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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BRIEF OF LEGISLATIVE DEFENDANTS-APPELLANTS

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INDEX

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

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INTRODUCTION

The three-judge panel of the Superior Court below erred by entering a judgment against statutes that had long been repealed by the General Assembly and enjoined by prior orders of federal courts. There was no precedent for the judgment entered by the Superior Court and the Superior Court cited none. (R. pp

395-402). Indeed, the Superior Court's order itself contradicts the judgment contained within it. (R. pp 401-02). The judgment should be reversed and this Court, pursuant to the mootness doctrine and the authority of the Peoples' representatives to end litigation by repealing a statute, should remand the case for entry of a judgment declaring this case moot.

STATEMENT OF ISSUES PRESENTED FOR APPEAL

1. Did the three-judge panel err in entering judgment in favor of plaintiffs and against the defendants on Claims for Relief 22, 23, and 24 of the *Dickson v. Rucho* Amended Complaint (11 CVS 16896) and Claims for Relief 9, 10, and 11 of the *NAACP v. State of North Carolina* Amended Complaint (11 CVS 16940)?

2. Did the three-judge panel err in entering judgment in favor of plaintiffs and against the defendants on Claims for Relief 19, 20, and 21 of the *Dickson v. Rucho* Amended Complaint (11 CVS 16896) and Claims for Relief 1, 2, and 3 of the *NAACP v. State of North Carolina* Amended Complaint (11 CVS 16940)?

3. Did the three-judge panel err in declaring the 2011 First and Twelfth Congressional Districts and the 2011 majority black legislative districts unconstitutional under the Equal Protection Clause of the United States Constitution?

4. Did the three-judge panel err in declaring the 2011 First and Twelfth Congressional Districts and the 2011 majority black legislative districts unconstitutional under Article 1, § 19 of the North Carolina Constitution?

5. Did the three-judge panel err in failing to conclude that all claims were moot and should be dismissed?

6. Did the three-judge panel err in retaining jurisdiction over this case for purposes of entertaining motions for costs and attorneys' fees?

STATEMENT OF PROCEDURAL HISTORY

In July 2011, the General Assembly enacted new redistricting plans for the North Carolina House of Representatives, the North Carolina Senate, and the United States Congress. (R. p 224). On 3 November 2011, Margaret Dickson and forty-five other plaintiffs filed a complaint challenging the majority black districts in these plans ("*Dickson* Plaintiffs"). (R. p 225). On 4 November 2011, the North Carolina State Conference of the Branches of the *NAACP* and forty-nine other plaintiffs filed a complaint challenging these same districts ("*NAACP* Plaintiffs"). (R. p 225). *Dickson v. Rucho*, 367 N.C. 542, 766 S.E.2d 238, 243 (2014) ("*Dickson I*").

In their complaints, plaintiffs challenged the 2011 districts under a number of state and federal theories. (R. pp 2-219). In pertinent part for purposes of this appeal, the plaintiffs alleged that the General Assembly's use of race to draw majority black districts violated both the federal and state constitutions. (R. pp 2-219). Plaintiffs alleged that the districts constituted racial gerrymanders in violation of the Fourteenth Amendment to the United States Constitution. (*Dickson* Pls' Am. Compl., Twenty-Second Claim for Relief; Twenty-Third Claim for Relief; Twenty-Fourth Claim for Relief) (R. pp 214-15); (*NAACP* Pls' Am. Compl., Ninth Claim for Relief; Tenth Claim for Relief; and Eleventh Claim for Relief) (R. pp 92-94). Plaintiffs also challenged these same districts as alleged

racial gerrymanders in violation of Article I, Section 19 of the North Carolina Constitution. (*Dickson* Pls' Am. Compl., Nineteenth Claim for Relief; Twentieth Claim for Relief; Twenty-First Claim for Relief) (R. pp 212-14); (*NAACP* Pls' Am. Compl., First Claim for Relief; Second Claim for Relief; Third Claim for Relief) (R. pp 84-89).

On 6 February 2012, the Superior Court partially granted defendants' motion to dismiss. (R. pp 225). This resulted in the dismissal of many of the plaintiffs' state law claims. (R. pp 225). All parties then filed motions for summary judgment. (R. pp 226). Before ruling on the summary judgment motions, the Superior Court ordered a trial on two specific issues related to plaintiffs' claims of racial gerrymandering. (R. pp 226). Following the trial, on 8 July 2013, the Superior Court released its unanimous opinion dismissing all of plaintiffs' state and federal claims. (R. p 293).

Pursuant to N.C. Gen. Stat. § 120-2.5, plaintiffs then filed a direct appeal with the North Carolina Supreme Court. On 19 December 2014, the North Carolina Supreme Court affirmed the decision by the Superior Court to dismiss all of plaintiffs' claims. *See Dickson I*, 766 S.E.2d at 260. On 16 January 2015, plaintiffs filed their first petition for a writ of *certiorari* with the United States Supreme Court seeking review of the federal issues decided by the North Carolina

Supreme Court in *Dickson I*. *See* Petition for Writ of *Certiorari*, *Dickson v. Rucho*, 2015 WL 241877 (No. 14-839); *see also* 135 S. Ct. 1843 (mem.) (2015).

Before the North Carolina Supreme Court issued its ruling in *Dickson I*, plaintiffs who were represented by counsel for the *Dickson* Plaintiffs, filed a federal lawsuit challenging Congressional Districts 1 and 12 as racial gerrymanders. *Harris v. McCrory*, No. 1:13-CV-949 (M.D.N.C. 24 October 2013).

On 20 April 2015, the United States Supreme Court vacated the judgment in *Dickson I* and remanded that case to this Court for further consideration in light of the decision in *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015), which had been handed down a month earlier on 25 March 2015.

Thereafter, another group of plaintiffs, who were represented either by counsel for the *Dickson* Plaintiffs or by counsel for the *NAACP* Plaintiffs, filed a second federal lawsuit challenging the 2011 majority black legislative districts as racial gerrymanders. *Covington v. North Carolina*, No. 1:15-CV-399 (M.D.N.C. 19 May 2015).

On 19 December 2015, following the first remand by the United States Supreme Court, this Court issued its second decision in the *Dickson* litigation. This Court once again affirmed the decision by the Superior Court to dismiss all of

the state and federal claims alleged by the *Dickson* Plaintiffs and the *NAACP* Plaintiffs. *Dickson v. Rucho,* 368 N.C. 481, 781 S.E.2d 404 (2015) ("*Dickson II*").

On 5 February 2016, the federal district court issued its decision in *Harris*, finding that the 2011 versions of Congressional Districts 1 and 12 were racial gerrymanders and enjoining their future use. *Harris v. McCrory*, 159 F.Supp.3d 600 (M.D.N.C. 2016), *aff'd, Cooper v. Harris*, 137 S. Ct. 1455 (2017). Subsequently, on 19 February 2016, the General Assembly enacted a new 2016 Congressional Plan. *See* N.C. Sess. Law 2016-1. (R. p 397) Elections were conducted under the 2016 Congressional Plan during the 2016 General Election. (R. p 397). The 2016 Congressional Plan remains in force.

On 30 June 2016, the *Dickson* and *NAACP* Plaintiffs filed a second petition for a writ of *certiorari* again seeking review of the federal issues resolved by this Court's decision in *Dickson II*. *See* Petition for Writ of *Certiorari*, *Dickson v Rucho,* 2016 WL 3611905; *see also* 137 S. Ct. 2186 (mem.) (2017).

On 11 August 2016, the *Covington* federal district court entered an opinion and judgment finding that the 2011 majority black legislative districts constituted racial gerrymanders. 316 F.R.D. 117, 176-78 (M.D.N.C. 2016), *aff'd*, 137 S. Ct. 2211 (2017). The *Covington* district court did not enjoin the 2011 majority black districts for the 2016 election but prohibited the State from using those districts in

elections after 2016. *Id.* The federal district court also directed that new plans be drawn by the General Assembly in its "next legislative session." *Id.* at 178.

On 22 May 2017, the United States Supreme Court affirmed the decision of the *Harris* district court. *Cooper v. Harris*, 137 S. Ct. 1455 (2017).

On 30 May 2017, the United States Supreme Court vacated this Court's judgment in *Dickson II* and remanded the case a second time for further consideration in light of the United States Supreme Court's decision in *Harris*. *See Dickson v. Rucho*, 137 S. Ct. 2186 (mem.) (2017).

On 5 June 2017, the United States Supreme Court affirmed the decision of the *Covington* district court. *Covington v. North Carolina*, 137 S. Ct. 2211 (2017).

On 31 July 2017, the *Covington* district court provided North Carolina an opportunity to enact new legislative redistricting plans no later than 1 September 2017. *See* 267 F.Supp.3d 664, 667 (M.D.N.C. 2017). The General Assembly enacted new legislative plans on 31 August 2017. *See* N.C. Sess. Law 2017-207; 2017-208. (R. p 397). These new plans repealed all of the majority black legislative districts challenged in this case.

On 12 July 2017, following the remand of *Dickson II* by the United States Supreme Court, this Court entered an expedited briefing schedule and heard oral argument on 28 August 2017. Following the oral argument, on 28 September 2017, this Court entered an order remanding the case back to the Superior Court to

answer three questions: (1) whether in light of *Cooper v. Harris* and *North Carolina v. Covington* a controversy exists or if this matter is moot in whole or in part; (2) whether there are other remaining collateral state and/or federal issues that require resolution; and (3) whether other relief may be proper. *Dickson v. Rucho*, No. 201PA12-4 (N.C. 2017) ("*Dickson III*"). This Court's order of 28 September 2017 was amended on 9 October 2017, but the three issues the Superior Court was asked to consider by this Court remained the same. (R. pp 393-94).

Following remand by this Court to the Superior Court, on 12 February 2018, the Superior Court entered two separate orders. (R. pp 394-403). One of the orders denied plaintiffs' motion for emergency relief requesting that the legislature be required to redraw certain 2017 House Districts in time for the 2018 General Election. (R. pp 400-01). The Superior Court also entered what it styled as a "judgment" answering the three questions posed to it by this Court. (R. p 401). In the "judgment" entered by the court, it concluded that the plaintiffs were entitled to a judgment on their claims that the 2011 majority black districts violated the Fourteenth Amendment to the United States Constitution and Article I, § 19 of the North Carolina Constitution. (R. p 401). The Superior Court also concluded that the plaintiffs were not entitled to any relief concerning the 2016 Congressional Plan or the 2017 legislative plans. (R. pp 401-02). Finally, the Superior Court

"retain[ed] jurisdiction of any motions for costs and attorneys' fees and other such post-judgment matters appropriately brought by the parties." (R. p 402).

In concluding that plaintiffs were entitled to a judgment that the 2011 majority black districts violated the United States and North Carolina constitutions, the Superior Court relied exclusively on the fact that those districts had been found unconstitutional under the federal constitution by the United States Supreme Court in *Harris* and *Covington*. (R. pp 399-401). The Superior Court's order did not analyze whether those claims were instead mooted by the United States Supreme Court's judgment and/or the fact that all of the challenged congressional and legislative districts in those cases had since been repealed and replaced. (*Id*.). Without explanation, the Superior Court concluded that the now-repealed districts had been held unconstitutional by the federal courts and "as such" the plaintiffs were entitled to a judgment in this case. (R. p 399).

Despite its conclusion that a judgment was warranted, the Superior Court entered declaratory, not injunctive, relief. (R. pp 401-02). Moreover, the court noted that "jurisdictional impediments" could "exist" where one court is "enforc[ing]" another court's order made upon a "distinct and separate record by distinct and separate plaintiffs." (R. p 400). Consequently, while entering a declaratory judgment on some of plaintiffs' claims, the court nonetheless declared the rest of the case moot. (R. pp 400-02). In so doing, the Superior Court conceded

that the "2011 Redistricting Plans no longer exist" and there "is no further remedy that the Court can offer with respect to the 2011 Plans." (R. p 401).

On 14 March 2018, the Legislative Defendants filed a notice of appeal from the Superior Court's judgment entered on 12 February 2018. (R. pp 414-16). Plaintiffs did not file a cross appeal.

GROUNDS FOR APPELLATE REVIEW

The Legislative Defendants filed a notice of appeal for direct review of the "judgment" entered by the Superior Court pursuant to N.C. Gen. Stat. § 120-2.5, a statute which was subsequently repealed but which Legislative Defendants contend still applies to this pre-existing action. *See* Legislative Defendants-Appellants' Response to Plaintiffs-Appellees' Motion to Dismiss Appeal. Alternatively, the Legislative Defendants move this Court to treat their appeal as a Petition for a Writ of *Certiorari* pursuant to Rule 21, N.C. R. App. P., or pursuant to Rule 2, N.C. R. App. P., issue an order directing that this appeal be heard in the first instance by this Court. Should the Court decline to hear this appeal in the first instance, the Legislative Defendants request that this Court transfer their appeal to the North Carolina Court of Appeals.

ARGUMENT

1. This matter is moot because the statutes plaintiffs challenge have been repealed and replaced.

Whenever during the course of litigation "the questions originally in controversy between the parties are no longer at issue, the case should be dismissed, for courts will not entertain or proceed with a cause merely to determine abstract propositions of law." *In re Peoples*, 296 N.C. 109, 147, 250 S.E.2d 890, 912 (1978), *cert. denied*, 442 U.S. 929 (1979). Thus, a case becomes moot when an intervening event either grants the relief sought by a plaintiff or resolves the controversy at issue. *Simeon v. Hardin*, 339 N.C. 358, 370, 451 S.E.2d 858, 866 (1994).

Plaintiffs' claims in these cases are moot because the General Assembly repealed and replaced all of the challenged districts in the 2011 Congressional and legislative plans *before* this Court had even remanded these cases to the Superior Court. Thus, the challenged districts were repealed long before the Superior Court entered its "judgment" which is the subject of this appeal. When the General Assembly repeals or "revises a statute in a material and substantial manner with the intent to get rid of a law of dubious constitutionality, the question of the act's constitutionality becomes moot." *Hoke County Bd. of Educ. v. State*, 367 N.C. 156, 159-60, 749 S.E.2d 451, 454-55 (2013).

Under these black-letter principles of North Carolina law, *all* of plaintiffs' claims are moot. Plaintiffs' complaints challenge congressional and legislative districts enacted by the General Assembly in 2011. Following the decisions in *Harris* and *Covington*, the constitutionality of these districts was certainly "dubious." *Hoke County Bd. of Educ.*, 367 N.C. at 159-60, 749 S.E.2d at 454-55. But all of these districts were then repealed and replaced by new congressional and legislative districts before any ruling by any state court finding them unconstitutional.[1] The Superior Court conceded that the "2011 Redistricting Plans no longer exist" and there "is no further remedy that the Court can offer with respect to the 2011 Plans." (R. p 401). Because all the districts plaintiffs challenged have been legislatively repealed and replaced, the decision below by the Superior Court is nothing more than a ruling on "abstract propositions of law." *In re Peoples*, 296 N.C. at 147, 250 S.E.2d at 912.

The General Assembly has the constitutional authority to moot a case challenging the constitutionality of a statute by repealing and replacing the statute even when it does so during the appeal of a Superior Court judgment declaring the statute unconstitutional. *Hoke County Bd. of Educ.*, 367 N.C. at 159-60, 749 S.E.2d at 872. In this case, the General Assembly repealed and replaced all of the

[1] Plaintiffs' complaints do not challenge any of the 2016 congressional districts or any of the 2017 legislative districts. The constitutionality of these new districts is not before the Court.

2011 majority black districts challenged by plaintiffs *before* this case was remanded and before the Superior Court had even entered its judgment. There was therefore no longer a case or controversy for the Superior Court to adjudicate. *State v. McCluney*, 280 N.C. 404, 405-07, 185 S.E.2d 870, 871 (1972) (action challenging statute held moot after General Assembly repealed and replaced the statute). Plaintiffs' complaints concerning the constitutionality of the challenged 2011 majority black districts were rendered moot when the 2011 congressional plan and the 2011 legislative plans were repealed and replaced. *Id*.

2. This matter is also moot because plaintiffs have obtained all of the relief they requested from the state courts by virtue of the federal court decisions.

Plaintiffs alleged several claims under the North Carolina Constitution in addition to their primary claim that the challenged majority black districts constituted racial gerrymanders under the Fourteenth Amendment and Article I, Section 19 of the North Carolina Constitution. These claims were finally resolved by *Dickson I* and then reaffirmed in *Dickson II*. Nothing in the United States Supreme Court's decision to vacate the *Dickson II* judgment on the federal claims alleged by plaintiffs changes the North Carolina Supreme Court's final resolution of separate and distinct state law claims. *See Stephenson v. Bartlett,* 355 N.C. 354, 362, 562 S.E.2d 377, 384 (2002) ("*Stephenson I*") (stating that the North Carolina Supreme Court is the final arbiter of "issues concerning the proper construction

and application of . . . the Constitution of North Carolina.") (quoting *State ex rel. Martin v. Preston*, 325 N.C. 438, 449, 385 S.E.2d 473, 479 (1989) (other citations omitted)).

But, there can be no doubt that the United States Supreme Court vacated the North Carolina Supreme Court's judgments in *Dickson I* and *II* as they related to plaintiffs' federal claims that the 2011 majority black districts were racial gerrymanders. Similarly, there can be no doubt that the majority black congressional and legislative districts established by the 2011 plans have been found unconstitutional by the United States Supreme Court. The State has been enjoined from conducting elections using any of the 2011 majority black districts. And, since the federal court injunctions were issued, the congressional and legislative districts challenged by the plaintiffs have been repealed and replaced.

Under these circumstances, there was no possible justification for the Superior Court to enter a judgment at all, declaratory or otherwise. Prior to the ruling below by the Superior Court, the federal courts had already found that the challenged majority black districts in the 2011 congressional and legislative plans violated the Fourteenth Amendment. The Superior Court was required to honor the judgments of the federal courts and had no authority to make any ruling concerning these districts under the federal constitution. *King v. Grindstaff*, 284 N.C. 348, 360, 200 S.E.2d 799, 808 (1973).

Moreover, after a statute is found to be unconstitutional under the United States Constitution, North Carolina courts will not address alternative claims under the North Carolina Constitution because they are moot. *See North Carolina Ass'n of Educators v. North Carolina*, 368 N.C. 777, 792, 786 S.E.2d 255, 792 (2016) ("Because we hold the repeal is unconstitutional in its retroactive application based on the Contract Clause of the United States Constitution, we need not address plaintiffs' alternative claim based on Article I, Section 19 of the North Carolina Constitution."). Despite this general rule, plaintiffs might have a better argument if they limited the relief they are seeking in this case to a declaration of their rights under the North Carolina Constitution because the federal courts made no rulings regarding plaintiffs' claims under the state constitution.[2] But plaintiffs did not seek a more limited declaration of their rights under state law – no doubt because they are not entitled to an award of attorney's fees for violations of the North Carolina Constitution. *Stephenson v. Bartlett*, 177 N.C. App. 239, 628 S.E.2d 442 (2006).

The plaintiffs in *Covington* and *Harris* have the right to move for their fees pursuant to 28 U.S.C. § 1988 because of the findings by both of those courts that the 2011 majority black districts violate the Fourteenth Amendment. Plaintiffs

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[2] And, if the state constitutional claims had not otherwise become moot as explained above, then, as noted by the Superior Court, given that the federal equal protection principle has been "expressly incorporated" into the state constitution, the outcome of any state claims on this issue would in any event have been controlled by the outcome on the federal equal protection claims. (R. p 399) (*citing S.S. Kresge Co. v. Davis*, 277 N.C. 654, 660 (1971)).

here cannot recover a second bucket of fees without a judgment in state court holding that the challenged districts violate the Fourteenth Amendment – even though that specific issue has been fully and completely resolved by the federal courts.

But plaintiffs are not entitled to an abstract finding concerning a repealed statute simply because they want an award of attorneys' fees and costs. *See, e.g.*, *Cochran v. Rowe*, 225 N.C. 645, 646, 36 S.E.2d 75 (1945) ("As a general rule this Court will not hear any appeal when the subject matter of the litigation has ceased to exist and the only matter to decide is the disposition of costs."); *Russell v. Campbell*, 112 N.C. 404, 17 S.E. 149 (1893) ("Since the appeal was taken the appellant has come into possession of the property, or its equivalent, the Court will not hear a matter merely to adjudicate the costs when the subject matter of the appeal has been disposed of."); *see also S-1 v. Spangler*, 832 F.2d 294, 297, n.1 (4th Cir. 1987) ("The fact that the parents still assert a claim for costs and attorney's fees against the State Board and Spangler does not avert mootness of the underlying action on the merits.") (*citing Flesch v. Eastern Pennsylvania Psychiatric Institute*, 472 F.Supp. 798, 802 (E.D.Pa.1979) ("Any other rule would largely nullify the mootness doctrine with respect to cases brought under the myriad federal statutes that authorize fee awards.")). There is no precedent for a North Carolina court to enter a judgment declaring unconstitutional a statute that

has already been enjoined by the federal courts and repealed by the General Assembly simply to allow the plaintiffs to apply for an award of fees.

In truth, all of the claims alleged by plaintiffs were fully resolved by the decisions in *Harris* and *Covington.* North Carolina courts are prohibited from hearing a moot case just "to . . . determine which party should have rightly won in the lower court." *Benvenue PTA Ass'n v. Nash County Bd. of Elec.*, 275 N.C. 675, 679, 170 S.E.2d 473, 476 (1969). Because the decisions in *Harris* and *Covington* fully resolve the controversy at issue, these cases are moot and should have been dismissed by the Superior Court. *Simeon,* 339 N.C. at 370, 451 S.E.2d at 866.

3. The Supreme Court of North Carolina has applied these principles to dismiss redistricting cases that have been resolved by judicial decisions or new legislation.

Application of the mootness doctrine to dismiss plaintiffs' case is further mandated by the North Carolina Supreme Court's decisions in the *Stephenson* line of cases. In 2002, a group of plaintiffs challenged the constitutionality of the 2001 legislative plans under the "whole county provisions" ("WCP") of the North Carolina Constitution. *See Stephenson I*, 355 N.C. 354, 562 S.E.2d 377 (2002). In *Stephenson I*, the North Carolina Supreme Court found that the 2001 legislative plans violated the WCP, established criteria under the WCP for the drawing of legislative districts, and remanded the case to Superior Court for further proceedings. The Superior Court then found that legislative plans enacted in 2002

by the General Assembly also violated the WCP and adopted interim plans for the 2002 election. In *Stephenson v. Bartlett*, 357 N.C. 301, 582 S.E.2d 247 (2003) ("*Stephenson II*"), the North Carolina Supreme Court affirmed the findings by the Superior Court including its approval of the Supreme Court's interim plans used only for the 2002 General Election.

Thereafter, in 2003, the General Assembly enacted new legislative plans to be used in the 2004 General Election. The General Assembly also enacted legislation vesting exclusive jurisdiction for all future districting lawsuits in a three-judge panel of the Superior Court. *Stephenson v. Bartlett*, 358 N.C. 219, 595 S.E.2d 112 (2004) ("*Stephenson III*"). After this legislation was enacted, the *Stephenson* plaintiffs challenged the 2003 legislative plans by filing a motion to enforce the judgment entered in *Stephenson II*. The Supreme Court affirmed the decision by the Superior Court denying plaintiffs' motion and directing the plaintiffs to file a new lawsuit to challenge the constitutionality of the 2003 legislative plans. In relevant part, the Supreme Court of North Carolina held:

> In other words, as a result of our opinions in *Stephenson I* and *II*, there is no longer any case or controversy before the Court relating to the constitutional requirements for a North Carolina legislative redistricting plan. Final orders have been issued as to the 2001 plans and the 2002 plans, and the 2002 election has been held. *This case is over*.

Stephenson III, 358 N.C. at 225-26, 595 S.E.2d at 117 (emphasis added).

As in the *Stephenson* line of cases, the 2011 congressional and legislative plans have been enjoined by a court. These decisions by the federal courts are binding on North Carolina courts. *King,* 284 N.C. at 360, 200 S.E.2d at 808. Thus, the impact on this litigation of the decisions of the United States Supreme Court in *Harris* and *Covington* cannot be distinguished from the decisions of this Court in *Stephenson I*, and *Stephenson II*. Just as the decisions in *Stephenson I* and *Stephenson II* ended any case or controversy regarding the districts used in the 2002 General Election, so did the decisions in *Harris* and *Covington* resolve all questions regarding the 2011 majority black districts. Moreover, as was the case in *Stephenson III*, all of the districts challenged in *Stephenson* have been repealed and replaced by the General Assembly. Just like the plaintiffs in *Stephenson III*, there was nothing left for the Superior Court to rule upon because the statutes challenged by plaintiffs had already been both enjoined and repealed. "This case is over," and plaintiffs here are not entitled to a judgment simply to facilitate their desire to double dip in an attorney's fees award.

4. Because this matter is moot, there are no remaining state or federal issues that the Superior Court could or should have addressed.

Plaintiffs have made several arguments to this Court and the Superior Court in an attempt to avoid the fact that this matter is now moot. To the extent plaintiffs intend to rely upon these arguments, they are just as inapplicable today as they

were when this matter was pending before the North Carolina Supreme Court a few months ago.

First, there is no applicable exception to the mootness doctrine that allowed the Superior Court to consider any further issues in these cases. The decision in *Stephenson III* recognizes that the "public interest" and other exceptions to the mootness doctrine do not apply in redistricting cases under these circumstances. *Stephenson III* also follows long-standing North Carolina precedent that a case challenging a statute becomes moot once the challenged statute is replaced. This is true even when the General Assembly replaces the statute while an appeal of a trial court's decision finding the statute unconstitutional is pending. *Hoke County Bd. of Educ.*, 367 N.C. at 59-60, 749 S.E.2d at 454-55; *see also Calabria v. North Carolina State Bd. of Elections*, 198 N.C. App. 550, 559, 680 S.E.2d 738, 746 (2009) (dismissing as moot appeal regarding candidate's rights under public campaign financing statute where General Assembly amended statute before appeal was heard and finding that the "public interest" and other exceptions to the mootness doctrine did not apply). If repeal of a statute moots an appeal even in a case where the plaintiff actually obtained a judgment declaring the statute unconstitutional, it cannot be disputed that repeal of a statute prior to any judgment finding it illegal also moots a case. *Hoke* and its progeny cannot be distinguished from the facts of this case.

When this matter was pending before the North Carolina Supreme Court following the second remand from the United States Supreme Court, plaintiffs argued that this matter was not moot because they had not "yet obtained the injunctive relief they sought and are entitled to." This contention is wrong because: (1) the statutes they challenge have been repealed; and (2) all of the relief sought by plaintiffs was fully granted by the federal courts. And, even though the federal courts based their decisions strictly on federal law, there was no reason for the Superior Court to address plaintiffs' racial gerrymander claims under the North Carolina Constitution because their state claims became moot once the federal courts enjoined the statutes. *See North Carolina Ass'n of Educators,* 368 N.C. at 792, 786 S.E.2d at 792.

Next, to the extent plaintiffs contend that they somehow remain entitled to a declaration of their rights under the challenged districts, the North Carolina Supreme Court has held that "[u]nder the Declaratory Judgment Act, jurisdiction does not extend to questions that are altogether moot." *Pearson v. Martin,* 319 N.C. 449, 451-52, 355 S.E.2d 496, 498 (1997) ("The statute does not require the court to give a purely advisory opinion which the parties might, so to speak, put on ice to be used if and when occasion might arise.") (quoting *Tryon v. Power Co.*, 222 N.C. 200, 204, 22 S.E.2d 450, 453 (1942)). Thus, the Superior Court could not lawfully enter a declaratory judgment for plaintiffs here.

Ultimately, there was nothing left for the Superior Court to do in this case other than to issue an advisory opinion about which party should have prevailed in the court below if the legislature had not repealed the challenged districts and if the federal courts had not already declared the statutes illegal and enjoined them. *Benvenue PTA Ass'n,* 275 N.C. at 679, 170 S.E.2d at 476 ("When, pending an appeal to this Court, a development occurs, by reason of which the questions originally in controversy between the parties are no longer at issue, the appeal will be dismissed for the reason that this Court will not entertain or proceed with a cause merely to determine abstract propositions of law or to determine which party should rightly have won in the lower court.") (*citing Kendrick v. Cain,* 272 N.C. 719, 159 S.E.2d 33 (1968)); *In re Assignment of School Children,* 242 N.C. 500, 87 S.E.2d 911 (1955); *Savage v. Kinston,* 238 N.C. 511, 78 S.E.2d 318 (1953) ; *Glenn v. Culbreth*, 197 N.C. 675. 150 S.E. 332 (1929)). *See also Pearson v. Martin,* 319 N.C. at 451-52, 355 S.E.2d at 498.

The federal decisions in *Harris* and *Covington* found that the challenged districts were unconstitutional and enjoined them. Thereafter, the districts challenged by plaintiffs were repealed and did not exist at the time the Superior Court entered its judgment. All of the relief plaintiffs were seeking in this case was awarded by the federal courts long before the Superior Court entered its judgment. There was nothing left for the Superior Court to decide. Plaintiffs are

not entitled to an advisory opinion on their federal claims for the sole purpose of giving them a right to apply for attorney's fees. The Superior Court should have dismissed these consolidated cases because they are moot.

CONCLUSION

There is no authority for the Superior Court to rule on statutes that have been enjoined and no longer exist. The judgment of the Superior Court should be reversed. These cases should be remanded to the Superior Court with instructions to dismiss them.

Respectfully submitted this, the 13th day of June, 2018.

OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.

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 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;

[X] Depositing a copy hereof, first class postage pre-paid in the United States mail, properly addressed to:

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This the 13th day of June, 2018.

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