No. 5PA12-2 TENTH DISTRICT

NORTH CAROLINA SUPREME COURT

* *

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.	From Wake County

* *

MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF
North Carolina School Boards Association and
National School Boards Association

* *

NOW COME the North Carolina School Boards Association and the National School Boards Association ("Associations"), by and through undersigned counsel and, pursuant to Rule 28(i) of the North Carolina Rules of Appellate Procedure, move for leave to file an *amici curiae* brief in this case supporting the rights of children. In support of this motion, the Associations show the following:

NATURE OF THE ASSOCIATIONS' INTEREST

The North Carolina School Boards Association is a nonprofit association formed to support local school boards across the state. Although participation is voluntary, all 115 county and city boards of education, as well as the school board of the Eastern Band of the Cherokee Nation, located on the Cherokee reservation in western North Carolina, are members. The Association advocates for the concerns of local school boards in the state and federal courts and legislatures. No other entity represents the interests of local boards of education in North Carolina or has as much understanding of matters affecting them as the Association.

Some of the Association's members are plaintiffs in this case, and all its members have a vital interest in this litigation. The trial court's order preserves the constitutional right of disadvantaged children across the State to the opportunity to obtain a sound basic education. It brings all our citizens closer to the day when they may proudly say all our children, whatever their circumstances, have the opportunity to obtain a sound basic education.

The National School Boards Association ("NSBA") is a not-for-profit organization of state associations of school boards and their approximately 13,600 member districts across the United States, including all of North Carolina's local boards of education. Taken as a whole, the public school districts represented by NSBA through its members are responsible for educating more than 50 million public school students. The NSBA's support for pre-K programs is noted in its Beliefs and Policies, Article IV, Section 3.7, which states: "NSBA supports pre-K and full day kindergarten programs with academic standards to raise student achievement and urges the federal and state governments to provide the necessary resources."

WHY THE ASSOCIATIONS' BRIEF WILL ASSIST THE COURT

The Associations' member boards in North Carolina are engaged every day in every community across the State in seeking to fulfill every child's right to the opportunity to obtain a sound basic education. By virtue of their knowledge and experience of their members, the Associations are uniquely qualified to assist the Court in understanding the challenges and opportunities the state faces in meeting its constitutional obligation to provide every child the opportunity to obtain a sound basic education.

ISSUES TO BE ADDRESSED

In their *amici curiae* brief, the Associations will respond to the issues raised in the Attorney General's brief for the General Assembly and support the positions argued by all other parties, including the State Board of Education. In the end, the Associations hope to assist the Court in understanding that the trial court properly applied the landmark decisions in *Leandro I* and *Leandro II* in enjoining the State, through the General Assembly, from denying disadvantaged children the opportunity to receive the additional assistance necessary for them to have the opportunity for a sound basic education.

CONCLUSION

For the reasons set forth above, the Associations respectfully move this Court to allow this motion and to accept the *amici curiae* brief submitted with this motion.

Respectfully submitted, this the 24th day of July, 2013.

POYNER SPRUILL LLP

By: /s/ Robert F. Orr_____
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N.C. R. App. P. 33(b) Certification:
I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document was this day filed with the North Carolina Supreme Court, and that a copy was also duly served upon all parties to this appeal by transmitting a copy thereof via e-mail to the following persons:

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No. 5PA12-2 TENTH DISTRICT

NORTH CAROLINA SUPREME COURT

* *

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.	From Wake County

* *

BRIEF OF *AMICI CURIAE*
NORTH CAROLINA SCHOOL BOARDS ASSOCIATION AND
NATIONAL SCHOOL BOARDS ASSOCIATION

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STATEMENT OF INTEREST

The North Carolina School Boards Association was founded in 1937 to provide services and support to local boards of education and the public schools they administer. Its members are all 115 of the local school boards across the State, as well as the school board of the Eastern Band of the Cherokee Nation, on the Cherokee reservation in western North Carolina. Local boards of education are charged with the statutory duty of being the front-line administrative units for the education of children in North Carolina's public schools. The Association advocates for public school education and provides leadership and services to enable all local boards of education to govern effectively.

The National School Boards Association ("NSBA") is a not-for-profit organization of state associations of school boards and their approximately 13,600 member districts across the United States, including all of North Carolina's local boards of education. Taken as a whole, the public school districts represented by NSBA through its members are responsible for educating more than 50 million public school students. The NSBA's support for prekindergarten programs is noted in its Beliefs and Policies, Article IV, Section 3.7, which states: "NSBA supports pre-K and full day kindergarten programs with academic standards to raise student achievement and urges the federal and state governments to provide the necessary resources."

The *Leandro* litigation started when a small number of "low wealth" counties' boards of education and individuals in those districts brought a declaratory judgment action against the State and State Board of Education asserting violations of the N.C. Constitution, particularly regarding the adequacy of State funding. *See Leandro v. State*, 346 N.C. 336, 342, 488 S.E.2d 249, 251 (1997) ("*Leandro I*"). Local boards of education from several "high wealth" counties later intervened. However, the constitutional issues in this case regarding the adequacy of the State educational system and the ramifications for local school boards, whether parties or not, are self-evident. The Associations' member boards and the children and families they serve are directly affected and impacted by the course and outcome of this litigation.

INTRODUCTION

This litigation was initiated almost twenty years ago and has made its way to this Court twice before. In 1997, in *Leandro I,* the Court held that the North Carolina Constitution guarantees every child "the opportunity to obtain a sound basic education" and defined the contents of that constitutionally required level of education. *Leandro I,* 346 N.C. at 351, 480 S.E.2d at 255.

In 2004, in *Leandro II*, this Court confirmed that the obligation to provide every child in the State the opportunity to obtain a sound basic education rests squarely on the State, through its legislative and executive branches. *See Hoke*

County School Board v. State, 358 N.C. 605, 599 S.E.2d 365 (2004) ("*Leandro II*"). The Court also affirmed the trial court's conclusion that prekindergarten "at-risk" students consistently were not obtaining the constitutionally guaranteed opportunity for a sound basic education. *Leandro II,* 358 N.C. at 641-42, 599 S.E.2d at 393. The Court remanded this matter to the trial court with instructions to permit the State's legislative and executive branches to first determine how to address this impediment to providing the constitutionally mandated educational opportunities described in *Leandro I*. *Id.* at 649, 599 S.E.2d at 397. Once a remedy for this constitutional shortcoming was determined, the State would be expected to provide those additional opportunities to all prekindergarten at-risk children who sought them.

The State ultimately chose to remedy its constitutional failings by increasing the availability of the More at Four (MAF) program, a high-quality prekindergarten program aimed at increasing the kindergarten readiness of at-risk children. The program initially began in 2001 and after the *Leandro II* decision in 2004, the State committed to expanding "the More at Four Prekindergarten Program and provid[ing] access to the program to the estimated 40,000 at-risk four year olds *across the State*." State Defendants' 2004 Action Plan to Court, pp. 1, 7 (emphasis added).

Despite the program's successes,[1] in 2011 the General Assembly adopted legislation moving the MAF into the Division of Child Development, under the Department of Health and Human Services, effectively eliminating the educational component of the program. In addition, the legislation significantly curtailed at-risk students' access to the program, by substantially cutting funding for the program and limiting the percentage of at-risk students who could be served within the restructured program.

After a hearing, the trial court ordered the State to refrain from implementing or enforcing that portion of the legislation that "limits, restricts, bars or otherwise interferes, in any manner, with the admission of all eligible at-risk four year olds that apply to the prekindergarten program …" The trial court further barred the State from implementing, applying or enforcing "any other artificial rule, barrier, or regulation to deny any eligible at-risk four year old admission to the prekindergarten program …" The Court of Appeals affirmed the trial court's order.

Thus, the issue before this Court, in *Leandro III,* is simply whether the State may refuse to fulfill its constitutional obligations to at-risk prekindergarten students by significantly curtailing the prekindergarten programs the State itself chose to establish as a remedy for its previous constitutional failings.

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[1] Those successes are detailed in the trial court's July 2011 order.

A simplistic, but useful, analogy can be found in the context of children assigned to a Little League baseball team. Some children arrive with exceptional preparation accomplished through a variety of independent means. Others come with more limited preparation. Finally, a group of children enter the competition with little or no preparation, having perhaps never thrown or caught a baseball—much less attempted to hit one with a bat. We can all agree that this last group of children has little or no chance to compete adequately without enormous effort, attention and resources devoted to them. Simply being on the team or playing in the games does not provide a meaningful opportunity to be successful.

This example mirrors, in a very small way, the circumstances of the at-risk children who find themselves in the mandated K-12 public school system. These at-risk children are woefully unprepared to compete and take advantage of the public educational system. There can be little doubt that these disadvantaged students will fall quickly behind their peers, experience enormous frustration and ultimately, in high numbers, never obtain a sound basic education, unless the State takes constructive steps to provide them with the educational opportunities to prepare them for the public school system. These are the children that this Court determined in *Leandro II* needed additional assistance in order to have "the *opportunity* to obtain a sound basic education." *Leandro II*, 358 N.C. at 609, 599 S.E.2d at 374 (emphasis added). These are the very children from whom the

General Assembly has now essentiality retreated by refusing to offer the additional educational opportunities the State itself established to fulfill its constitutional obligations to them.

The unanimous Court of Appeals opinion succinctly points out: "…should the problem cease to exist or should its solution be superseded by another approach, the State should be allowed to modify or eliminate MAF." (Slip op. p. 20) However, this case rests on the undeniable facts that the problem certainly has not ceased to exist nor has an alternative approach been proposed – much less presented to the trial court. Instead, the legislation at issue unilaterally withdraws the commitments the State made in this case to remedy the constitutional deprivation of the opportunity to a sound basic education.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY AFFIRMED THE TRIAL COURT'S ORDER BARRING THE STATE FROM DENYING ANY ELIGIBLE AT-RISK FOUR YEAR OLD ADMISSION TO THE NORTH CAROLINA PREKINDERGARTEN PROGRAM

In its brief to this Court, the State hinges its misguided arguments on three points: (1) the Trial Court's Order requires the state to provide prekindergarten services and therefore exceeds the proper scope of judicial authority (2) the scope of the *Leandro II* decision is limited to Hoke County students and is not applicable statewide and (3) because there is not a constitutional right to prekindergarten services, the State is free to diminish, if not eliminate, any remedial efforts for

prekindergarten at-risk children previously committed to by the defendants in this case pursuant to *Leandro II*. However, upon close examination, the State's arguments must fail.

A. The trial court's order does not require a particular remedy; instead, it reaffirms the State's obligation to continue to offer its chosen remedy until and unless another remedy is in place.

The existing prekindergarten program is the *remedy that the State itself chose* to address its failure to provide at-risk students with the opportunity to receive a sound basic education. In addition, the State has offered *no other remedy* for the at-risk students who would have been barred from an existing prekindergarten program as a result of the 2011 legislation.

The Associations agree that *Leandro II* does not require prekindergarten programs for at-risk children. However, it does require the State to select and implement *some* form of additional educational opportunities for those children. *Leandro II* does not hold that prekindergarten programs are the *only* remedy for at risk children, but it does hold that *some* remedy is necessary for those children and must be implemented. *Leandro II,* 358 N.C. at 644, 599 S.E.2d at 394.

It has been almost 10 years since the *Leandro II* decision, in which this Court held that the trial court could not select for the State the method that would, as the Court of Appeals wrote, "best satisfy their duty to help prepare those students who enter the schools to avail themselves of an opportunity to obtain a

sound basic education." In that interval, "[t]he only program, evidenced in the record, that was developed by the State since Leandro II to address the needs of those students was MAF, a prekindergarten program." Neither the trial court nor the Court of Appeals is attempting to impose a particular remedy; "[r]ather, the State made that determination for itself when in 2001 it developed the prekindergarten program."[2]

The trial court, in its order now before this Court for review, did nothing more than properly prevent the State from backtracking and regressing from *the State's* chosen remedy for providing a vehicle for at-risk prekindergarten children to have the opportunity to obtain a sound basic education.

B. The holding in the two prior *Leandro* decisions is not limited to Hoke County.

While *Leandro II* was tried in Hoke County, its holdings are not limited to Hoke County children. The parties, including the State, agreed early in the litigation that Hoke County would serve as the *representative* low-wealth district, in an effort to conserve resources and in the interest of judicial economy.

However, *Leandro II* reaffirmed that *all* children in the State have a constitutional right to the opportunity for a sound basic education. This Court, upon review of the evidence presented at trial and the trial court's extensive order

[2] Again, as discussed above, the MAF program was developed in 2001 and expanded in 2004, after the *Leandro II* decision.

upon which the appeal was based, concluded and declared that the at-risk children in Hoke County had been denied the constitutionally required opportunity for a sound basic education. While the evidence was primarily focused on Hoke County, as the representative low-wealth county plaintiff, the State's assertion that the *Leandro II* holding applies only to Hoke County is disingenuous, given both this Court's ruling and the State's subsequent conduct. As this Court stated:

> While this Court assuredly recognizes the gravity of the situation for 'at-risk' prospective enrollees in Hoke County *and elsewhere*, and acknowledges the imperative need for a solution that will prevent existing circumstances from remaining static or spiraling further, we are equally convinced that the evidence indicates that the State shares our concerns and, more importantly, that the State has already begun to assume its responsibilities for implementing corrective measures.

Leandro II, 358 N.C. at 643-44, 599 S.E.2d at 395 (emphasis supplied). This part of *Leandro II* unquestionably declares the expanded focus and declaration of rights in the case beyond the provincial boundaries of Hoke County. The State appeared to agree, because, as discussed above, when the case was remanded to the superior court, the State presented to the Court a plan for the expansion of the MAF program *across the state,* not just in Hoke County.

This Court did observe that there is no *separate* right to prekindergarten for at-risk prospective enrollees. However, it also held that the right of *all* children to the opportunity for a sound basic education encompasses for at-risk children the

right to additional assistance, designed by the State, to level the playing field and meet the "special needs attendant to such at-risk students." *Leandro II*, 358 N.C. at 640, 599 S.E.2d at 392. With this additional assistance "at risk" children will then have access to the opportunity to obtain a sound basic education on the same basis as all other children.

This Court further noted that "preemptive action on the part of the State should target those children about to enroll, recognizing that preemptive action affecting such children prior to their entering public schools might well be far more cost effective than waiting until they are actually in the educational system." *Leandro II*, 358 N.C. at 640-41, 599 S.E.2d at 392. Furthermore, the evidence throughout has reflected a realization by the State (corroborated by reams of expert testimony), that intervention for these at-risk children, across the state, prior to starting kindergarten program, was the most effective, both substantively and financially, of any program considered. As a result, the evidentiary record post *Leandro II*, reflects an increasing and expanding commitment by the State to preemptively prepare these at-risk children so that upon reaching kindergarten, they are adequately prepared to access a sound basic education. Without such an "opportunity," these children were consigned to the track of failure analogized in the earlier example of Little Leaguers. The best and most practical solution, as

shown by the evidence, is the preemptive programs established by the State, which is exactly what the State has done.

As this Court well knows, constitutional rights are not confined to county lines or school districts. The *Leandro* litigation began as a declaratory judgment action, *see Leandro I*, 346 N.C. at 342, 488 S.E.2d at 251, and it continues as such. The two decisions of this Court have clearly and without equivocation declared the contours of the particular constitutional right, and secondly, applied the right to specific evidence dealing with an identifiable subset of at-risk children present *in every school system* in every part of the State. The children of this State should not have to litigate those rights on a county-by-county, school system-by-system or school-by-school basis. In fact, to accept the State's arguments would lead to extraordinarily expensive litigation, as plaintiffs in each county would be required to prove what the State, with its 2004 statewide plan for increased access to MAF, already acknowledged: that there are at-risk students within each county and that their special needs are not being met. Such a process would be incredibly wasteful of resources and educational opportunities for another generation of school children. Local boards across North Carolina are committed to upholding and fulfilling the constitutional promises to each and every child – including those from at-risk circumstances that leave them significantly disadvantaged upon entering the mandated K-12 public school system without appropriate prophylactic

measures. This is not an issue, as the State asserts, that only the Hoke County Board of Education need be concerned with but one that impacts the educational rights of children throughout North Carolina.

II. THE TRIAL COURT CORRECTLY RULED THAT THE LEGISLATION AT ISSUE VIOLATES THE CONSTITUTIONAL RIGHTS OF AT-RISK CHILDREN.

Amici reiterates that this litigation is a declaratory judgment action, and the Court is empowered to declare the rights of affected individuals and impose a remedy. As previously discussed, the trial court found and the Supreme Court affirmed the right of all North Carolina children to the opportunity for a sound basic education. *Leandro II,* 358 N.C. at 621-22, 599 S.E.2d at 381. Furthermore, the special sub-group of children—at-risk children—was determined to have been denied the *opportunity* or the gateway to actually obtaining a sound basic education, in violation of the North Carolina Constitution. *Id.* at 638, 599 S.E.2d at 398. This determination was made by this Court in July of 2004.

Since that decision, over the course of the ensuing 9 years, the trial court has monitored the State's compliance with the requirement that it provide at-risk children with this opportunity. The State and the State Board of Education stated that "[w]ithout access to quality prekindergarten programs, at-risk students start behind and remain at-risk of school failure throughout their school careers." State Defendants' 2004 Action Plan to Court, at RS 584. Additionally, the State

represented to the Trial Court that the State could "expand the move and form Pre-Kindergarten Program and provide access to the program to the estimated 40,000 at-risk four-year olds across the State." *Id.* at 578. Further, the trial court noted that N.C. Gen. Stat. § 143B-168.10 provided:

> The General Assembly finds, upon consultation with the Governor, that every child can benefit from, and should have access to, high quality early childhood education and development services.[3]

Thus, when the General Assembly passed the Budget Act in 2011, including the provisions at issue, the rights of at-risk children to be provided the *opportunity* for a sound basic education had been firmly established. Moreover, a solution for providing the means to that opportunity had been created by the State with the Court's approval and implemented in a progressively affirmative manner toward achieving full compliance with the constitutional needs of these children.

The trial court in its Order at issue here concluded that "the 2011 Budget, Sections 10.7(e), (f), and (g), combine to effectively limit access to prekindergarten services for many of those at-risk 4-year olds who need the program so they can start Kindergarten ready to take advantage of their constitutional right to the opportunity to obtain a sound basic education." Order, p. 20. The trial court thus concluded that this aspect of the legislation served and had the purpose of creating

[3] The trial court noted that this commitment by the State occurred during the course of the trial in Hoke County and prior to the Supreme Court's ruling in *Leandro II*.

a formidable barrier to the necessary opportunity for a sound basic education. As in any constitutional challenge to an act or acts of the General Assembly, the Court has the responsibility to strike down any offending legislation and prohibit its implementation. *Bayard v. Singleton*, 3 N.C. 42 (1787); *Corum v. Univ. of North Carolina*, 330 N.C. 761, 783, 413 S.E.2d 276, 290 (1992).

Here, as part of this ongoing declaratory judgment action, the trial court concluded that the legislation at issue violated the articulated constitutional rights of the State's at-risk children, whose right to the opportunity for a sound basic education had been recognized and affirmed by this Court. The trial court enjoined the implementation and enforcement of "that portion of the 2011 Budget Bill, Section 10.7(f), that limits, restricts, bars or otherwise interferes, in any manner, with the admission of all eligible at-risk four-year olds *that apply* to the prekindergarten program, including but not limited to the 20% cap restriction or for that matter any percentage cap, of the four-year olds served within the prekindergarten program, NCPK." Order, p. 25 (emphasis added). The Trial Court reinforced this specific declaratory remedy by ordering that "the State of North Carolina shall not implement, apply or enforce any other artificial barrier, or regulation to deny any eligible at-risk four-year old admission to the prekindergarten program, NCPK." Order, p. 25.

The State's argument that the trial court's action was beyond its powers as a part of the Judicial branch of government is simply untenable. The trial judge in this case did what every other trial judge does when a plaintiff seeks a declaration that an action by the General Assembly violates the Constitution. The judge determines whether the action violates the plaintiff's rights under the Constitution and, if it does, then enjoins the continuation of that violation.

III. THE COURT OF APPEALS CORRECTLY AFFIRMED THE TRIAL COURT'S ORDER REQUIRING THE STATE TO COME FORWARD WITH ANY PROPOSED MODIFICATIONS TO THE REMEDY OF PREKINDERGARTEN FOR AT-RISK STUDENTS.

The State makes much of the use of the word "pre-clearance" to describe the requirement that the State come back before the Trial Court if it should seek to change the remedy for the constitutional deprivation at issue. As previously quoted from the Court of Appeals opinion, the State simply has to come forward to show the Court that either the constitutional problems no longer exists or that the State has devised another effective way to address the problem. Despite the State's efforts to minimize, if not repudiate, the long-standing representation to the trial court about how the State would address the at-risk prekindergarten problem, the current remedy has been in operation for years. Changes in how the State might now or in the future remedy that problem obviously need to go back before the trial court to determine whether the proposed solution adequately meets the needs of these vulnerable children. To categorize the use of the word "pre-clearance" as

some sort of violation of separation of powers principles is disingenuous beyond description. This is routine jurisprudence.

CONCLUSION

The Associations' members are charged with the functional responsibility of carrying out the State's constitutional obligation to provide all children the opportunity to obtain a sound basic education. On behalf of its members, the Associations respectfully request this Court affirm the trial court's decision. As this Court said in *Leandro II* in 2004:

> 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. While obtaining judicial interpretation of our Constitution in this matter and applying it to the context of facts in this case is a critical process, one can only wonder how many additional teachers, books, classrooms and programs could have been provided by that money in furtherance of the requirement to provide the school children of North Carolina with the opportunity for a sound basic education.

Leandro II, 358 N.C. at 609, 599 S.E.2d at 374.

Now, nine more years further down the road, the State is still litigating, still dragging its feet in meeting its most fundamental constitutional responsibility. Since the *Leandro II* ruling, a generation of children, at-risk and otherwise, have passed through and out of our schoolhouse doors, many prematurely and without having truly had the opportunity to obtain the sound basic education our

Constitution mandates. The legislation at issue only further delays and erodes the primary responsibility of the General Assembly under the State Constitution to provide our next generation of children the opportunity for a sound basic education – most particularly those most vulnerable children from at-risk circumstances who most need the prekindergarten programs. This Court has consistently and without reservation articulated the constitutional principles at issue in this case; and the trial court through many years of litigation has sought to give practical meaning to those principles. Educators, parents and government officials have worked tirelessly to implement and give real meaning to an opportunity for a sound basic education. The North Carolina School Boards Association and National School Boards Association urges this Court to affirm the unanimous decision of the Court of Appeals and reaffirm the constitutional right to an opportunity for a sound basic education for the children of this state.

Respectfully submitted, this the 24th day of July, 2013.

POYNER SPRUILL LLP

By: /s/ Robert F. Orr_____
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N.C. R. App. P. 33(b) Certification:
I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document was this day filed with the North Carolina Supreme Court, and that a copy was also duly served upon all parties to this appeal by transmitting a copy thereof via e-mail to the following persons:

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This the 24th day of July, 2013.

/s/ Robert F. Orr_____
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