No. 425A21-3 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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HOKE COUNTY BOARD OF EDUCATION, et al., plaintiffs

and

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, plaintiff-intervenor

and

RAFAEL PENN, et al., plaintiff-intervenors

v.

STATE OF NORTH CAROLINA and the STATE BOARD OF EDUCATION, defendants

and

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, realigned defendant

and

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

From N.C. Court of Appeals
22-86, 23-788

From Wake
95CVS1158

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ORDER

On the petition for discretionary review prior to a determination by the Court of Appeals filed by intervenor-defendants on 20 September 2023, the Court hereby allows the petition solely on the question of whether the trial court lacked subject matter jurisdiction to enter its order of 17 April 2023. *See Lemmerman v. A.T. Williams Oil Co.*, 318 N.C. 577, 580 (1986) ("The question of subject matter jurisdiction may be raised at any time, even in the Supreme Court.").

By order of the Court in Conference, this the 18th day of October 2023.

/s/ Allen, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 20th day of October 2023.

Grant E. Buckner
Clerk of the Supreme Court

Copy to:
North Carolina Court of Appeals
Mr. Robert Neal Hunter, Jr., Attorney at Law, For Combs, Linda, State Controller - (By Email)
Judge Michael L. Robinson, Attorney at Law - (By Email)
Mr. Amar Majmundar, Senior Deputy Attorney General, For State of N.C. - (By Email)
Mr. Matthew Tulchin, Special Deputy Attorney General, For State of N.C. - (By Email)
Ms. Tiffany Y. Lucas, Deputy General Counsel, For State of N.C. - (By Email)
Mr. Thomas J. Ziko, Attorney at Law, For State Board of Education - (By Email)
Mr. Neal A. Ramee, Attorney at Law, For Charlotte-Mecklenburg Board of Education - (By Email)
Mr. David Noland, Attorney at Law, For Charlotte-Mecklenburg Board of Education - (By Email)
Mr. H. Lawrence Armstrong, Attorney at Law, For Hoke County Board of Education, et al. - (By Email)
Ms. Melanie Black Dubis, Attorney at Law, For Hoke County Board of Education, et al. - (By Email)
Mr. Scott B. Bayzle, Attorney at Law, For Hoke County Board of Education, et al. - (By Email)
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Mr. Matthew F. Tilley, Attorney at Law, For Berger, Philip E., et al. - (By Email)
Mr. Russ Ferguson, Attorney at Law, For Berger, Philip E., et al. - (By Email)
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Ms. Catherine G. Clodfelter, Attorney at Law, For Hoke County Board of Education, et al. - (By Email)
Mr. Ryan Y. Park, Solicitor General, For State of N.C. - (By Email)
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Ms. Sarah G. Boyce, Deputy Solicitor General, For State of N.C. - (By Email)
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Mr. Chavis Jones, Attorney at Law, Pro Hac Vice, For Penn, Rafael, et al. - (By Email)
Mr. Michael Robotti, Attorney at Law, Pro Hac Vice, For Penn, Rafael, et al. - (By Email)
West Publishing - (By Email)
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Justice BERGER concurring.

The premise of the dissent is that this Court already "resolved the question of subject-matter jurisdiction in [*Hoke County III*]."[1] The dissent is wrong.

Take, for example, the question of standing. My dissenting colleague previously served as the lawyer for some of the parties in this case, known as the Penn Intervenors.[2] Those parties, in filings while my dissenting colleague was their counsel, requested to intervene in this matter. The lawsuit, at that point, focused on educational deficiencies in rural counties in the eastern part of our State. The Penn Intervenors sought intervention to "enforce their constitutional rights to a sound basic education" against the Charlotte-Mecklenburg School System. Core to their rationale for intervention was that every public school district faces its own unique educational challenges and groups of students or school districts in one area of our state are ill-suited to address the educational deficiencies in others.

This raises questions that our Court has not yet addressed: If public school students or local school boards who are not parties to this case believe the remedial order does not sufficiently address the educational failure in their districts, are they

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[1] "Because the distinction is meaningful, we refer to *Hoke County Board of Education v. State* as *Hoke County*, not *Leandro* [ ]. See discussion at *Hoke County Board of Education v. State*, 367 N.C. 156, 158 n.2, 749 S.E.2d 451, 453 n.2 (2013)." *Hoke Cnty. Bd. of Educ. v. State*, 382 N.C. 386, 480 n.1 (Berger, J., dissenting) (2022).

[2] To be clear, not a lawyer for those parties in some other case, but the lawyer for them *in this case*.

bound by the remedial order? If so, how were their rights adjudicated without their presence in the suit—an elementary principle of jurisdictional law. *See Martin v. Wilkes*, 490 U.S. 755, 759 (1989) ("[T]he general rule" is "that a person cannot be deprived of his legal rights in a proceeding to which he is not a party."). Moreover, if they are not bound by the remedial order and may bring their own claims (as the Penn Intervenors did in this case with my dissenting colleague as their counsel), how did the trial court have jurisdiction to enter a judgment purportedly adjudicating their rights? *See id.*

There are many other unresolved issues of subject matter jurisdiction as well. How did so many crucial issues get ignored when many of these issues were addressed at length in the *Hoke County III* dissent? *See Hoke Cnty. Bd. of Educ. v. State*, 382 N.C. 386, 477–536 (2022). The Court never explained.

However, as my dissenting colleague acknowledges, this Court rushed to complete its earlier opinion in this incredibly complex, novel case (one that has spanned decades) so that it could be released in November of last year. The failure to resolve these jurisdictional questions is not the first oversight from this Court's rush to judgment in *Hoke County III*. As other filings have acknowledged, there is another pending appeal at this Court, involving the same parties and related issues.

My dissenting colleague laments that subject matter is now being addressed because it will cause various harms to judicial integrity and "snuff out legal finality." Once again, we endure ad nauseum these fanciful protestations. But it is black letter

law that courts cannot ignore potential defects in subject matter jurisdiction. "Where there is no jurisdiction of the subject matter the whole proceeding is void ab initio and may be treated as a nullity anywhere, at any time, and for any purpose." *High v. Pearce*, 220 N.C. 266, 271 (1941). Even if we again failed to address jurisdictional concerns, these issues could be raised later in a collateral attack on the trial court's order, causing tremendous chaos if steps are already being taken to execute the novel relief in the remedial order. *See Pulley v. Pulley*, 255 N.C. 423, 429 (1961).

In sum, the Legislative-Intervenors argued various jurisdictional theories in their briefs and arguments to this Court that were left unresolved. This court is duty-bound to address any potential subject matter jurisdiction issues, even those that are not raised by the parties. *In re Sauls*, 270 N.C. 180, 187 (1967). However, in its rush to publish an opinion in the prior matter, the majority declined to address fundamental subject matter jurisdiction questions. To be sure, these issues were raised, but the majority chose to ignore the bedrock legal principle that courts must examine jurisdiction to act. Even legal neophytes understand that subject matter jurisdiction can never be waived and can be raised at any time. *See Lemmerman v. A.T. Williams Oil Co.*, 318 N.C. 577, 580 (1986).

Because these crucial issues of subject matter jurisdiction cannot be waived and must be addressed by this Court, it is a sound exercise of this Court's constitutional role to take this case and permit the parties to brief the various issues including standing, joinder of necessary parties, adverseness, intervention, and

jurisdiction of the trial court to provide the requested relief, all of which are necessary jurisdictional prerequisites to execution of the trial court's remedial order.

Justice DIETZ and Justice ALLEN join in this concurring opinion.

Justice EARLS dissenting.

Legislative-Intervenors' bypass petition should be denied because it is substantively hollow and procedurally improper. This Court resolved the question of subject-matter jurisdiction in *Leandro IV*. *See Hoke Cty. Bd. of Educ. v. State,* 382 N.C. 386 (2022) ("*Leandro IV*"). In that case—just 11-months old—the Legislative-Intervenors raised the same arguments they do in their bypass petition: That the trial court lacked jurisdiction to remedy constitutional deficiencies in public education. *See id.* at 469-70. We examined that claim and "unequivocally rejected" it. *See id.* at 469-71.

Legislative-Intervenors could have asked us to reconsider our ruling at that time. In fact, North Carolina's Rules of Appellate Procedure gave them a specific mechanism to do so. *See* N.C. R. App. P. 31(a). They did not. And now, they seek a belated "do over"—a result foreclosed by our procedural rules and long-standing practice. *See, e.g., Davis v. S. Ry. Co.,* 176 N.C. 186 (1918) (denying request to reconsider an earlier decision because the "only method" to do so was a "petition to rehear" and defendant had not timely filed one); *accord Newton v. State Highway Com.,* 194 N.C. 303 (1927). In short, the majority grants an untimely petition to reopen a settled question. Because I think that action is unsound in principle and destabilizing in practice, I dissent.

Our decision in *Leandro IV* shows that the issue of jurisdiction is not new to this case. The Legislative-Intervenors previously have raised the same jurisdictional

arguments they now seek to raise in their bypass petition. *See Leandro IV*, 382 N.C. at 391, 469-70. There, as here, they disputed the trial court's authority to order a statewide remedy because, in their view, that court never found a statewide constitutional violation. *Id.* We found those assertions "untimely, distortive, and meritless." *Id.* at 391.

The trial court, we explained, focused on "one foundational question": Whether North Carolina was complying with its "constitutional mandate to provide all children with the opportunity to receive a sound basic education." *Id.* at 398. To answer it, the court spent "several years" immersed in "fact finding, research, and hearings" on public education across the State. *Id.* And that was *before* the court held a "fourteen-month trial" where it heard from "over forty witnesses," sifted through "thousands of pages of exhibits," and considered the parties' arguments. *Id.* Based on its exhaustive, years-long review, the court concluded that "there were at-risk students failing to achieve a sound basic education statewide." *Id.* at 398-99. It included those findings in its final judgment. *Id.* at 400-01.

Since the trial court found a statewide constitutional violation, we explained, it had subject-matter jurisdiction to order a statewide remedy. *Id.* at 391, 398-401 (pointing to the trial court's Second and Third Memorandums of Decision); *id.* at 405-08 (noting four trial court orders). But the Legisative-Intervenors ignored the trial court's sound analysis and solid conclusion. They instead argued before us—as they do now in their petition—that "there has never been a finding" of a constitutional

violation "beyond Hoke County." *See id.* at 471. We rebuffed that argument. And we went further, decrying it as "a fundamental misunderstanding of the history of this case and the State's constitutional obligations." *Id.*; *see also id.* at 470 ("Based on an abundance of clear and convincing evidence, the trial court repeatedly concluded that the State's *Leandro* violation was not limited to Hoke County but was pervasive statewide. Time and time again, the trial court observed that the evidence indicated that in way too many school districts across the state, thousands of children in the public schools have failed to obtain, and are not now obtaining a sound basic education as defined by and required by the *Leandro* decisions." (cleaned up)). Our holding in *Leandro IV* is the "law of the case"—we should reject Legislative-Intervenors' efforts to relitigate it.

Although parties waive some arguments if they do not timely object, subject-matter jurisdiction may be raised at any time. *See Lemmerman v. A.T. Williams Oil Co.*, 318 N.C. 577, 580 (1986). As we have explained:

> When the record clearly shows that subject matter jurisdiction is lacking, the Court will take notice and dismiss the action *ex mero motu.* Every court necessarily has the inherent judicial power to inquire into, hear and determine questions of its own jurisdiction, whether of law or fact, the decision of which is necessary to determine the questions of its jurisdiction.

Id. (cleaned up). But the calculus is different where—as here—this Court has already reached and resolved the issue. In that case, a dissatisfied party may not simply cry "jurisdiction" to reopen the dispute. Instead, we may properly revisit our decisions

when a "direct authority" or "material point was overlooked" in our analysis, or the case has meaningfully changed since we last heard it. *See Watson v. Dodd*, 72 N.C. 240 (1875). If, for instance, new evidence or intervening developments alter the nature of the dispute and our subject-matter jurisdiction over it, then we may properly reexamine that question. *See Devereux v. Devereux,* 81 N.C. 12, 17 (1879). But a "partial change in the personnel of the Court affords no reason for a departure from the rule." *Weisel v. Cobb*, 122 N.C. 67, 69 (1898) (rejecting petition for rehearing because "neither the record nor the briefs disclose anything relating to the only points now before us that was not apparently considered when the former judgment was rendered").

A different approach would sow chaos and snuff out legal finality. If parties can reopen a case by casting their disagreement in the language of "jurisdiction," then our courts will be nothing but revolving doors and our decisions nothing but paper tigers. This case shows the danger of that approach. In substance, "[n]othing has changed" since *Leandro IV*: The "legal issues are the same; the evidence is the same; and the controlling law is the same." *See Harper,* 384 N.C. at 5 (Earls, J., dissenting). We already grappled with and resolved the question of subject matter jurisdiction in this case—nothing imperils that decision or requires us to revisit it. But by alchemizing its disagreement with *Leandro IV* into a "jurisdictional" issue, the majority gives itself a tool to rewrite—and litigants to resist—our earlier decisions.

In my view, that move is destabilizing and unmoored from precedent. [1]

Moreover, granting this petition creates an end-run around established appellate procedure. Legislative-Intervenors—like all litigants before this Court—are bound by our Rules of Appellate Procedure. If Legislative-Intervenors had proper grounds to ask this Court to reconsider its decision in *Leandro IV,* they had the same option as every other litigant: To seek a rehearing under N.C. R. App. P. 31(a).[2] They did not. And now they cannot, as their request would be nine months too late. *See* N.C. R. App. P. 27(c) (The "Court *may not* extend the time for… filing… a petition for rehearing") (emphasis added).

Instead, Legislative-Intervenors repackage their request to rehear *Leandro IV* as a petition for discretionary review prior to determination by the Court of Appeals. Their filing makes clear their true goal: Again and again, Legislative-Intervenors

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[1] *See also Gainesville & Alachua Cty. Hosp. Ass'n v. Atl. C. Co.*, 157 N.C. 460, 461 (1911) (declining to overturn earlier decision because "[t]here is no practical difference between this case and the one we formerly heard"); *Weston v. John L. Roper Lumber Co.*, 168 N.C. 98 (1914) (finding "no reason to reverse our former judgment" because the "grounds of error assigned in the petition are substantially the same as those argued and passed upon on the former hearing" and "no new fact has been called to our attention, and no new case or authority cited, and no new position assumed"); *Strunks v. S. R. Co.,* 188 N.C. 567, 568 (1924) (noting that "a party who loses in this Court may not have the case reheard by a second or third appeal" because "[o]ur former decisions have become the law of the case so far as the questions then presented and decided are concerned").

[2] Indeed, our rules set a high bar for rehearing by requiring that the litigants secure the certifications of two disinterested attorneys that the case merits rehearing: A petition for rehearing "shall be accompanied by a certificate of at least two attorneys who for periods of at least five years, respectively, shall have been members of the bar of this State and who have no interest in the subject of the action and have not been counsel for any party to the action, that they have carefully examined the appeal and the authorities cited in the decision, and that they consider the decision in error on points specifically and concisely identified." N.C. R. App. P. 31(a).

urge this Court to revisit and reverse *Leandro IV*'s ruling on subject-matter jurisdiction. *See* Petition at 41, 42, 45, 47. By granting the petition, the majority allows Legislative-Intervenors to improperly—and belatedly—relitigate our precedent.

Mere months ago, the majority declared a Rule 31 petition to be the sole mechanism to revisit "alleged errors of law" in a "recently issued opinion." *See Harper v. Hall*, 384 N.C. 1, 3 (2023). A "petition to rehear," the majority explained, is "the appropriate method of obtaining redress from errors committed by this Court." *Id.* Now, for the second time in this case, it allows a party that "failed to seek rehearing" to "do exactly that." *See Hoke Cnty. Bd. of Educ. v. State*, 384 N.C. 8, 11 (order allowing State Controller's motion to reinstate writ of prohibition) (Earls, J., dissenting). Our procedural rules—as well as basic principles of *stare decisis*—forbid a party from "request[ing] a 'do over' with a newly constituted Court" to "obtain a different result." *Id.* By charting a different course, the majority elevates political expedience over the even-handed application of the law.

Equally disturbing is the majority's lopsided treatment of the parties here. In March 2023, the majority "reinstat[ed] the writ of prohibition, until this Court has an opportunity to address the remaining issues in this case." *See Hoke Cnty.*, 384 N.C. 8, 9. In effect, that move reversed *Leandro IV* by barring lower courts from ordering the State to comply with its constitutional duties. Mere hours after this Court's order, the Legislative-Intervenors filed a Renewed Conditional Petition for Writ of

Certiorari. The other parties responded to that petition and urged this Court to deny it. They also sought to clarify the basis and scope of our decision to revive the writ of prohibition. To that end, some parties asked us to identify the "remaining issues in this case" and order briefing on them. *See Response of State of North Carolina,* dated 10 March 2023, at pp. 1, 3, 4.

Yet we did nothing. For months, this Court let those filings languish on our docket. But while the majority ignored those requests, it jumps at Legislative-Intervenors' wish to revisit *Leandro IV*. Although this Court is sworn to "administer justice without favoritism to anyone or to the State," *see* N.C.G.S. § 11-11 (2022), the majority's asymmetric treatment here is without justification.

And the Court's actions stretch beyond this case. As other jurists have explained, a court's legitimacy is "earned over time." *See Dobbs v. Jackson Women's Health Org.,* 142 S. Ct. 2228, 2350 (Breyer, Sotomayor, and Kagan, JJ., dissenting). But it "can be destroyed much more quickly." *Id.* That is because our authority largely depends on the "public's willingness to respect and follow [our] decisions." *See Harper*, 384 N.C. at 7 (Earls, J., dissenting) (cleaned up). And the public's trust, in turn, hinges "on the fragile confidence that our jurisprudence will not change with the tide of each election." *Id.* When our decisions shift with the political headwinds, it "invite[s] the view that this institution is little different from the two political branches of the Government." *See Dobbs*, 142 S. Ct. at 2350 (Breyer, Sotomayor, and Kagan, JJ., dissenting) (cleaned up).

That is especially true in "hotly contested cases" like this one. *Id.* at 2349. Beyond question, public education is an important issue that sparks strong beliefs. And when this Court rapidly reverses course on that topic, it "calls into question its commitment to legal principle." *Id.* It signals to North Carolinians "that their constitutional protections h[a]ng by a thread"—that "a new majority" can "by dint of numbers alone expunge their rights." *Id.* at 2350. It poisons the public's faith in us. *See Harper,* 384 N.C. at 6 (Earls, J., dissenting).

Make no mistake: By granting the Legislative-Intervenors' petition, the majority agrees to revisit *Leandro IV* and ignore what we said just 11 months ago. By doing so, it tells "the public that our decisions are fleeting." *See id.* at 7. Across every meaningful metric, we have already resolved this dispute: The "legal issues are the same; the evidence is the same; and the controlling law is the same." *Id.* at 5. The only real difference: The "political composition of the Court." *Id.* Yet again, the majority signals that "our precedent is only as enduring as the terms of the justices who sit on the bench." *Id*. at 7. And yet again, I dissent.

Justice RIGGS joins in this dissenting opinion.