

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-978

Filed: 3 December 2019

Wake County, No. 17 CVS 6465

ROY A. COOPER, III, individually and in his official capacity as GOVERNOR OF THE STATE OF NORTH CAROLINA, Plaintiff,

v.

PHILIP E. BERGER, in his official capacity as PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE; TIMOTHY K. MOORE, in his official capacity as SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES; CHARLTON L. ALLEN, in his official capacity as CHAIR OF THE NORTH CAROLINA INDUSTRIAL COMMISSION; and YOLANDA K. STITH, in her official capacity as VICE-CHAIR OF THE NORTH CAROLINA INDUSTRIAL COMMISSION, Defendants.

Appeal by Plaintiff from an order and judgment entered 9 April 2018 by Judge Henry W. Hight, Jr. in Wake County Superior Court. Heard in the Court of Appeals 15 October 2019.

*BROOKS, PIERCE, MCLENDON, HUMPHREY & LEONARD, L.L.P., by Daniel F. E. Smith, Jim W. Phillips, Jr., and Eric M. David, for Plaintiff-Appellant.*

*NELSON MULLINS RILEY & SCARBOROUGH LLP, by D. Martin Warf and Noah H. Huffstetler, III, for Defendants-Appellees Philip E. Berger and Timothy K. Moore.*

*No briefs filed by Charlton L. Allen and Yolanda K. Stith.*

INMAN, Judge.

Plaintiff-Appellant Roy A. Cooper, III, the Governor of North Carolina, appeals from an order and judgment dismissing his claim challenging the General Assembly's appropriation of federal block grant funds awarded to the State in a manner inconsistent with the Governor's recommended budget. The Governor contends the federal funds are not within the General Assembly's constitutional authority to control, and that the General Assembly has interfered with the Governor's constitutional duty to faithfully execute the law.

After careful review, and with the benefit of ample and able briefing and argument from the parties, we hold that the block grant funds are, despite their source in the federal government, subject to appropriation by the General Assembly. We affirm the trial court.

### **FACTUAL AND PROCEDURAL HISTORY**

The record below shows the following:

In 2017, the Governor filed suit against Defendants-Appellees Philip E. Berger, President Pro Tempore of the North Carolina Senate, and Timothy K. Moore, Speaker of the North Carolina House of Representatives (the "Legislative Defendants"), challenging the constitutionality of two session laws and six statutes.<sup>1</sup> While those claims were pending, the Governor and the General Assembly continued in the

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<sup>1</sup> Charlton Allen and Yolanda K. Stith were also named as defendants; however, because they have not entered an appearance in this appeal and the order and judgment at issue here does not involve any claims against them, we omit them from further discussion in this opinion.

execution of their duties, which included the preparation of the State budget for the 2017-2019 biennium. The Governor submitted a recommended budget proposing, among other things, specific allocations of various federal block grant funds awarded to North Carolina. Those federal block grants included the Community Development Block Grant (“CDBG”), the Maternal and Child Health Block Grant (“MCHBG”), and the Substance Abuse Prevention and Treatment Block Grant (“SABG,” collectively with the CDBG and MCHBG as the “Block Grants”).

The General Assembly disagreed with the Governor’s proposed allocations of the Block Grants and passed the State budget as Session Law 2017-57 on 28 June 2017, which altered the allocations as follows:

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**Community Development Grant**

<b>Item</b>	<b>Governor's Budget</b>	<b>S.L. 2017-57</b>	<b>Difference</b>
Scattered Site Housing	\$10,000,000	\$0	(\$10,000,000)
Neighborhood Revitalization	\$0	\$10,000,000	\$10,000,000
Economic Development	\$13,737,500	\$10,737,500	(\$3,000,000)
Infrastructure	\$18,725,000	\$21,725,000	\$3,000,000

**Substance Abuse Grant**

<b>Item</b>	<b>Governor's Budget</b>	<b>S.L. 2017-57</b>	<b>Difference</b>
Substance Abuse Services – Treatment for Children/Adults	\$29,322,717	\$27,722,717	(\$1,600,000)
Competitive Block Grant	\$0	\$1,600,000	\$1,600,000

**Maternal and Child Health Grant**

<b>Item</b>	<b>Governor's Budget</b>	<b>S.L. 2017-57</b>	<b>Difference</b>
Women and Children's Health Services	\$14,070,680	\$11,802,435	(\$2,268,245)
Every Week Counts <sup>2</sup>	\$0	\$2,200,000	\$2,200,000
Perinatal Strategic Plan Support Position	\$0	\$68,245	\$68,245

See 2017 N.C. Sess. Laws 57 §§ 11A.14.(a), 11L.1.(a), 11L.1.(y)-(z), 11L.1.(aa)-(ee), 15.1.(a), 15.1.(d) (collectively, the “Block Grant Appropriations”).

In response to passage of the State budget, the Governor amended his complaint to add a claim challenging the constitutionality of the Block Grant Appropriations. This new claim asserted that the “Block Grant Appropriations are unconstitutional because they prevent the Governor from performing his core

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<sup>2</sup> Every Week Counts is “a demonstration project in two counties . . . of North Carolina to study (i) the extent to which a home-based prenatal care model can reduce the rate of preterm birth among multiparous women and (ii) whether multiparous women without a prior preterm birth, but with multiple risk factors for preterm birth in the current pregnancy, may benefit from 17 Alpha-Hydroxyprogesterone Caproate (17P) therapy.” 2017 N.C. Sess. Laws 57 § 11E.12.(a).

function under [Article III, Section 5(4) of] the North Carolina Constitution to ‘take care that the laws be faithfully executed[.]’ and, “[t]o the extent the Block Grant Appropriations are part of the State budget, they also violate Article III, Section 5(3) of the North Carolina Constitution because they encroach on the Governor’s duty to administer the budget.”<sup>3</sup>

The Legislative Defendants filed a combined motion to dismiss and answer to the Governor’s amended complaint. The Governor then filed a motion for partial summary judgment and permanent injunction declaring the Block Grant Appropriations unconstitutional “as applied in this case[.]” Two days later, the Legislative Defendants filed a motion for judgment on the pleadings as to that same claim. After briefing and argument, Judge Henry W. Hight, Jr., entered a combined order and judgment on 9 April 2018 resolving all motions in favor of the Legislative Defendants.

The trial court concluded that the federal block grant funds “are designated for the State of North Carolina and will be paid into the State Treasury.” It also concluded that “Article V, Section 7 of the Constitution unambiguously states that *no* money can be drawn from the State Treasury without an appropriation[.]” and

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<sup>3</sup> The Governor’s amended complaint also included a claim challenging additional portions of Session Law 2017-57 related to the appropriation of settlement funds set aside for North Carolina as part of a federal lawsuit against Volkswagen. Although review of that claim was originally part of this appeal, we granted a motion, filed by the Governor, to dismiss that portion of the appeal. Our review is therefore limited to the constitutionality of the Block Grant Appropriations.

rejected the Governor’s argument that the federal block grants constitute “custodial fund[s]” exempt from the constitutional and statutory budgetary and appropriations processes as without precedent under state law. The trial court ultimately concluded that: (1) the Governor failed to allege and forecast evidence “that the challenged portions of Session Law 2017-57 violate his duty to take care that the laws be faithfully executed or otherwise encroach on his duty to administer the budget;” and (2) that, therefore, the challenged provisions of Session Law 2017-57 are not unconstitutional.

Judge Hight certified the order and judgment for immediate appeal pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure. The Governor appeals.

## **ANALYSIS**

### **I. Appellate Jurisdiction**

In general, no right of immediate appeal from an interlocutory order exists. *Paradigm Consultants, Ltd. v. Builders Mutual Ins. Co.*, 228 N.C. App. 314, 317, 745 S.E.2d 69, 72 (2013).

However, there are two avenues by which a party may immediately appeal an interlocutory order or judgment. First, if the order or judgment is final as to some but not all of the claims or parties, and the trial court certifies the case for appeal pursuant to N.C. Gen. Stat. § 1A–1, Rule 54(b), an immediate appeal will lie. Second, an appeal is permitted under N.C. Gen. Stat. §§ 1–277(a) and 7A–27(d)(1) if the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review.

*N.C. Dep't of Transp. v. Page*, 119 N.C. App. 730, 734, 460 S.E.2d 332, 334 (1995) (citations omitted). Because the order and judgment at issue in this case was final as to the Governor's challenge to the Block Grant Appropriations and certified by the trial court for immediate appeal pursuant to Rule 54(b), we possess jurisdiction to hear the Governor's appeal. *See, e.g., Estate of Tipton By & Through Tipton v. Delta Sigma Phi Fraternity, Inc.*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 826 S.E.2d 226, 231-32 (2019) (holding a grant of partial summary judgment on less than all claims was subject to immediate appeal when the order contained a Rule 54(b) certification).

## **II. Standard of Review**

A trial court's entry of judgment on the pleadings—or of summary judgment—is subject to *de novo* review on appeal. *See N.C. Concrete Finishers, Inc. v. N.C. Farm Bureau Mut. Ins. Co.*, 202 N.C. App. 334, 336, 688 S.E.2d 534, 535 (2010) (acknowledging *de novo* review applies to entry of judgment on the pleadings); *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (“Our standard of review of an appeal from summary judgment is *de novo*[.]” (citation omitted)). “Judgment on the pleadings is properly entered only if ‘all the material allegations of fact are admitted[,] . . . only questions of law remain,’ and no question of fact is left for jury determination.” *N.C. Concrete Finishers*, 202 N.C. App. at 336, 688 S.E.2d at 535 (quoting *Ragsdale v. Kennedy*, 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974)) (alteration in original). Summary judgment “is appropriate only when the record

shows that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” *Jones*, 362 N.C. at 573, 669 S.E.2d at 576 (citation and internal quotation marks omitted).

Our Supreme Court has recently explained the standard of review for constitutional questions:

We review constitutional questions de novo. In exercising de novo review, 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 reasonable doubt. In other words, the constitutional violation must be plain and clear. To determine whether the violation is plain and clear, we look to the text of the constitution, the historical context in which the people of North Carolina adopted the applicable constitutional provision, and our precedents.

*State ex rel. McCrory v. Berger*, 368 N.C. 633, 639, 781 S.E.2d 248, 252 (2016) (citations and quotations omitted).

### **III. Historical and Legislative Context**

The Governor’s appeal presents an as-applied constitutional challenge to the Block Grant Appropriations identified in his complaint, but it turns on a broader constitutional issue of first impression: whether the North Carolina Constitution permits the General Assembly to appropriate federal funds designated to the State through federal block grants. This Court has not previously been presented with this issue. Our Supreme Court was presented with—and declined to answer—this exact query in *Advisory Opinion In re Separation of Powers*, 305 N.C. 767, 779, 295 S.E.2d



589, 594-95 (1982). There, the Supreme Court demurred because “[t]he briefs and materials submitted to us contain very little, if any, information about the grants, their purposes, for whom they are intended, and the conditions placed on them by Congress.” *Id.*

We are not so bereft of congressional context here, however, and, as pointed out by both parties, other states’ supreme courts have squarely resolved the issue by considering their respective constitutions and looking to the texts, nature, purposes, and contours of the block grants at issue and the federal grants-in-aid regime generally. *Compare Colorado General Assembly v. Lamm*, 738 P.2d 1156 (Colo. 1987) (surveying the federal block grant landscape and examining the terms and conditions of eight specific federal block grants, including the Block Grants at issue here, before holding that each was not subject to appropriation by the state’s legislature under Colorado’s constitution), *with Shapp v. Sloan*, 480 Pa. 449, 391 A.2d 595 (1978) (holding federal block grant funds were subject to appropriation by Pennsylvania’s legislature under the state’s constitution in part because Congress’s authorizing legislation did not suggest the contrary).

*A. Federal Grants-In-Aid*

For the first half of the twentieth century, the federal government operated a relatively small grants-in-aid system as compared to current standards. *See Shapp*, 480 Pa. at 466, 391 A.2d at 603 (noting that federal aid to states grew from \$2.9 billion

in 1954 to \$60 billion in 1976); Robert Jay Dilger & Michael H. Cecire, Cong. Research Serv., R40638, *Federal Grants to State and Local Governments: A Historical Perspective on Contemporary Issues* 39 (2019) (hereinafter “*Federal Grants*”) (observing that President Donald Trump’s budget request for fiscal year 2020 “estimates that total outlays for grants to state and local governments will increase from \$696.5 billion in FY2018 to an anticipated \$749.5 billion in FY2019 and \$750.7 billion in FY2020”).<sup>4</sup> President Lyndon Johnson’s “Great Society” platform enacted during the 1960s expanded federal funding for states; the number of federal grants-in-aid tripled between 1960 and 1968, and “[m]ost . . . were designed purposively by Congress to encourage state and local governments to move into new policy areas, or to expand efforts in areas identified by Congress as national priorities.” *Federal Grants* at 21-22. The grants were generally structured to provide “an increased emphasis on narrowly focused project, categorical grants to ensure that state and local governments were addressing national needs.” *Id.* at 22. These categorical grants are the most restrictive form of federal grants-in-aid:

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<sup>4</sup> The Congressional Research Service’s “primary function is to respond to congressional research requests[.]” *Bowsher v. Synar*, 478 U.S. 714, 758, 92 L. Ed. 2d 583, 616, n.25 (1986) (Stevens, J., concurring), and the Service is tasked with carrying out its statutory duties “without partisan bias[.]” 2 U.S.C. § 166(d) (2018). Other courts frequently cite to the Service’s reports to provide historical or other context when addressing legal issues. *See, e.g., United States v. Valdovinos*, 760 F.3d 322, 331 (4th Cir. 2014) (citing to Congressional Research Service reports for “some necessary and useful background” on incarceration); *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 103, 181 L. Ed. 2d 586, 596 (2012) (citing a Congressional Research Service report for the proposition that the use of arbitration clauses in consumer contracts rose during the early 1990s). Both parties in this case cite to a Congressional Research Service report in their appellate briefs to provide general background information on federal block grants.

[P]roject categorical grants typically impose the most restraint on recipients . . . . Federal administrators have a high degree of control over who receives project categorical grants (recipients must apply to the appropriate federal agency for funding and compete against other potential recipients who also meet the program’s specified eligibility criteria); recipients have relative little discretion concerning aided activities (funds must be used for narrowly specified purposes); and there is a relatively high degree of federal administrative conditions attached to the grant, typically involving the imposition of federal standards for planning, project selection, fiscal management, administrative organization, and performance.

Robert Jay Dilger & Eugene Boyd, Cong. Research Serv., R40486, *Block Grants: Perspectives and Controversies* 2 (2014) (hereinafter “*Block Grants*”).

Despite Congress’s preference for categorical grants and the federal control they offered during the 1960s, that decade also saw the creation of the first two federal block grants. *Federal Grants* at 22. Block grants differ from categorical grants in several key ways:

Block grants are at the midpoint in the continuum of recipient discretion. Federal administrators have a low degree of discretion over who receives block grants (after setting aside funding for administration and other specified activities, the remaining funds are typically allocated automatically to recipients by a formula or formulas specified in legislation); recipients have some discretion concerning aided activities (typically, funds can be used for a specified range of activities within a single functional area); and there is a moderate degree of federal administrative conditions attached to the grant, typically involving more than periodic reporting criteria and the application of standard government accounting

procedures, but with fewer conditions attached to the grant than project categorical grants.

*Block Grants* at 3.

As the expansion of the federal grants-in-aid system continued through the 1960s—largely through continued creation of restrictive categorical grants—there “came ‘a rising chorus of complaints from state and local government officials’ concerning the inflexibility of fiscal and administrative requirements attached to the grants.” *Federal Grants* at 23 (quoting Advisory Comm’n on Intergovernmental Relations, *Categorical Grants: Their Role and Design*, A-52, 29 (1978), available at <https://library.unt.edu/gpo/acir/Reports/policy/a-52.pdf>);<sup>5</sup> see also *Lamm*, 738 P.2d at 1158-59 (noting that the Commission “suggested that federal assistance to the states be restructured to allow revenue sharing and block grants in addition to categorical grants.”). State governments found willing allies in the presidential administrations of the 1970s, when Presidents Richard Nixon and Gerald Ford advocated for more block grants and revenue sharing programs because “block grants and general revenue sharing provided state and local governments additional flexibility in project selection and promoted program efficiency by reducing administrative costs.” *Federal*

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<sup>5</sup> The Advisory Commission on Intergovernmental Relations (“the Commission”) was created by Congress as a “permanent bipartisan commission” whose purposes included “giv[ing] critical attention to the conditions and controls involved in the administration of Federal grant programs” and “recomm[en]d[ing], within the framework of the Constitution, the most desirable allocation of governmental functions, responsibilities, and revenues among the several levels of government.” Act of Sept. 24, 1959, Pub. L. No. 86-380 §§ 1-2, 73 Stat. 703, 703-04. The Commission was terminated by an act of Congress in 1995. Independent Agencies Appropriations Act of 1996, Pub. L. No. 104-52, 109 Stat. 480, 480 (1995).

*Grants* at 23. By 1976, the Commission “determined that state legislative control over federal funds does not contravene federal policy and is, in fact, the desirable mode of administration.” *Shapp*, 480 Pa. at 470, 391 A.2d at 605.

President Ronald Reagan continued the push started by his Republican predecessors to “increase the emphasis on block grants to provide state and local government officials greater flexibility in determining how the program’s funds are spent,” and, in 1981, Congress significantly altered the federal grants-in-aid system by consolidating 77 categorical grants and two block grants into nine new block grants as part of the Omnibus Budget Reconciliation Act of 1981 (“OBRA”). *Federal Grants* at 28-29.<sup>6</sup> In enacting OBRA, “Congress did not include . . . the comptroller general’s recommendation that would have required state legislative appropriation of the OBRA block grants[,]” and instead was simply “silent regarding the authority of state legislatures to appropriate federal block grant funds[.]” *Lamm*, 738 P.2d at 1160.

Despite OBRA’s shift from categorical grants towards block grants, Congress passed only one of the 26 additional block grants President Reagan proposed over the remainder of his two terms, *Federal Grants* at 30, and “[t]he emphasis on categorical grants . . . continued” through the 1990s. *Id.* at 33. Block grants have nonetheless become more common in the past two decades. *Compare id.* (counting four block

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<sup>6</sup> The Block Grants at issue in this case were among the nine new block grants created in 1981.

grants in existence as of 1980), *with Block Grants* at 5 (counting 23 federal block grants as of 2014). As noted *supra*, the federal grants-in-aid system now totals in excess of \$740 billion; in North Carolina, federal grants-in-aid comprised 28.4 percent of the State’s spending in fiscal year 2017. *Federal Aid to State and Local Governments*, Center on Budget and Policy Priorities (Apr. 19, 2018), <https://www.cbpp.org/research/state-budget-and-tax/federal-aid-to-state-and-local-governments>.

*B. The Block Grants*

Each of the Block Grants at issue in this appeal fits within the general definition and structure of block grants as outlined *supra*.

The Community Development Block Grant awards federal funds to state government applicants who submit a consolidated plan for each program year, including an action plan detailing how CDBG funds will be allocated. 24 C.F.R. §§ 91.10, 91.300, 91.320, & 570.485(a) (2019). The consolidated plan must identify “[t]he lead agency or entity responsible for overseeing the development of the plan.” 24 C.F.R. § 91.300(b)(1) (2019). In North Carolina, that agency is the Department of Commerce (“N.C. DOC”). See N.C. Dep’t of Commerce et al., *North Carolina 2016-2020 Consolidated Plan and 2016 Annual Action Plan* 3 (2016), available at <https://files.nc.gov/nccommerce/documents/Rural-Development-Division/CDBC/Con-PlansCDBG/20162020-ConPlan.pdf> (designating N.C. DOC as the “CDBG

Administrator”). CDBG funds must be spent to benefit low- and moderate-income persons, to prevent or eliminate slums or blight, or to meet urgent needs threatening community health or welfare. 42 U.S.C. § 5304(b)(3) (2018). Congress has enumerated 26 community development activities that can be funded by this block grant. 42 U.S.C. § 5305(a) (2018). At least 70 percent of grant expenditures must benefit low- or moderate-income persons. 24 C.F.R. § 570.484 (2019). Congress prohibits States from using the funds for certain expenditures. *See, e.g.*, 42 U.S.C. § 5305(h) (2018) (prohibiting the use of CDBG funds to assist in relocations of certain industrial facilities).<sup>7</sup>

The Maternal Child Health Block Grant operates similarly. State government applicants request funds each year. 42 U.S.C. § 705 (2018). By statute, “[t]he State health agency of each State shall be responsible for the administration (or supervision of the administration) of programs carried out with [MCHBG] allotments.” 42 U.S.C. § 709(b) (2018). The North Carolina Department of Health and Human Services (“N.C. DHHS”) administers these programs in North Carolina. The federal government awards the funds “for the purpose of enabling each State . . . to provide

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<sup>7</sup> A more detailed summary of the Community Development Block Grant and its requirements is available from the U.S. Department of Housing and Urban Development (“HUD”), which administers the CDBG at the federal level. *See* U.S. Dep’t of Hous. and Urban Dev., Office of Block Grant Assistance, *Basically CDBG for States* (July 2014), *available at* <https://www.hudexchange.info/resource/269/basically-cdbg-for-states/>. HUD’s guidance acknowledges that states are responsible for “[s]etting priorities and deciding what activities to fund[,]” and, “[u]nder the state CDBG program, states are provided maximum feasible deference.” *Id.* at 1-2.

and to assure mothers and children (in particular those with low income or with limited availability of health services) access to quality maternal and child health services.” 42 U.S.C. § 701(a)(1)(A) (2018). Each state receiving funds must allocate at least 30 percent toward preventive and primary care for children, at least 30 percent toward services for children with special needs, and no more than ten percent toward administration of the grant; the remaining funds may be spent however the state decides, consistent with the governing statutes and regulations. 42 U.S.C. §§ 701(a)(1)(A), 704(a), 704(d) & 705(a)(3) (2018). MCHBG funds may not be spent in particular ways, such as to purchase land. 42 U.S.C. § 704(b) (2018).<sup>8</sup>

Congress also requires states to apply annually for the Substance Abuse Block Grants. 42 U.S.C. § 300X-32(b)(1)(C); 45 C.F.R. § 96.122(g)(2) (2019). Applicants must “identif[y] the single State agency responsible for the administration of the program[,]” 42 U.S.C. 300x-32(b)(1)(A)(i) (2018), which, for North Carolina, is currently N.C. DHHS. Recipients expend SABG funds within the framework of their plans according to their discretion, with a minimum of 20 percent spent on substance

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<sup>8</sup> The U.S. Department of Health and Human Services (“U.S. DHHS”) administers both the Maternal Child Health Block Grant and the Substance Abuse Block Grant. A detailed breakdown of the application, spending, and reporting requirements is available from the agency. U.S. Dep’t of Health and Human Servs., Health Res. and Servs. Admin., Maternal and Child Health Bureau, Div. of State and Cmty. Health, OMB No. 0915-0172 *Title V Maternal and Child Health Services Block Grant to States Program: Guidance and Forms for the Title V Application/Annual Report* (expires Dec. 31, 2020), *available at* <https://grants6.tvisdata.hrsa.gov/uploadedfiles/Documents/blockgrantguidance.pdf>.



abuse prevention. 42 U.S.C. §§ 300x-21(b) & 300x-22(a)(1) (2018).<sup>9</sup> As a prerequisite to receiving these funds, each state must enact and enforce laws that prohibit the sale or distribution of tobacco products to minors. 42 U.S.C. § 300x-26(a)(1) (2018). No more than five percent of the grant may be used to administer the block grant, 45 C.F.R. § 96.135(b)(1) (2019), and states are prohibited from using SABG funds on six specific activities. 45 C.F.R. § 96.135(a) (2019).

In sum, while the Block Grants all impose certain restrictions and criteria for the application, acceptance, and expenditure of their respective grant funds, each affords significant discretion to the recipient states on how that money is ultimately spent. *See* Eugene Boyd, Cong. Research Serv., R43520, *Community Development Block Grants and Related Programs: A Primer* 1 (2014) (“Although . . . states are given great discretion and flexibility in the selection of activities to be funded, the [CDBG] program’s governing statute requires that all activities meet one of three national objectives.”); Victoria L. Elliott, Cong. Research Serv., R44929, *Maternal and Child Health Services Block Grant: Background and Funding* 13 (2017) (“Beyond . . . broad requirements, states determine the actual services provided under the

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<sup>9</sup> A fact sheet authored by U.S. DHHS discloses that outside of the 20 percent allocated toward primary prevention, five percent of Substance Abuse Block Grant funds are set aside for federal data collection purposes, an additional five percent must be spent by certain states on HIV treatment, and “[t]he remainder . . . can be expended by the States . . . for substance abuse prevention, early intervention, treatment and recovery support services at grantees’ discretion.” U.S. Dep’t of Health and Human Services, Substance Abuse and Mental Health Services Admin., *Fact Sheet: Substance Abuse Prevention and Treatment Block Grant* 2 (2013), available at [https://www.samhsa.gov/sites/default/files/sabg\\_fact\\_sheet\\_rev.pdf](https://www.samhsa.gov/sites/default/files/sabg_fact_sheet_rev.pdf).

[MCHBG] block grant.”); Erin Bagalman, Cong. Research Serv., R44510, *Substance Abuse and Mental Health Services Administration (SAMHSA): Agency Overview 2* (2016) (“States have flexibility in the use of SABG funds within the framework of the state plan and federal requirements.”).

According to affidavits in the record, the State of North Carolina receives and expends federal grant funds through a process that is roughly uniform across each of the Block Grants. Funds are held by the federal government up until N.C. DOC or N.C. DHHS submits a discrete request tied to a given expenditure; in response, the federal government remits the requested funds into an account in the name of the North Carolina Department of State Treasurer (the “Treasurer”). The funds are assigned a budget code tied to the State agency on receipt by the Treasurer, and the agency submits a requisition to the Office of the State Controller to transfer the coded funds to a disbursing account tied to the agency—also held and maintained by the Treasurer. Those funds are then disbursed through a paper warrant or electronic transfer, at which time they enter the hands of a sub-grantee, a third party, another division within the agency, or are used to satisfy an administrative expense of the agency itself.

*C. State Expenditures Under The North Carolina Constitution*

The North Carolina 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). The General Assembly’s primacy over State expenditures embodied in this language dates to the genesis of the State. *See* John V. Orth and Paul Martin Newby, *The North Carolina State Constitution* 154 (2d ed. 2013) (noting that “[t]he power of the purse is the exclusive prerogative of the General Assembly[,]” and “Subsection 1 dates from the 1776 constitution”). Legislative—rather than executive—authority over the State’s expenditure of funds was intrinsic to the State’s founding, as “Colonial Americans were acutely aware of the long struggle between the English Parliament and the Crown over the control of public finance and were determined to secure the power of the purse for their elected representatives.” *Id.* The drafters of the State’s first constitution expressly made the Governor’s authority over public funds subordinate to the General Assembly’s authority, while employing language that recognized the appropriations power as a means of oversight. *See* N.C. Const. of 1776, § XIX (“That the Governor, for the Time being, shall have Power to draw for, and apply, *such Sums of Money as shall be voted by the General Assembly* for the Contingencies of Government, *and be accountable to them for the same.*” (emphasis added)).

The language now found in Article V, Subsection 7(1) was first adopted in 1868. N.C. Const. of 1868 art. XIV § 3. It remained unchanged until 1971, when the provision was reorganized and restated in Article V without further alteration. N.C. Const. of 1971 art. V § 7(1). Although the verbiage of the provision has evolved, its

paramount importance has not: “It is the power of the purse, to which the power of the sword is a mere sequence.” *Wilmington & W.R. Co. v. Alsbrook*, 110 N.C. 137, 145, 14 S.E. 652 (1892); *see also White v. Hill*, 125 N.C. 194, 200-01, 34 S.E. 432, 433-34 (1899) (Clark, J., dissenting) (reviewing Article XIV, Section 3 of the 1868 Constitution and observing that “[t]he legislative power is supreme over the public purse. . . . The power of the purse is essentially the supreme power, and by it alone in England and in this country the power of the sword has been subordinated to the civil power.”). Nor has the power been diverted from the legislature’s exclusive control: “Article XIV, section 3, [now Article V, section 7], of the North Carolina Constitution . . . states in language no man can misunderstand that the legislative power is supreme over the public purse.” *State v. Davis*, 270 N.C. 1, 14, 153 S.E.2d 749, 758 (1967).

Both the General Assembly and the Governor exercise certain constitutional duties in crafting the State’s budget. Our Constitution provides that “[t]he Governor shall prepare and recommend to the General Assembly a comprehensive budget of the anticipated revenue and proposed expenditures of the State for the ensuing fiscal period. The budget as enacted by the General Assembly shall be administered by the Governor.” N.C. Const. art. III § 5(3). The General Assembly has, since at least 1981, appropriated block grant funds through the budget process. *See, e.g.*, 1981 N.C. Sess. Laws ch. 1282 § 6 (appropriating \$193,701,970 of federal block grant funds, including

the Community Development Block Grant, Maternal Child Health Block Grant, and Substance Abuse Block Grant for the 1982-83 fiscal year).

#### **IV. The Block Grant Appropriations Are Constitutional**

The Governor asserts that the Block Grant funds are not within “the State treasury” as used in Article V, Section 7, and therefore are not subject to appropriation by the General Assembly. To support that claim, the Governor posits that: (1) under North Carolina law, the only funds in “the State treasury” for constitutional purposes are those raised by the State through taxation, fines, or penalties; (2) Congress did not intend the General Assembly to have spending power over the Block Grant funds; and (3) the funds are therefore “custodial funds” held by the State to accomplish federal goals, and the Governor—not the General Assembly—has exclusive authority to direct the funds outside the constitutional appropriation and budgetary processes to further those aims. We address each point in turn.

##### *A. The Block Grant Funds Are Within The State Treasury*

Our Supreme Court defined the term “State treasury” in *Gardner v. Board of Trustees of N.C. Local Governmental Employees’ Retirement System*, 226 N.C. 465, 38 S.E.2d 314 (1946), and both parties seize on this decision to support or rebut any conclusion that the Block Grant funds are outside the ambit of Article V, Section 7. In *Gardner*, a Charlotte police officer was a member of the Law Enforcement Officers’ Benefit and Retirement Fund, which was established by statute, financed by a two

dollar fee assessed against convicted criminal defendants, and held in a special fund with the State Treasurer. 225 N.C. at 466-67, 38 S.E.2d at 315-16. The officer sought membership in a second state retirement fund, the Local Governmental Employees' Retirement System; however, that system's enabling statute provided that "[p]ersons who are . . . members of any existing retirement system and who are . . . entitled to benefits . . . at the expense of funds drawn from the treasury of the State of North Carolina . . . shall not be members." *Id.* at 466, 38 S.E.2d at 315. The Local system denied the officer membership, and he filed suit, ultimately arguing before the Supreme Court that the prohibition did not apply because benefits under the Law Enforcement fund were not paid out of the treasury's general funds derived from general taxation. *Id.* at 466-67, 38 S.E.2d at 315-16.

The Supreme Court held that the Law Enforcement fund's benefits were drawn from the State treasury. *Id.* at 467-68, 38 S.E.2d at 316. The fact that the monies were raised outside of the general taxation powers, set aside for a special purpose, and kept in a separate account was not "controlling, since it is the duty of the State Treasurer 'to receive all monies which shall from time to time be paid into the treasury of this state.'" *Id.* at 468, 38 S.E.2d at 316 (quoting N.C. Gen. Stat. § 147-68 (1945)). The Supreme Court continued:

And once in the treasury, "No money shall be drawn from the treasury but in consequence of appropriations made by law." Moneys paid into the hands of the State Treasurer by virtue of a State Law become public funds for which the

Treasurer is responsible and may be disbursed only in accordance with legislative authority. A treasurer is one in charge of a treasury, and a treasury is a place where public funds are deposited, kept and disbursed.

*Id.* (quoting N.C. Const. of 1868, art. XIV § 3) (citing Webster’s Dictionary).<sup>10</sup> Thus, the State treasury is a depository of “public funds,” and “[m]oneys paid into the hands of the State Treasurer by virtue of State Law become public funds[.]” *Id.*

We are not persuaded that *Gardner* compels us to interpret or treat the Block Grant funds as being outside “the State treasury” as used in Article V, Subsection 7(1). The Supreme Court’s definition of “public funds” in *Gardner* did not, by its plain language, exclude sources of money other than State-levied taxes, fines, or penalties, and, when read in context, *expanded* the sources of monies that constitute “public funds” in the “State treasury.” Also, the federal Block Grant funds at issue here do, strictly speaking, enter “into the hands of the State Treasurer by virtue of a State Law.” *Id.* Neither party disputes that the Block Grant funds are received and deposited in an account maintained by the Treasurer, a practice consistent with our general statutes:

All funds belonging to the State of North Carolina, in the hands of any head of any department of the State which collects revenue for the State *in any form whatsoever*, and every institution, agency, officer, employee, or representative of the State or any agency, department,

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<sup>10</sup> It is unclear from the opinion which edition of Webster’s Dictionary the Supreme Court cited; however, Merriam-Webster currently provides a substantively identical definition for “treasury.” *Treasury*, Merriam-Webster.com, <https://www.merriam-webster.com/dictionary/treasury> (last visited Nov. 11, 2019).

division or commission thereof, except officers and the clerks of the Supreme Court and Court of Appeals, collecting or receiving any funds or money belonging to the State of North Carolina, shall daily deposit the same in some bank, or trust company, selected or designated by the State Treasurer, in the name of the State Treasurer.

N.C. Gen. Stat. § 147-77 (2019) (emphasis added).

Finally, *Gardner* did not involve federal funds. There is no indication that the Supreme Court in 1948 considered federal block grant funds in its analysis, particularly given the facts before it. As the Supreme Court of Pennsylvania observed in rejecting a substantially identical argument by its governor based on a Pennsylvania decision from 1941:

The Court in 1941 could not anticipate that another source of income would become available for wide-spread administration of programs on the State level, and that within three decades, federal funds would constitute a large portion of the budgets of most states in the union.

....

In an age when state funds were provided almost entirely through state taxation, the [court in 1941] had no reason to foresee the vast impact that federal funding would eventually have on state fiscal matters. To interpret its choice of words as excluding such federal funds from state monies available for appropriation is as illogical as to exclude regulation of air traffic from the Congress' constitutional Commerce Clause powers because [it was] not mentioned or contemplated by the framers.

*Shapp*, 480 Pa. at 466-67, 391 A.2d at 603. *Gardner* is likewise distinguishable.



In short, *Gardner* is not controlling to our decision here, and, to the extent that it is pertinent, its expansive reading of “State treasury” and “public funds” such that non-tax dollars deposited in a special fund for a specific purpose are nonetheless subject to appropriation suggests that the Block Grant funds are within the “State treasury” for purposes of Article V, Subsection 7(1).

The Governor also cites our Supreme Court’s decision in *Garner v. Worth*, 122 N.C. 250, 29 S.E. 364 (1898), describing the State Treasurer as “the officer in whose hands the legislative department has placed the funds it has raised and appropriated.” 122 N.C. at 256, 29 S.E. at 366. *Garner*, however, dealt only with the question of whether the judiciary, by writ of mandamus, could compel the State Treasurer to pay a judgment entered against the State without legislative appropriation. *Id.* The case did not involve federal funds or a dispute about whether the Treasurer had constitutional authority over or possession of funds. *Id.*

*Garner* is therefore distinguishable from the facts before us for the same reasons as *Gardner*, and the language relied upon by the Governor is non-binding *dicta*. See, e.g., *Tr. of Rowan Tech. Coll. v. J. Hyatt Hammond Assocs., Inc.*, 313 N.C. 230, 242, 328 S.E.2d 274, 281 (1985) (“Language in an opinion not necessary to the decision is *obiter dictum* and later decisions are not bound thereby.” (citations omitted)).

*B. Legislative Appropriation Is Not Prohibited by Federal Law*

We also disagree with the Governor's contention that the Block Grants' enabling statutes and governing federal regulations demonstrate Congress's intent to give North Carolina's executive branch unfettered discretion over the allocation of the Block Grant funds to the exclusion of the appropriation power of the General Assembly. Though the Governor cites several decisions from other jurisdictions holding, under their respective state constitutions, that federal grant-in-aid funds are not subject to appropriation by their state legislatures, those decisions are not premised on the legal conclusion that Congress intended state legislatures to have no say over the allocation and expenditure of block grant funds. *See State ex rel. Sego v. Kirkpatrick*, 524 P.2d 975, 985-86 (N.M. 1974) (holding New Mexico's legislature could not appropriate federal funds designated to the state's public institutions of higher learning because the state's constitution vested authority over those funds with a separate Board of Regents); *Opinion of the Justices to the Senate*, 375 Mass. 851 (1978) (following long-established state precedents and caselaw to opine that federal funds carrying federal statutory conditions are held in trust outside the commonwealth's treasury as established in its constitution and are therefore not subject to appropriation); *In re Okla. ex rel. DOT*, 646 P.2d 605, 609-10 (Okla. 1982) (holding federal grants-in-aid are not subject to appropriation under state law without addressing Congressional intent as to state legislative appropriation).

The only out-of-state decision cited by the Governor that addresses whether Congress intended to prohibit state legislatures from appropriating federal block grant funds is contrary to and undercuts his argument. The Colorado Supreme Court’s decision in *Lamm* reviewed the federal grants-in-aid system and several specific block grants, including the CDBG, MCHBG, and SABG, and concluded that “Congress has left the issue of state legislative appropriation of federal block grants for each state to determine.” *Lamm*, 738 P.2d at 1169.

Other state courts examining Congress’s intent for allocation of federal block grant funds have reached the same conclusion. *See, e.g., Shapp*, 480 Pa. at 468, 391 A.2d at 604 (“Appellants have cited nothing which dictates that the federal laws pursuant to which these programs are funded requires that the Pennsylvania legislature is to be by-passed.”); *Anderson v. Regan*, 53 N.Y.2d 356, 368 n.12 (1981) (observing, in a decision holding that federal grants-in-aid are subject to state legislative appropriation, that “the mere application of the appropriation requirement to Federal funds received by the State is not inherently at odds with any of the existing Federal mandates”). We agree with the conclusion reached by the *Lamm* court and others cited, particularly in light of the apparent intent of the block grant structure. *See supra* Part III.A.<sup>11</sup>

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<sup>11</sup> Several legal scholars agree with this analysis of the federal block grant scheme. *See, e.g.,* Roderick M. Hills, Jr., *Dissecting the State: The Use of Federal Law to Free State and Local Officials from State Legislatures’ Control*, 97 Mich. L. Rev. 1201, 1260-61 (1999) (“[T]hese [block grant] laws are

Counsel for the Governor conceded at oral argument that all of the purposes for which the General Assembly appropriated the Block Grants fall within the terms of the federal statutes and regulations governing them, and did not identify any federal law expressly prohibiting state legislative appropriation.

We are also unpersuaded by the Governor’s argument that the Block Grants’ enabling statutes and regulations award the grants directly to the Governor or to a specific state agency. Each of the pertinent statutes directs the grants to be awarded to the “State,” 42 U.S.C. §§ 300x-21, 702(c), & 5303 (2018), and the definition of “State” in each statute does not compel the conclusion that the Executive Branch is the necessary and lone beneficiary or arbiter of the funds rather than the administrator on behalf of the State as a whole. *See* 42 U.S.C. § 5302(a)(2) (2018) (defining “State” under the CDBG as “any State of the United States, *or* any instrumentality *thereof* approved by the Governor” (emphasis added)); 42 U.S.C. § 701(c)(5) (2018) (defining “State” for purposes of the MCHBG as “each of the 50 States and the District of Columbia”); 42 U.S.C. § 300x-64(b)(2) (2018) (defining “State” as

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usually silent about the role of state legislatures. But such silence should not be read to exclude state legislatures’ role in appropriating federal revenue. . . . [N]othing in the legislative history suggests a conscious congressional decision to exclude legislative involvement. . . . [T]here seems little reason to exclude all legislative appropriation of federal grants as a matter of federal law.”); James A. Gardner, *State Courts as Agents of Federalism: Power and Interpretations in State Constitutional Law*, 44 Wm. & Mary L. Rev. 1725, 1752 n.97 (2003) (observing that the U.S. General Accounting Office—now the U.S. Government Accountability Office—recommended Congress increase state legislative involvement in federal grants-in-aid in 1980, and that “Congress seems to have followed this recommendation”).

used in the statute creating the SABG as “each of the several States”).<sup>12</sup> The fact that specific State agencies are tasked with administering each Block Grant does not render those agencies the sole beneficiaries or allocators to the exclusion of the rest of the State. *Cf. Shapp*, 480 Pa. at 468, 391 A.2d at 604 (“The funds which Pennsylvania receives from the federal government do not belong to officers or agencies of the executive branch. They belong to the Commonwealth. The agency or official who is authorized to apply for federal funds does so only *on behalf of* the Commonwealth.” (emphasis in original)).<sup>13</sup>

The Governor also points out that other federal block grant statutes expressly authorize state legislative appropriation, and contends that the absence of such authorization in the CDBG, MCHBG, and SABG statutes reflects an intent to prohibit the General Assembly from appropriating those funds. *See, e.g.*, 29 U.S.C. § 3251(a) (2018) (providing that funds awarded to states under the Workforce Innovation and Opportunity Grants program “shall be subject to appropriation by the

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<sup>12</sup> Even if the grants were awarded directly to the Governor or an Executive Branch agency, that would not necessarily indicate a choice by Congress to preclude the General Assembly from appropriating the funds consistent with North Carolina law. *See Hills, supra* note 11, at 1260-61 (noting that even where federal grants are “bestow[ed] . . . on state executive agencies or governors[.]” legislative history does not support excluding state legislatures from appropriating the funds); Gardner, *supra* note 11, at 1752-53 (acknowledging that while Congress may elect to give federal funds “directly to specific state executive agencies[.]” such an action does not prohibit state legislative appropriation).

<sup>13</sup> We note that just as nothing in the North Carolina Constitution appears to enable the General Assembly to “receive” funds outside the State treasury and to the exclusion of the other branches, *In re Separation of Powers*, 305 N.C. at 778, 295 S.E.2d at 596, nothing in the Constitution appears to give the Executive Branch that authority either.

State legislature, consistent with the terms and conditions required under this subchapter”). We construe that language to permit legislatures in some states—such as Colorado and Massachusetts—to appropriate those block grant funds where they would otherwise be barred from doing so under state law. The absence of this language from the Block Grants at issue here does not alter our conclusion that Congress left the issue of state legislative appropriation power to the individual states.<sup>14</sup>

*C. The Block Grants Are Not Otherwise “Custodial Funds” Under State Law*

The Governor also contends that the Block Grants are “custodial funds” held in trust and not subject to appropriation, but—aside from *Gardner* and *Garner* addressed *supra*—cites no North Carolina authority suggesting the existence of a *constitutional* concept of “custodial funds” that are in the hands of the state treasurer yet entirely beyond the reach of the General Assembly.<sup>15</sup> The Governor does,

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<sup>14</sup> The Governor’s argument that the act of legislative appropriation itself violates congressional intent raises the syllogism that the Block Grant Appropriations are preempted under the Supremacy Clause of the United States Constitution: if federal law governing the Block Grants prohibits the General Assembly from appropriating the funds, then any state budget act appropriating them is preempted by that federal law. Given that we have discerned no Congressional intent to prohibit state legislative appropriation and there appears to be no actual conflict with the Block Grants’ enabling statutes—either as to the act of appropriation or the purposes for which they were appropriated—no preemption has occurred. *See, e.g., Stephenson v. Bartlett*, 355 N.C. 354, 369, 562 S.E.2d 377, 388 (2002) (noting that North Carolina law is preempted under the Supremacy Clause where Congress expressly or impliedly intends to preempt state law or where federal law actually conflicts with state law).

<sup>15</sup> As explained *supra*, the out-of-state decisions the Governor cites in support of the “custodial fund” concept were decided against the backdrop of their respective state constitutions and related jurisprudence. *See, e.g., Lamm*, 738 P.2d at 1169-72 (relying on a body of state caselaw dating as far back as 1922 for the concept of “custodial funds” under the Colorado constitution).

however, point out that the State Budget Act, N.C. Gen. Stat. §§ 143C-1-1 *et seq.* (2019), defines “State funds” as “[a]ny moneys including federal funds deposited in the State treasury except moneys deposited in a[n] . . . agency fund[.]” N.C. Gen. Stat. § 143C-1-1(d)(25), and defines “agency funds” as “[a]ccounts for resources held by the reporting government in a purely *custodial* capacity.” N.C. Gen. Stat. § 143C-1-3(a)(8) (emphasis added). The Legislative Defendants concede that agency funds are not appropriated under the ordinary budget process called for by the Budget Act. The Governor argues that the Budget Act’s exclusion of agency funds constitutes the General Assembly’s “recognition” that there are funds held by the State that are not subject to legislative appropriation.

We are not convinced. The fact that the legislature may elect to treat some funds as custodial in nature as a *statutory* matter does not mean the funds are “custodial funds” and not subject to appropriation as a *constitutional* matter. *Cf. Gardner*, 226 N.C. at 467-68, 38 S.E.2d at 316 (holding that non-tax monies held by the state treasurer in a special fund for a limited purpose pursuant to statute were nonetheless within the State treasury and subject to legislative appropriation); *Shapp*, 480 Pa. at 468, 391 A.2d at 604 (“That funds are designated custodial funds does not mean that legislative action approving the use of the funds is not needed.” (citations omitted)).

Nor does it appear that the Block Grant funds are “agency funds” within the meaning of the Budget Act.<sup>16</sup> The General Assembly has been appropriating block grants—including these Block Grants—without challenge through the budgetary appropriations process since 1981. And, the Governor’s brief acknowledges that his preferred allocations of the Block Grant funds were accounted for in his proposed annual budget, which was submitted to the General Assembly pursuant to the State Budget Act.

Further, the State Budget Act provides that “[e]xcept where provided otherwise by federal law, funds received from the federal government become State funds when deposited in the State treasury and shall be classified and accounted for in the Governor’s budget recommendations no differently from other sources[.]” N.C. Gen. Stat. § 143C-3-5(d), and the Governor is specifically required to “submit [federal] Block Grant plans to the General Assembly *as part of* the Recommended State Budget submitted pursuant to [Section] 143C-3-5.” N.C. Gen. Stat. § 143C-7-2(a) (emphasis added). While some federal funds may therefore be considered custodial agency funds for purposes of the State Budget Act depending on the circumstances—such as where required by federal law—the State Budget Act treats federal block grants as state funds subject to appropriation through the statutory budgetary process. We do not

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<sup>16</sup> Per the evidence in the record, “agency funds” are generally understood, by way of example, to include monies akin to county vehicle property taxes that the State, through the Division of Motor Vehicles, collects during the vehicle registration renewal process on the counties’ behalf and later remits back to the counties for their own appropriation and use.



see, and the Governor has not otherwise identified, any federal prohibition against treating the Block Grant funds as state funds subject to legislative appropriation.

The logistics by which the State of North Carolina accepts, receives, and expends the Block Grant funds do not alter our analysis. Although the Governor asserts generally that the Block Grant Appropriations interfere with the draw-down process employed to receive and spend Block Grant funds, no evidence in the record suggests that to be the case. Rather, and by way of example, it appears that instead of drawing and expending Community Development Block Grant monies for a project related to “scattered site housing,” as proposed by the Governor, the North Carolina Department of Commerce must simply draw down and expend CDBG monies for a project aimed at “neighborhood revitalization,” as appropriated by the General Assembly. This election of which broad policy aims to fund within the larger national objective of community development is, fundamentally, a legislative one:

The legislative branch of government is without question the policy-making agency of our government[.] . . . [T]he General Assembly is well equipped to weigh all the factors surrounding a particular problem, balanc[e] the competing interests, provide an appropriate forum for a full and open debate, and address all of the issues at one time[.]

*Rhyne v. K-Mart Corp.*, 358 N.C. 160, 169-70, 594 S.E.2d 1, 8-9 (2004) (citations and internal quotation marks omitted) (third alteration in original). Nothing shows that the founders of this State, in drafting our Constitution, intended for the Executive Branch to wield such authority over a category of funds that now constitutes more

than a quarter of all State expenditures, and that it could do so free from legislative control, appropriation, and substantial oversight. This same concern was raised by New York's court of last resort:

Although the framers of the [New York] Constitution obviously could not have anticipated the massive role that Federal funds were to play in the composition of future treasuries, the concerns they expressed at the time that the appropriation rule was adopted remain of equal concern today.

. . . .

Even more important, however, is the need to ensure a measure of accountability in government. As the framers of the Constitution astutely observed, oversight by the people's representatives of the cost of government is an essential component of any democratic system. Under the present system, some one third of the State's income is spent by the executive branch outside of the normal legislative channels. The absence of accountability in this sector of government is, manifestly, an unacceptable state of affairs in light of the framers' intention that *all* of the expenditures of government be subjected to legislative scrutiny.

Finally, we note that application of the strictures imposed by section 7 of article VII to Federal funds is necessary to the maintenance of the delicate balance of powers that exists between the legislative and executive branches of government. . . . When the appropriation rule is bypassed[,] . . . the Legislature is effectively deprived of its right to participate in the spending decisions of the State, and the balance of power is tipped irretrievably in favor of the executive branch.

*Anderson*, 53 N.Y.2d at 364-66 (emphasis in original).

In sum, neither the North Carolina Constitution and statutes nor decisions from other states interpreting their own constitutions suggest the existence of a category of “custodial funds” held by the State but outside the appropriations power vested in the General Assembly under Article V, Subsection 7(1) of the North Carolina Constitution. The Governor does not identify any North Carolina constitutional provision or caselaw creating one. This Court cannot fashion such a category out of whole cloth. *See Shera v. N.C. State Univ. Veterinary Teaching Hosp.*, 219 N.C. App. 117, 127, 723 S.E.2d 352, 358 (2012) (“This Court is an error-correcting court, not a law-making court.”).

### **CONCLUSION**

The North Carolina Constitution plainly 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). The federal laws governing the Block Grants identify the State as the beneficiary of the funds, and they do not prohibit their appropriation by our General Assembly—the branch that wields exclusive constitutional authority over the State’s purse. Though some states, applying their own respective constitutions and statutes, may proscribe state legislative appropriation of federal block grant funds, our Constitution and law does not permit us to be counted amongst them, and the Governor has neither rebutted the presumption that acts of the General Assembly are constitutional nor identified a “plain and clear” constitutional

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violation. *Berger*, 368 N.C. at 639, 781 S.E.2d at 252. As a result, we hold that the Block Grant Appropriations are constitutional as-applied and affirm the ruling of the trial court.

AFFIRMED.

Judges STROUD and TYSON concur.