

No. _____

TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

COMMON CAUSE; NORTH CAROLINA
 DEMOCRATIC PARTY; PAULA ANN
 CHAPMAN; HOWARD DU BOSE JR.;
 GEORGE DAVID GAUCK; JAMES
 MACKIN NESBIT; DWIGHT JORDAN;
 JOSEPH THOMAS GATES; MARK S.
 PETERS; PAMELA MORTON; VIRGINIA
 WALTERS BRIEN; JOHN MARK TURNER;
 LEON CHARLES SCHALLER; REBECCA
 HARPER; LESLEY BROOK WISCHMANN;
 DAVID DWIGHT BROWN; AMY CLARE
 OSEROFF; KRISTIN PARKER JACKSON;
 JOHN BALLA; REBECCA JOHNSON;
 AARON WOLFF; KAREN SUE
 HOLBROOK; KATHLEEN BARNES; ANN
 MCCRACKEN; JACKSON THOMAS
 DUNN, JR.; ALYCE MACHAK; WILLIAM
 SERVICE; DONALD RUMPH; STEPHEN
 DOUGLAS MCGRIGOR; NANCY
 BRADLEY; VINOD THOMAS; DERRICK
 MILLER; ELECTA E. PERSON; DEBORAH
 ANDERSON SMITH; ROSALYN SLOAN;
 JULIE ANN FREY; LILY NICOLE QUICK;
 JOSHUA BROWN; CARLTON E.
 CAMPBELL SR.

Plaintiffs,

v.

DAVID LEWIS, IN HIS OFFICIAL
 CAPACITY AS SENIOR CHAIRMAN OF
 THE HOUSE SELECT COMMITTEE ON
 REDISTRICTING,; RALPH HISE, IN HIS
 OFFICIAL CAPACITY AS CHAIR OF THE
 SENATE STANDING COMMITTEE ON
 REDISTRICTING; SPEAKER OF THE

From Wake County
 No. 18 CVS 014001

**PETITION FOR
 DISCRETIONARY REVIEW
 PRIOR TO DETERMINATION
 BY THE COURT OF APPEALS
 AND MOTION TO SUSPEND
 APPELLATE RULES**

NORTH CAROLINA HOUSE OF REPRESENTATIVES TIMOTHY K. MOORE; PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE PHILIP E. BERGER; THE NORTH CAROLINA STATE BOARD OF ELECTIONS; DAMON CIRCOSTA, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS; STELLA ANDERSON, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS; KENNETH RAYMOND, IN HIS OFFICIAL CAPACITY AS MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS; JEFF CARMON, IN HIS OFFICIAL CAPACITY AS MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS; DAVID C. BLACK, IN HIS OFFICIAL CAPACITY AS MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS,

Defendants.

INDEX

TABLE OF AUTHORITIES	iii
INTRODUCTION	3
PETITION FOR DISCRETIONARY REVIEW	5
STATEMENT OF THE CASE.....	5
A. Pretrial and Trial Proceedings Below.....	5
B. The Superior Court’s 3 September 2019 Judgment and Decree	6
C. Enactment of Remedial Plans and Petitioners’ Objections.....	8
D. The Superior Court’s 29 October 2019 Approval Order.....	10
E. The Deadline to Finalize Remedial Plans for the March 2020 Primaries	11
REASONS WHY CERTIFICATION SHOULD ISSUE PRIOR TO DETERMINATION BY THE COURT OF APPEALS.....	11
I. This Appeal Is of Enormous Public Interest	11
A. Forsyth-Yadkin	12
B. Columbus-Pender-Robeson	19
II. This Appeal Involves Legal Principles of Utmost Significance to the State’s Jurisprudence	23
III. Failure To Certify Will Cause Enormous Harm by Preventing Appellate Review of the Remedial Plans Before the 2020 Elections	24
IV. The Expedient Administration of Justice Requires Certification.....	24

V. The Question of Whether the Remedial Plans Cure the Constitutional Violations Found Is Critical to the Jurisdiction and Integrity of the Court System	25
ISSUES FOR WHICH REVIEW IS SOUGHT.....	25
MOTION TO SUSPEND APPELLATE RULES	25
CONCLUSION	27
CERTIFICATE OF SERVICE	29

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Pages</u>
<i>Common Cause v. Lewis</i> , 2019 WL 4569584 (N.C. Super. Sept. 3, 2019)	<i>passim</i>
<i>State v. Hart</i> , 361 N.C. 309, 644 S.E.2d 201 (2007).....	26
<i>State v. Stanley</i> , 288 N.C. 19, 215 S.E.2d 589 (1975).....	26
 <u>Statutes</u>	
N.C.G.S. § 7A-31(b).....	5, 11
N.C.G.S. § 7A-31(b)(1).....	11
N.C.G.S. § 7A-31(b)(2).....	23
N.C.G.S. § 7A-31(b)(3).....	24
N.C.G.S. § 7A-31(b)(4).....	24
N.C.G.S. § 7A-31(b)(5).....	25
N.C.G.S. § 120-2.4.....	7
N.C.G.S. § 163A-700(b).....	24
N.C.G.S. § 974(b).....	24
 <u>Other Authorities</u>	
North Carolina Const. art. I, § 10.....	7
North Carolina Const. art. I, § 19.....	7
North Carolina Const. art. I, § 12.....	7
North Carolina Const. art. IV, § 12(1)	27
N.C. R. App. P. 2.....	7, 25, 26
N.C. R. App. P. 15(a)	7, 25

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Defendants.

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Petitioners Common Cause, the North Carolina Democratic Party, and 37 individual North Carolina voters respectfully petition this Court to certify for discretionary review, prior to determination by the Court of Appeals, the Order entered on 28 October 2019 in *Common Cause v. Lewis*, No. 18-CVS-014001 (N.C. Super. Ct., Wake Cty.), as well as any related petitions or appellate motions relating to the Order. In the Order, a three-judge panel of the Superior Court approved remedial state House and Senate redistricting plans passed by the General Assembly after the Superior Court rightfully held that the prior redistricting plans violated the North Carolina Constitution's

Free Elections Clause, Equal Protection Clause, and Freedom of Speech and Freedom of Assembly Clauses. Petitioners here appeal the Superior Court's approval of two remedial House county groupings—Forsyth-Yadkin and Columbus-Pender-Robeson—because the General Assembly reestablished those groupings as extreme partisan gerrymanders in the post-judgment remedial process. Petitioners also move to suspend the North Carolina Rules of Appellate Procedure to avoid manifest injustice and to expedite this matter of immense public importance. This matter is of extreme urgency, as the State Board of Elections has stated that, absent intervention by the courts, final remedial plans likely must be in place by 15 December 2019 for use in the 3 March 2020 primaries.

INTRODUCTION

Petitioners brought this case challenging the State's gerrymandered 2017 state House and Senate plans to ensure that every North Carolina voter would have the opportunity, just once this decade, to vote in free and fair legislative elections untainted by partisan manipulation. In a judgment that no defendant appealed, the Superior Court below held that the 2017 plans violated the North Carolina Constitution, enjoined their further use, and ordered a remedial process to develop new plans. The Superior Court correctly interpreted the state constitution to prohibit extreme partisan gerrymandering, and its important judgment has resulted in fair districts for North Carolina voters, for the most part. In the court-ordered remedial process, however, the General Assembly once again gerrymandered a host of House districts, including by recreating specific features of the prior gerrymanders. In the Order now on appeal, the Superior Court nonetheless

approved the General Assembly's remedial House plan in its entirety over Petitioners' objections.

Petitioners appeal the Superior Court's approval of two specific remedial House county groupings in which the partisan gerrymandering is most evident and egregious: (1) the Forsyth-Yadkin grouping, which has five districts, and (2) the Columbus-Pender-Robeson grouping, which has three districts. In manually revising both groupings to unpair incumbents, the House acted with clear partisan intent and restored the prior gerrymander. As a result, these remedial groupings are extreme partisan outliers relative to non-partisan plans. Indeed, the Superior Court acknowledged that incumbents in Forsyth-Yadkin likely had "partisan considerations in mind" in revising their own districts, and that these partisan incumbency-protection measures subordinated traditional districting criteria. But the court approved the grouping on the ground that the revisions would "mutually benefit" both a Republican incumbent and a Democratic incumbent by making their districts more politically favorable for each of them. That ruling allowed the General Assembly to perpetuate, rather than cure, the unconstitutional partisan gerrymandering, and is inconsistent with the Superior Court's consequential merits determination. Given that this case is the first time North Carolina courts have provided guidance on extreme partisan gerrymandering, and that the next round of redistricting is fast-approaching, the Superior Court's remedial order deserves immediate appellate review from the State's highest court.

This appeal raises two time-sensitive questions of immense importance to voters and democracy in this State: (1) can the General Assembly manipulate the State's

legislative districts for partisan gain during the remedial phase of a partisan gerrymandering case after a court strikes down the prior plan; and (2) can the General Assembly be excused for gerrymandering districts when the results are politically favorable to individual incumbents of both parties alike. The answer to both questions is no, and this Court's review is urgently needed. Given the State Board of Elections' impending 15 December 2019 deadline for the final new plans to be used in the March 2020 primaries, there is simply no time for review by the Court of Appeals.

PETITION FOR DISCRETIONARY REVIEW

Pursuant to N.C.G.S. § 7A-31(b) and Rules 2 and 15(a) of the North Carolina Rules of Appellate Procedure, Petitioners respectfully petition this Court to exercise its authority to grant discretionary review of the Order prior to determination by the Court of Appeals. As set forth below, this case satisfies all five of the statutory criteria under N.C.G.S. § 7A-31(b) for certification prior to determination by the Court of Appeals, any one of which is sufficient to justify this Court's exercise of discretionary review.

STATEMENT OF THE CASE

A. Pretrial and Trial Proceedings Below

Petitioners, who were Plaintiffs below, filed this case on 13 November 2018. They moved to expedite the case one week later. On 14 December 2018, rather than respond to Petitioners' motion to expedite, Legislative Defendants removed the case to federal court. The federal district court granted Petitioners' emergency motion to remand on 2 January 2019.

On 29 January 2019, Legislative Defendants finally responded to Petitioners' motion to expedite. In advocating a longer schedule for the liability phase of the case, Legislative Defendants asserted that "[i]f any proceeding is going to advance at breakneck speed, it should be the remedial proceeding, not the liability proceeding." App. 108.

The Superior Court presided over a two-week bench trial from 15 July 2019 to 26 July 2019. Petitioners presented testimony from four expert witnesses who established the extreme partisan intent and effects of the 2017 Plans. Petitioners also introduced files produced in discovery that had belonged to the late mapmaker Dr. Thomas Hofeller, which revealed his and Legislative Defendants' singular focus on partisan advantage in drawing the 2017 Plans.

B. The Superior Court's 3 September 2019 Judgment and Decree

On 3 September 2019, the Superior Court entered final judgment for Petitioners invalidating the 2017 Plans. *See Common Cause v. Lewis*, 2019 WL 4569584 (N.C. Super. Sept. 3, 2019). The court held that the 2017 Plans violated the North Carolina Constitution's Free Elections Clause, art. I, § 10, Equal Protection Clause, art. I, § 19, and Freedom of Speech and Assembly Clauses, art. I, §§ 12, 14. The 2017 Plans, the court explained, "do not permit voters to freely choose their representative, but rather representatives are choosing voters based upon sophisticated partisan sorting." *Id.* at *3. The 2017 Plans sought to entrench Republican control of both chambers of the General Assembly statewide, and "also unlawfully seek to predetermine election outcomes in specific districts and county groupings." *Id.* at *112. The court detailed the ways in

which each challenged House and Senate county grouping packed or cracked Democratic voters in order to maximize Republican advantage. *Id.* at *43-73. The court invalidated a total of fourteen House county groupings and seven Senate groupings. *Id.* at *135.

In line with N.C.G.S. § 120-2.4, the Superior Court gave the General Assembly two weeks to pass remedial plans redrawing the invalidated county groupings. The court's Decree specified the criteria to govern creation of remedial plans. The court mandated that "[p]artisan considerations and election results data shall not be used in the drawing of legislative districts in the Remedial Maps." *Id.* at *136. The court listed the "exclusive[]" criteria that instead must be used in drawing the remedial plans, including the traditional districting criteria of compactness and avoiding splitting municipalities and precincts. *Id.* The court added that "mapmakers may take reasonable efforts to not pair incumbents unduly in the same election district," but directed that "the invalidated 2017 districts may not be used as a starting point for drawing new districts, and no effort may be made to preserve the cores of invalidated 2017 districts." *Id.* Finally, the court stated its intention to appoint a Referee "(1) to assist the Court in reviewing any Remedial Maps enacted by the General Assembly; and (2) to develop remedial maps for the Court should the General Assembly fail to enact lawful Remedial Maps within the time allowed." *Id.* at *137. The court subsequently appointed Dr. Nathaniel Persily to serve as the Referee. *See App.* 89.

No defendant appealed the Superior Court's 3 September 2019 final judgment.

C. Enactment of Remedial Plans and Petitioners' Objections

At the legislative hearings that began on 9 September 2019, leaders of the House and Senate Redistricting Committees announced that, as the “base map” for each county grouping, they would select one of the computer-simulated plans that had been created in the litigation by Petitioners’ expert, Dr. Jowei Chen. Because these simulated plans paired the current incumbents in many groupings, the Committees undertook a manual process to unpair the incumbents. In the House, the adopted process allowed the paired incumbents in each county grouping to revise their own districts in order to unpair themselves.

In the final floor votes, every Democrat in both chambers of the General Assembly voted against the remedial House plan.

Petitioners filed objections to the General Assembly’s remedial plans on 27 September 2019. *See* App. 29-85. After detailing numerous irregularities in the House’s process, Petitioners objected to five specific House groupings.¹ To limit the scope of the instant time-sensitive appeal, Petitioners now challenge the Superior Court’s approval of two remedial House groupings in which the gerrymandering is most egregious: Forsyth-Yadkin and Columbus-Pender-Robeson.

In their objections brief below, Petitioners detailed how, in manually revising the “base map” for these two groupings, incumbents restored specific elements of the prior gerrymander and made each grouping much more favorable to Republicans. *See* App.

¹ Petitioners did not object at all to the remedial Senate plan.

55-66. To illustrate the extent to which these remedial groupings are gerrymandered, Petitioners' expert Dr. Chen generated 1,000 new computer simulations for each grouping, which he described as "Simulation Set 3." Like the simulations Dr. Chen presented at trial, Simulation Set 3 includes 1,000 randomly-drawn maps for each county grouping that prioritize traditional districting criteria such as ensuring compactness and avoiding splitting counties, municipalities, and voting tabulation districts (VTDs), without consideration of partisanship. Simulation Set 3 differed from the simulations Dr. Chen presented at trial in that the algorithm avoided pairing the current incumbents, as opposed to the incumbents in place when the prior districts were drawn.

Dr. Chen demonstrated that the remedial Forsyth-Yadkin and Columbus-Pender-Robeson groupings are both extreme partisan outliers compared to his 1,000 non-partisan plans that avoid pairing the current incumbents. App. 57, 62-63. Dr. Chen further showed that the manual revisions to the Forsyth-Yadkin grouping rendered it an extreme outlier in its lack of compactness, and that the incumbents in the grouping split two additional municipalities in revising the grouping. App. 64-66.

Because the Superior Court had indicated that the Referee would develop remedial districts if the General Assembly failed to enact lawful ones, Petitioners did not propose a specific alternative configuration for each challenged grouping. Petitioners stated, however, that "if it would assist the Court or the Court otherwise deems it appropriate, [Petitioners] would be happy to provide the Court with any relevant data and files from Dr. Chen's Simulation Set 3 for these [challenged] House groupings." App. 83. As

noted, Dr. Chen's Set 3 included 1,000 alternative nonpartisan maps that did not pair any of the current incumbents in either grouping.

D. The Superior Court's 29 October 2019 Approval Order

On 20 October 2019, the Superior Court entered the Order now on appeal. The court rejected Petitioners' objections to all five remedial House county groupings and approved the General Assembly's remedial House and Senate plans in full.

With respect to Forsyth-Yadkin, the court recognized that the incumbents' manual revisions to this grouping from the base map "likely were made with partisan considerations in mind." App. 21. The Court further found that "traditional redistricting criteria of compactness and preserving municipal boundaries were subordinated to unpairing incumbents." *Id.* But the court nevertheless approved the grouping. The court reasoned that, in addition to benefitting the Republican incumbent in House District 75, the revisions would "mutually benefit" the Democratic incumbent in House District 71 by packing additional Democratic voters into the district. *Id.*

With respect to Columbus-Pender-Robeson, the court acknowledged that, in revising this grouping from the base map, the paired incumbents moved eleven different VTDs, that these revisions made House District 46 several points more Republican-leaning, and that the changes reinstated the division of the Democratic-leaning municipalities of Whiteville and Chadbourn, just like the invalidated 2017 Plan. App. 22-24. But the court approved the grouping. *Id.*

E. The Deadline to Finalize Remedial Plans for the March 2020 Primaries

On 4 October 2019, the Executive Director of the State Board of Elections submitted an affidavit to the Superior Court setting forth the relevant dates by which remedial plans must be finalized for use in the primaries on 3 March 2020 as scheduled. *See* App. 98-104. The Board's Executive Director explained that, with an adjustment that either the courts or the Board can order to the deadline for distributing overseas ballots, the Board would likely need final remedial plans by 15 December 2019 for use in the March 2020 primaries. App. 101.

**REASONS WHY CERTIFICATION SHOULD ISSUE
PRIOR TO DETERMINATION BY THE COURT OF APPEALS**

Under N.C.G.S. § 7A-31(b), this Court may certify a cause for discretionary review before determination by the Court of Appeals if, in this Court's opinion, any of five conditions are met. This case satisfies all five of those conditions.

I. This Appeal Is of Enormous Public Interest

This appeal warrants this Court's immediate discretionary review because "[t]he subject matter of the appeal has significant public interest." N.C.G.S. § 7A-31(b)(1). This appeal will decide whether hundreds of thousands of North Carolinians will be able to vote in nonpartisan, non-discriminatory House districts in 2020, or whether they will be forced yet again to vote in districts manipulated for partisan advantage to predetermine election outcomes. In a final judgment that was not appealed, the Superior Court correctly held that such partisan manipulation violates the fundamental rights of North Carolinians under the state constitution. The unlawful gerrymandering of legislative

districts has eroded public confidence in democracy in this State, and it is of paramount public interest that the remedy in this case—which carries the affirmative approval of the state judiciary—cure the constitutional violations.

As detailed below, the two remedial House groupings at issue in this appeal perpetuate rather than cure the partisan gerrymanders from the prior 2017 Plans.

A. Forsyth-Yadkin

In striking down the 2017 Plan version of the Forsyth-Yadkin grouping, the Superior Court found that the grouping unlawfully “packed Democratic voters into House Districts 71 and 72” and “then cracked the remaining Democratic voters in this grouping across the remaining districts.” *Common Cause*, 2019 WL 4569584, at *63. The court explained that, “in order to join Republican VTDs, House District 75 traverse[d] an extremely narrow passageway on the border of Forsyth County,” and that House District 75 also “wrap[ped] around the city [of Winston-Salem] to include Republican-dominated VTDs on either side of Forsyth County.” *Id.*

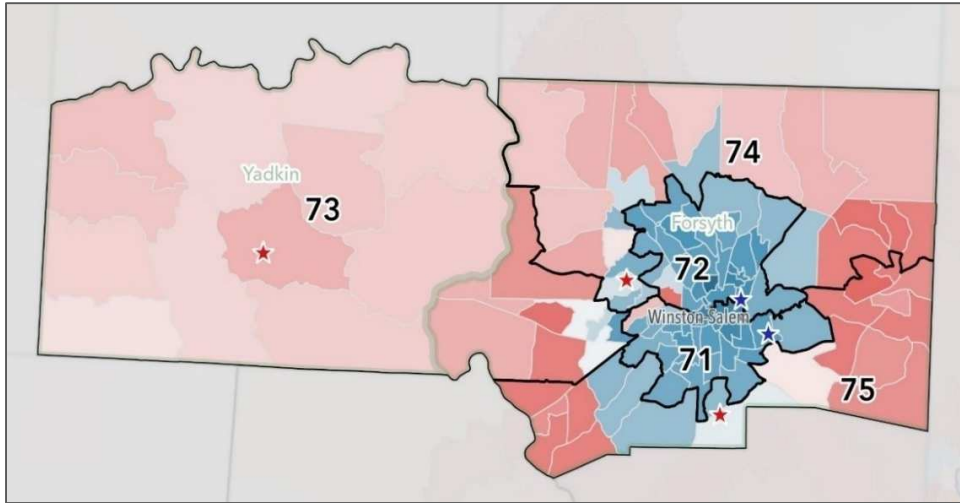
The Remedial House Plan recreates this gerrymander. In amending the base map chosen from Dr. Chen’s simulations, the incumbents revised House Districts 71 and 75² to pack three additional heavily Democratic VTDs into House District 71 and move the Republican incumbent, Representative Lambeth, into a safe Republican district. In so doing, the House recreated the specific features of the prior gerrymander. Once again,

² Petitioners refer to the district numbers under the final Remedial House Plan. The Superior Court’s references in the order below to “House District 74” are to the district number in the base map, but that district corresponds to House District 71 in the Remedial House Plan.

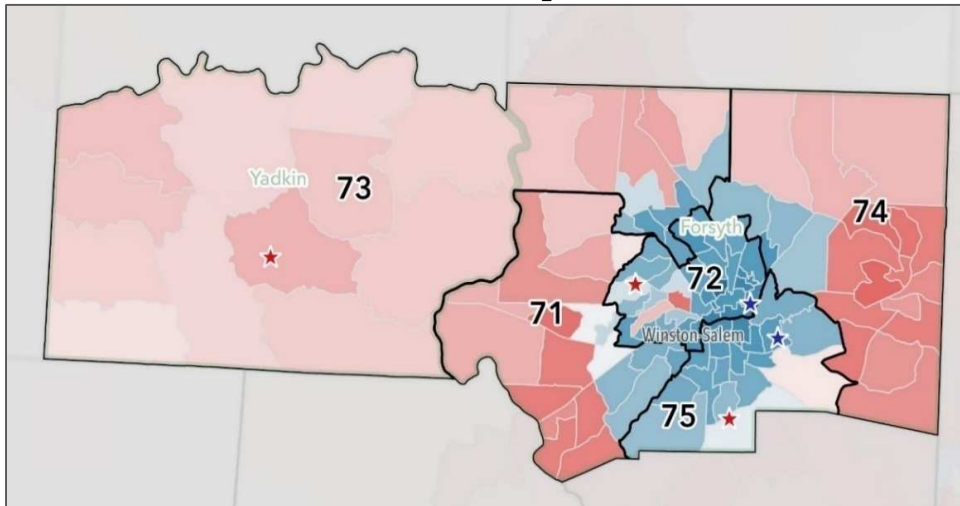
“to join Republican VTDs, House District 75 traverses an extremely narrow passageway on the border of Forsyth County,” and once again, House District 75 “wrap[s] around the city [of Winston-Salem] to include Republican-dominated VTDs on either side of Forsyth County.” *Id.* The incumbents made these revisions after Rep. Lambeth stated at the very onset of the amendment process that he wanted to “take the 75th out to Kernersville because [he has] represented it in the past.” App. 19-20, 59.

The three maps below lay bare the patent gerrymandering of this remedial grouping, including the perfect division of Democratic and Republican voters on the eastern side of Forsyth County. Specifically, these maps depict (1) the 2017 Plan version of this grouping, (2) the base map chosen from Dr. Chen’s simulations, and (3) the final remedial grouping. The color-coding represents the Democratic or Republican vote margin of each VTD in the 2016 Attorney General race, with darker blue representing more Democratic VTDs and darker red representing more Republican VTDs. The blue stars represent the home addresses of the Democratic incumbents and the red stars represent the home addresses of the Republican incumbents.

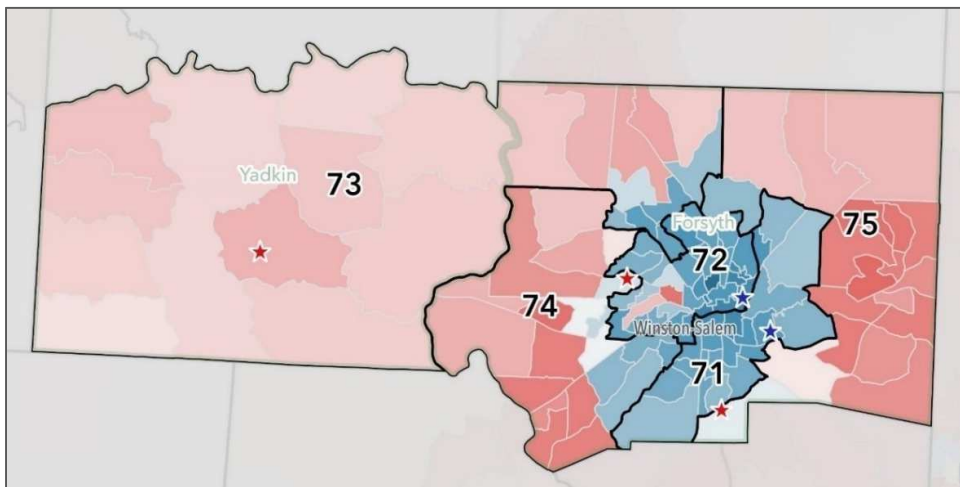
2017 House Plan



Base Map

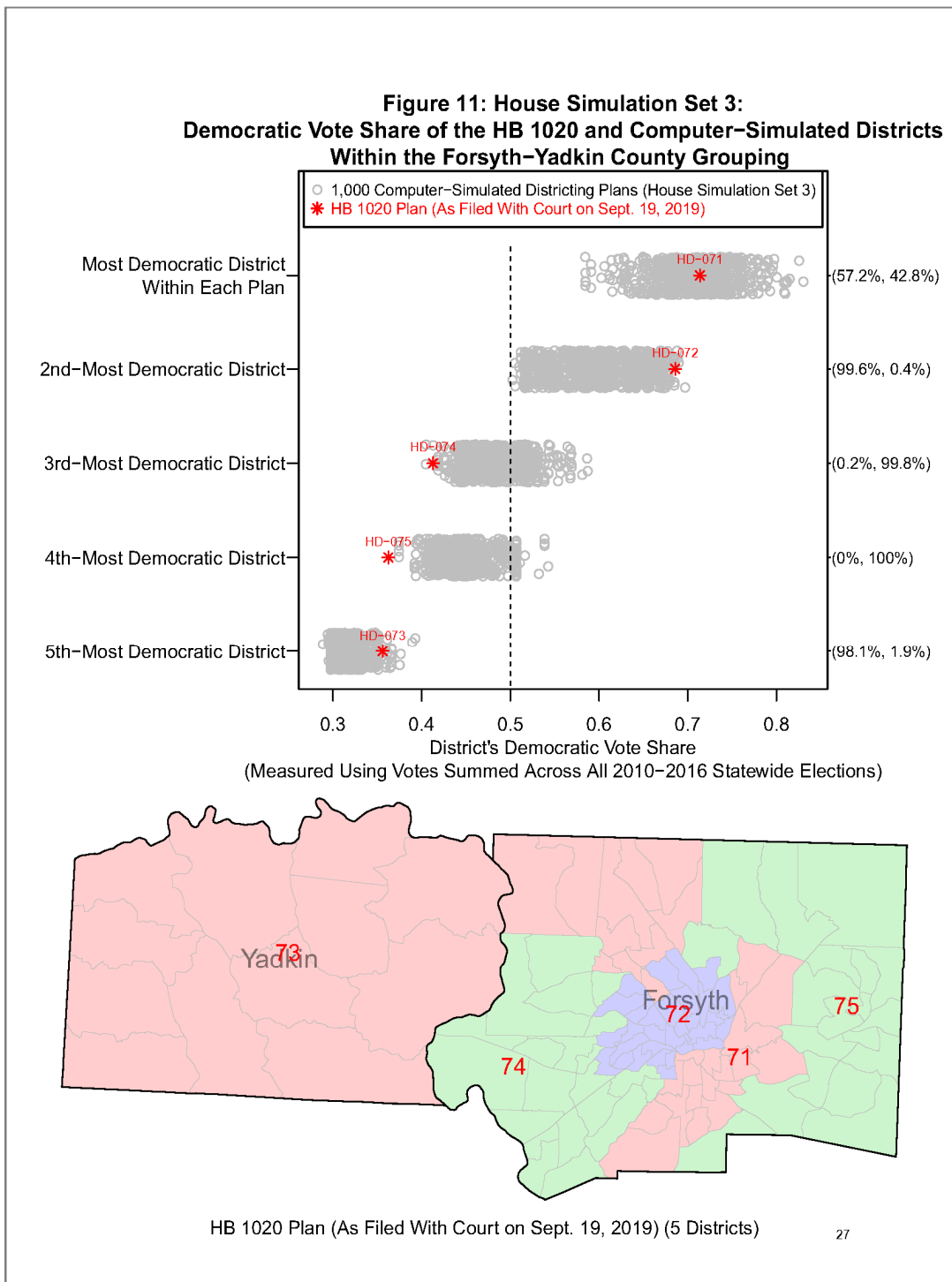


Remedial House Plan



Dr. Chen further demonstrated the extreme partisan gerrymandering of the remedial Forsyth-Yadkin grouping through his Simulation Set 3, which produced 1,000 non-partisan plans for this grouping that comply with traditional districting criteria and avoid pairing the current incumbents. As shown below, this remedial grouping has four districts that are more extreme in their partisanship than 98% of their corresponding districts in the Simulation Set 3 plans. This renders the remedial configuration of Forsyth-Yadkin an *even more extreme gerrymander than the invalidated 2017 Plan*, since the 2017 Plan's version of this grouping had just two districts that were over 98% outliers.

In the chart below, the red stars correspond to the districts in the remedial plan and the gray circles correspond to the districts in Dr. Chen's Simulation Set 3 plans. The top row compares the most Democratic district in this remedial grouping (House District 71) with the most Democratic district in each of the 1,000 Simulation Set 3 plans, the second row compares the second most Democratic district in this remedial grouping (House District 72) with the second most Democratic district in each of the 1,000 Simulation Set 3 plans, and so on. The numbers in parentheses on the right side of the figure indicate the percentage of the 1,000 simulations that are less or more Democratic than the remedial House plan district for the relevant row.



Dr. Chen’s analysis shows that two safe Republican districts under the remedial House plan—House Districts 74 and 75—would be competitive or even Democratic-leaning districts under a non-partisan plan.

The Superior Court’s reasoning for accepting the General Assembly’s remedial plan for this grouping is contrary to the North Carolina Constitution, is inconsistent with its own determination on the merits and order on remedy, and should be reversed. The court approved the grouping despite finding that the incumbents’ manual revisions to this grouping “likely were made with partisan considerations in mind,” and that the “traditional redistricting criteria of compactness and preserving municipal boundaries were subordinated to unpairing incumbents.” App. 21. The Court stated that this partisan-motivated incumbency protection was permissible because the revisions “inured to the mutual benefit of both” a Republican incumbent *and* a Democratic incumbent. *Id.* Specifically, the changes made the Democratic incumbent’s House District 71 more Democratic and the Republican incumbent’s House District 75 more Republican. This erroneous holding raises issues of significant public import.³

First, partisan gerrymandering always provides a “mutual benefit” to Democratic incumbents in packed Democratic districts and Republican incumbents in neighboring districts. Partisan gerrymandering operates by packing Democratic voters into a few districts that Democratic incumbents win by lopsided margins, enabling the neighboring Republican incumbents to have safe districts that otherwise could be competitive. The

³ The obvious way to amend the base map to unpair the incumbents in a non-partisan way, and without subordinating traditional districting criteria, would have been to move the Democratic incumbent into the district now-labeled House District 75. The Superior Court suggested that this alternative approach would have put the Democratic incumbent “into a safe Republican district,” App. 21, but that is not accurate. Unpairing the incumbents by moving the Democratic incumbent into House District 75 would have made that district highly competitive.

invalidated 2017 Plan operated in exactly this manner—it packed Democratic voters into House District 71 (and House District 72) to ensure safe Republican seats in House District 75 and the other districts in the grouping. *Common Cause*, 2019 WL 4569584, at *63. The General Assembly’s remedial plan for this grouping is no different; indeed, the remedial House District 71 has an even *higher* Democratic vote share than the 2017 Plan version, as it packs Democratic voters with even greater precision than the invalidated 2017 version. That the incumbents from both sides of the aisle appeared to accept this outcome should not excuse it; the General Assembly should not be permitted to use incumbency protection as a smokescreen for partisan gerrymandering.

Second, the Superior Court’s Decree mandated that “[p]artisan considerations and election results data *shall not be used* in the drawing of legislative districts in the Remedial Maps.” Decree ¶ 5(h) (emphases added). Yet in approving the General Assembly’s remedial House plan in full, the court found that incumbent legislators had “*partisan considerations* in mind” when constructing the remedial districts in Forsyth-Yadkin. App. 21 (emphasis added). Given this finding, this remedial grouping does not comply with the Decree. This remedial grouping also violates the Superior Court’s directive that “no effort may be made to preserve the cores of invalidated 2017 districts,” *Common Cause*, 2019 WL 4569584, at *136, given that Representative Lambeth was caught on camera directing specific changes to allow him to regain areas he has “represented in the past,” *i.e.*, under the invalidated 2017 Plan, App. 19-20.

Finally, even putting aside that the remedial version of this grouping advantages Republicans as a whole, the Superior Court’s mistaken approval of remedial districts that

work to the “mutual benefit of both Democrats and Republicans” could have far-reaching and deleterious consequences. App. 21. The court acknowledged that the incumbency protection in this grouping “subordinated . . . traditional redistricting criteria of compactness and preserving municipal boundaries.” *Id.* This Court should hold that efforts by incumbents of both parties to guarantee their own reelection is not a legitimate districting principle in this State, or at least that such politically-motivated incumbency protection cannot subordinate traditional districting criteria. At a minimum, this Court should hold that the General Assembly may not engage in this form of incumbency protection in drawing remedial districts following the invalidation of the prior plan as an unconstitutional gerrymander. Seeking to preserve the partisan leanings of each incumbent’s district inherently serves to perpetuate the prior unconstitutional plan. That is certainly the case here with the Forsyth-Yadkin grouping. And looking forward, Legislative Defendants may argue in future redistrictings that such “bipartisan gerrymandering” is permissible in creating new districts. This Court should make clear that it is not.

B. Columbus-Pender-Robeson

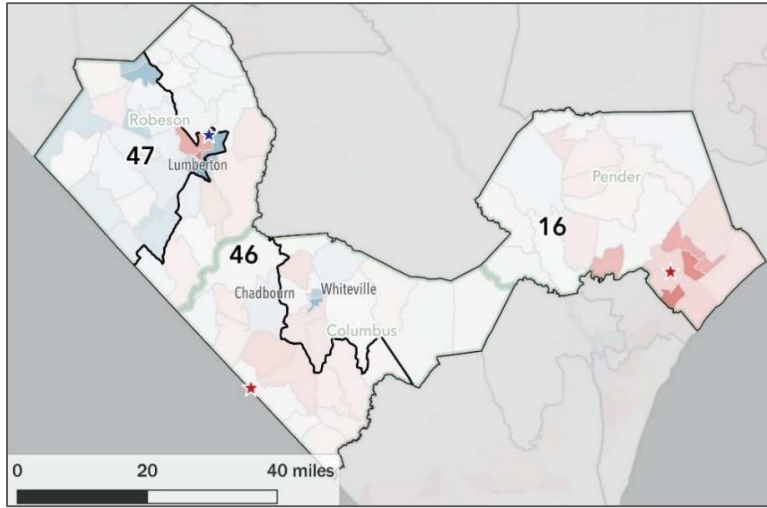
There is nothing bipartisan about the remedial version of the Columbus-Pender-Robeson House county grouping. It is a straight Republican gerrymander.

In finding that the 2017 version of this county grouping was an “extreme partisan gerrymander,” the Superior Court credited “the analysis of Plaintiffs’ experts.” *Common Cause*, 2019 WL 4569584, at *55. Petitioners’ expert Dr. Christopher Cooper had explained that the 2017 Plan not only packed Democratic voters in Robeson County into

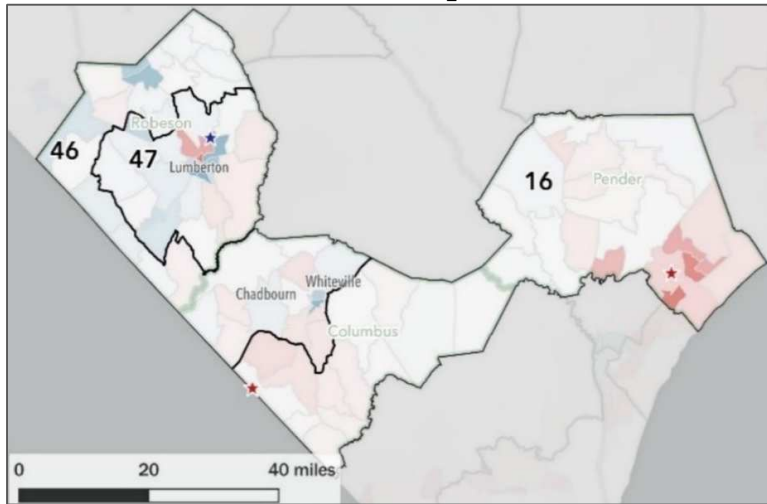
House District 47, but also cracked Democratic voters in Columbus County across House Districts 46 and 16. In particular, “the Democratic areas of Chadbourne [were] cracked from the Democratic voters in and around Whiteville, helping to ensure that neither HD-46 nor HD-16 would elect a Democrat.” App. 187. The Superior Court’s judgment highlighted this cracking, holding that “Legislative Defendants cracked African American voters” in groupings including Columbus-Pender-Robeson “where cracking Democratic voters would maximize Republican victories.” *Common Cause*, 2019 WL 4569584, at *102-03. The municipalities of Chadbourn, Whiteville, and their surrounding communities are the heavily African-Americans areas of Columbus County that the 2017 Plan cracked.

The base map selected from Dr. Chen’s simulations cured this cracking, as it kept Whiteville, Chadbourn, and their immediately surrounding areas together in House District 46. But the Republican incumbents in this grouping proceeded to reinstate the prior gerrymander. While the base map paired Republican incumbents Jones and Smith in House District 16, Jones lived in a VTD on the border with House District 46, which had no incumbent under the base map, meaning that unpairing him should not have been difficult. Rather than make minimal, non-partisan changes to unpair these two incumbents, the incumbents swapped a total of *11 VTDs* between House Districts 16 and 46 in a blatant effort to make District 46 more favorable for Republicans. As shown below, this remedial grouping again cracks the Democratic voters of Columbus County, again separating the VTDs in and around Whiteville and Chadbourn.

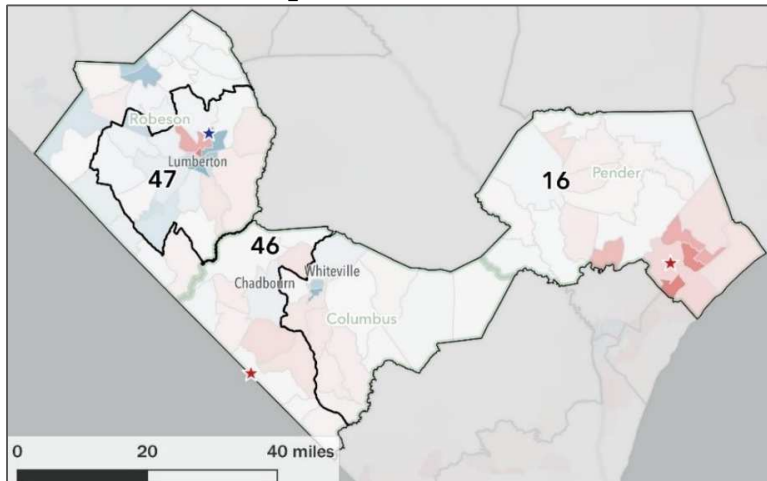
2017 House Plan



Base Map



Proposed House Plan



The revisions to the base map, once again cracking Columbus County's Democratic voters, have significant partisan effects. They make House District 46 roughly two points more Republican than the base map, while House District 16 remains a safe Republican seat despite adding more Democratic voters. App. 57. This cracking also makes House District 46 an extreme outlier relative to the 1,000 versions of this grouping in Dr. Chen's Simulation Set 3. The remedial House plan's version of District 46 is less Democratic than its corresponding district in over 92% of the non-partisan plans in Dr. Chen's Simulation Set 3. *Id.*

In approving this grouping, the Superior Court stated that moving Whiteville and its surrounding areas to House District 16 "was not an unreasonable exercise of the discretion in the General Assembly's efforts to unpair incumbents while respecting traditional districting criteria." App. 24. The court further asserted that "no alternative map that better achieved these objections was offered by Plaintiffs." *Id.* But Petitioners offered to provide the 1,000 alternative maps in Dr. Chen's Simulation Set 3 that avoid pairing the current incumbents, strictly comply with traditional districting criteria, and do not intentionally recreate the specific features of the unconstitutional 2017 districts. And Representative Darren Jackson offered two alternatives on the House floor that would also have unpaired the incumbents while making the most minimal changes possible from the base map. And the court could have had the Referee redraw the grouping in a manner that did not perpetuate the prior gerrymander. Under the General Assembly's remedial version of this House grouping, tens of thousands of North Carolina citizens will once again be forced to vote in districts that are gerrymandered for partisan ends.

II. This Appeal Involves Legal Principles of Utmost Significance to the State's Jurisprudence

This Court's discretionary review is also warranted because this appeal "involves legal principles of major significance to the jurisprudence of the State." N.C.G.S. § 7A-31(b)(2). This appeal presents the following critically important questions:

1. Can the General Assembly manipulate the State's legislative districts for partisan gain during the remedial phase of a partisan gerrymandering case after a court strikes down the prior plan (or ever)?
2. Can the General Assembly be excused, during the remedial phase of a partisan gerrymandering case (or ever), for gerrymandering districts when the results are politically favorable to incumbents of both parties alike?

These are significant jurisprudential questions. Partisan gerrymandering violates the fundamental rights of North Carolina citizens under the North Carolina Constitution. This State's citizens have been forced to vote in unconstitutional districts in every state legislative election this decade. Absent certification, hundreds of thousands of North Carolina citizens in the challenged groupings will be forced to vote in districts that perpetuate rather than cure the violations of their fundamental rights. The only way to ensure that North Carolinians do not again have to vote in unconstitutional districts is for this Court to assume immediate jurisdiction over this appeal and set expedited briefing. This Court's review is even more imperative given that this is the first time North Carolina courts have provided guidance on extreme partisan gerrymandering, and given that the next round of redistricting is fast approaching.

III. Failure To Certify Will Cause Enormous Harm by Preventing Appellate Review of the Remedial Plans Before the 2020 Elections

This Court independently should grant discretionary review because “[d]elay in final adjudication is likely to result from failure to certify and thereby cause substantial harm.” N.C.G.S. § 7A-31(b)(3). Deadlines for the 2020 elections are fast approaching. As a result of recent changes by the General Assembly, primary elections are currently scheduled to be held on 3 March 2020—one of the earliest primary dates in the country. *See* N.C.G.S. § 163A-700(b); 2017 N.C. Sess. Laws S.L. 2018-21 (S.B. 655). The window for candidates to file for party primary nominations is currently set to open on 2 December 2019, and to close on 20 December 2019. *See* N.C.G.S. § 974(b). Most importantly, the Executive Director of the State Board of Elections has attested that, absent intervention by the courts, the Board likely must receive final remedial plans before 15 December 2019 for use in the March 2020 primaries. App. 101.

In these circumstances, there is no time for intermediate appellate proceedings before the Court of Appeals. Absent certification, the remedial plans will go into effect for the 2020 primaries without any appellate review of the groupings that Petitioners challenge on appeal.

IV. The Expeditious Administration of Justice Requires Certification

Immediate discretionary review also is appropriate where “[t]he work load of the courts of the appellate division is such that the expeditious administration of justice requires certification.” N.C.G.S. § 7A-31(b)(4). As explained, the expeditious

administration of justice simply does not allow time for two levels of appellate review, and it should be this Court that resolves these issues of substantial public importance.

V. The Question of Whether the Remedial Plans Cure the Constitutional Violations Found Is Critical to the Jurisdiction and Integrity of the Court System

Finally, this Court should grant immediate discretionary review because “[t]he subject matter of the appeal is important in overseeing the jurisdiction and integrity of the court system.” N.C.G.S. § 7A-31(b)(5). Ensuring that state officials cure constitutional violations that the courts of this State have found is of the utmost importance to the jurisdiction and integrity of the court system. Respectfully, the order on appeal does not do so for the remedial Forsyth-Yadkin and Columbus-Pender-Robeson groupings in the House.

ISSUES FOR WHICH REVIEW IS SOUGHT

Petitioners respectfully request that the Court allow discretionary review on the following issue:

Whether the Superior Court erred in approving the Remedial House Plan for the Forsyth-Yadkin and Columbus-Pender-Robeson county groupings, after finding that the 2017 versions of those groupings violate the North Carolina Constitution’s Free Elections Clause, Equal Protection Clause, and Freedom of Speech and Assembly Clauses because they unconstitutionally discriminated against voters on partisan grounds.

MOTION TO SUSPEND APPELLATE RULES

In addition to petitioning for discretionary review prior to determination by the Court of Appeals under Rule 15(a), Petitioners also respectfully move under Rules 2 and

37(a) to suspend the appellate rules as necessary to facilitate a prompt decision on this filing and appeal.

Rule 2 authorizes this Court to “suspend or vary the requirements or provisions” of the North Carolina Rules of Appellate Procedure in order “[t]o prevent manifest injustice to a party, or to expedite decision in the public interest.” This Rule “relates to the residual power of our appellate courts to consider, in exceptional circumstances, significant issues of importance in the public interest or to prevent injustice which appears manifest to the Court.” *State v. Hart*, 361 N.C. 309, 315-16, 644 S.E.2d 201, 205 (2007) (quotation marks omitted). Appellate courts exercise this discretionary residual power “with a view towards the greater object of the rules.” 361 N.C. at 316, 644 S.E.2d at 205. This Court also possesses general supervisory authority under article IV, § 12(1) of the North Carolina Constitution, which the Court “will not hesitate to exercise ... when necessary to promote the expeditious administration of justice.” *State v. Stanley*, 288 N.C. 19, 26, 215 S.E.2d 589, 594 (1975).

This is the paradigmatic case for exercising this Court’s supervisory authority and residual power under Rule 2. In light of the exceptionally important and singularly urgent questions at stake, suspending the appellate rules here is not only appropriate, but necessary.

Petitioners thus respectfully request that this Court grant this petition and set an expedited schedule that will allow for sufficient time for a decision by this Court, and, if Petitioners prevail on appeal, for the Superior Court to adopt alternative remedial plans

on remand for the two challenged House county groupings, before the 15 December deadline.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court allow discretionary review of the Superior Court's 28 October 2019 order prior to determination by the Court of Appeals, assume immediately jurisdiction over this appeal and any related petitions or appellate motions relating to the Order, and suspend the appellate rules to expedite a decision on these matters in the public interest.

Respectfully submitted this 1st day of November, 2019.

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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

Pursuant to Rule 26 of the North Carolina Rules of Appellate Procedure, I hereby certify that the foregoing document has been filed with the Clerk of the North Carolina Supreme Court by electronic submission. I further certify that a copy of this document has been duly served upon the following counsel of record by email and U.S. First Class

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This the 1st day of November, 2019.

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