No. 201PA12-5 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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MARGARET DICKSON, *et al.*, *Plaintiffs,* v. ROBERT RUCHO, *et al.*, *Defendants.* NORTH CAROLINA STATE CONFERENCE OF BRANCHES OF THE NAACP, *et al.*, *Plaintiffs,* v. THE STATE OF NORTH CAROLINA, *et al.*, *Defendants.*	From Wake County 11 CVS 16896 11 CVS 16940 *(Consolidated)*

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PLAINTIFFS-APPELLEES' RESPONSE BRIEF

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PLAINTIFFS-APPELLEES' RESPONSE BRIEF

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INTRODUCTION

This Court should not hear this appeal. The Court lacks jurisdiction, and the Legislative Defendants have failed to show exceptional circumstances to justify their appeal to the wrong court, so the Court should not hear the appeal by certiorari. In addition, the trial court properly applied binding federal law to award Plaintiffs-Appellees the declaratory relief they

requested. Even though Plaintiffs also requested injunctive remedial relief, the trial court declined to order it. That decision does not mean the declaratory relief awarded was in error. If the Court proceeds to decide this appeal, the trial court's declaratory judgment in favor of Plaintiffs-Appellees should be affirmed.

STATEMENT OF THE CASE

These suits challenging several state legislative and congressional districts on state and federal constitutional grounds were filed in November 2011. (R pp 9-24, 32-35). Following multiple rounds of appeal, and intervening decisions in favor of the plaintiffs in concurrent and similar North Carolina redistricting cases, the three-judge panel 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")[1] 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.

[1]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 1).

Gen. Stat. § 120-2.5." Defendants the State of North Carolina and the Bipartisan State Board of Elections and Ethics Enforcement did not appeal.

On 18 April 2018, Legislative Defendants served the proposed record on appeal. The parties settled the record on appeal on 1 May 2018. On 9 May 2018, Legislative Defendants filed the record on appeal. Plaintiffs moved to dismiss the appeal for lack of jurisdiction on 11 May 2018, and Legislative Defendants responded on 21 May 2018. As of the filing of this brief, this Court has not ruled on Plaintiffs-Appellees' Motion to Dismiss.

ARGUMENT

I. This Court Should Not Decide This Appeal Because It Lacks Jurisdiction.

As outlined in Plaintiffs' Motion to Dismiss Appeal, Legislative Defendants should have appealed to the Court of Appeals, not this Court. *See* 2016 S.L. 125 (repealing the direct repeal statute, N.C.G.S. § 120-2.5). An appeal to the wrong court is a jurisdictional defect, and the only option is to dismiss the appeal. *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 196, 657 S.E.2d 361, 364 (2008).

Legislative Defendants now contend the Court retains jurisdiction because N.C.G.S. § 120-2.5 provides a substantive right to a forum that cannot be retroactively eliminated. Leg Defs' Response to Plaintiffs-Appellees' Motion to Dismiss Appeal at 9-10. Legislative Defendants confuse

venue for *jurisdiction*. As explained in Plaintiffs-Appellees' motion to dismiss, an appeal to the wrong court is *jurisdictional*, not merely a matter of venue or forum. Thus, the cases Legislative Defendants rely upon are inapplicable here. In any event, there is no retroactive application of the repeal of N.C.G.S. § 120-2.5 because Session Law 125 was effective on 16 December 2016.

A. Legislative Defendants Have Not Filed a Proper Petition for Writ of Certiorari

Legislative Defendants also contend this Court should treat their appeal as a petition for writ of certiorari. Leg Defs' Br. at 10 (citing N.C. R. App. P. 2 and 21). This Court should reject Legislative Defendants' request to "treat their appeal as a Petition for a Writ of *Certiorari*" or transfer their case to the Court of Appeals. Leg. Defs' Br. at 10. Legislative Defendants have not filed a petition for review in either appellate court, and they are essentially asking this Court to create an appeal for them *somewhere* despite their failure to follow either the jurisdictional statutes or the appellate rules. This Court should decline the invitation.

Legislative Defendants have made no attempt to comply with Rule 21 in their requests to treat any document in this case as a petition. A petition for writ of certiorari "shall be filed without unreasonable delay," and

> shall contain a statement of the facts necessary to an understanding of the issues presented by the application; a

> statement of the reasons why the writ should issue; and certified copies of the judgment, order, or opinion or parts of the record which may be essential to an understanding of the matters set forth in the petition. The petition shall be verified by counsel[.]

N.C. R. App. P. 21(c). When a litigant requests that a brief or other document be treated as a petition for writ of certiorari, that party must comply with Rule 21(c). Absent compliance with Rule 21(c), a party has no right to review by certiorari unless this Court also invokes the provisions of Rule 2. *See State v. McCoy*, 171 N.C. App. 636, 638-39, 615 S.E.2d 319, 321 (2005) (declining to invoke Rule 2 and dismissing appeal when defendant requested in a footnote that brief be treated as a petition for certiorari).

Consistent with the theory that they forgot about their own repeal of N.C.G.S. § 120-2.5 (*see infra* section IB), the Legislative Defendants did not file any petition with this Court or the Court of Appeals until after they had docketed the Record on Appeal and Plaintiffs filed a motion to dismiss. In the conclusion of their Response to the motion to dismiss, the Legislative Defendants asked, in the alternative, "that the Court treat this response as Petition for Writ of Certiorari pursuant to Rule 21." Leg. Defs' Response at 16. The Response did not contain a full statement of the issues. It did not set out reasons that certiorari should be granted. It did not append certified copies of any documents in the case. It was not verified. Nor did their most recent brief contain the requisite elements. In short, Legislative Defendants

made no effort to file an actual petition for writ of certiorari or any document that could be treated as one.

"The North Carolina Rules of Appellate Procedure are mandatory and 'failure to follow these rules will subject an appeal to dismissal.'" *Viar v. N.C. DOT*, 359 N.C. 400, 401, 610 S.E.2d 360, 360 (2005) (quoting *Steingress v. Steingress*, 350 N.C. 64, 65, 511 S.E.2d 298, 299 (1999)). Legislative Defendants have not complied with Rule 21 and have not shown the "exceptional circumstances" that would justify suspension of the requirements of Rule 21 in order to consider their non-existent petition. *State v. Biddix*, 244 N.C. App. 482, 489-90, 780 S.E.2d 863, 868 (2015) (citing *Steingress*, 350 N.C. at 66, 511 S.E.2d at 299-300).

It should also be noted that Legislative Defendants' alternative request to transfer this case to the Court of Appeals is in reality a request that this Court create, consider, and grant a petition for writ of certiorari to the Court of Appeals on their behalf. Although Legislative Defendants had a statutory right of appeal to the Court of Appeals, they failed to appeal within the time required. The failure to give proper and timely notice of appeal is jurisdictional, and "an untimely attempt to appeal must be dismissed." *Booth v. Utica Mutual Ins. Co.*, 308 N.C. 187, 189, 301 S.E.2d 98, 99-100 (1983). This Court should not consider a phantom petition for discretionary review on the Court of Appeals' behalf, and should instead dismiss the case.

B. Certiorari is Not Warranted in this Case

Even if this Court deems Legislative Defendants' "appeal" or brief to constitute a petition, certiorari should nonetheless be denied. Certiorari is based on concerns of fairness and is within the equitable discretion of the Court. *Radcliffe v. Avenel Homeowners Ass'n*, __ N.C. Ct. App. __, __, 789 S.E.2d 893, 902 (2016). Here, those factors point to dismissal of the appeal for two reasons. First, Legislative Defendants were on notice of the change in law. Second, Legislative Defendants will not be harmed or inconvenienced by the judgment entered by the trial court.

Legislative Defendants are not unsophisticated litigants who may be unfamiliar with the rules and statutes governing appellate rules and procedure. These appellants are the very people who repealed the direct appeal to the Supreme Court. In fact, Senator Rucho was a primary sponsor of the bill. Senate Bill 4/S.L. 2016-125 Bill History, *available at* https://www.ncleg.net/gascripts/BillLookUp/BillLookUp.pl?Session=2015E4&BillID=s4 (last visited 9 July 2018). Representative Lewis proposed an amendment to the bill, which was adopted. *Id.* Senator Berger and

Representative Lewis both voted in favor of the bill.[2] The Legislative Defendants' contention that the law was not intended to apply to this case does not withstand even cursory scrutiny. In the last decade, this Court has cited § 120-2.5 only three times—in *Dickson v. Rucho*, 368 N.C. 481, 499, 781 S.E.2d 404, 419 (2015); *Dickson v. Rucho*, 367 N.C. 542, 545, 766 S.E.2d 238, 242 (2014); and *Dickson v. Rucho*, 366 N.C. 332, 339, 737 S.E.2d 362, 368 (2013). Defendants would have this Court believe that, in removing the right of direct appeal without any statement regarding retroactivity, they gave no consideration to its application in the one case in which it had been repeatedly applied and to which they were all parties. *Cf.* S.L. 2013-154, § 5.(d) (repealing Racial Justice Act with specific provisions regarding non-retroactive application to certain pending cases). Thus, Legislative Defendants should have been aware of the change in the law, and their appeal should be dismissed.

The equities also favor dismissal of the appeal because the trial court's order imposes no affirmative obligation on Legislative Defendants. The order

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[2] Legislative Defendants have stated that Senator Hise and Speaker Moore are automatically substituted as parties in place of Senator Rucho and Speaker Tillis. (R p 1). Senator Hise and Speaker Moore both voted in favor of this bill as well. *See* 16 December 2016 Senate Roll Call, *available at* https://www.ncleg.net/gascripts/voteHistory/RollCallVoteTranscript.pl?sSession=2015E4&sChamber=S&RCS=3 (last visited 9 July 2018); 16 December 2016 House Roll Call, *available at* https://www.ncleg.net/gascripts/voteHistory/RollCallVoteTranscript.pl?sSession=2015E4&sChamber=H&RCS=17 (last visited 9 July 2018). Speaker Tillis was no longer in the North Carolina legislature when this bill was introduced and passed.

does not require the legislature to redistrict or amend districting plans in any way. Plaintiffs' requests for injunctive relief have been denied. As explained below, the order simply grants declaratory judgments in favor of Plaintiffs to conform to binding federal decisions and reserves the possibility of future motions for attorneys' fees and costs. Thus, this Court should decline Legislative Defendants' request to treat their "appeal" as a petition for certiorari because Legislative Defendants will not be prejudiced by dismissal.

II. The Trial Court Acted Appropriately and Followed This Court's Guidance in Entering Judgment in Favor of Plaintiffs and Declaring the Remedial Questions Moot

The Legislative Defendants' brief concentrates its energy on arguments of mootness that they have previously advanced without success before multiple courts. This Court heard those arguments last year and ordered that the trial court should make the determination of mootness, which it did. More recently, in its order affirming in part the District Court's remedial order in the *Covington* litigation, the United States Supreme Court rejected essentially the same mootness arguments, finding that the Legislative Defendants misunderstood the nature of racial gerrymandering claims. *North Carolina v. Covington*, No. 17-1364, 585 U.S. __, __, 2018 U.S. LEXIS 4044, at *8 (June 28, 2018). This Court should decline to entertain these arguments yet again, in an appeal the Legislative Defendants have no right to bring before this Court.

Legislative Defendants' brief provides additional reasons for this Court to decline to reach their mootness argument. In this iteration of their argument, Legislative Defendants cite *Benvenue PTA v. Nash Cnty. Bd. of Ed.*, 275 N.C. 675, 170 S.E.2d 473 (1969), and *Cochran v. Rowe*, 225 N.C. 645, 36 S.E.2d 75 (1945), two cases holding that this Court may not hear the case. Leg. Defs' Br. at 16-17. Legislative Defendants claim that the subject matter of this case is moot apart from an issue of attorneys' fees. Leg. Defs' Br. at 19. However, *Benvenue* and *Cochran* both left the trial court's underlying ruling undisturbed. *Benvenue*, 275 N.C. at 680, 170 S.E.2d at 477; *Cochran*, 225 N.C. at 646, 36 S.E.2d 75. These cases stand for the proposition that *this Court* will not review a trial court's ruling on a proposition of law or its determination of costs and fees when the underlying subject matter of the suit has ceased to exist. They do not, as the Legislative Defendants would have it, support an argument that the trial court erred by entering judgment in accordance with remand orders from this Court and the United States Supreme Court. Rather, if this Court were to agree with the Legislative Defendants that there is no live controversy, *Benvenue* and *Cochran* counsel that this Court should leave the trial court's order intact and dismiss Legislative Defendants' appeal.

This Court has already determined that the trial court was the best situated entity to determine mootness, and explicitly opened the door for a

ruling of mootness in part, just as the trial court ruled. (R pp 393-94) (instructing the trial court to determine, among other things, whether "this matter is moot in whole or in part" following briefing and oral argument). Because Supreme Court precedent required that judgment be entered in their favor on their federal and state equal protection claims, Plaintiffs were entitled to have the trial court consider whether further remedial proceedings were warranted. The three-judge panel carefully considered all of Plaintiffs' requests for relief—both declaratory and injunctive—granted some of that relief, and declined to grant other relief. The denial of injunctive relief does not and cannot moot all other requests for relief.

A. The Trial Court Was Not Barred By Any Mootness Doctrine From Entering Judgment In Favor of Plaintiffs

1. *The United States Supreme Court Rejected Legislative Defendants' Arguments that Passage of Remedial Districts Made Plaintiffs' Claims Moot*

Legislative Defendants' lead argument for a finding of mootness rests on the General Assembly's purported "constitutional authority to moot a case" by repealing and replacing the legislative districts in the 2011 plan. Leg. Defs' Br. at 12. The United States Supreme Court rejected this same argument at the end of June in its most recent ruling in the *Covington* litigation:

> The defendants first argue that the District Court lacked jurisdiction even to enter a remedial order in this case. In their

> view, "[w]here, as here, a lawsuit challenges the validity of a statute," the case becomes moot "when the statute is repealed." Juris. Statement 17. **Thus, according to the defendants, the plaintiffs' racial gerrymandering claims ceased to exist when the North Carolina General Assembly enacted remedial plans for the State House and State Senate and repealed the old plans**.
>
> **The defendants misunderstand the nature of the plaintiffs' claims.** Those claims, like other racial gerrymandering claims, arise from the plaintiffs' allegations that they have been "separate[d] . . . into different districts on the basis of race." *Shaw* v. *Reno*, 509 U.S. 630, 649, 113 S. Ct. 2816, 125 L. Ed. 2d 511 (1993). Resolution of such claims will usually turn upon "circumstantial evidence that race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing" the lines of legislative districts. *Miller* v. *Johnson*, 515 U.S. 900, 913, 115 S. Ct. 2475, 132 L. Ed. 2d 762 (1995). But it is the segregation of the plaintiffs—not the legislature's line-drawing as such—that gives rise to their claims. It is for this reason, among others, that the plaintiffs have standing to challenge racial gerrymanders only with respect to those legislative districts in which they reside. See *Alabama Legislative Black Caucus* v. *Alabama*, 575 U.S. __, __ (2015) (slip op., at 6). Here, in the remedial posture in which this case is presented, the **plaintiffs' claims that they were organized into legislative districts on the basis of their race did not become moot simply because the General Assembly drew new district lines around them**. To the contrary, they argued in the District Court that some of the new districts were mere continuations of the old, gerrymandered districts. Because the plaintiffs asserted that they remained segregated on the basis of race, their claims remained the subject of a live dispute, and the District Court properly retained jurisdiction.

Covington, 585 U.S. __, __, 2018 U.S. LEXIS 4044, at *8-9 (emphasis added).

Legislative Defendants' lead mootness argument (Leg. Defs' Br. at 11-13) is

indistinguishable from the argument flatly rejected by the United States Supreme Court just days ago.

2. *The Two-Prong Test on Mootness Has Not Been Satisfied Because the Effects of the Constitutional Violation Have Not Been Alleviated*

Centrally, "the mootness doctrine is less restrictive in the courts of North Carolina than in the federal courts." *Thomas v. N.C. Dep't of Human Resources*, 124 N.C. App. 698, 705, 478 S.E.2d 816, 820 (1996) (internal citations omitted). "In state courts the exclusion of moot questions from determination is not based on a lack of jurisdiction but rather represents a form of judicial restraint." *In re Peoples*, 296 N.C. 109, 147, 220 S.E.2d 890, 912 (1978). In defining the appropriate circumstances where such restraint should be exercised, the North Carolina Court of Appeals has adopted the two-prong test for mootness laid out by the United States Supreme Court in *Los Angeles v. Davis*, 440 U.S. 625, 631, 99 S. Ct. 1379, 1383 (1979), which requires that "(1) the alleged violation has ceased, and there is no reasonable expectation that it will recur, **and** (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Comer v. Ammons*, 135 N.C. App. 531, 536, 522 S.E.2d 77, 80 (1999) (emphasis added); *see also Neier v. State*, 151 N.C. App. 228, 232, 565 S.E.2d 229, 232 (2002).

Here, both when the trial court entered judgment in Plaintiffs' favor and today, the first prong of this test is not satisfied. While legislators

elected from unconstitutionally-drawn districts are still in office, the effects of the constitutional violation have not been alleviated. *See Neier*, 151 N.C. App. at 232, 565 S.E.2d at 232; *Comer*, 135 N.C. App. at 536, 522 S.E.2d at 80. Both *Comer* and *Neier* involved judicial elections. In *Comer*, the plaintiff brought a constitutional challenge to state laws allowing judges to run simultaneously for district and superior court seats. *Comer*, 135 N.C. App. at 533, 522 S.E.2d at 78-79. While the case was pending, state law was changed to prohibit this; however, the court held that the plaintiff's claims were not moot. The court reasoned that if the older statutes in question were in violation of the state constitution, then certain sitting judges would have been holding office unlawfully. *Id.* at 536, 522 S.E.2d at 80. Thereby, the violation had not ceased, and there was no eradication of the effects of the alleged violation. *Id.*

Similarly, in *Neier*, the issue was whether partisan primary elections violated the constitutional rights of a candidate who wanted to run for district court judge. *Neier*, 151 N.C. App. at 230-31, 565 S.E.2d at 231. While the case was pending, the legislature changed the law to require non-partisan primaries for district court judges. The Court of Appeals held that the claim was not moot because "…in the appeal now before us, if appellants are correct that Judge Dickson was elected pursuant to an unconstitutional statute, then he holds his office unlawfully, and the violation continues.

Hence, under *Comer*, this appeal is not moot." *Id.* at 232, 565 S.E.2d at 232. Legislative Defendants have tried both before this Court and the three-judge panel to distinguish *Davis*, *Comer* and *Neier*, to no avail, and are unable to do so now.

Therefore, because officials elected pursuant to an unconstitutional statute are still serving, this case was not moot when the trial court entered judgment in favor of Plaintiffs and is not moot now. Specifically, under *Davis*, *Comer*, and *Neier*, this case is not moot because the constitutional violation has not ceased and its effects have not been eradicated. On these facts, this Court cannot dismiss the case as moot.

3. *The Public Interest Exception Applies*

Even if this Court were to conclude that by virtue of the U.S. Supreme Court's rulings in *Harris* and *Covington*, the Plaintiffs in this case were no longer entitled to any relief, the public interest exception to the mootness doctrine applies here and this Court should allow the decision below to stand. Because mootness is a form of judicial restraint, not a question of jurisdiction, North Carolina courts are not required to abstain from review on matters of significant public concern, even if the case is moot. *In re Peoples*, 296 N.C. at 147, 220 S.E.2d at 912. *See, e.g., Graham Cnty. Bd. of Elections v. Graham Cnty. Bd. of Comm'rs*, 212 N.C. App. 313, 317, 712 S.E.2d 372, 375 (2011); *N.C. State Bar v. Randolph*, 325 N.C. 699, 701, 386 S.E.2d 185, 186 (1989);

see also Bright Belt Warehouse Ass'n v. Tobacco Planters Warehouse, Inc., 231 N.C. 142, 56 S.E.2d 391 (1949) (plaintiff's claim was moot but issues were in the public interest and decided by the court); *State v. Chisholm*, 135 N.C. App. 578, 521 S.E.2d 487 (1999) (court ruled on vehicle seizure issue because it was of public importance even where the statute in question had been amended). Indeed, this exception applies in election cases as well. *See Ferguson v. Riddle*, 233 N.C. 54, 62 S.E.2d 525 (1950) (ruling on propriety of municipal election issue after the vote was held); *Libertarian Party of N.C. v. State*, 200 N.C. App. 323, 688 S.E.2d 700 (2009) (deciding ballot access issue even though the plaintiffs had obtained recognition as a political party and were on the ballot in the election after the case was filed).

The public interest in how legislative districts will be drawn cannot be understated, and certainly exceeds the public interest in other cases where the public interest exception has been held to apply. *See, e.g., Granville Cnty. Bd. of Comm'rs v. N.C. Hazardous Waste Mgmt. Comm'n*, 329 N.C. 615, 623, 407 S.E.2d 785, 790 (1991) ("the process of siting hazardous waste facilities" implicated the public's interest); *State v. Corkum*, 224 N.C. App. 129, 132, 735 S.E.2d 420, 423 (2012) (structured sentencing under the Justice Reinvestment Act of 2011 implicated the public's interest); *In re Brooks*, 143 N.C. App. 601, 605-06, 548 S.E.2d 748, 751-52 (2001) (challenge of a State Bureau of Investigation procedure for handling personnel files implicated the

public's interest); *Leake v. High Point City Council*, 25 N.C. App. 394, 213 S.E.2d 386 (1975) (case relating to the right of the city council to have media coverage of investigative hearings implicated the public's interest). Declaratory judgment in this case does not simply serve as an advisory opinion—it settles long-disputed questions of federal and state law that will be implicated again in the fast-approaching 2020 redistricting cycle. Ending seven years of litigation without any answers from this state's courts does not serve the public interest: it simply muddies the waters and nearly guarantees that the next redistricting cycle will be subject to legal dispute.

B. Entry of Judgment in Favor of Plaintiffs Was Appropriate and Necessary

1. *State and Federal Law Obligated the Trial Court to Enter Judgment in Favor of Plaintiffs*

The North Carolina Constitution admonishes that "[a] frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty." N.C. Const. art. I, § 35. Therefore, where a statutory provision is specifically challenged by a person directly affected by it, and "fundamental human rights are denied in violation of constitutional guarantees," declaratory relief as to the constitutional validity of that provision is appropriate. *Jernigan v. State*, 279 N.C. 556, 562, 184 S.E.2d 259, 264 (1971); *see also Malloy v. Cooper*, 356 N.C. 113, 118, 565 S.E.2d 76, 79-80 (2002).

The Supremacy Clause of the North Carolina Constitution also compelled the trial court to conform its decision to the U.S. Supreme Court's decision in *Cooper v. Harris*, 581 U.S. __, __ 137 S. Ct. 1455, 1482 (2017), and to enter judgment in favor of Plaintiffs. Our Constitution provides:

> Every citizen of this State owes paramount allegiance to the Constitution and government of the United States, and no law or ordinance of the State in contravention or subversion thereof can have any binding force.

N.C. Const. art. I, § 5. The U.S. Constitution also explicitly provides that it binds state judges. *See* U.S. Const. art. VI cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby"). *See also In re Sarvis*, 296 N.C. 475, 483, 251 S.E.2d 434, 439 (1979) (rejecting under the Supremacy Clause an interpretation of a statute that would conflict with federal case law). There can be no doubt that, in light of the Supremacy Clauses of both Constitutions, the trial court was obligated to reverse its prior erroneous decision and enter judgment in favor of Plaintiffs.

The fundamental interests at stake, combined with this Court's obligation to give force to federal law, mandate a judgment that these Plaintiffs' rights have been violated. Once the Supreme Court has spoken, "it is the duty of other courts to respect that understanding of the governing rule

of law." *Nitro-Lift Technologies, L.L.C. v. Howard*, 568 U.S. 17, 21, 133 S. Ct. 500, 503 (2012) (per curiam) (quoting *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312, 114 S. Ct. 1510, 1519 (1994)). Once the U.S. Supreme Court decided *Harris* and *Covington*, Plaintiffs were thus entitled to a judgment in their favor on their federal claims in this case, as well as their state constitutional equal protection claims.

2. *Plaintiffs Were Entitled to Declaratory Relief*

Plaintiffs and the State Defendants agree that Plaintiffs were entitled to entry of judgment in their favor. *See* Br. of Defs-Appellees the State of North Carolina and the State Board of Elections on Second Remand, No. 201PA12-4, at 10 (hereinafter "State Br.") ("Under these circumstances, the appropriate procedural result should be remand by this Court to the trial court for entry of judgment.").

Plaintiffs sought both declaratory and injunctive relief. (R pp 96-98, 216-17). The trial court granted Plaintiffs the declaratory relief they sought but denied any injunctive relief. This determination was entirely consistent with state law. *See, e.g.*, *News & Obs. Pub'g Co. v. Coble*, 128 N.C. App. 307, 310, 494 S.E.2d 784, 786, *aff'd per curiam*, 349 N.C. 350, 507 S.E.2d 272 (1998) (holding case was not moot because plaintiffs had not been awarded declaratory relief sought and observing that a related case "did not provide all of the relief sought by the plaintiffs in the instant case"). "[I]n some

instances the simple declaratory adjudication of the illegality of the act complained of [is] the most assured and effective remedy available." *Goldston v. State*, 361 N.C. 26, 34, 637 S.E.2d 876, 882 (2006).

The imposition of new district lines does not affect Plaintiffs' request for declaratory relief relating to the 2011 districts. In *Wake Cares, Inc. v. Wake County Bd. of Educ.*, 190 N.C. App. 1, 16, 660 S.E.2d 217, 226 (2008), *aff'd*, 363 N.C. 165, 675 S.E.2d 345 (2009), the Court of Appeals held, in a challenge to the Wake County School Board's decision to assign students to year-round schools without parental consent, that even though the individual plaintiffs had been reassigned to new schools, the case was not moot. The court had the obligation of determining whether the school board's plan violated applicable law, even if that determination would not impact the individual plaintiffs' school assignments, because the plaintiffs had requested declaratory relief. The trial court correctly held the same here. (R p 399).

As pointed out by the State Defendants, State Br. at 10, what Plaintiffs and the State Defendants urge is consistent with what this Court did in *Swanson v. State*, 335 N.C. 674, 441 S.E.2d 537 (1994). In *Swanson*, the United States Supreme Court issued a definitive ruling in plaintiffs' favor on federal constitutional claims regarding payment of retirement benefits. The U.S. Supreme Court granted the *Swanson* plaintiffs' petition for writ of certiorari, vacated this Court's decision, and remanded the case for further

consideration in light of the related, intervening decision—just as occurred in this case. This Court in *Swanson* did not simply dismiss the matter as moot on remand. Rather, this Court fully addressed the defendants' parallel arguments under state law and ordered the trial court to enter judgment in their favor. Although the state law claims had been raised in the federal litigation, this Court found that there had been no final judgment on the merits of those claims and a state court decision was appropriate. *Id.* at 692-93, 441 S.E.2d at 547-48.

Plaintiffs were not simply seeking a declaratory judgment from the trial court that the statutes at issue violated state law, but even if Plaintiffs were requesting only that relief, the trial court would have been within its discretion to grant it. In relying on *N.C. Ass'n of Educators v. State*, 368 N.C. 777, 792, 786 S.E.2d 255, 266 (2016), for the proposition that a state court cannot address alternative claims once a statute is found to be unconstitutional under the United States Constitution, Legislative Defendants mistake a court's exercise of its discretion for a mandate to avoid ruling on both federal and state law claims. Leg. Defs' Br. at 15. Contrary to Legislative Defendants' assertions, it is not uncommon for North Carolina courts to invalidate a statute on both state and federal constitutional grounds. *See, e.g.*, *In re Appeal of Springmoor, Inc.*, 348 N.C. 1, 12, 498 S.E.2d 177, 184 (1998) (affirming the Court of Appeals' finding that a statute

giving preferential tax treatment to religious nursing homes violated both the First Amendment to the United States Constitution and Article I, Section 13 of the North Carolina Constitution); *Treants Enterprises, Inc. v. Onslow Cnty.*, 94 N.C. App. 453, 463, 380 S.E.2d 602, 608 (1989) (holding that an ordinance requiring an escort bureau to maintain clients' names and addresses for county inspection violated the First and Fourteenth Amendments of the United States Constitution as well as Article I Section 19 of the North Carolina Constitution). Under North Carolina law, the trial court was not prohibited from deciding the live state law issues that, in addition to Plaintiffs' outstanding request for an adequate remedy, prevented this case from being "altogether moot." Leg. Defs' Br. at 21 (quoting *Pearson v. Martin*, 319 N.C. 449, 451-52, 355 S.E.2d 496, 498 (1997)). Plaintiffs were entitled to judgment that conformed the rulings of these state courts with the rulings of the United States Supreme Court, and to judgment recognizing their rights under Article I, Section 19 of the North Carolina Constitution. Plaintiffs won appropriate relief from the trial court, and this Court should not disrupt that outcome.

In addition, there is precedent for a trial court resolving redistricting litigation by making a final judgment and determination of which party prevailed after a United States Supreme Court remand. In *Texas v. United States*, 49 F. Supp. 3d 27 (D.D.C. 2014), the trial court granted a motion for

fees that required it to determine which party had prevailed in a case brought under § 5 of the Voting Rights Act after *Shelby County v. Holder*, 570 U.S. 529, 133 S. Ct. 2612 (2013), made the action moot. In that case, despite finding mootness since *Shelby County* made § 5 no longer applicable to the state of Texas, the trial court conducted a full analysis of the prior litigation, found that the plaintiffs had prevailed, and granted an award of fees. *Texas*, F. Supp. 3d at 38-42. This is, of course, how litigation is brought to a close after a definitive remand from a higher court.

3. *Defendants' Continuing Reliance on Stephenson III Is Misplaced*

Legislative Defendants repeat their unavailing arguments made to this Court last year that this case is similar to *Stephenson v. Bartlett*, 358 N.C. 219, 595 S.E.2d 112 (2004) (*Stephenson III*). As Plaintiffs have explained before, *Stephenson II*, 357 N.C. 301, 582 S.E.2d 247 (2003), is the more applicable case. In *Stephenson II*, the Supreme Court affirmed the trial court's determination that the legislature's revised remedial redistricting plans did not comply with state constitutional requirements—that is, the State Supreme Court confirmed that the plaintiffs in *Stephenson II*, like the plaintiffs here, were entitled to an opportunity to be heard on the issue of whether the remedial districts were themselves constitutional. *Id.* In contrast, *Stephenson III* was decided on a complex procedural posture

following the enactment of a new venue statute requiring a three-judge panel instead of a single judge to review state redistricting plans. *Stephenson III*, 358 N.C. at 222-23, 595 S.E.2d at 115. In light of the new statute regarding venue, and the fact that the *Stephenson* plaintiffs had already been heard on the adequacy of the remedy for the 2001 unconstitutional redistricting plans, new litigation was appropriate rather than continuing the *Stephenson* case. *Id.* at 225-26, 595 S.E.2d at 117.

The *Stephenson III* facts are not present here. Plaintiffs were appropriately allowed to argue the adequacy of the remedial plans. They did not obtain that relief, but did obtain declaratory judgment relief. The fact that they were denied one form of the relief they sought does not mean that they were not entitled to seek it. This case is now over, but that does not mean it was or is now moot—Plaintiffs obtained some of the relief they sought, but not all of it. The only parties dragging out the litigation at this point are the Legislative Defendants. At the end of the day, Legislative Defendants' arguments, unavailing to this Court last year, and unavailing to the trial court in the extensive briefing and argument before it in December of 2017, carry no more weight today. *Stephenson II* is the case analogous to this one, and where plaintiffs had the right to ask for further remedial relief, regardless of whether they were awarded that relief or not, the case was not moot.

CONCLUSION

For all of these reasons, Plaintiffs-Appellees respectfully request that this Court dismiss Legislative Defendants' appeal, or, alternatively, affirm the judgment of the trial court.

Respectfully submitted, this the 16th day of July, 2018.

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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:

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