



rounds of appeal, and intervening decisions in favor of the plaintiffs in concurrent and similar North Carolina redistricting cases, the three-judge panel consisting of Judges Ridgeway, Hinton, and Crosswhite issued a final order on 12 February 2018. That order entered partial judgment in favor of Plaintiffs, dismissed some claims as moot, and retained jurisdiction for any motions for costs and attorneys' fees and other post-judgment matters.

On 14 March 2018, Defendants Tim Moore, Philip E. Berger, Ralph Hise, and David Lewis (the "Legislative Defendants")<sup>1</sup> filed a notice of appeal in the trial court. The notice of appeal stated that Legislative Defendants were appealing "as of right directly to the Supreme Court pursuant to N.C. Gen. Stat. § 120-2.5."

On 18 April 2018, Legislative Defendants served the proposed record on appeal. The parties settled the record on appeal on 1 May 2018. On 8 May 2018, Legislative Defendants filed the record on appeal. Plaintiffs now move to dismiss the appeal for lack of jurisdiction.

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<sup>1</sup>Legislative Defendants have stated that Senator Hise and Speaker Moore are automatically substituted as parties in place of Senator Robert Rucho and Speaker Thom Tillis pursuant to N.C. R. Civ. P. 25(f)(1). (R p 3).

## ARGUMENT

### **I. This Court lacks jurisdiction to decide Legislative Defendants’ appeal.**

Legislative Defendants appealed directly to this Court pursuant to a statute that no longer exists—N.C.G.S. § 120-2.5. Prior to 2016, N.C.G.S. § 120-2.5 allowed for “any appeal from a three-judge panel dealing with apportionment or redistricting pursuant to N.C.G.S. § 1-267.1 [] direct to” the North Carolina Supreme Court. *Pender Cnty. v. Bartlett*, 361 N.C. 491, 497, 649 S.E.2d 364, 368 (2007). However, in 2016, the legislature repealed N.C.G.S. § 120-2.5.

On 16 December 2016, the General Assembly ratified Session Law 2016-125 (“S.L. 125”), which made several changes to the existing State Board of Elections and State Ethics Commission, restored partisan elections for North Carolina’s appellate judges and justices, and modified appellate review of certain cases, among other things. Section 22.(f) of S.L. 125 states: “G.S. 120-2.5 is repealed.” This change was effective upon ratification on 16 December 2016 and was still in effect as of 14 March 2018. *See* S.L. 125, Sec. 26. Thus, Legislative Defendants should have appealed to the Court of Appeals, rather than this Court.

An appeal to the wrong court is jurisdictional. N.C. R. App. P. 3(d); *In re Albemarle*, 300 N.C. 337, 266 S.E.2d 661 (1980). *See also Christenbury Eye*

*Ctr., P.A. v. Medflow, Inc.*, 783 S.E.2d 264 (N.C. Ct. App. 2016) (dismissing appeal for lack of jurisdiction when appellant should have appealed to the Supreme Court instead of the Court of Appeals); *Iredell Mem'l Hosp. v. N.C. Dep't of Human Res.*, 103 N.C. App. 637, 406 S.E.2d 304 (1991) (dismissing appeal for lack of jurisdiction when appellant should have appealed to the Superior Court instead of the Court of Appeals); *Zloop, Inc. v. Parker Poe Adams & Bernstein, LLP*, 2018 NCBC 39, 17 CVS 5480 (N.C. Super. Ct. 2018) (dismissing appeal for lack of jurisdiction when appellant's notice of appeal improperly indicated appeal was to the Court of Appeals rather than the Supreme Court). "It is axiomatic that courts of law must have their power properly invoked." *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 196, 657 S.E.2d 361, 364 (2008). "The appellant's compliance with the jurisdictional rules governing the taking of an appeal is the linchpin that connects the appellate division with the trial division and confers upon the appellate court the authority to act in a particular case." *Id.* at 197, 657 S.E.2d at 364 (citing *Moore v. Vanderburg*, 90 N.C. 10, 10 (1884)).

Where jurisdiction is lacking, dismissal of the appeal is required. *Id.* at 195-96, 657 S.E.2d at 364. *See also In re Me.B.*, 181 N.C. App. 597, 600, 640 S.E.2d 407, 409 (2007) ("It is well-established that without proper notice of appeal, the appellate court acquires no jurisdiction and neither the court nor the parties may waive the jurisdictional requirements even for good cause

shown under Rule 2 of the Rules of Appellate Procedure.”) (internal quotations and citations omitted). In fact, the Court is precluded from “acting in any manner other than to dismiss the appeal.” *Dogwood*, 362 N.C. at 197, 657 S.E.2d at 365. “[A] jurisdictional default brings a purported appeal to an end before it ever begins.” *Id.* at 198, 657 S.E.2d at 365.

Since Legislative Defendants have appealed to the wrong court, this Court has no power to act other than to dismiss the appeal.

### **CONCLUSION**

For the foregoing reasons, Plaintiffs respectfully request the Court dismiss Legislative Defendants’ appeal for lack of jurisdiction.

Respectfully submitted, this the 11th day of May, 2018.

### **POYNER SPRUILL LLP**

By: /s/ Edwin M. Speas, Jr.  
Edwin M. Speas, Jr.  
N.C. State Bar No. 4112  
espeas@poynerspruill.com  
P.O. Box 1801  
Raleigh, NC 27602-1801  
Telephone: 919.783.6400  
Facsimile: 919.783.1075  
*COUNSEL FOR PLAINTIFFS-  
APPELLANTS THE DICKSON  
PLAINTIFFS*

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

**POYNER SPRUILL LLP**

By: /s/ Caroline P. Mackie  
Caroline P. Mackie  
N.C. State Bar No. 41512  
cmackie@poynerspruill.com  
P.O. Box 1801  
Raleigh, NC 27602-1801  
Telephone: 919.783.6400  
Facsimile: 919.783.1075  
*COUNSEL FOR PLAINTIFFS-  
APPELLANTS THE DICKSON  
PLAINTIFFS*

**SOUTHERN COALITION FOR  
SOCIAL JUSTICE**

By: /s/ Allison Riggs  
Allison Riggs  
N.C. State Bar No. 40028  
AllisonRiggs@southerncoalition.org  
Jaclyn Maffetore  
N.C. State Bar No. 50849  
jaclynmaffetore@scsj.org  
1415 Highway 54, Suite 101  
Durham, NC 27707  
Telephone: (919) 323-3380  
Facsimile: (919) 323-3942  
*COUNSEL FOR PLAINTIFFS-  
APPELLANTS THE NAACP  
PLAINTIFFS*

**CERTIFICATE OF SERVICE**

I do hereby certify that I have this day served a copy of the foregoing via email and by depositing a copy thereof in an envelope bearing sufficient postage in the United States mail, addressed to the following person at the following address which is the last address known to me:

Alexander M. Peters  
apeters@ncdoj.gov  
Office of the Attorney General  
NC Department of Justice  
P.O. Box 629  
Raleigh, NC 27602  
*Counsel for Defendants*

Phillip J. Strach  
phillip.strach@ogletreedeakins.com  
Michael McKnight  
michael.mcknight@ogletreedeakins.com  
Ogletree, Deakins, Nash, Smoak &  
Stewart, P.C.  
4208 Six Forks Road, Suite 1100  
Raleigh, NC 27602  
*Counsel for Defendants Rucho, Lewis,  
Dollar, Dockham, Berger, and Tillis*

This the 11th day of May, 2018.

/s/ Edwin M. Speas, Jr.  
Edwin M. Speas, Jr