

STATE OF NORTH CAROLINA

COUNTY OF WAKE

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 DESTIN C. HALL, in
his official capacity as Speaker of the North
Carolina House of Representatives,

Intervenor-Defendants.

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
95CVS001158-910

**RESPONSE IN OPPOSITION TO
MOTION TO STAY**

Intervenor-Defendants Philip E. Berger, in his official capacity as President Pro Tempore of the North Carolina Senate, and Destin C. Hall, in his official capacity as Speaker of the North Carolina House of Representatives, oppose Plaintiffs’ Motion to Stay Execution of the Supreme Court’s Mandate. In support of their opposition, Intervenor-Defendants show the Court:

1. On 2 April 2026, the Supreme Court of North Carolina entered an opinion vacating the 17 April 2023 order and dismissing this action with prejudice for lack of subject matter jurisdiction. *See Hoke Cnty. Bd. of Educ. v. State*, No. 425A21-3, 2026 WL 926893 (N.C. Apr. 2, 2026). In doing so, the Court held that “any court decision entered in this matter after 24 July 2017 was entered without subject matter jurisdiction and is void *ab initio*, meaning it is ‘a nullity anywhere, at any time, for any purpose.’” *Id.*, 2026 WL 926893, at *4 (citing *High v. Pearce*, 220 N.C. 266, 271 (1941)). The Court then concluded “***this action is dismissed with prejudice.***” *Id.*, 2026 WL 926893, at *46 (emphasis added) (“VACATED; ACTION DISMISSED WITH PREJUDICE.”)

2. In accordance with N.C. R. App. Proc. 32(b), the Court’s mandate in this matter issued on 22 April 2026—*i.e.*, twenty days after the written opinion was filed. At that point, the action was concluded, and in accordance with the Supreme Court’s decision and judgment, the matter was dismissed with prejudice. *See* N.C. R. App. Proc. 32(b) (“Unless a court orders otherwise, its clerk shall enter judgment and issue the mandate of the court twenty days after a written opinion of the court has been filed with the clerk.”).

3. On 22 April 2026—the same day the Supreme Court’s mandate issued—Plaintiffs moved this Court to stay its execution of the Supreme Court’s mandate pending a forthcoming petition for rehearing. *See* Mot. For Stay ¶¶ 11-14. The Court’s mandate, however, requires this Court to deny that Motion.

4. The Supreme Court’s mandate operates as a final judgment. *See D & W, Inc. v. City of Charlotte*, 268 N.C. 720, 722 (1966). Thus, the Court’s mandate “is binding upon the trial court and must be strictly followed without variation or departure.” *McKinney v. McKinney*, 228 N.C. App. 300, 302 (2013). “No judgment other than that directed or permitted by the appellate court may be entered.” *In re S.M.M.*, 374 N.C. 911, 914, 845 S.E.2d 8, 11 (2020). And, because the mandate operates as a judgment in-and-of-itself, it is effective “whether the lower court afterwards made any order conforming its judgment to that of the Supreme Court or not.” *D&W, Inc.*, 268 N.C. at 722. Trial court judgments that are “inconsistent and at variance with, contrary to, and modified, corrected, altered or reversed prior mandates of the Supreme Court ... [are] unauthorized and void.” *Lea Co. v. N.C. Bd. of Transp.*, 323 N.C. 697, 699 (1989). In interpreting a mandate, “the plain language of the mandate controls.” *In re Parkdale Mills*, 240 N.C. App. 130, 135 (2015).

5. Here, the plain language of the Supreme Court’s mandate could not be more clear: “***this action is dismissed with prejudice.***” *Hoke Cnty. Bd. of Educ.*, 2026 WL 926893, at *46 (emphasis added). If this Court were to stay execution of the mandate, that decision would be the kind of “variation or departure” the mandate rule forbids.

6. The Appellate Rules allow only one method to stay the Supreme Court’s mandate. Under N.C. R. App. Proc. 31(e), “*when a petition for rehearing is filed*, the petitioner may obtain a stay of execution in the trial court to which the mandate of the appellate court has been issued.” (Emphasis added.) But here, no such petition has been filed. Instead, Plaintiffs ask the Court to stay the Supreme Court’s order based on the representation that there may be a “forthcoming Petition for Rehearing.” Plaintiffs therefore resort to N.C. R. Civ. Proc. 62, urging the Court to exercise its “discretion” “by virtue of its inherent authority to manage its own docket.” *See Mot. For Stay* ¶ 10 . The Appellate Rules, however, do not permit trial courts to stay the execution of

Supreme Court mandates based on the mere possibility that Plaintiffs might file a petition for rehearing. Instead, the petition must be filed in order for the trial court to have such authority.

7. What is more, the substance of the Supreme Court’s decision underscores why a stay is inappropriate here. The Court did not merely reverse on the merits or remand for further proceedings. Rather, the Court vacated the order and dismissed the entire action with prejudice because the Court lacked subject matter jurisdiction to hear Plaintiffs’ current claims. *Hoke Cnty. Bd. of Educ.*, 2026 WL 926893, at *46. But a stay of execution presumes a valid judgment or order whose enforcement may be suspended. So where the underlying proceedings are a nullity, like here, there is nothing to stay. *See Pearce*, 220 N.C. at 271, 17 S.E.2d at 112 (“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.”).

8. The self-executing nature of the mandate also distinguishes this case from the typical stay scenario. *See D & W, Inc.*, 268 N.C. at 722 (noting that the Supreme Court can issue self-executing orders). Rules 62(a) and (d) of the Rules of Civil Procedure and Rule 8(a) of the Rules of Appellate Procedure contemplate stays of judgments that require affirmative enforcement—such as money judgments, injunctions, or orders directing specific performance. A dismissal with prejudice for lack of subject matter jurisdiction is no such judgment. It does not compel any party to act or refrain from acting; it simply terminates the litigation. In short, there is no “execution” to stay.

9. Nor can this Court’s inherent authority to manage its docket contravene the mandate rule. A trial court’s inherent powers are subordinate to the binding directives of an appellate court. *C.f. State v. Allen*, 144 N.C. App. 386, 391 (2001) (“the general rule is that the trial court does not have inherent authority to act in a manner inconsistent with a statute

addressing” the relevant action). To hold otherwise would allow trial courts to effectively overrule the Supreme Court’s judgments through indefinite stays.


10. Even setting aside the mandate rule, the equities do not favor a stay. Plaintiffs suggest that a brief stay would not prejudice Defendants because the case has been “dormant before this trial court for several years” and the mandate “does not relate to any injunction or enable the Defendants to move forward with a money judgment.” *See* Mot. For Stay ¶ 14. But that argument misses the point. The Supreme Court has determined that proceedings after 24 July 2017 were conducted without subject matter jurisdiction and are void. Every day that the mandate remains unexecuted maintains the cloud of a void proceeding. As a result, the public interest is best served by this Court promptly executing the Supreme Court’s mandate.

11. Lastly, a stay would serve no practical purpose. If the Supreme Court grants Plaintiffs’ petition for rehearing, it has authority to recall or modify its own mandate at that time. This Court need not—and under the mandate rule, may not—preemptively stay the mandate in anticipation of a rehearing petition that has not yet been filed, let alone granted.

WHEREFORE, Intervenor-Defendants respectfully request that this Court deny Plaintiffs’ Motion to Stay Execution of the Supreme Court’s Mandate and promptly execute the mandate by entering the appropriate orders vacating the 17 April 2023 order and reflecting the dismissal of this action with prejudice.

This the 24th day of April, 2026.

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CERTIFICATE OF SERVICE

I hereby certify that on April 24, 2026, a copy of the foregoing **RESPONSE IN OPPOSITION TO MOTION TO STAY** was duly filed and served on all counsel pursuant to N.C. Gen. Stat. § 1A-1, Rule 5 via eCourts File & Serve and/or via electronic mail as follows:

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The undersigned has also provided by electronic mail a courtesy copy of the foregoing document to the following attorneys who have entered an appearance in *Hoke County Bd. of Educ., v. State*, No. 425A21-3:

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