No. 201PA12-5 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA
****

MARGARET DICKSON, *et al.*	)	
	)	
Plaintiffs,	)	**From Wake County**
v.	)	No. 11 CVS 16896
	)	No. 11 CVS 16940
ROBERT RUCHO, *et al*.	)	(*Consolidated*)
	)	
Defendants.	)	
	)	
NORTH CAROLINA STATE CONFERENCE OF BRANCHES OF THE NAACP; *et al.*	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
THE STATE OF NORTH CAROLINA, *et al.*	)	
Defendants.	)	

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REPLY BRIEF OF LEGISLATIVE DEFENDANTS-APPELLANTS

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REPLY BRIEF OF LEGISLATIVE DEFENDANTS-APPELLANTS
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INTRODUCTION

Plaintiffs-appellees ("Plaintiffs") argue that this Court lacks jurisdiction to hear this appeal but, in any case, should affirm the judgment entered by the three-judge panel of the superior court below. In arguing that this Court should not hear this appeal, plaintiffs rely upon statements of law from other cases in completely

different contexts. They do not cite a single case that is remotely similar to the facts and circumstances of this case and do not even attempt to distinguish the decision of the Court of Appeals in *Stephenson v. Bartlett*, 177 N.C. App. 239, 628 S.E.2d 442 (2006) ("*Stephenson V*"), the case that is most analogous to this one. As in *Stephenson V*, it is undisputed that Legislative Defendants-appellants ("Legislative Defendants") filed a timely notice of appeal and that this Court has the jurisdiction and discretion to either resolve this appeal or remand the case to the Court of Appeals.

Should this Court exercise its jurisdiction or authority to resolve this appeal, the judgment of the three-judge superior court panel should be reversed. Plaintiffs fail to cite even a single case involving a statute that has been both enjoined by a federal court and repealed by the General Assembly where the plaintiffs then obtained a state court judgment declaring the enjoined and repealed statute unconstitutional. Similar to their procedural arguments, plaintiffs' substantive contentions are based upon abstract statements of law taken out of context. There is no precedent for a court to declare an enjoined and repealed statute unconstitutional for any purpose much less for the purpose of facilitating multiple applications for attorneys' fees by the same attorneys.

ARGUMENT

1. Plaintiffs incorrectly discount the many procedural grounds for this Court to either resolve this appeal or, in the alternative, transfer the case to the Court of Appeals.

If the judgment entered by the three-judge panel below is not reversed, plaintiffs will then be able to file an application for an award of attorney's fees that will likely cost the taxpayers hundreds of thousands, if not millions, of dollars. This has never happened before in a case involving statutes that have already been both enjoined by federal courts (where the same attorneys can rightfully apply for an award of fees and costs) and then repealed by the General Assembly. Plaintiffs have failed to cite even a single case where a judgment has been entered declaring an enjoined and repealed statute unconstitutional. This Court should not adopt such an unprecedented legal theory.

Legislative Defendants will not repeat their arguments regarding their substantive right to a direct appeal to the Supreme Court notwithstanding the repeal of N.C. Gen. Stat. § 120-2.5 on 16 December 2016. (*See* Legislative Defendants-Appellants' Response to Plaintiffs-Appellees' Motion to Dismiss at 8-13). But, if plaintiffs are correct and this Court "lacks jurisdiction" to now hear this appeal, then this Court also lacked jurisdiction to enter its order of September 28, 2017 (10 months after the repeal of § 120-2.5). Under plaintiffs' theory, following the remand of *Dickson v. Rucho*, 368 N.C. 481, 781 S.E.2d 404 (2015)

("*Dickson II*") by the United States Supreme Court, the plaintiffs no longer had the right of a direct appeal from the original decision by the three-judge panel to the North Carolina Supreme Court. Thus, following plaintiffs' logic, rather than hearing a third direct appeal following the second remand from the United States Supreme Court, this Court should have remanded the case to the Court of Appeals for an initial determination on whether plaintiffs' claims had been rendered moot.

Contrary to the jurisdictional theory now advanced by plaintiffs, in September of 2017, this Court exercised jurisdiction despite the repeal of § 120-2.5. It remanded the case to the three-judge panel (not the Court of Appeals) asking it to consider questions regarding the status of the case. The fact that this Court exercised jurisdiction to hear the appeal following the second remand by the United States Supreme Court and then posed questions to the three-judge panel rather than the Court of Appeals underscores the substantive and vested right of the Legislative Defendants to have the Supreme Court, and not the Court of Appeals, review in the first instance the three-judge panel's answers to the questions posed to it by this Court.

However, if this Court now lacks jurisdiction as argued by the plaintiffs, it also lacked jurisdiction when it entered its order of September 28, 2017, and improperly sent the case to the three-judge panel instead of the Court of Appeals. Thus, if this Court now accepts plaintiffs theory of jurisdiction, its only course is to

vacate both its order of September 28, 2017 and the judgment of the three-judge panel of the superior court entered on February 12, 2018 in response to that order and send this case to the Court of Appeals for an initial determination on the impact of the United States Supreme Court's remand of *Dickson II*.

Of course, the Legislative Defendants believe that the plaintiffs' argument is meritless and that this Court should decide this appeal. Whether plaintiffs' claims are moot will ultimately need to be resolved by this Court now or after any award of attorney's fees by the three-judge panel. There is no reason to further delay the resolution of whether this case should be dismissed on the grounds of mootness.

In any case, this Court has jurisdiction to resolve this appeal. Plaintiffs have failed to distinguish the decision by the Court of Appeals in *Stephenson V*, a case in which the Court of Appeals resolved an appeal of an order denying an award of attorney's fees. The Court of Appeals resolved that appeal even though the timely notice of appeal filed in that case was captioned as being filed in the North Carolina Supreme Court and not the Court of Appeals. The Court of Appeals held that this discrepancy did not deprive the Court of Appeals of jurisdiction. This was because the appellants' intent to appeal could be fairly inferred from the notice of appeal and there was no prejudice to the appellee. *Id.* at 243, 628 S.E.2d at 444-45. The same circumstances exist here. No one could dispute the intent of the Legislative Defendants to appeal the ruling by the three-judge panel and it is

completely implausible for plaintiffs to argue they have been prejudiced because of the way the notice of appeal was captioned. It would be untenable for the resolution of the important issues raised by this timely appeal to be ignored because Legislative Defendants reasonably understood that they were entitled to a direct appeal from answers given by the three-judge panel to questions posed to that panel by this Court.

Plaintiffs have failed to cite a single case involving a dismissal of an appeal because the notice of appeal allegedly cited the wrong court in the appellate division, much less a case that has already involved three direct appeals to this Court, including one that was resolved long after the statute authorizing a direct appeal was repealed. Thus, unlike the facts in this case, two decisions cited by plaintiffs, *State v. McCoy*, 171 N.C. App. 636, 615 S.E.2d 319 (2005) and *Booth v. Utica Mut. Ins. Co.*, 308 N.C. 187, 301 S.E.2d 98 (1983), involved cases where appellants failed to file a timely notice of appeal. Similarly, two other cases cited by plaintiffs, *Dogwood Development Mgmt. Co. v. White Oak Transp. Co., Inc.*, 362 N.C. 191, 657 S.E.2d 361 (2008) and *Viar v. N.C. Dept. Transportation*, 359 N.C. 400, 610 S.E.2d 360 (2005), involved appellants who failed to comply with non-jurisdictional rules related to assignments of error (since repealed) or violations concerning the form of briefs. Yet, contrary to the arguments made by the plaintiffs, both of these cases recognized the authority of the state appellate

courts under Rule 2, N.C. R. App. P., to hear an appeal despite actual appellate rule violations.

The most instructive case cited by plaintiffs is *Radcliffe v. Avenel Homeowners Ass'n*, ___ N.C. App. ___,789 S.E. 2d 893 (2016). Plaintiffs here argue that the Court cannot hear this case under a petition for *certiorari* because Legislative Defendants' notice of appeal, the record on appeal, and briefs filed by the Legislative Defendants, allegedly do not meet all the requirements of Rule 21, N.C. R. App. P. (*See* Plaintiffs-Appellees Response Brief at 4, 5). Yet, this same argument was rejected in *Radcliffe* where the Court agreed to issue a writ of *certiorari* to review an interlocutory order. *Radcliffe* acknowledged the long-standing practice that an appellate court has the discretion to grant a petition for *certiorari* based upon the information included in the appellate briefs and record. *Radcliffe,* 789 S.E. 2d at 901-02. In this appeal, as in *Radcliffe*, all of the information required for a petition for *certiorari* is included in the briefs filed by the Legislative Defendants and the record on appeal.

The Legislative Defendants enacted redistricting plans that were twice affirmed by this Court in direct appeals by the plaintiffs. This Court heard a third direct appeal in the fall of 2017 despite the repeal of the direct appeal statute in December 2016. Because there is no precedent for a North Carolina court to enter a judgment declaring an already enjoined and repealed statute unconstitutional, it

would be hard to think of circumstances in which there was a stronger argument for the Court to hear this appeal through the issuance of a writ of *certiorari* under Rule 21, N.C.R. App. P. But regardless of the procedural vehicle used by this Court, justice requires that this appeal be resolved by direct appeal to this Court or through a remand of the case to the Court of Appeals.

2. Plaintiffs have failed to cite a single case where a judgment was entered declaring an already enjoined and repealed statute unconstitutional.

The illogical nature of plaintiffs' position is best demonstrated by a hypothetical. Assume that the decisions in *Cooper v. Harris*, 137 S. Ct. 1455 (2017) and *Covington v. North Carolina*, 137 S. Ct. 2211 (2017) were issued by the North Carolina Supreme Court and affirmed judgments by the superior court declaring the 2011 congressional and legislative districting plans unconstitutional. Further assume that, in compliance with those judgments, the General Assembly repealed the laws declared unconstitutional and enacted new plans. Then assume that a different set of plaintiffs represented by the same lawyers filed suit to have the enjoined and repealed statutes declared unconstitutional for a second time. Would the Superior Court assigned the new litigation even consider entering a judgment declaring permanently enjoined and repealed statutes unconstitutional?

Of course, the answer to this hypothetical is obvious. No superior court judge would enter a judgment declaring unconstitutional any statute that had

already been permanently enjoined by the North Carolina Supreme Court and then repealed by the General Assembly. Here, the fact that the final judgment which rendered plaintiffs' claims in this case moot was entered by a federal court, as opposed to another state court, forms an even more compelling basis to find plaintiffs' case moot. This is because state courts are bound by the judgments of federal courts on issues of federal law. *King v. Grindstaff*, 284 N.C. 348, 360, 200 S.E.2d 799, 800 (1973).

Affirming the judgment entered here would simply promote endless challenges to statutes already enjoined and already repealed and replaced. Based upon this precedent, what would prevent a set of plaintiffs from challenging the 1992 Congressional plan under the state constitution on the grounds that the decision in *Shaw v. Hunt*, 517 U.S. 899 (1996) only adjudicated the rights of the plaintiffs in *Shaw* and did not answer the question of the statute's legality under the North Carolina Constitution? Further, what would prevent attorneys from soliciting two groups of plaintiffs, filing the same claims in parallel state with federal proceedings, and then moving for an award of fees based upon a favorable judgment entered in either of the two cases?

Plaintiffs try to obscure both common sense and the settled principles of law that require dismissal of this case by taking statements of law completely out of context in the cases they have cited. For example, plaintiffs rely primarily, and

wrongfully, on the decisions in *Comer v. Ammons*, 135 N.C. App. 531, 522 S.E.2d 77 (1999) and *Neir v. State*, 151 N.C. App. 228, 565 S.E.2d 229 (2002), as establishing binding authority for this Court to consider whether a repealed statute is unconstitutional. Plaintiffs' reliance on these cases is misplaced.

First, the decision in *Neir*, on whether the repeal of a statute moots a case, relies exclusively on the authority set by the opinion of one Court of Appeals judge in *Comer*. On their face, both cases are inapplicable here because neither decision involves a statute that was enjoined by a final judgment of another court before it was repealed. Further, the rationale followed in *Comer* to reject defendants' mootness argument actually supports a finding of mootness here. The *Comer* decision found that the repeal of the statute in question did not moot that case because the officials there might have been holding their office illegally because they were elected under a statute that had not yet been the subject of judicial review. Of course, that exigency does not exist in this litigation because the constitutionality of the 2011 districting plans has already been decided by the federal courts. Thus, even under the flawed reasoning of *Comer*, there is no need for a second court to find the same two statutes unconstitutional for a second time.

To the extent the rationale in *Comer* carries any weight at all, the only remaining matter that has not been adjudicated is whether the 2011 plans violate the state constitution, a legal theory that was not raised or decided in the federal

cases but, in any event, was decided against plaintiffs by this Court in *Dickson I* and *II*. Nonetheless, this is also a moot question since a statute that violates the federal equal protection clause also violates the corollary provision of the North Carolina Constitution. *City of Greensboro v. Guilford Cnty. Bd. Of Elec.*, 120 F. Supp.3d 479, 487 (M.D.N.C. 2015) (citing *White v. Pate*, 308 N.C. 759, 765, 304 S.E.2d 199, 203 (1983)) ("[T]he Equal Protection Clause of Article 1, § 19 of the Constitution of North Carolina is functionally equivalent to the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States"). Tellingly, plaintiffs have not limited their request for relief to obtaining a ruling under the North Carolina Constitution. A judgment only resolving that moot issue would not give plaintiffs grounds to apply for attorney's fees. *See Stephenson V*, *supra*.

Plaintiffs also fail to explain that only one of the three judges in *Comer* issued an opinion rejecting the principle that repeal of a statute moots a challenge to that statute. In *Comer*, Judge Edmunds merely concurred in the judgment. Judge John entered a concurring opinion explaining that he agreed with the result only because the opinion of the court found the challenged statute to be legal. But Judge John also explained that it was unnecessary to address the substance of plaintiffs' arguments because of the long-standing and commonly accepted principle, as established by the North Carolina Supreme Court, that repeal of a

statute during a lawsuit moots a case. *Comer,* 135 N.C. App. at 543, 522 S.E.2d at 77 (citing *Simeon v. Hardin,* 339 N.C. 358, 370, 451 S.E.2d 858, 866 (1994)).

The decision in *Neir,* on the issue of mootness, rests exclusively on the opinion written by the single judge in the *Comer* ruling. The decision in *Comer* found that the litigation was not moot on the grounds that the judges in question were holding office illegally if the statute applicable to their election was unconstitutional. Under *Comer,* if the statute in question was unconstitutional, "then the violation has not ceased and there has been no eradication of the effects of the alleged violation." *Id.* at 536, 522 S.E.2d at 80.

This legal conclusion is not supported by reference to any other precedent and is contrary to settled case law on the valid authority of officials elected to office under unconstitutional statutes. Since the decision of the United States Supreme Court in *Thornburg v. Gingles*, 478 U.S. 30 (1986), many North Carolina redistricting plans have been declared unconstitutional. Yet, no one has ever disputed the settled principle of law that a legislature elected under an unconstitutional plan remains "a legislature empowered to act…." *Baker v. Carr,* 369 U.S. 186, 250 n. 5 (1962). Moreover, it is well settled that "legislative acts performed by legislators held to have been elected in accordance with an unconstitutional apportionment" are "not therefore void." *Ryder v. United States*

515 U.S. 177, 183 (1995) (acknowledging prior holding in *Connor v. Williams*, 404 U.S. 549, 550-51 (1972)).

These settled principles of law are completely at odds with the opinion of th single Court of Appeals judge in *Comer* who declined to find moot a lawsuit challenging an allegedly unconstitutional, but repealed statute, on the ground that officials illegally hold office if they have been elected under an unconstitutional statute. Neither the opinions in *Comer*, nor *Neir*, nor the plaintiffs here, cited any authority for such an outlying legal theory that would allow a court to enter a judgment declaring a repealed statute to be unconstitutional.

Finally, the decisions in *Comer* and *Neir* are not binding on this Court and both of those decisions are nothing more than *dicta* as it relates to their rulings on mootness. This is because the statutes in both cases were found to be legal which answered the question of whether the elected officials were lawfully holding office, the grounds upon which the *Comer* decision relied to dismiss the argument that repeal of a statute mooted the case. *See Comer*, 135 N.C. App. at 542-43, 522 S.E.2d at 83-85 (Edmunds, J., concurring, and John, J., concurring in the result).

Plaintiffs further incorrectly rely upon statements by the United States Supreme Court in *Covington*. Taking these statements completely out of context, plaintiffs argue that their claims concerning the 2011 plans are not moot. But the comments by the United States Supreme Court in the *Covington* decision cited by

the plaintiffs relate to challenges raised by the plaintiffs in that case to the 2017 legislative plans, not the 2011 plans. The federal court in *Covington* permitted the *Covington* plaintiffs to challenge the 2017 plans after they obtained a judgment declaring the 2011 plans unconstitutional. Accordingly, the United States Supreme Court in *Covington* rejected defendants' mootness defense because of a live case or controversy *in that litigation* (and not in this one) concerning the assignment of voters under the 2017 legislative plans.

In contrast to the position taken by the federal courts in *Covington*, in its September 2017 decision, this Court did not find an active case or controversy in this litigation concerning the 2016 congressional plan or the 2017 legislative plans. Instead, this Court certified several questions to the three-judge panel including whether plaintiffs were entitled to any relief for alleged violations in the 2016 and 2017 plans. Consistent with this Court's decision in *Stephenson v. Bartlett*, 358 N.C. 219, 595 S.E.2d 112 (2004) ("*Stephenson III*"), the three-judge panel rejected plaintiffs' argument that they had a right to litigate the constitutionality of the 2017 plans in this case and declared those claims moot. (R. at 400). Plaintiffs did not appeal this ruling by the three-judge panel.

Therefore, unlike the *Covington* case, there are no claims in this case concerning the constitutionality of the 2016 Congressional Plan or the 2017

legislative plans.[1] Instead, the claims of the plaintiffs in this case are limited to whether the 2011 plans were unconstitutional. Under established North Carolina precedent, plaintiffs' claims concerning the 2011 plans were mooted when the federal courts permanently enjoined the 2011 plans and the General Assembly then repealed them.

Plaintiffs also incorrectly cite the decision in *United Sates v. Texas*, 49 F.Supp.3d 27 (D.D.C. 2014) for the proposition that they are entitled to fees because of the decision of the United States Supreme Court to vacate and remand *Dickson II*. There is nothing whatsoever in the *Texas* decision to support the argument that plaintiffs here are entitled to a judgment in their favor declaring a permanently enjoined and repealed statute unconstitutional.

In *Texas*, the intervening defendants successfully obtained a judgment denying preclearance to a districting plan under Section 5 of the Voting Rights Act. Following this judgment, the State of Texas adopted a new districting plan substantially based upon an interim plan drawn by a district court in a case involving alleged violations of Section 2 and other constitutional violations. *Id.* at 33.

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[1] Nor did the plaintiff in these cases, unlike the *Covington* plaintiffs, obtain a judgment declaring the 2011 plans unconstitutional before they were enjoined by another court and repealed.

Thereafter, the United States Supreme Court issued its decision in *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013), declaring unconstitutional the coverage formula for Section 5. Following the decision in *Shelby County*, the State of Texas moved to dismiss the Section 5 lawsuit. The three-judge court for the District of Columbia agreed that the decisions in *Shelby County* and by the Texas legislature to repeal and replace the districting plans that were the subject of the Section 5 lawsuit mooted the case.

After the case was dismissed, the *Texas* intervening defendants moved for and were granted an award of attorney's fees. The issue was whether the plaintiffs in the Section 5 lawsuit were prevailing parties as that term is defined under 42 U.S.C. § 1988, a necessary predicate to the intervening defendants receiving attorney's fees. The United States Supreme Court has only affirmed awards of attorney fees in cases where the prevailing party has obtained a final judgment or a consent decree or settlement. *Buckhannon Bd. and Care Home v. West Virginia Dep't. of Health and Human Serv.*, 532 U.S. 598, 603-05 (2001). This same condition to an award of attorney's fees has been adopted by the Fourth Circuit. *See Smyth v. Rivero*, 282 F.3d 268, 274-85 (4th Cir. 2002). In contrast, the District of Columbia has adopted a more permissive definition of prevailing party and has allowed an award of fees where plaintiffs have obtained some form of relief because of the litigation. *Texas*, 49 F.Supp.3d at 37-38. The court in *Texas*

awarded fees because the intervening defendants there obtained a judgment denying preclearance to the original Texas districting plans which then led to Texas enacting a new plan.

The principles in *Texas* do not apply here for several reasons. First, plaintiffs ignore the holding in *Texas* that the claims of the intervening defendants became moot after *Texas* repealed and replaced the statutes they had challenged in the Section 5 proceeding. This holding by the *Texas* district court is fully consistent with the position of the Legislative Defendants here that plaintiffs' claims are moot and that they are not entitled to a judgment. Indeed, just like the *Texas* litigation, this case should have been dismissed once the General Assembly repealed the 2011 redistricting statutes.

Next, unlike the intervening defendants in *Texas*, the plaintiffs here never obtained any relief in this litigation until after another set of plaintiffs (represented by the same lawyers) obtained a final judgment declaring the 2011 plans unconstitutional and those plans had been repealed. Thus, unlike the *Texas* intervening defendants, it cannot be said that the plaintiffs here obtained any relief because of their efforts. Nor can it be rationally argued that the General Assembly enacted new districting plans because of any order entered in this case.

The plaintiffs here are not asking for the same relief granted to the intervening defendants in *Texas*. More specifically, plaintiffs here are not asking

the court to award them fees because of any alleged relief they obtained in this case. No doubt, this is for two reasons: (1) they failed to obtain any relief in this case before the challenged statutes were enjoined and repealed; and (2) because the United States Supreme Court and the Fourth Circuit have only given "prevailing party" status to litigants who have actually obtained a final judgment or a consent decree. So, instead of asking the Court to give them fees absent the entry of a final judgment in their favor (the relief requested by the intervening defendants in *Texas*), plaintiffs' counsel are asking this Court to affirm an unprecedented judgment declaring a permanently enjoined and repealed statute unconstitutional. The sole possible purpose of plaintiffs' requested relief—entry of an unprecedented judgment declaring a repealed and enjoined statute unconstitutional—is to give them the necessary predicate for filing for an award of attorney's fees. There is simply no precedent to affirm the judgment of the three-judge panel below to facilitate the unprecedented relief plaintiffs will then seek.

Finally, plaintiffs rely upon a decision by the North Carolina Supreme Court in *Swanson v. State*, 335 N.C. 674, 441 S.E.2d 537 (1994) ("*Swanson III*"). But a review of the facts in *Swanson* shows it does not support or require such a result. The *Swanson* decision followed two prior decisions in the same litigation by the North Carolina Supreme Court. During the trial stage, the superior court granted judgment to the plaintiffs and ordered the State to refund taxes that had been

improperly paid by the *Swanson* plaintiffs. The North Carolina Supreme Court initially ruled that the plaintiffs were not entitled to refunds because the United States Supreme Court's decision in *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803 (1989) applied only prospectively. *Swanson v. State*, 329 N.C. 576, 407 S.E.2d 791 (1991) ("*Swanson I*"). On rehearing, the North Carolina Supreme Court further found that certain provisions in the North Carolina Constitution afforded plaintiffs no relief and affirmed its prior opinion. *Swanson v. State*, 330 N.C. 390, 410 S.E.2d 490 (1991) ("*Swanson II*").

Plaintiffs then petitioned the United States Supreme Court for review of *Swanson I* and *Swanson II*. While this petition was pending, the United States Supreme Court clarified that its decision in *Davis* must be applied retroactively. *Harper v. Va. Dep't of Taxation*, 509 U.S. 86 (1993). The United States Supreme Court then vacated the prior judgment in *Swanson* and remanded the cases to the North Carolina Supreme Court for reconsideration in light of the *Harper* decision.

On remand, the North Carolina Supreme Court reaffirmed its prior holding that plaintiffs were not entitled to refunds because they had failed to comply with the State's statutory past payment refund demand procedure. *Swanson III*, 335 N.C. at 680, 441 S.E.2d at 540. Despite the ruling by the United States Supreme Court in favor of plaintiffs' position that they were entitled to retroactive relief, the

North Carolina Supreme Court remanded the case to the trial court with directions that judgment be entered for the defendants, not the plaintiffs.

Thus, the *Swanson* cases bear no relevance whatsoever to the facts before this court. No one in *Swanson* argued that the claims of the plaintiffs had become moot because a federal court had directly granted all the relief they were seeking or because the statute they were challenging had been repealed and replaced. Further, in *Swanson III*, the North Carolina Supreme Court did not remand the case to direct entry of judgment for the plaintiffs based upon the issues of federal law decided by the United States Supreme Court. Instead, the case was remanded for entry of judgment for the defendants on state law grounds, despite the ruling on federal law by the United States Supreme Court that was favorable to the plaintiffs. Because of these distinctions, plaintiffs' interpretation of *Swanson* is a red herring and provides no direction whatsoever for how this Court ought to evaluate statutes that have been previously enjoined and repealed through no efforts attributable to the plaintiffs here.

None of the other cases cited by the plaintiffs involve challenges to a permanently enjoined and repealed statute. Most of the cases cited by plaintiffs involve statutes, regulations, or rules of a private organization that could be applied to one of the parties or the general public in the future, thus justifying clarification concerning the interpretation of the statute, regulation, or rule. *See e.g. Granville*

County Bd. Of Comm'rs v N.C. Hazardous Waste Mgmt. Comm'n, 329 N.C. 615, 407 S.E.2d 785 (case against Commission not mooted following commission's decision to downgrade a challenged waste site because of the importance of clarifying that, under the pertinent statue, the superior court lacked jurisdiction to consider a challenge to a site determination by the Commission until it was final); *Thomas v. N.C. Dep't of Human Resources*, 124 N.C. App. 698, 478 S.E.2d 816 (1996) (case was not mooted by agency's decision to change its interpretation of a regulation because of the possibility for agency to reapply its previously erroneous interpretation); *Bright Belt Warehouse Ass'n v. Tobacco Planters Warehouse, Inc.*, 231 N.C. 142, 56 S.E.2d 391 (1949) (expiration of growing season did not moot the question of how association's rules would be applied in the future).

None of these cases involve a statute, regulation, or rule that had been repealed. Further, they are not relevant here because there has never been any dispute about the interpretation of the repealed 2011 districting plans, such as a challenge to the location of a particular district line or the number of congressmen or legislators to be elected. Plaintiffs' claims here dealt solely with the intent of the 2011 General Assembly and whether race was the predominant motive for the districts that were challenged. That issue has been completely resolved by the two prior federal court decisions and the Legislature's repeal of the statutes. Thus, unlike the cases cited by the plaintiffs, there was no need for the three-judge panel

to enter a judgment either interpreting the 2011 plans or declaring unconstitutional statutes that already could never again be enforced or applied by the state officials sued.[2]

Plaintiffs have failed to cite a single case supporting their request for an advisory opinion on whether they would have prevailed in this case if a judgment had been entered before the statutes they challenged were enjoined in two other cases and repealed by the General Assembly. Allowing the judgment below to stand will create a dangerous new precedent that would encourage the simultaneous filing of parallel federal and state cases by plaintiffs' attorneys who recruit different groups of plaintiffs so that these attorneys can bootstrap a favorable judgment in one case to justify an award of fees in the other. It will also endorse endless challenges to statutes already declared unconstitutional and eviscerate the authority of the General Assembly to end expensive litigation by repealing a challenged statute.

Despite many opportunities to do so, this Court has never allowed a challenge to a repealed statute, much less one that has also been enjoined by a

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[2] Plaintiffs' reliance on *In re Peoples*, 296 N.C. 109, 250 S.E.2d 890 (1978) is also misplaced. In that case, the Judicial Standards Commission recommended to the Superior Court that a district court judge be removed from office. Before the Commission made its recommendation, the judge resigned. The Supreme Court ruled that the judge's resignation did not moot the case because the statute imposed sanctions other than removal from office. *Id*. at 913. However, *In re Peoples* has no application here because it did not involve the Court making an interpretation of a statute that had already been enjoined and repealed by the legislature.

federal court. There is no justification for the Court to depart from its long-standing and consistent precedent to facilitate the ability of plaintiffs' counsel to obtain two separate awards of attorneys' fees.

CONCLUSION

The judgment of the three-judge panel should be reversed and these cases should be remanded with instructions to dismiss them. In the alternative, should the Court decline to exercise jurisdiction at this time, it should remand this appeal to the North Carolina Court of Appeals and direct that Court to make an initial ruling regarding the mootness of plaintiffs' claims.

Respectfully submitted this the 2nd day of August, 2018.

OGLETREE, DEAKINS, NASH,
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Electronically submitted

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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.

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CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served the foregoing REPLY BRIEF OF LEGISLATIVE DEFENDANTS-APPELLANTS in the above titled action upon all other parties to this cause by:

[ ] Hand delivering a copy hereof to each said party or to the attorney thereof;

[ ] Transmitting a copy hereof to each said party via facsimile transmittal;

[X] By email transmittal;

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This the 2nd day of August, 2018.

By: /s/ Phillip J. Strach
Phillip J. Strach