No. 89PA22 DISTRICT THREE-A

SUPREME COURT OF NORTH CAROLINA

****

ERIC STEVEN FEARRINGTON,
CRAIG D. MALMROSE,

Plaintiffs,

v.

CITY OF GREENVILLE, PITT COUNTY BOARD OF EDUCATION,

Defendants.

From the Court of Appeals
No. COA20-877

From Pitt County
No. COA 20-441

****

AMICUS CURIAE BRIEF OF NORTH CAROLINA INSTITUTE FOR CONSTITUTIONAL LAW

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INTRODUCTION

Pursuant to Rule 28(i) of the North Carolina Rules of Appellate Procedure, the North Carolina Institute for Constitutional Law submits

this brief as amicus curiae in support of Plaintiffs Eric Fearrington and Craig Malmrose.[1] N.C. R. App. P. 28(i).

STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus North Carolina Institute for Constitutional Law ("NCICL") is a 501(c)(3) corporation established to conduct research, and to educate and advise the general public, policy makers, and the Bar on the rights of citizens under the constitutions of the State of North Carolina and the United States of America. NCICL engages in litigation as necessary to further these goals. Its mission is to ensure compliance with constitutional restraints on government and protect the rights of North Carolinians. Throughout its history, NCICL has worked to ensure government compliance with educational provisions and has addressed education funding in both litigation and general, academic writing. NCICL remains committed to safeguarding sound education and constitutional principles. It thus has a strong interest in this Court's ruling in this case.

ARGUMENT

[1] Pursuant to Rule 28(i)(2), no person or entity—other than amici curiae, their members, and their counsel—directly or indirectly wrote this brief or contributed money for its preparation.

Education is a constitutional right imperative to the well-being of the children of North Carolina and the state itself. North Carolina guarantees "[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. To help guard and maintain this right, N.C. Const. Art. IX, § 7, "The Fines and Forfeitures Clause," mandates that the "clear proceeds" of all fines, penalties, and forfeitures "for any breach of the penal laws of the State, shall belong to and remain in the several counties, and shall be faithfully appropriated and used exclusively for maintaining free public schools."

Public education and its funding remain an ongoing constitutional issue, drawing attention of the public, lawmakers, and the courts. One need look no further than the *Leandro* saga for confirmation of that interest. *See generally Hoke Cty. Bd. Of Educ. v. State*, 382 N.C. 386 (2022); *Leandro v. State,* 346 N.C. 336 (2004).

A ruling affirming the Court of Appeals' entry of summary judgment in favor of Plaintiffs' Article IX, § 7 claim is essential in safeguarding public education and the constitutional framework for its funding. Defendants have entered a Red-Light Camera Enforcement

Program ("RLCEP") interlocal funding agreement ("Interlocal Agreement") that circumvents public school funding requirements established by the People in their Constitution.

Defendant-Appellants City of Greenville ("The City") and Pitt County Board of Education ("The Board") invite an interpretation of Article IX, § 7 that cannot be reconciled with constitutional text and that would render the Fines and Forfeitures Clause impotent. Because the Board receives less than the clear proceeds of civil penalties collected by the City's RLCEP, the RLCEP violates The Fines and Forfeitures Clause, and this Court should so hold.

I. DEFENDANTS' INTERLOCAL AGREEMENT AND RED LIGHT CAMERA ENFORCEMENT PROGRAM ARE REPUGNANT TO THE INTENT AND PURPOSE OF ARTICLE IX, § 7.

Defendants have entered an Interlocal Agreement to implement RLCEP that is repugnant to the scope and purpose of the Fines and Forfeitures Clause. This clause was enacted to maintain one source of public school funds *and* protect those funds from being diverted for non-education purposes. *Cauble v. Asheville*, 66 N.C. App. 537, 544 (1984) ("*Cauble III*") (citing *Shore v. Edmisten*, 290 N.C. 628, 633 (1976)). The City and Board have tried to limit Article IX, § 7's effect by clever

drafting and urging this Court to accept their gamesmanship as constitutional compliance. To that end, they conveniently ignore the Clause's historical purpose in preventing diversion of school funds.

Although the 1776 State Constitution included "[t]hat a school or schools shall be established by the Legislature for the convenient Instruction of Youth," public education remained stagnant.[2] N.C. Const., § XLI (1776). After years of inadequate funding and diversion of education funds for unrelated purposes, the 1868 constitutional convention placed an "irreducible educational fund" in the Reconstruction Constitution.[3] D. Lawrence, *Fines, Penalties, and Forfeitures: An Historical and Comparative Analysis*, 65 N.C.L. Rev. 49, 54 (1986).

[2] The General Assembly did not create the statutory Literary Fund until 1825 and did not establish a statewide public school system until 1839. These were very slow to grow, largely because of socio-economic norms and funds being diverted for non-educational uses, especially during the Civil War. *See* S. Bauer, SURVEY OF DEVELOPMENTS IN NORTH CAROLINA LAW AND THE FOURTH CIRCUIT, 1996: II. CONSTITUTIONAL LAW: *Faithfully Maintaining the State's Public Schools*. . .75 N.C.L. Rev. 2252, 2257-2259 (1997).

[3] *See* 65 N.C.L. Rev. 49, 54 (1986) ("Against this background, the Reconstruction Constitution of 1868 replaced the statutorily based Literary Fund with a constitutionally based "irreducible educational fund, the annual income of which could be used only "for establishing and perfecting . . . a system of free public schools.").

Despite these advances, "during the period from 1868 to 1875 State government remained unable to keep its hands off the endowment fund." *Id.* at 59. Consequently, the irreducible fund was strengthened and amended into the current Fines and Forfeitures Clause during the 1875 constitutional convention. *See* 75 N.C.L. Rev. 2252, 2258. There, the convention added the county school fund, which endures to this day and mandates "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." *Id.*

The Fines and Forfeitures Clause remains as Article IX, § 7 in the present constitution and the Courts have continued to confirm its dual purpose:

> It is manifest that Article IX, Section [7], of the Constitution was designed in its entirety to secure two wise ends, namely: (1) To set apart the property and revenue specified therein for the support of the public school system; and (2) to prevent the diversion of public school property and revenue from their intended use to other purposes.

Shore, 290 N.C. at 633 (quoting *Boney v. Kinston Graded School*, 229 N.C. 136, 140 (1948)).

Through three iterations of our constitution, the People have refined and strengthened their commitment to public education. That commitment cannot be defeated by sham compliance.

Here, the Board reasons that because Article IX, § 7's purpose "is to increase revenues and support for public schools," and because the Interlocal Agreement increases revenue for public schools, "[t]here is no violation." (Defendant Pitt County Board of Education New Brief p 20). The Board's argument invites absurd results. Under such narrow logic, any agreement that nominally increases school funding would satisfy the mandates of the Fines and Forfeitures Clause, rendering it impotent.

The City emphasizes that this case involves two transactions, one in which the Board receives "100% of the proceeds" and a "wholly distinction arrangement" in which the Board reimburses the City for the RCLEP. According to the City, the "first transaction is the one to which the 'clear proceeds' analysis applies." (Defendant City of Greenville's New Brief p 14). The City continues: "When the two transactions between the City and the Board are properly considered as separate, it is clear that the Board receives 100% of the clear proceeds

of the RLCEP as contemplated by Article IX, Section 7, and N.C. Gen. Stat. § 115C-437." By the City's reasoning, a school board could receive *all* the money from civil fines and in a supposedly distinct arrangement, turn around and give back to a collecting city *all* of the proceeds because, as the City's argument goes, the transactions should be considered "separate." The City's position would invite structuring schemes calculated to circumvent the constitution.

Defendants correctly acknowledge that Article IX, § 7's purpose is to grow and maintain school funds, but they ignore limits on diversion of fines for non-educational purposes. Civil penalty proceeds must *remain* in the county school fund and be used "*exclusively* for the maintenance of public schools." Art. IX, § 7 (emphasis added). However, the RLCEP here diverts 28.34% of proceeds away from Pitt County Schools. *Fearrington v. City of Greenville*, 282 N.C. App. 218, 222 (2022). The constitution requires that the clear proceeds of the red-light camera fines be used for education. Contrary to the Board's argument, *some* proceeds aren't enough. The constitution does not take a "something is better than nothing" approach. Contrary to the City's argument, the clear proceeds must be used exclusively for education,

not diverted to other units of government or out-of-state for-profit corporations. In the realm of constitutional compliance, pseudo-compliance is no compliance.

II. GREENVILLE'S RLCEP CONFLICTS WITH THE PLAIN LANGUAGE OF ARTICLE IX, § 7 AND ALLOWING IT TO CONTINUE WOULD INCENTIVIZE POOR PUBLIC POLICY.

Although "[a]ll statutes are presumed to be constitutional, and every presumption is to be indulged in favor of validity," *State ex rel. Thornburg v. House & Lot*, 334 N.C. 290, 298 (1993) (quoting *Martin v. N.C. Housing Corp.*, 277 N.C. 29 (1970)), presumption and indulgence cannot overcome glaring constitutional infirmities.

Defendants argue for a shallow interpretation of Article IX, § 7 that invites perverse financial incentives. The City asserts "[t]his first transaction [prior to the City's reimbursement] is the one to which the 'clear proceeds' analysis applies," "[t]herefore the Fines and Forfeitures Clause does not apply to the Board's own expenditures of funds". (New Brief for City pp 14-15). The Board similarly asserts that "[o]nce placed in this [Pitt County School] fund, the constitutional inquiry should be concluded. The funds are faithfully appropriated, exclusively to the local board for maintaining public schools." (New Brief for Board p 15).

The plain language of Article IX, § 7 states that funds must "belong *and remain*" in the county school fund. (Emphasis added). Ending the constitutional inquiry with the transfer of proceeds to the Board would require ignoring the requirement that the money "*remain"* for the public schools. Funds cannot be "faithfully appropriated" or "used exclusively" for schools if school boards divert the funds back to the city.

Furthermore, ending the constitutional inquiry when funds are initially placed in the county fund, it would open the door to unscrupulous public policy. So long as there is an initial deposit in a school fund, those funds could be subject to diversion at any time and in any amount.

This factored into the Court of Appeals' reasoning in *Donoho v. City of Asheville*, 153 N.C. App. 110 (2002). There, the court found that Article IX, § 7 required the Western N.C. Regional Air Pollution Control Agency to remit funds derived by environmental penalties from the Agency's clean air trust fund to the Buncombe County School Fund. *Id.* at 118. The court reasoned that "every county and local governmental unit could circumvent the state constitution by setting up a local air

quality enforcement unit pursuant to state-delegated authority, and thereby develop a new revenue stream, while depriving the schools of funds directed to them by Article IX, Section 7." *Id.* The same risk exists in the present case. Adopting Defendants' interpretation would encourage local governments to create their own revenue streams by placing penalty funds with the county school fund and simply invoicing those funds back to themselves.

Article IX, §7 is an express constitutional limitation on the use of the clear proceeds from fines. The Fines and Forfeitures Clause is the will of the People, as expressed directly by them in their constitution. The constitution does not tolerate sham satisfaction of its provisions, neither should this Court.

CONCLUSION

For the reasons stated above, Amicus respectfully requests the Court affirm the Court of Appeals and grant summary judgment in favor of Appellee's Article IX, § 7 claim.

Respectfully submitted, this the 7th day of August 2023.

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CERTIFICATE OF SERVICE

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