolina’s children. 13 March 2018 Order at 5 (“[T]he evidence before this court . . . is wholly inadequate to demonstrate . . . substantial compliance with the constitutional mandate of *Leandro* . . .”); 21 January 2020 Order, *Hoke Cnty. Bd. of Educ. et al. v. State*, No. 95-CVS-1158, at 33 (N.C. Super. Ct.) (ordering the State to create and implement a plan “expeditiously and without delay” to provide North Carolina children with the opportunity for a sound basic education); June Order at 7 (ordering State Defendants to secure funding for the CRP they had developed); November Order at 3 (“For over eleven (11) years and in over twenty (20) compliance hearings, the State demonstrated its inability, and

repeated failure, to develop, implement, and maintain any kind of substantive structural initiative designed to remedy the established constitutional deficiencies.”).

### **E. Subsequent Appellate Proceedings**

Once the State Budget had passed, the State Comptroller did not appear before this Court, but instead petitioned the Court of Appeals to resolve her purported conflicting obligations to release funds under the November Order and the State Budget. Pet. for Writ of Prohibition, Temporary Stay and Writ of Supersedeas 4. Following unusual proceedings at the Court of Appeals—which prompted one judge to dissent—the Court granted the writ of prohibition.<sup>2</sup> 30 November 2021 Order at 1-2, *Hoke Cnty. Bd. of Educ. et al. v. State*, No. P-21-511 (N.C. App.).

On December 7, the State appealed the November Order. The next day, Philip E. Berger, President Pro Tempore of the North Carolina Senate, and Timothy K. Moore, Speaker of the North Carolina House of Representatives (collectively, “Intervenor-Defendants”), filed a Notice of Intervention alleging that they had a right to intervene pursuant to N.C. Gen. Stat. § 1-72.2(b).<sup>3</sup> See Notice of Intervention, *Hoke Cnty. Bd. of Educ. et al. v. State*, No. 95-CVS-1158 (N.C. Super. Ct.).

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<sup>2</sup> Judge Arrowood dissented from the majority’s order as “incorrect for several reasons.” Order 2. Specifically, the Judge concluded that the majority lacked “good cause” to shorten the time for a response, which left Plaintiff Parties “one day to respond,” “without a full briefing schedule, no public calendaring of the case, and no opportunity for arguments on the last day this panel is constituted. This is a classic case of deciding a matter on the merits using a shadow docket of the courts.” *Id.*

<sup>3</sup> Whether Intervenor-Defendants had a right to intervene or were required to file a motion to intervene is a matter of dispute not before this Court on remand. See, e.g., State’s Response to the Notice of Intervention by Philip E. Berger, in his 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, *Hoke Cnty. Bd. of Educ. et al. v. State*, No. 95-CVS-11158 (N.C. Super. Ct. Dec. 22, 2021).

Plaintiff Parties subsequently petitioned the Supreme Court to “review of the grounds for issuing the writ and the authority of the courts to effectuate a remedial order for the grave, persistent constitutional violation that this Court previously recognized in . . . *Leandro II*.” Plaintiff-Intervenors’ Notice of Appeal and Petition for Discretionary Review at 3, *Hoke Cnty. Bd. of Educ. et al. v. State*, No. P-21-511 (N.C. Dec. 15, 2021); *see also* Plaintiffs’ Notice of Appeal, Petition for Discretionary Review and, Alternatively, Petition for Writ of Certiorari, *Hoke Cnty. Bd. of Educ. et al. v. State*, No. P-21-511 (N.C. Dec. 15, 2021). The State, too, petitioned for discretionary review. Petition for Discretionary Review Prior to a Determination by the North Carolina Court of Appeals, *Hoke Cnty. Bd. of Educ. et al. v. State*, No. P-21-511 (N.C. Feb. 14, 2022). The Supreme Court granted the Plaintiff Parties’ and State’s petitions on 18 March 2022. Order, *Hoke Cnty. Bd. of Educ. et al. v. State*, No. 425A21-2 (N.C.).

#### **F. The Supreme Court’s Remand Order**

This case now comes before this Court on remand from the Supreme Court, “to determine what effect, if any, the enactment of the State Budget has upon the nature and extent of the relief that the trial court granted in its 11 November 2021 order.” *Id.* at 2. The Supreme Court directed this Court to address this narrow factual issue within 30 days from the date of its order. *Id.*

Subsequently, this Court issued an order reiterating the narrow scope on remand, directing the parties to brief the following discrete points:

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

25 March 2022 Order at 2, *Hoke Cnty. Bd. of Educ. et al. v. State*, No. 95-CVS-1158 (N.C. Super. Ct.). On 5 April 2022, at the direction of the Court, the Chief Deputy Director of State Budget and her staff submitted the State Budget Analysis, which examined the first two points referenced in the Court's supplemental briefing order. *See Walker Affidavit and accompanying Exhibits 1-4.*

### III. Argument

Pursuant to the Supreme Court's remand order, the scope of this Court's inquiry is limited to analyzing the effect of the State Budget on the November Order. As discussed below, the State Budget has minimal effect on the November Order, other than to change the precise amount of funds that should be transferred.

According to the State Budget Analysis, the State Budget does not fully fund years two and three of the constitutionally required CRP. To the contrary, it funds only a fraction and reflects significant shortcomings in the obligations required under the CRP. But, according to that analysis, there are presently more than sufficient unallocated funds—**over \$4.25 billion**—in the General Fund available to fully fund those years of the CRP. This Court, thus, should make the necessary factual findings

to adjust the amounts that the Court previously ordered transferred in the November Order to the responsible fiscal governmental entities.

Nothing about the State Budget changes the underlying rationale of the November Order. Moreover, challenges to the Court's legal reasoning in that order are beyond the scope of this Court's mandate on remand. Rather than re-litigating the same arguments at the trial court, including the application of *Richmond*, this Court should defer such issues to the Supreme Court, which will decide them on the pending appeal. Accordingly, the Court should conclude that the State Budget has no effect on its ability to order the transfer.

**A. The State Budget Does Not Adequately Fund Years Two and Three of the Constitutionally Required CRP**

In the November Order, the Court determined that it would cost approximately \$1.75 billion to fund years two and three of the CRP based on State Defendants' own estimates. *See* November Order at 19. But according to the State Budget Analysis, the State Budget provides just 55% of those total necessary funds. *See* Walker Affidavit, Ex. 3. Specifically, the State Budget funds 63% of year 2 and 49% of year 3. *See* Walker Affidavit, Ex. 2.<sup>4</sup>

According to the State Budget Analysis, the partial funding of the CRP shows that only 24 out of the 44 funding priorities in year two are funded, and only 22 out

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<sup>4</sup> Those percentages include non-recurring federal emergency funds. Specifically, the State Budget Analysis credits \$69,353,256 in nonrecurring federal and state funds to recurring CRP items. Walker Affidavit, Ex. 3 at 2. As recognized in the November Order, reliance on such funds introduces the risk that these constitutionally-necessary actions will be underfunded once again in the next biennium budget. 30 November 2021 Order at 1-2, *Hoke Cty. Bd. of Educ. et al. v. State*, No. P-21-511 (N.C. App.).

of 42 funding priorities in year three are funded through the State Budget. Walker Affidavit, Ex. 3.

These shortfalls in the State Budget further reflect the State's ongoing neglect of the needs of at-risk students. Several of the CRP items only partially funded programs and resources that addressed the needs of at risk-students.<sup>5</sup> Walker Affidavit, Ex. 2.

Furthermore, there are several programs specifically targeting the needs of at-risk students that the State Budget does not fund *at all*, including the following initiatives:

- Combine the disadvantaged student supplemental funding and at-risk allotments and increase funding such that the combined allotment provides an equivalent supplemental weight of 0.4 on behalf of all economically-disadvantaged students (III.B.ii.2);
- Increase low-wealth funding to provide eligible counties supplemental funding equal to 110% of the statewide local revenue per student (III.B.ii.3);
- Eliminate the limited English proficiency funding cap, simplify formula, and increase funding to provide per-student support equivalent to a weight of 0.5 (III.B.ii.4);
- Simplify teacher assistant formula and increase funding until funding will provide approximately one teacher assistant for every 27 K-3 students (III.C.iii.2);

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<sup>5</sup> These include the following initiatives: (1) remove children with disabilities funding cap and increase supplemental funding to provide funding for students with disabilities equivalent to 2.3 times the cost of an average student (III.B.ii.1) (funded at 24%); (2) provide funding for Specialized Instructional Support Personnel to meet national guidelines (III.D.ii.1) (funded at 16%); (3) expand NC Pre-K through incremental rate and slot increases (VI.A.ii.1) (funded at 7%); and (4) incrementally increase Smart Start funding annually (VI.D.ii.1) (funded at 50%). Walker Affidavit, Ex. 2.

- Provide resources and support to high-poverty schools to adopt a community-schools or other evidence-based model to address out of school barriers (V.C.ii.1);
- Provide funding to cover the reduced-price lunch co-pays for all students who qualify for reduced-price meals so that those students would receive free lunches (V.C.iii.1);
- Provide funding to increase recruitment and support for up to 1,500 Teaching fellows (I.C.ii.1), which intended to help schools increase the pipeline of diverse, well-prepared teachers to better support students, especially at risk students; and for high quality teacher preparation programs in high-need rural and urban districts (I.C.ii.1), both of which can create long-term benefits for all of the schools, employees, and most importantly, the at-risk students of a particular district;
- Provide funding for comprehensive induction services through the NC New Teacher Support Program to beginning teachers in low-performing, high-poverty schools (I.G.ii.1); and
- Revise the funding approach for North Carolina Virtual Public School to remove barriers that prevent students in low-wealth districts from participating (VII.B.iii.1).

*Id.* Thus, as demonstrated by the State’s own analysis, the State Budget significantly underfunds the CRP.

**B. The General Fund Has More Than Sufficient Unallocated Funds to Fully Fund Years Two and Three of the CRP**

The State Budget Analysis also calculated “[t]he amount of funds remaining in the General Fund currently both in gross and net of appropriations in the 2021 Appropriations Act.” Walker Affidavit ¶ 7 (quoting 25 March 2022 Order at 2). The State determined “total unappropriated funds in the Savings Reserve” to be \$4.25 billion, and “the net unreserved cash balance” to be \$4.79 billion. *Id.* at ¶¶ 8-9. The unappropriated funds in the Savings Reserve are alone enough to fund the State’s

calculated shortfall. In other words, the General Fund has sufficient, unallocated funds to fully fund years two and three of the CRP.

**C. The Court Should Find that the Transfer Amounts in the November Order Will Need to be Adjusted**

The State has acknowledged, and the Court has held, that full funding of the CRP is required to satisfy the constitutional requirement for a sound basic education. *See* June Order at 4; November Order at 9, 16. That question is settled in this case. *See State ex rel. Regan v. WASCO, LLC*, 269 N.C. App. 292, 302, 837 S.E.2d 565, 571 (2020) (“[W]hen a fact has been agreed on or decided in a court of record, [no party] shall be allowed to call it in question, and have it tried over again at any time thereafter, so long as the judgment or decree stands unreversed[.]”); *Freedman v. Payne*, 253 N.C. App. 282, 287, 800 S.E.2d 686, 690 (2017) (“[T]he law of the case applies . . . to issues that were decided in the former proceeding, whether explicitly or by necessary implication[.]”); *State v. Todd*, 249 N.C. App. 170, 173, 790 S.E.2d 349, 354 (2016) (“[W]hen a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages of the same case.”).

“The right to a sound basic education is one of a very few affirmative constitutional rights that, to be realized, requires the State to supply adequate funding.” November Order at 16. That right has been described by the Supreme Court as both “paramount” and “sacred.” *Id.* at 16. Even after the passage of the State Budget, the “State’s ability to meet this constitutional obligation is not in question.” *Id.* at 16. “The unappropriated funds in the State Treasury greatly exceed



the funds needed to implement the [CRP].” *Id* at 16. “Consequently, there is no need to make impossible choices among competing constitutional priorities.” *Id* at 16.

Consistent with the same reasons discussed in the November Order, the Court should find that the amounts required to be transferred to fully fund years two and three of the CRP will need to be modified as follows:

- The transfer to the Department of Health and Human Services should be reduced from \$189,800,000 to \$168,441,761;
- The transfer to the Department of Public Instruction should be reduced from \$1,522,053,000 to \$593,628,196;
- The transfer to the University of North Carolina System should be reduced from \$41,300,000 to \$32,758,000.
- In the aggregate, the total transferred under the Order will be reduced from \$1.75 billion to \$794,827,957.

**D. *Richmond* is not Implicated and the Limited Remand Does Not Allow This Court to Revisit the Rationale for the Transfer of Funds Articulated in the November Order**

**i. The Scope of this Court’s Inquiry on Remand is Narrow and *Richmond* is Not Implicated**

As noted above, in the third item identified by this Court for briefing, the Court asked the parties to brief:

The effect of the appropriations in the 2021 Appropriations Act on the ability of the Court to order the Legislature to transfer funds to the Department of Health and Human Services, Department of Public Instruction, and the University of North Carolina System. *See Richmond Cty. Board of Education v. Cowell*, 254 N.C. App. 422 (2017).

First, given the limited remand of the case, any reexamination of the effect of *Richmond* on the Court’s November Order is beyond the scope of the Supreme Court’s order. The Supreme Court issued a narrow remand, with a tight 30-day deadline, to

address a limited factual question, namely, the effect of the State Budget on the CRP. It did not intend to reopen past issues decided in this case, including the applicability of *Richmond* to the Court’s November Order to transfer the funds. Rather, it directed this Court to settle a discrete factual issue, so that it may resolve the contested legal issues that the trial court already decided with the benefit of a complete factual record. With the benefit of this complete record, the case will be ripe for Supreme Court review to settle the contested issues of law.

Second, even if this Court reconsiders the applicability of *Richmond*, that inquiry should be limited to determining whether—in light of Defendant-Intervenors’ misrepresentation to this Court that there are insufficient unappropriated funds to cover the costs of fully implementing the CRP—the Court may still enter its transfer order. The simple answer is that *Richmond* does not preclude the Court from ordering the transfer of funds to the responsible fiscal governmental entities.<sup>6</sup> As represented in the State Budget Analysis, there are at least \$4.25 billion in unappropriated funds, which would more than satisfy the amount needed to cover the remaining obligations owed under years two and three of the CRP.

*Richmond* concerned a court’s attempt to order the State to transfer funds to one entity when those funds were already allocated to—and spent by—another entity. More specifically, the Richmond County school system contended that it was entitled

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<sup>6</sup> In the third item requesting briefing of the Court’s Supplemental Briefing Order, the Court inquires about the “effect of the appropriations in the 2021 Appropriations Act on the ability of the Court to *order the Legislature . . .*,” however, in the November Order, the Court did not order the Legislature to make the transfer, but instead ordered the responsible executive state officials to transfer the appropriate amounts. *See* November Order at 19-20.

to \$273,000 of fee revenue back from the State under Article IX, Section 7 of the Constitution, which mandates that the revenue from certain fines be spent on the schools, and not on county jails as allocated by the General Assembly. *See Richmond Cnty. Bd. of Edu. v. Cowell*, 254 N.C. App. at 423. The Court agreed that the State had violated the Constitution, and it entered a money judgment, but it concluded that it was powerless under the Constitution's Separation of Powers Clause to enforce that judgment, because the funds had already been reallocated and spent.

Here, while Intervenor-Defendants represented to this Court during the March 24 hearing that there was insufficient money available in the General Fund to fully fund years two and three of the CRP, the State Budget Analysis shows that they were wrong. As noted above and in the November Order, the funds in the General Fund have not been allocated to any entity and those funds remain available for disbursement. Therefore, the State Budget does not implicate *Richmond*. There are presently more than sufficient unallocated funds in the General Fund to address the significant funding shortcomings for years two and three of the constitutionally-required CRP. Thus, to the extent this Court revisits *Richmond*, that holding is inapplicable in light of the available funds, among other grounds not asserted here.

**ii. This Court Should Not Allow the Parties to Relitigate the Applicability of *Richmond***

“[T]he conservation of judicial manpower and the prompt disposition of cases are strong legal arguments against allowing repeated hearings on the same legal issues. The same considerations require that alleged errors of one judge be corrected by appellate review and not by resort to relitigate the same issues before a different

trial judge.” *Harco Nat’l Ins. Co. v. Grant Thornton LLP*, No. COA09-906, 2010 N.C. App. LEXIS 1773, at \*11-12 (Ct. App. Sep. 7, 2010) (quoting *Huffaker v. Holley*, 111 N.C. App. 914, 915-16, 433 S.E. 2d 474, 475 (1993)).

The North Carolina judiciary has already expended significant resources on this litigation. As the Supreme Court observed, “The time and financial resources devoted to litigating these issues over the past ten years undoubtedly have cost the taxpayers of this state an incalculable sum of money.” *Leandro II*, 358 N.C. at 610, 599 S.E.2d at 374. That was eighteen years ago. At this point, this case will not benefit from unnecessary re-litigation at the trial court. Both the November Order and the subsequent order from the Court of Appeals addressed the applicability of *Richmond* to the Court’s authority to transfer the funds. November Order at 14; 30; 30 November 2021 Order at 1-2, *Hoke Cnty. Bd. of Educ. et al. v. State*, No. P-21-511 (N.C. App.). The Supreme Court will have the benefit of those orders in the record, as well as full briefing from the parties on that issue. There is therefore no need for this Court to venture outside the scope of the Supreme Court’s limited remand to consider this issue a third time. Had the Supreme Court desired further consideration of *Richmond*, it would have said so in its remand order. But it did not.

#### **IV. Conclusion**

For the foregoing reasons, this Court should find and conclude: that the State Budget failed to cover 37% of the costs for year two and 51% of year three of the CRP, that there are more than enough unallocated funds in the General Fund to cover the costs of fully implementing years two and three of the CRP, and that *Richmond* is not

implicated. The Court should further revise the transfer amounts in the November Order (at 19) to reflect the costs in the CRP covered by the State Budget as follows:

- The transfer to the Department of Health and Human Services should be reduced from \$189,800,000 to \$168,441,761;
- The transfer to the Department of Public Instruction should be reduced from \$1,522,053,000 to \$593,628,196;
- The transfer to the University of North Carolina System should be reduced from \$41,300,000 to \$32,758,000.

Respectfully Submitted on 8 April 2022,

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## CERTIFICATE OF COMPLIANCE

Pursuant to BRC 7.8, counsel for Penn-Intervenors certifies that the foregoing brief, which is prepared using a proportional 12-font is less than 7,500 words (excluding cover, caption, index, table of authorities, signature block, certificate of service, and this certificate of compliance) as reported by the word-processing software.

This the 8th day of April, 2022.

/s/ Christopher A. Brook  
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CERTIFICATE OF SERVICE

Pursuant to BCR 3.9, the foregoing brief has been served on all parties upon its filing. In addition, the foregoing response brief has been served on the following via electronic mail:

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