No. 425A21-3 TENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

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,
Defendant,

and

STATE BOARD OF EDUCATION,

Defendant,

and

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION,

Realigned Defendant,

and

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

Defendant-Intervenors.

From Wake County

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PETITION FOR REHEARING

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No. 425A21-3 TENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

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, Defendant, and STATE BOARD OF EDUCATION, Defendant, and CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, Realigned Defendant, and PHILIP E. BERGER, in his official capacity as President *Pro Tempore* of the North Carolina Senate, and TIMOTHY K. MOORE, in his official capacity as Speaker of the North Carolina House of Representatives, Defendant-Intervenors.	)	<u>From Wake County</u> 95-CVS-1158

****

PETITION FOR REHEARING

****

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Pursuant to Rule 2 and Rule 31 of the North Carolina Rules of Civil Procedure, Plaintiffs Cumberland County Board of Education, Halifax County Board of Education, Hoke County Board of Education, Robeson County Board of Education, and Vance County Board of Education, and Plaintiff-Intervenor Charlotte Mecklenburg Board of Education respectfully petition the Court for a limited rehearing of the Court's 2 April 2026 Opinion. Consistent with Appellate Rule 31(a), Plaintiffs include certification from the following two attorneys, who for periods of at least five years, respectively, have been members of the bar of this State, who have no interest in the subject of the action and have not been counsel for any party to the action, and who certify that they have carefully examined the appeal and the authorities cited in the decision, and consider the decision in error on points specifically and concisely identified: Jonathan D. Sasser and Mark Sigmon. Also consistent with Rule 31, this petition is being filed within fifteen days after the mandate of the Court issued, on 22 April 2026.

REQUEST FOR REHEARING

Plaintiffs respectfully request the Court rehear two issues decided in the 2 April 2026 Opinion for the following reasons:

I. Plaintiffs request that this Court grant rehearing to clarify that dismissal of Plaintiffs' facial constitutional claims for lack of subject matter jurisdiction is without prejudice.

II. There is no question that the trial court had, and has, subject matter jurisdiction over Plaintiffs' claims to oversee a remedy for violations of the rights of at-risk students found in the Hoke County trial, and, to the extent there are questions of mootness, those issues are not jurisdictional, were not raised by any party in this appeal, have not been addressed by Plaintiffs, and involve factual issues not before the Court.

INTRODUCTION

In its 2 April 2026 Opinion dismissing this decades-long effort to protect the constitutional rights of at-risk students in several low-wealth North Carolina school districts, this Court held that the trial court lacked subject matter jurisdiction over an unpled facial[1] challenge. Although Plaintiffs are disappointed by that decision, they do not seek rehearing of the dismissal of an unpled claim here. Plaintiffs are requesting, however, that the Court reconsider two issues also determined in the Court's 2 April 2026 Opinion that potentially create confusion about the scope of that decision and its impact—not just in this case, but in future cases. Thus,

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[1] As Plaintiffs understand it, the Court has categorized Plaintiffs claims against the statutory framework ("facial" and "as applied"), which categorization is distinct from the way those terms are used to describe claims against a specific statute. Plaintiffs will use these terms throughout this Petition to be consistent with this Court in its 2 April 2026 Opinion.

pursuant to Rule 2 and Rule 31(a) of the North Carolina Rules of Appellate Procedure, Plaintiffs ask the Court to rehear this appeal and reconsider two issues decided by the Court's 2 April 2026 Opinion.

First, in reaching its conclusion that Plaintiffs had exceeded the trial court's subject matter jurisdiction in pursuing a facial constitutional challenge, the Court drew a sharp line between Plaintiffs' constitutional claims that were described as as-applied, over which there was no jurisdictional dispute, and claims described as facial claims, which were the focus of the Court's jurisdictional concerns. But, after determining that the trial court lacked subject matter jurisdiction over what the Court referred to as Plaintiffs' facial claims, the Court dismissed all claims *with prejudice*.

Plaintiffs respectfully request rehearing to resolve an ambiguity in that ruling and to avoid potential confusion in the trial courts. A dismissal *with prejudice* is, by definition, a determination on the merits. And—as the Court's Opinion itself recognizes—it is blackletter, centuries-old law that a court that lacks subject matter jurisdiction cannot reach the merits of the case. Indeed, as the Court is well aware, to hold otherwise would be internally contradictory, legally incoherent, and an improper usurpation of power.

Without reconsideration and clarification, the Court's 2 April 2026 Opinion could be misinterpreted as having reached the merits of a claim over which it lacks subject matter jurisdiction.

Second, in dismissing the entire matter along with those unpled claims, this Court overlooked and misapprehended the fact that the trial court had, and still has, subject matter jurisdiction to monitor the Court's directive to the State to remedy the violation of the rights of at-risk students in the low wealth districts following a full trial. That directive, and the trial court's continuing jurisdiction over the matter, was affirmed by this Court in 2004. Plaintiffs therefore request that the Court grant rehearing to clarify that it did not dismiss these as-applied claims for lack of subject matter jurisdiction and to reconsider whether it should remand those claims back to the trial court for resolution, rather than dismiss outright.

In addition, the Court appears in a footnote to have relied on the mootness doctrine to justify dismissal of claims over which the trial court did have subject matter jurisdiction. But the Court never took jurisdiction in this appeal to resolve if those claims were moot, the parties did not raise or brief it, Plaintiffs have never had an opportunity to respond to the Court's mootness concerns, and determinations of mootness typically involve the sort of fact-finding that falls to a trial court. Moreover, it is well-established that dismissals on mootness grounds should be without prejudice, as such dismissals do not go to the merits of a claim.

Plaintiffs thus respectfully request that the Court grant rehearing to reconsider whether the proper outcome here is to remand for the trial court to consider the fact-intensive questions of whether Plaintiffs' as-applied claims have become moot.

Plaintiffs understand and appreciate the finality of the Court's decision. But Plaintiffs are asking this Court to grant rehearing to clarify the scope and impact of its decision and make clear that the Court is not suggesting that, despite centuries of precedent to the contrary, claims over which a court lacks subject matter jurisdiction can be dismissed with prejudice. And Plaintiffs are asking the Court for rehearing to reconsider its decision to dismiss the as-applied claims over which the trial court unquestionably had subject matter jurisdiction based on arguments and theories that were not brought before the Court, and could potentially overturn the Court's holdings as far back as 2004.

GROUNDS FOR REHEARING

I. Plaintiffs request rehearing for the Court to clarify that its dismissal of Plaintiffs' facial constitutional claims is without prejudice.

In taking this appeal, the Court expressly stated that the by-pass petition was granted "solely on the question of whether the trial court lacked subject matter jurisdiction to enter its order of 17 April 2023." *Hoke Cnty. Bd. of Educ. v. State*, 385 N.C. 380, 380, 892 S.E.2d 594, 595 (2023). In addressing that question, the Court distinguished between two types of constitutional claims—as-applied claims and facial claims—and determined that, to the extent Plaintiffs have been pursuing

facial claims, those claims were not pleaded and thus should be dismissed for lack of subject matter jurisdiction.

From that holding, the Court ordered that "this action is dismissed with prejudice." (Op. at 111; *see also* Op. at 10, 107.) Because that disposition does not distinguish between the distinct facial and as-applied claims, it could be construed as dismissing Plaintiffs' facial constitutional claim—over which, the Court has held, there is no subject matter jurisdiction—with prejudice.

But such an outcome, dismissal with prejudice for lack of subject matter jurisdiction, is a legal impossibility. Plaintiffs thus urge the Court to grant rehearing and clarify that the dismissal of Plaintiffs' facial claims is without prejudice.

As the Court explained in its 2 April 2026 Opinion, "jurisdiction is the legal power and authority of a court to make a decision that binds the parties to any matter properly brought before it." (Op. at 83–84 (cleaned up).) "Without jurisdiction," the Court continued, "the court cannot proceed at all in any cause." (Op. at 84 (cleaned up).) Rather, where jurisdiction "ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." (*Id.* (cleaned up).)

From this, it necessarily follows that "[w]here no subject matter jurisdiction exists, the dismissal should be without prejudice." 1 N.C. Civil Prac. and Proc. § 12:4 (6th ed.). And that is because a dismissal with prejudice is a disposition on the

merits. *E.g.*, *Ward v. Wake Co. Bd. of Educ.*, 166 N.C. App. 726, 730, 603 S.E.2d 896, 900 (2004) ("As a dismissal with prejudice, it constitutes a final judgment on the merits.") (citing *Hogan v. Cone Mills Corp.*, 315 N.C. 127, 136, 337 S.E.2d 477, 482 (1985)); *Barnes v. McGee*, 21 N.C. App. 287, 289, 204 S.E.2d 203, 205 (1974) ("A dismissal 'with prejudice' is the converse of a dismissal 'without prejudice' and indicates a disposition on the merits."). Thus, a dismissal with prejudice for lack of subject matter jurisdiction is a "contradiction" because "a dismissal with prejudice is a merits disposition, but the failure of subject-matter jurisdiction precludes consideration of the merits." *Flynn v. FCA US LLC*, 39 F.4th 946, 954 (7th Cir. 2022); *see also Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101-102 (1998) ("For a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act *ultra vires*."); *Christopher v. Stanley-Bostitch, Inc.*, 240 F.3d 95, 100 (1st Cir. 2001) ("[O]rders relating to the merits of the underlying action are void if issued without subject matter jurisdiction."); *Hernandez v. Conriv Realty Assocs.*, 182 F.3d 121, 123 (2d Cir. 1999) ("[W]here a court lacks subject matter jurisdiction, it also lacks the power to dismiss with prejudice.").

While the dissents gesture to this principle, (*see, e.g.*, Op. at 227–28 (Riggs, J. dissenting)), they do not make an essential practical point: if this Court has indeed dismissed some or all of Plaintiffs' claims with prejudice for lack of subject matter

jurisdiction, then that decision is self-voiding. *See, e.g.*, *Commander v. Bryan*, 123 S.W.2d 1008, 1013, 1015 (Tex. Civ. App., Fort Worth, 1938) (describing a judgment rendered by a court that lacked jurisdiction as "mere waste paper, an absolute nullity" that could be "said to be in law no judgment at all, having no force or effect, conferring no rights, and binding nobody"); *Voorhees v. Jackson*, 35 U.S. (10 Pet.) 449, 469 (1836) (also characterizing such a judgment as "waste paper"). Indeed, this Court has described the "rendition of a judgment" (i.e., a decision on the merits) without subject matter jurisdiction as a "usurpation of power" that makes the judgement itself void. *McRary v. McRary*, 228 N.C. 714, 717, 47 S.E.2d 27, 29 (1948); *see also Commonwealth of Kentucky v. Powers*, 201 U.S. 1, 35 (1906) ("This court, while sustaining the subordinate courts of the United States in the exercise of such jurisdiction as has been lawfully conferred upon them, must see to it that they do not usurp authority not affirmatively given to them by acts of Congress."); *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 351–52 (1871) ("Where there is clearly no jurisdiction over the subject-matter any authority exercised is a usurped authority."); *Hickey's Lessee v. Stewart*, 44 U.S. (3 How.) 750, 762 (1845) ("[N]o power having been conferred by Congress, on that court, to take or exercise jurisdiction . . . the exercise of jurisdiction was a mere usurpation of judicial power."); *cf. Carr v. Coke*, 116 N.C. 223, 223, 22 S.E. 16, 22 (1895) (Montgomery, J. concurring) (warning that a court's assumption of "a jurisdiction which does not belong to it" could "end, possibly, in

judicial tyranny, the basest and the most detestable species of oppression"). For these reasons, this Court has not hesitated to correct the error of a dismissal with prejudice for lack of jurisdiction. *See, e.g.*, *United Daughters of the Confederacy v. City of Winston-Salem*, 383 N.C. 612, 649–50, 653, 881 S.E.2d 32, 60, 62 (2022) (Newby, C.J., concurring in the result only with Berger, J., and Barringer, J., joining) (agreeing with the majority that, "because there is no subject matter jurisdiction over plaintiff's claims," "the proper disposition is dismissal *without prejudice*." (emphasis added)).

Plaintiffs respectfully request that the Court rehear this case to clarify that no such usurpation has taken place here and that its dismissal of Plaintiffs' facial claim for lack of subject matter jurisdiction is, as it must be, without prejudice. Plaintiffs raise these issues not only because of concern about the impact a "with prejudice" dismissal could have on future students' attempts to protect their constitutional rights—they are concerned that courts and litigants could misconstrue the Court's decision to authorize trial courts, in many different contexts, to reach the merits in cases over which they have no power. Because that is surely not what this Court intended, Plaintiffs petition for rehearing to provide needed clarity.

II. Plaintiffs request rehearing to allow the Court to remand, rather than dismiss, Plaintiffs' as-applied claims.

Plaintiffs offer the following arguments in support of their request for rehearing of the dismissal of their as applied constitutional claims.

A. Plaintiffs request rehearing because the Court overlooked and misapprehended the trial court's unquestionable subject matter jurisdiction with respect to the as-applied claims.

The Court's basis both for taking the appeal and for dismissing the case rests on the proposition that the trial court lacks subject matter jurisdiction. (*See* Op. at 111.) But there is no suggestion in the 2 April 2026 Opinion, or any of the decisions below, that the trial court lacks subject matter jurisdiction over the claims that the Court identifies as Plaintiffs' as-applied claims. Nor could there be, because this Court in *Hoke County I* affirmed both the trial court's direction that Defendants must "work with the Hoke County School Board to remedy the resource allocation problem identified in the Hoke County Trial," (Op. at 56), and the trial court's retention of jurisdiction to enforce that remedy. *See* 4 April 2002 Judgment, R pp 679–681; *Hoke Cnty. Bd. of Educ. v. State*, 358 N.C. 605, 608–09, 599 S.E.2d 365, 372–73 (2004) (*Hoke County I*) (affirming, with modifications, the trial court's first remedy to order the State to "assume the responsibility for, and correct, those educational methods and practices that contribute to the failure to provide students with a constitutionally-conforming education").

By dismissing the entire action instead of only the unpled claims, the Court dismisses claims over which the trial court had subject matter jurisdiction, thereby denying a remedy to at-risk children in the low-wealth school districts (at a minimum in Hoke County) to which they are entitled. (*See* Op. at 56.) And it does so by raising issues that were not the subject of this appeal, that were not briefed by

the parties, and that were not considered by the trial court or informed by the trial court's fact-finding. For these reasons, as explained in more detail below, Plaintiffs request rehearing on this issue.

1. As this Court confirmed in *Hoke County I*, the trial court retains subject matter jurisdiction to enforce its judgment and craft a remedy.

As a brief overview of the history of this case shows, there can be no real question that the trial court has long had subject matter jurisdiction over Plaintiffs' as-applied claims. Starting from the beginning, Plaintiffs[2] originally brought this declaratory action seeking a "declaration of their educational rights under the North Carolina Constitution and Chapter 115C of the General Statutes. *See* N.C.G.S. § 1–253 (2003)." *Hoke County I*, 358 N.C. at 614, 599 S.E.2d at 376. "[O]nce their educational rights were declared" in *Leandro I*, "plaintiffs sought: (1) to show that their declared rights were being violated by State-defendants and, if so demonstrated, (2) a court-imposed remedy that would correct the demonstrated violation(s)." *Id.*; *see also* N.C.G.S. § 1–259 (2003) (providing for further relief based on a declaratory judgment whenever necessary or proper, which statute this Court cited in describing the procedure through which Plaintiffs were seeking a remedy). A trial was then held

[2] Historically, and as the Court stated in *Hoke County I*, "Plaintiffs" meant "select students from Cumberland, Halifax, Hoke, Robeson, and Vance Counties, their respective guardians *ad litem,* and the corresponding local boards of education, denominated as plaintiffs," 358 N.C. at 611, 599 S.E.2d at 374 (2004). As used in this Petition, "Plaintiffs" also encompasses the Charlotte-Mecklenburg Board of Education except where otherwise clear from context.

in 2002. At that trial, Plaintiffs demonstrated—on behalf of all at-risk children in Hoke County within Plaintiffs' zone of interest—that their declared rights were being violated by the State Defendants. After trial, the trial court entered judgment finding such violations and requiring Defendants and Plaintiffs to work together to remedy them. (R pp 570–681, the "4 April 2002 Judgment.")

While all sections of the 4 April 2002 Judgment's decretal are relevant here,[3] Sections 4, 5, and 7-9 are critical. In Section 4, the trial court ordered the State of North Carolina "to remedy the Constitutional deficiency for those children who are not being provided the basic educational services set out in paragraph 1 . . . ." (R p 680.) And in *Hoke County I*, this Court affirmed Section 4 with respect to the Constitutional deficiency for those children who are not being provided the basic educational services in Hoke County. *Hoke County I,* 358 N.C. at 638, 599 S.E.2d at 391.

The trial court recognized, however, that—to show "proper deference to the Executive and Legislative Branches"—it needed to allow the other branches "to use their informed judgment as to how best to remedy the identified constitutional deficiencies." (Rp. 680.) So the State was ordered to "work with the Hoke County

[3] Including, specifically, that the "State of North Carolina is ultimately responsible for providing each child with access to a sound basic education and that this ultimate responsibility cannot be abdicated by transferring responsibility to local boards of education." (R p 679.)

school board to remedy the resource allocation problem identified in the Hoke County Trial," (Op. at 56), which was to be accomplished through Sections 7 and 8 of the 4 April 2002 Judgment. Specifically, those Sections direct the State to:

> (7) "keep the plaintiff-parties fully informed of the progress of its efforts to remedy the constitutional deficiencies identified;"[4] and
>
> (8) "keep the Court advised of the remedial actions taken by the State by written report filed with the Court every 90 days, or as otherwise may be directed by the Court."

(R p 680.) Section 9 then made clear that the trial court "***retain[ed] jurisdiction*** over this matter for purposes of resolving any remaining issues, including, but not limited to, enforcement of this Judgment as provided by *Leandro*." (*Id.* (emphasis added).)

The Court confirmed all this in the current Opinion. As the Court explained, "[i]n Hoke County specifically, … there had been a showing that at-risk students were being deprived of their opportunity to receive a sound basic education, and this Court affirmed the trial court's directive for defendants to work with the Hoke County school board to remedy the resource allocation problem identified in the Hoke County trial." (Op. at 56.) This work, as also described by this Court, resulted in "protracted, non-trial proceedings" lasting "for several more years." (Op. at 57.)

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[4] Plaintiff parties were directed to fully cooperate in being informed.

2. The Court's suggestion that Plaintiffs lost subject matter jurisdiction by "abandoning" their claims is supported by neither fact nor law and was neither briefed nor argued.

Yet, in the 2 April 2026 Opinion, the Court says that, at some point after 2009 and before 2017, "the original claims were neglected, steadily abandoned, and seemingly forgotten." (*Id.*) As a result, the Opinion says, the trial court no longer had subject matter jurisdiction "by no later than" 24 July 2017, because, by that time, Plaintiffs began pursuing their facial claims. (Op. at 93.)

But even if one accepts the premise that Plaintiffs abandoned their as-applied claims, it does not follow that the trial court *lost* subject matter jurisdiction "to remedy the Constitutional deficiency for those children who are not being provided the basic educational services" in Hoke County. (R p 680.) Per this Court's precedent, subject matter jurisdiction is not something a plaintiff can "lose." (*See, e.g.*, Op. at 156–57 (Earls, J. dissenting) (explaining the legal rule and its basis).)

Even if it were, however, any conclusion that Plaintiffs abandoned their right to seek a remedy for the violation of their constitutional rights finds no support in logic or the record. For example, it is illogical to say that Plaintiffs abandoned their claims because they pursued a statewide remedy, as a statewide remedy would necessarily remedy at least some violations in Cumberland, Halifax, Hoke, Robeson, and Vance Counties, or any other county.[5] Indeed, any Plaintiff County in which at-

[5] The State has previously acknowledged that any statewide remedy would, by its very nature, provide "concrete actions to improve the educational opportunities for at-risk

risk students faced constitutional violations arising from the issues as those found in the Hoke County trial (which was to be representative of the low-wealth districts, *Hoke County I*, 358 N.C. at 613, 599 S.E.2d at 375) sought a remedy when seeking a statewide remedy.

There is no finding anywhere in the voluminous record of these proceedings that the established violations of constitutional rights found in the Hoke County trial were ever remedied. On the contrary, the record shows that Plaintiffs continued to demand a remedy for the violations found in the Hoke County trial, but those violations continued unabated.

That these proceedings have taken many years should not be surprising. The mere passage of time and the parties' and the trial court's prolonged good-faith efforts to fashion a remedy can provide no support for the proposition that the trial court lost subject matter jurisdiction.

More fundamentally, the trial court's jurisdiction over the entire case was never presented to this Court for decision and was therefore not briefed or argued by the parties. In pursuing this appeal, the Legislative-Intervenor Appellants' statement of issues did not mention the trial court's subject matter jurisdiction over the entire case.[6] Instead, the issues concerned (1) subject matter jurisdiction to issue

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students in the plaintiff-party LEAs [districts] along with their similarly disadvantaged peers across the State." (R p 1491.)

[6] The issues presented on appeal were:

orders requiring a statewide remedy; (2) standing to assert claims in districts where Plaintiffs do not reside; (3) whether the court issued an impermissible advisory opinion on statewide educational funding; (4) subject matter jurisdiction to issue a remedy in a "friendly suit;" and (5) subject matter jurisdiction under the political question doctrine to order implementation of a statewide remedy.

And in litigating this appeal, Legislative-Intervenor Appellants never argued that the trial court lost subject matter jurisdiction to monitor the State providing a remedy for at-risk children in the low-wealth districts, or at a minimum, Hoke County. That issue was not briefed. That issue was not argued.

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1. Did the trial court lack subject matter jurisdiction to issue orders, including those requiring the Comprehensive Remedial Plan, that purported to dictate educational policy on a statewide basis when Plaintiffs' claims were limited to the conditions in their individual school districts?

2. Did Plaintiffs lack standing to assert claims for, and to obtain orders directing the operations of, school districts where they do not reside and that were never made part of their claims?

3. Did the trial court exceed its subject matter jurisdiction by issuing an impermissible advisory opinion dictating the programs and funding that must be implemented for North Carolina's statewide educational system, over an eight-year period, in the absence of any claim or judgment that the State system as a whole was insufficient to provide children the opportunity for a sound basic education?

4. Did the trial court exceed its subject matter jurisdiction by issuing remedies, purporting to dictate educational programs and funding, through the issuance of consent orders in a "friendly suit" where there was no true adversity between the parties?

5. Did the trial court lack subject matter jurisdiction under the political question doctrine to order the State to implement, and fund, each element of the Comprehensive Remedial Plan?

Indeed, it is apparent from Legislative-Intervenor Appellants' briefing that they did not believe that the trial court's subject matter jurisdiction over a remedy for the violations found in the Hoke County trial was even in question. Instead, they argued the trial court lacked subject matter jurisdiction "to enter orders . . . or to in any other way grant 'relief' ***beyond the limits*** of Hoke County and Halifax County." (Legislative-Intervenor Appellants' Br. at 72 (emphasis added).) They appear to concede the trial court had subject matter jurisdiction to provide a remedy in Halifax County by acknowledging "the parties entered into a Consent Order that required Halifax County Schools to cooperate with the State Board of Education to fix deficiencies in its delivery of educational services." (Legislative-Intervenor Appellants' Br. at 20 (citing R S p 2671).) And they even sought instructions for "any further proceedings" to "be conducted in a manner consistent with the limits imposed by this Court's decision in *Hoke County I* and the scope of claims Plaintiffs have actually alleged."[7] (Legislative-Intervenor Appellants' Br. at 72.)

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[7] Plaintiffs agree with what appears to be Legislative Intervenors point that it is possible for a trial court to have subject matter jurisdiction over one claim and not another. *See, e.g.*, *Burgess v. Burgess*, 205 N.C. App. 325, 334, 698 S.E.2d 666, 672 (2010) (finding the superior court properly concluded that it had subject matter jurisdiction over plaintiff's causes of action for inspection, accounting, and breach of fiduciary duties, but not the claim for equitable divestiture of shares); *Baumann-Chacon v. Baumann*, 212 N.C. App. 137, 147, 710 S.E.2d 431, 438 (2011) (affirming the trial court's dismissal over claims for which it did not have subject matter jurisdiction but reversing the trial court's dismissal over claims for which it did have subject matter jurisdiction).

Moreover, this Court did not give the Parties an opportunity to brief or argue the matter of whether the trial court had subject matter jurisdiction to grant relief *within* the limits of Hoke County (or any of the other low-wealth school districts). Instead, it said that this appeal would be "solely on the question of whether the trial court lacked subject matter jurisdiction to enter its order of 17 April 2023," *Hoke Cnty. Bd. of Educ. v. State*, 385 N.C. 380, 380, 892 S.E.2d 594, 595 (2023)—which the 2 April 2026 Opinion itself describes as a resolution to "the unpled facial challenge to the current education system." (Op. at 93.)

Therefore, Plaintiffs respectfully request that the Court rehear this issue, to allow the parties to fully brief the issue of the trial court's continuing subject matter jurisdiction over the remedy for the yet-unremedied constitutional violations found long ago.

B. To the extent the Court believes that Plaintiffs' case has become moot, or that there are other non-jurisdictional concerns, Plaintiffs request rehearing for the Court to consider remanding that issue rather than deciding it, because the issue was not before the Court to decide.

Rather than viewing the Court's dismissal of Plaintiffs' as-applied claims as a matter of subject matter jurisdiction, several concurring and dissenting opinions view it as a matter of mootness. (*See, e.g.*, Op. at 115 n.3 (Berger J., concurring); 157–65 (Earls, J. dissenting); 202 (Dietz, J. dissenting).) The basis for this interpretation is found in footnote 26 of the Court's Opinion, in which the Court cited several of its mootness precedents to support the proposition that "[r]emanding for renewed

litigation over the original as-applied claims or dismissing without prejudice would be inappropriate." (Op. at 107 n.26.)

To the extent that reading is accurate, Plaintiffs respectfully request that the Court grant rehearing to reconsider its with-prejudice dismissal of Plaintiffs' as-applied claims on mootness or grounds noted in footnote 26, because such determination creates two problems.

First, as both the concurring and dissenting opinions point out, mootness is not jurisdictional. (Op. at 115 n.3 (Berger, J., concurring); 164 & n.19 (Earls, J., dissenting).) Because the Court states repeatedly that it was only considering jurisdiction and that its basis for its decision was lack of jurisdiction, mootness can have no bearing on the disposition of the action.

Moreover, to the extent that the Court's footnote argues that a long-litigated as-applied challenge was mooted by a change of circumstances, that decision travels outside the scope of this appeal and purports to adjudicate factual issues that were never presented to or decided by the trial court. If this Court suspects that the circumstances in Hoke County have changed enough to moot the as-applied challenge, the best course is to remand with directions that the trial court make appropriate findings of fact, and any ultimate dismissal would then be without prejudice.

For these reasons, and as more fully set out below, Plaintiffs respectfully request that the Court grant rehearing to reconsider its disposition of Plaintiffs' as-applied claims on mootness grounds.

1. As a matter of law, mootness cannot form the basis for a dismissal with prejudice here.

By its own terms, the Court's footnote provides the reasons why it elected to dismiss the action with prejudice rather than without prejudice. (*See* Op. at 107 n.26 ("[D]ismissing without prejudice would be inappropriate for many reasons. We will address only a few.").) But that decision comes at the cost of introducing significant doctrinal confusion as it misapprehends the distinction between mootness and subject matter jurisdiction. (*See* Op. at 115 n.3 (Berger, J., concurring); 228 n. 10 (Riggs, J., dissenting).)

This Court has repeatedly and explicitly cautioned that the only issue in this appeal was subject matter jurisdiction. But, as Justice Berger points out, footnote 26 discusses mootness, and "[m]ootness for this Court has consistently been held to be a prudential doctrine, not a jurisdictional bar." (Op. 115 n.3 (Berger, J., concurring).) This highlights two problems with relying on the mootness doctrine to justify dismissal with prejudice.

First, dismissals for mootness, like dismissals for lack of jurisdiction, should be without prejudice, because a dismissal for mootness means that the court has declined to reach the merits. *Greenleaf Johnson Lumber Co. v. Valentine*, 179 N.C.

423, 102 S.E. 774, 775 (1920) ("On careful consideration we think the record presents only a 'moot question,' and under our decisions the court should express no opinion concerning it."). None of the cases cited in footnote 26 dismissed a case with prejudice for mootness (or for lack of jurisdiction). Indeed, in one of them, this Court stated that the interests at issue "should not be passed upon." *Parker v. Raleigh Sav. Bank*, 152 N.C. 253, 67 S.E. 492, 493 (1910).

Second, as a matter of fundamental fairness and due process, the express limitation of this appeal to questions of subject matter jurisdiction should have prevented the Court from reaching a non-jurisdictional issue like mootness. The Rules of Appellate Procedure prohibit an appellate court from addressing non-jurisdictional issues not raised or argued by a party. N.C. R. App. P. 28(a) & (b). This Court has recognized that deviating from this principle means that "the Rules become meaningless, and an appellee is left without notice of the basis upon which an appellate court might rule." *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005) (per curiam) (citing *Bradshaw v. Stansberry*, 164 N.C. 356, 79 S.E. 302, 302 (1913) ("It is therefore necessary to have rules of procedure and to adhere to them, and, if we relax them in favor of one, we might as well abolish them.")).

Here, the Defendants asked only for a review of a jurisdictional question, and this Court explicitly told the parties that it would only hear that jurisdictional

question. Thus, if the Court justified its decision on mootness grounds, that justification either went beyond the scope of the appeal without notice to the parties or established (in a footnote and with neither acknowledgment nor explanation) a sea change in this Court's mootness doctrine. This alone merits rehearing on the issue.

2. To the extent the Court has mootness concerns about Plaintiffs' as-applied claims, the Court should grant rehearing to consider remanding with instructions for the trial court to address this inherently factual issue.

The issues identified by the Court in footnote 26 as making any remand "futile" are fact-based issues that should be decided in the first instance by the trial court following an opportunity for all parties to be fully heard. Indeed, this problem underscores the importance of requiring that fact issues be raised, clarified, and resolved at the trial level before an appellate court passes on them as a court of review rather than first view. *Johnson v. New York State Ed. Dep't*, 409 U.S. 75, 76 (1972) (per curiam) (where school children challenged a state law as effectively denying them textbooks, remanding for fact-finding by district court whether passage of a new tax to buy textbooks had mooted claim); *id.* at 78–79 (Marshall, J., concurring) (describing what fact issues the district court should investigate to determine if claim was moot); *see also, e.g.*, *Manguriu v. Lynch*, 794 F.3d 119, 122 (1st Cir. 2015) ("Only when the pertinent facts are undisputed and the supplemented

record allows for a conclusive determination of mootness can a reviewing court dispose of the matter without further ado.”).

Plaintiffs have responses to each point raised in the Court’s footnote 26 and should have an opportunity to address them with full briefing and argument before they form the basis for dismissal of any of Plaintiff’s claims. For example, the footnote states that “this litigation lacks a necessary party: the General Assembly.” (Op. at 107 n.26.) As a matter of record, however, the General Assembly is a party to this litigation—it brought and prosecuted this appeal. Moreover, the footnote states that it is addressing the “original as-applied claims,” so the law requiring the General Assembly as a party does not apply. *See Wilson Cnty. Bd. of Educ. v. Ret. Sys. Div.*, 290 N.C. App. 226, 241, 891 S.E.2d 626, 636 (“Because Petitioner did not challenge the facial validity of a North Carolina statute, Speaker Moore and President Pro Tempore Berger were not proper parties to the petition for judicial review and the superior court therefore erred by denying Respondents’ Rule 12(b)(6) motion to dismiss [Speaker Moore and President Pro Tempore Berger].”), *appeal dismissed, disc. review denied*, 901 S.E.2d 797 (2023).

Similarly, the Court’s determination that Plaintiffs’ original claims “categorically did not present facial challenges,” (Op. at 94), means that those claims could not result in a “declaration regarding the constitutionally of [state] laws,” (Op. at 108 n.26), that implicates the General Assembly’s interests. Regardless of all this,

however, especially as the General Assembly has forecasted that it would not object to its joinder, the Generally Assembly could be easily added to the trial court proceedings.

The Court's footnote also states that the "original as-applied claims are no longer viable" because "the education system of 1994 and 2005 no longer exists." (Op. at 107 n.26.) Plaintiffs' disagreement with the narrow characterization of their original claims aside, this assertion is not supported by the Court's own view of the case. The Court's basis for the assertion that "the education system of 1994 and 2005" no longer exists is that "the BEP—the epicenter of the original complaints—was repealed in 2017." (Op. at 107 n.26.) Under this Court's "as-applied" framing, Plaintiff's original, viable, claims alleged that the State was denying students their constitutional rights *irrespective* of the facial sufficiency of the statutes. As this Court affirmed in *Hoke I*, an as-applied *Leandro* claim turns more on whether there is a certified teacher in a classroom, for example, than what the statutes say about end-of-grade testing. *See Hoke County I*, 358 N.C. at 636, 599 S.E.2d at 389 (affirming the trial court's general guidelines for a *Leandro*-compliant resource allocation system, including the requirements: (1) that "every classroom be staffed with a competent, certified, well-trained teacher"; (2) "that every school be led by a well-trained competent principal"; and (3) "that every school be provided, in the most cost effective manner, the resources necessary to support the effective instructional

program within that school so that the educational needs of all children, including at-risk children, to have the equal opportunity to obtain a sound basic education, can be met.").

To moot the as-applied claims, therefore, there must be a certified teacher in every classroom. This Court has neither the entire record from the trial court before it nor one fact that would suggest that violation has been remedied in the low-wealth districts, or at a minimum in Hoke County. Thus, for the purposes of Plaintiffs' claim, the "education system" still exists, and Plaintiffs' claims are not moot.

The footnote next asserts that "none of the remaining participants possess the constitutional right at issue" and that "all of the students named in the complaints have left the public school system, having surpassed the maximum age for enrollment." (Op. at 107 n.26.) Presumably, this means that the Court believes dismissal with prejudice is appropriate because there is currently no Plaintiff who has standing to litigate these decades-old claims.

That justification traps Plaintiffs in a catch-22. In 1997 the *Leandro I* court instructed the trial court to afford the State deference in this case, 346 N.C. at 357, a deference that lasted until 2022. *Hoke Cnty. Bd. of Educ. v. State*, 382 N.C. 386, 390, 879 S.E.2d 193, 198 (2022) ("Today, that deference expires."). This period of

deference was longer than any student with the underlying constitutional right can remain in school.

Moreover, there are ready solutions to any judicial problems posed by students aging out of high school before complex constitutional claims are fully adjudicated. As Justice Dietz points out, for example, current student plaintiffs could be added. (Op. 204–06 (Dietz, J., dissenting).) And, as Justice Dietz explains, this would also aid the resolution of the case by expanding the pool of viewpoints, resulting in better decision-making. Counsel for Plaintiff School Districts were approached by guardians of current students about this following the issuance of the Court's opinion and are confident this goal could be accomplished quickly and easily.

The footnote concludes that "since at least 2018, there has not been actual adversity in this litigation" and that because North Carolina courts do not entertain suits not arising out of a real controversy between the parties, it would be "inappropriate" to remand for further adjudication of the claims. (Op. at 108 n.26.) This assertion has again overlooked directives from the 4 April 2002 Judgment that were affirmed by this Court in 2004.

The proceedings required by the 4 April 2002 Judgment, which Judgment was in part affirmed by this Court in *Hoke County I*, expressly required Plaintiff-parties to "fully cooperate" with the State in accomplishing the task of "efforts to remedy

the constitutional deficiencies identified." (R p 680.) In other words, a remand for continued "cooperation" would be consistent with this Court's prior rulings, which "affirmed the trial court's directive for defendants to work with the Hoke County school board to remedy the resource allocation problem identified in the Hoke County trial," (Op. at 56).

Additionally, and more fundamentally, adversity continues as required for a declaratory judgment. The record shows that Hoke County proved that the State was denying its at-risk students the opportunity to receive a sound basic education, and there has *never* been a finding that the State made good on a remedy. The violations of the rights of at-risk students in Hoke County remain, adversity remains, and at-risk students remain entitled to relief in the open courts of this State.

Ultimately, this Court's own explanation of the facial and as-applied challenge dichotomy casts as-applied challenges as matters of fact tied to a plaintiff's circumstances. (Op. at 91–92.) Thus, the continuing viability of Plaintiffs' as-applied claims is a factual issue that must be considered in the first instance by a fact-finding court. "[O]ur procedural scheme contemplates that parties shall come to issue in the trial forum vested with authority to determine questions of fact," and "[t]his is essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues which the trial tribunal is alone competent to decide; it is equally essential in order that litigants may not be surprised on appeal by final

decision there of issues upon which they have had no opportunity to introduce evidence." *Hormel v. Helvering*, 312 U.S. 552, 556 (1941). As this Court said over a century ago, "[t]he appellate jurisdiction of this [C]ourt extends only to the correction of errors in law. It cannot hear evidence in a cause, and of course cannot properly determine questions depending upon facts." *Simonton v. Chipley*, 64 N.C. 152 (1870). The Court's grounds for dismissing Plaintiffs' as-applied claims on untested factual determinations risks upsetting the procedural order of the courts.

For these reasons, Plaintiffs request that the Court grant rehearing, reconsider its disposition of the action, and remand Plaintiffs' as-applied claims to the trial court for further proceedings before this Court reaches their merits and forecloses any opportunity for judicial relief to longstanding, well established, constitutional violations.

This the 7th day of May, 2026.

Electronically Submitted
Melanie B. Dubis
State Bar No. 22027
E-mail: melaniedubis@parkerpoe.com

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

Catherine G. Clodfelter
N.C. Bar No. 47653
catherineclodfelter@parkerpoe.com
PARKER POE ADAMS & BERNSTEIN LLP

301 Fayetteville Street, Suite 1400 (27601)
P.O. Box 389
Raleigh, North Carolina 27602-0389
Telephone: (919) 828-0564
Facsimile: (919) 834-4564

H. Lawrence Armstrong, Jr.
N.C. Bar No. 6485
ARMSTRONG LAW, PLLC
119 Whitfield Street
Enfield, North Carolina 27823
Telephone: (252) 445-5656
E-mail: hla@hlalaw.net
Counsel for Plaintiffs

Neal Ramee
David Noland
THARRINGTON SMITH, LLP
P.O. Box 1151
Raleigh, North Carolina 27602
nramee@tharringtonsmith.com
dnoland@tharringtonsmith.com
Counsel for Charlotte-Mecklenburg Board of Education

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served the foregoing document in the above-entitled action on all parties to this cause by electronic mail to the following:

Jeff Jackson, Attorney General
Daniel P. Mosteller, Associate Deputy Attorney General
Lindsay V. Smith, Deputy Solicitor General
NC Department of Justice
P.O. Box 629
Raleigh, North Carolina 27602
dmosteller@ncdoj.gov
lsmith@ncdoj.gov
Counsel for State of North Carolina

Tiffany Lucas
Todd Russell, Special Deputy Attorney General
NC Department of Justice
114 W. Edenton Street
Raleigh, North Carolina 27603
TLucas@ncdoj.gov
trussell@ncdoj.gov
Counsel for State Board of Education

Neal Ramee
David Noland
Tharrington Smith, LLP
P.O. Box 1151
Raleigh, North Carolina 27602
nramee@tharringtonsmith.com
dnoland@tharringtonsmith.com
Counsel for Charlotte-Mecklenburg Board of Education

Christopher A. Brook
Patterson Harkavy LLP
100 Europa Dr., Suite 420
Chapel Hill, North Carolina 27517
cbrook@pathlaw.com
Counsel for Rafael Penn Intervenors

Robert N. Hunter, Jr.
Higgins Benjamin, PLLC
301 North Elm Street, Suite 800
Greensboro, NC 27401
rnhunterjr@greensborolaw.com
Counsel for NC Office of State Controller

Matthew Tilley
W. Clark Goodman
Womble Bond Dickinson (US) LLP
301 S. College Street, Suite 3500
Charlotte, NC 28202-6037
matthew.tilley@wbd-us.com
clarkgoodman@wbd-us.com
Counsel for Legislative Intervenors

This 7th day of May, 2026.

Electronically submitted________________
Melanie B. Dubis
N.C. Bar No. 22027
E-mail: melaniedubis@parkerpoe.com

PARKER POE ADAMS & BERNSTEIN LLP
301 Fayetteville Street, Suite 1400 (27601)
P.O. Box 389
Raleigh, North Carolina 27602-0389
Telephone: (919) 828-0564
Facsimile: (919) 834-4564

Attorney for Plaintiffs

ATTACHMENTS

Attached to this Petition for Rehearing are copies of the following documents:

Exhibit A: Rule 31 Certification of Jonathan D. Sasser

Exhibit B: Rule 31 Certification of Mark Sigmon

Exhibit A

No. 425A21-3 TENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

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,

Defendant,

and

STATE BOARD OF EDUCATION,

Defendant,

and

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION,

Realigned Defendant,

and

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

Defendant-Intervenors.

From Wake County

****

RULE 31 CERTIFICATE OF JONATHAN D. SASSER

****

I, Jonathan D. Sasser, state as follows:

1. I have been licensed to practice law in the State of North Carolina and have been a member of the North Carolian Bar at all times since 1981. I am also licensed to practice law in New York since 1983.

2. I graduated from the University of North Carolina School of Law in 1981. After law school, I worked at Paul Weiss Rifkind Wharton & Garrison LLP in New York for four years. In 1986, I began practice in North Carolina at Moore & Van Allen, PLLC and have practiced continuously in North Carolina since that time.

3. I joined Ellis & Winters LLP in Raleigh in 2003. My practice focuses on complex litigation and appeals.

4. I have no personal or pecuniary interest in the subject of this action. I do not represent any party in this action.

5. I have carefully examined the appeal in this case, including this Court's 2 April 2026 opinion and the authorities cited therein. I respectfully believe that the Court's decision could be misconstrued as dismissing with prejudice claims based on a lack of subject matter jurisdiction. I also respectfully consider the Court's decision to dismiss the as-applied claims with prejudice for either lack of subject matter jurisdiction or for mootness to be error in this case. For these reasons, I respectfully urge the Court to rehear this appeal and revise its 2 April 2026 opinion to clarify that any dismissal of claims over which the Court lacks subject matter jurisdiction is without prejudice, and to remand the as-applied claims for a remedy or for findings

of fact regarding whether the injury for which liability was previously found still exists, as set forth in more detail in Plaintiffs' Petition for Rehearing.

Respectfully submitted, this the 7th day of May, 2026.

By: ______________________

Jonathan D. Sasser
N. C. State Bar No. 10028
E-mail: jon.sasser@elliswinters.com
Ellis & Winters LLP
4131 Parklake Avenue Suite 400
Raleigh, NC 27612
Telephone: (919) 865-7002

Exhibit B

No. 425A21-3 TENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

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, Defendant,	) From Wake County
and	)
STATE BOARD OF EDUCATION,	)
Defendant,	)
and	)
CHARLOTTE-MECKLENBURG BOARD OF EDUCATION,	)
Realigned Defendant,	)
and	)
PHILIP E. BERGER, in his official capacity as President *Pro Tempore* of the North Carolina Senate, and TIMOTHY K. MOORE, in his official capacity as Speaker of the North Carolina House of Representatives,	)
Defendant-Intervenors.	)

****

RULE 31 CERTIFICATE OF MARK SIGMON

****

I, Mark Sigmon, state as follows:

1. I have been licensed to practice law in the State of North Carolina and have been a member of the North Carolina State Bar at all times since 2008. I am also a North Carolina State Bar Board Certified Specialist in Appellate Practice.

2. I graduated from Duke University School of Law in 2005. After law school, I served as a law clerk to the Hon. Patrick E. Higginbotham, Circuit Judge for the U.S. Court of Appeals for the Fifth Circuit, from 2005 to 2007. I entered private practice in 2007, joining Womble Carlyle Sandridge & Rice, LLP, in its Raleigh, North Carolina office.

3. I am currently a partner at Lee Segui PLLC in Raleigh. My practice concentrates on appellate litigation before state and federal courts, as well as class action, employment, civil rights, and consumer protection litigation.

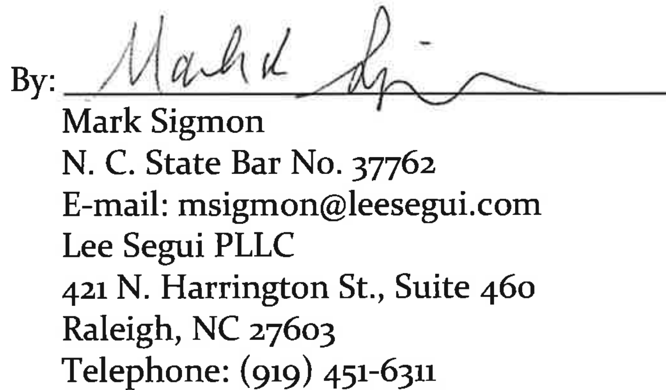
4. I have no personal or pecuniary interest in the subject of this action. I do not represent any party to this action.

5. I have carefully examined the appeal in this case, including this Court's 2 April 2026 Opinion and the authorities cited therein. I respectfully consider that rehearing is warranted for two reasons: (1) the Court's dismissal of Plaintiffs' facial constitutional claims could be interpreted as being *with prejudice*, despite the Court's determination that the trial court lacked subject matter jurisdiction, which would be a legal impossibility; and (2) the Court did not address Plaintiffs' as-applied constitutional claims, which appear to involve unresolved factual issues within the

trial court's subject-matter jurisdiction and therefore are more appropriately considered on remand.

6. For these reasons, I respectfully urge the court to rehear this appeal and revise its 2 April 2026 Opinion to clarify that the dismissal of Plaintiffs' facial claims for lack of subject matter jurisdiction is *without prejudice* and remand Plaintiffs' as-applied claims to the trial court for consideration of the remaining factual issues, as set forth in more detail in Plaintiffs' Petition for Reconsideration.

Respectfully submitted, this the 7th day of May, 2026.



By: ______________________

Mark Sigmon
N. C. State Bar No. 37762
E-mail: msigmon@leesegui.com
Lee Segui PLLC
421 N. Harrington St., Suite 460
Raleigh, NC 27603
Telephone: (919) 451-6311