NO. 417 P 19 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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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

From Wake County No. 18
CVS 014001

****

INTERVENOR-APPELLANTS' RESPONSE IN OPPOSITION TO PETITION FOR DISCRETIONARY REVIEW PRIOR TO DETERMINATION BY THE COURT OF APPEALS AND MOTION TO SUSPEND APPELLATE RULES

****

THE 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.

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Defendants.

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

NOW COME Intervenor-Defendants Reginald Reid, Carolyn Elmore, Cathy Fanslau, Ben York, Connor Groce, and Aubrey Woodard (collectively "Intervenor-Appellees") and, pursuant to N.C. R. App. P. 15(d) and 37(a), respond to the Petition for Discretionary Review Prior to Determination by the Court of Appeals and Motion to Suspend Appellate Rules ("Petition") filed by Plaintiffs-Appellants ("Appellants") on November 1, 2019. In opposition to the Petition, Intervenor-Appellees show the Court the following:

Although Intervenor-Appellees may not have agreed with the Three-Judge Panel's ("Panel") 3 September 2019 Judgment and Decree ("Judgment"), it is clear that the North Carolina General Assembly ("General Assembly") endeavored to fully comply with the Judgment in drawing remedial legislative district maps ("2019 Maps"). Indeed, after approximately a year of more than hotly-contested litigation, Appellants seek emergency appeal directly to the Supreme Court of North Carolina not over the process by which the 2019 Maps were actually enacted, nor over the entirety of the 2019 Maps, but instead over the Panel's approval of two specific changes to the base House of Representatives district map adopted by the General Assembly: (1) the moving of six VTDs in the Yadkin-Forsyth county grouping to unpair four incumbents, and (2) the moving of eleven VTDs to unpair two incumbents in the Robeson-Columbus-Pender county grouping. (28 October 2019 Order Approving Remedial Maps ("Approval Order") at Appellants' Appx. p 19, 22; Petition p 4, 12-22). These two modifications to the base maps were made in order to unpair incumbents, an action expressly permitted by the Judgment. It is also a matter of record that Appellants failed to submit alternative district maps to the Panel for the challenged county groupings. (Appellants' Appx. p 22, 24).

Appellants now contend that those limited changes "reestablished those groupings as extreme partisan gerrymanders in the post-judgment remedial process" (Petition p.3), and thus this Court should grant certification pursuant to N.C. Gen. Stat. § 7A-31(b), mere weeks before candidate filing begins in the 2020 election. The relief Appellants seek in this appeal—yet another redrawing but this time on such an

expedited schedule that it calls into question the Court's ability to fully hear the case on the merits[1]—is not only unwarranted by the facts and North Carolina law of this case, but could potentially operate to violate citizens' Federal civil rights. *See Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) (per curiam) ("Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase."). Accordingly, the Court should deny the Petition.

INTRODUCTION

Shortly after the 2018 election, Appellants brought this lawsuit to challenge the constitutionality of General Assembly districts in county groupings drawn in 2016: 18 in the House of Representatives ("House") and 7 in the Senate. After approximately ten months of litigation, the Panel entered Judgment, concluding that the legislative district maps then at issue were unconstitutional and requiring the General Assembly to redraw districts in 14 House county groupings and 7 Senate county groupings within a two-week timeframe in September 2019. Thus, the 2016 districts are no longer at issue.

On 17 September 2019, the General Assembly enacted legislative district maps in compliance with the Judgment. After the Legislative Defendants submitted the 2019 Maps to the Panel for approval, Appellants did not object to any of the new

[1] By way of example, Appellants filed their Petition on Friday, November 1, 2019. The Court informed counsel for the Legislative Defendants and State Defendants by email on November 4 that it expected any response to the Petition to be filed by 2:00 p.m. on November 6, 2019; counsel for Intervenor-Appellees, however, was left off of that email and did not learn about the November 6, 2019 deadline until the morning of November 5, 2019. Nonetheless, counsel for Intervenor-Appellees was informed by the Clerk of Court's office that the Court would not be moving the 2:00 p.m. November 6, 2019 deadline, prejudicing Intervenor-Appellees.

Senate districts. They only objected to five county groupings in the House, comprising nineteen House districts. (See Appellants' Appx. p 53). After the panel approved the 2019 Maps in their entirety, Appellants filed a Notice of Appeal, limiting their appeal further to eight districts in two county groupings in the new House map, the Yadkin-Forsyth grouping and the Robinson-Columbus-Pender grouping. (Petition p 4).

Appellants' Petition contends that the Supreme Court of North Carolina should certify this case for its review pursuant to N.C. General Statute 37A-31(b) and N.C. R. App. P. 15 essentially because the Panel somehow abused its discretion and misapplied its own Judgment. To put it another way, in the Yadkin-Forsyth grouping, Appellants contend that the Panel abused its discretion in finding that a bipartisan move of six (6) VTDs to unpair four (4) incumbents, with a partisan voting index effect measured by Appellants of approximately 2 or 3 percent in the affected districts, did not cause an otherwise constitutional county grouping to become unconstitutional. (*See* Petition p 15; Intervenor-Appellants' Appx. p 23 (Expert Report of Jowei Chen, Ph.D., September 27, 2019 ("Chen Report")). Likewise, in the Robeson-Columbus–Pender grouping, Appellants contend that the Panel abused its discretion in finding that moving eleven (11) VTDs, again done in order to unpair incumbents, with a partisan vote index effect measured by Appellants of less than two (2) percent in the affected districts, (Petition p 22; *see also* Chen Report at 13), did not cause an otherwise constitutional county grouping to become unconstitutional.

For the reasons described below and in the opposition filed by the Legislative

Defendants, Appellants' rationale for these arguments is not only unavailing, it ignores or minimizes crucial evidence relied on by the Panel in approving the 2019 Maps. Finally, considerations specific to election law cases, given the imminence of the filing period for the 2020 election, the necessity for the district lines at issue to be decided before then, and the inadequate time for resolving the factual disputes and implementing Appellants' requested remedies, weigh in favor of denial of the Petition and the Motion to Suspend the Appellate Rules.

RESPONSE IN OPPOSITION TO APPELLANTS' PETITION FOR DISCRETIONARY REVIEW

Pursuant to N.C. R. App. P. 15(d), Intervenor-Appellees ask the Court to deny Appellants' Petition, as a review of the Panel's Approval Order and the record indicate that the N.C. Gen. Stat. § 7A-31(b) factors are not present.

I. Statement of the Case.

This case has proceeded in two phases: (1) litigation over the constitutionality of the 2016 legislative district maps, and (2) the remedial process that began after the Panel entered its September 3, 2019 Judgment and Decree. No party appealed the Judgment; thus, the 2016 legislative district maps are not at issue here. The sole issue Appellants present to this Court is whether the General Assembly engaged in extreme partisan gerrymandering in violation of the North Carolina Constitution when, during the remedial process, it (1) moved six VTDs in the Yadkin-Forsyth county grouping to unpair four incumbents, and (2) moved eleven VTDs between two districts in the base map, in order to unpair two incumbents in the Robeson-Columbus-Pender county grouping.

A. The Panel Enters the Judgment Finding the 2016 Maps Unconstitutional and Requires that Remedial Maps Be Drawn by the General Assembly.

Appellants filed this lawsuit shortly after the 2018 elections, on 13 November 2018, alleging that the legislative district maps enacted by the General Assembly in 2017 were unconstitutional under Article I, Sections 10, 12, 14, and 19 of the North Carolina Constitution. (Petition p 5-6). After a two-week bench trial, which took place from 15 July 2019 to 26 July 2019, the Panel entered its Judgment and Decree on 3 September 2019 which, *inter alia*, held that the 2017 Maps were unconstitutional, gave the General Assembly two weeks to draw new legislative district maps, and set out a process by which the General Assembly was required to draw the new legislative district maps. (Petition p 6; *see also Common Cause v. Lewis*, 2019 WL 4569584 (N.C. Super. Sept. 3, 2019) at 135-37).

B. The General Assembly Faithfully Follows the Remedial Process Set Out by the Panel.

After entry of the Judgment, the General Assembly quickly moved to enact remedial maps in full compliance therewith. The process included conducting the vast majority of the remedial redistrict process in broadcasted public hearings, starting from random bipartisan base maps which did not use the invalidated 2017 districts as a starting point, and making significant and reasonable efforts to limit partisan considerations and election results data from being used in the process. The remedial maps were enacted on 17 September 2019, in compliance with the Panel's 18 September 2019 deadline. *See* N.C. Sess. Laws 2019-219 (Senate Bill 692) and 2019-220 (House Bill 1020); *see also* Judgment ¶172 (establishing a deadline of

September 18, 2019 for the General Assembly to enact remedial maps).

C. Appellants Object to Five County Groupings Using Untested Expert Analysis from Dr. Jowei Chen.

Following the Legislature's enactment of the remedial maps, Appellants thereafter did not submit any specific objections to the new Senate districts enacted in N.C. Sess. Laws 2019-219. However, they did raise objections to nineteen House districts, contained in five county groupings, enacted in N.C. Sess. Laws 2019-220. *See generally* Plaintiffs' Objections to the Remedial Plans (Sept. 27, 2019). (Appellants' Appx. p 1).

In support of their objections, Appellants commissioned Dr. Jowei Chen to conduct additional expert analysis, which was undisclosed to the parties and untested in expert discovery. (Appellants' Appx. p 32). Had Dr. Chen's expert analysis been subject to the rigors of expert discovery, it would be apparent that his new analysis contradicts itself and other analysis Dr. Chen submitted in this litigation.

Dr. Chen's Simulation Set 3 created a slyly selective set of one thousand maps to which to compare the Remedial House Plan. Dr. Chen's algorithm for Simulation Set 3 does not assume the use of the base map used by the legislature; it assumes completely newly redrawn maps without the use of a base map, weighing the court-ordered criteria in the same way that Dr. Chen's algorithm weighed it. (Chen Report 7–9). Had Dr. Chen been interested in providing even remotely relevant analysis, Dr. Chen's algorithm should have assumed use of the base map agreed upon by a bipartisan legislature, and then ran simulations intended to unpair incumbents to determine how a "non-partisan" redrawing would have occurred.

Accordingly, Dr. Chen's analysis is less than helpful to any court. For example, if Appellants' arguments are to be believed, Dr. Chen's analysis demonstrates that his own maps were "extreme partisan gerrymanders." Appellants claim that the Remedial Forsyth/Yadkin Plan has 4 of 5 districts that are "more extreme in their partisanship than 98% of their corresponding districts in the Simulation Set 3 plans"—those districts being HD 72, 73, 74, and 75 (Appellant's Petition p 15–16). Looking at Table 3a of Dr. Chen's analysis, the shift of one VTD from HD 72 to HD 74 increased the Democratic Vote Share from the base map in both districts. (Chen Report 23). When comparing that shift to Figure 11 contained in Appellants' Petition, in HD 74, the remedial district was closer to the mean than Dr. Chen's own base map. And even more incredibly, the changes in HD 73 resulted in *no changes in Democratic Vote Share from Dr. Chen's base map*—meaning that, if Appellants are correct, Dr. Chen's maps that were submitted as a neutral baseline in the underlying action were in fact "extreme partisan outliers." Nevertheless, Appellants rely on Dr. Chen's untested analysis as the basis for this Petition. (*See* Petition 12–22).

D. The Panel Approves the Remedial Maps Enacted by the General Assembly Over Appellants' Objections and Appellants Appeal.

A substantial part of the Approval Order is devoted to analyzing whether, in that process, the General Assembly followed the procedural requirements of the Judgment. (*See* Appellants' Appx. p 2-10; *see also* Judgment ¶¶167-76 (setting forth the criteria to be used by the General Assembly in adopting remedial legislative district maps). In short, the Panel found that the General Assembly complied with the Judgement's requirements to conduct the remedial redistricting process in full

public view, to not use the invalidated 2017 legislative districts as a starting point for drawing new districts, to not use partisan considerations or election result data in the drawing of the remedial maps, and to obtain prior approval of the Panel to retain individuals other than then-current legislative employees to assist with the map-drawing process. *Id.*

E. Deadlines Specific to Election Cases Will Run Soon.

As Appellants acknowledge, the North Carolina State Board of Elections ("State Board") has stated that they need the legislative districts at issue to be finalized by December 15, 2019 at the latest in order to properly administer the March 2020 primaries. (Petition p 24). State and county election officials require time prior to elections in order to properly administer those elections. For example, election administrators must provide for the distribution of voting systems, ballots, and pollbooks, training election officials, conducting absentee and in-person voting, and tabulation and canvassing of election results. Appellants' Appx. p 94-104 (Affidavit of Karen Brinson Bell ("Bell Aff.")). Election officials must also geocode voters, assigning them to relevant voting districts—a process that must be audited by the State Board. (Appellants' Appx. p 98-99). The geocoding process would likely take weeks. *Id.* Election officials must also prepare ballots, which can only occur after geocoding is complete and candidate filing closes. (Appellants Appx. p 99-100). Ballot preparation would also likely take weeks, making the total time needed for geocoding and ballot preparation 34 to 42 days. (Appellants' Appx. p 101). Pursuant to N.C. Gen. Stat. § 163-227.10(a), the State Board of Elections must begin mailing absentee

ballots 50 days prior to the primary election day. N.C. Gen. Stat. § 163-227.10(a) (2019). Based on the scheduled primary date of March 3, 2020 for state legislative races, 50 days before the primary election falls on January 13, 2020. (Appellants Appx. p 101).

II. Reasons Why the Petition Should Be Denied.

Appellant's Petition suffers from two fatal flaws. First, Appellants' appeal rests primarily on meritless challenges to discrete findings of fact by the Panel, which are insufficient to show the "significant public interest" or "legal principles of major significance to the state" that would justify the extraordinary relief sought by the Petition. Second, profound and well-recognized principles weigh heavily against disturbing these districts, which were the product of a "transparent, open process, more transparent than anything I've seen in this Legislature," (Appellants' Appx. 4 (quoting Senator Dan Blue, Senate Floor Debate Tr., Sept. 16, 2019, at 20:7-12; 22: 15-17)), mere weeks before the start of candidate filing. *See, e.g.*, *Purcell*, 549 U.S. 1 (reversing injunctive relief on the grounds of proximity to an election); *see also Rucho v. Common Cause*, 139 S.Ct. 2484, 2516 (2019) (Kagan, J., dissenting) ("Respect for state legislative processes—and restraint in the exercise of judicial authority—counsels intervention in only egregious cases.").

A. The Changes Made by the General Assembly to the Forsyth-Yadkin and the Robeson-Columbus-Pender Base Map Did Not Render It Unconstitutional.

Appellants' arguments for certification prior to a determination of the cause by the Court of Appeals fundamentally rests on challenging findings of fact made by the

Panel about the 2019 redrawn maps—not the invalidated 2017 maps. Findings of fact made by the trial court are "conclusive on appeal if supported by competent evidence." *Lumbee River Elec. Membership Corp. v. City of Fayetteville*, 309 N.C. 726, 741, 209 S.E.2d 209, 219 (1983); *see also Tillman v. Commercial Credit Loans, Inc.*, 362 N.C. 93, 100-101, 655 S.E.2d 362, 369 (2008). Further, the mere fact that evidence contrary to the trial court's findings of fact exists in the record has no effect on this presumption. *Id.* In the context of this matter, these robust presumptions only bolster the already exceptionally high presumption of validity afforded to acts of the legislature facing constitutional challenges. *See, e.g.*, *Cooper v. Berger*, 370 N.C. 392, 413, 809 S.E.2d 98, 111 (2018) ("[Courts] presume that laws enacted by the General Assembly are constitutional, and we will not declare a law invalid unless we determine that it is unconstitutional beyond a reasonable doubt.") (quoting *McCrory v. Berger*, 368 N.C. 633, 639, 781 S.E.2d 248, 252 (2016)); *see also Brannon v. N.C. State Bd. of Elections*, 331 N.C. 335, 339, 416 S.E.2d 390, 392 (1992).

Appellants gloss their appeal with frequent and deceiving references to the 2017 House maps. (Petition p 25 (proposing as the Issue for Which Review is Sought as the validity of remedial maps "...after finding that the 2017 versions of those groupings violated the North Carolina Constitution...")). However, the 2017 House maps are not at issue here. The only districts at issue now were drawn in September 2019 from base maps that have no relation to the 2017 House maps. Because the role that partisan considerations played in the drawing of these maps is a fundamentally factual question, Appellants' present challenges to these districts is discrete and

factual and does not involve significant public interest or legal principles of major significance to the jurisprudence of the state. *See* N.C. Gen. Stat. § 7A-31(b). Appellants are unable to meet their extraordinarily high burden of invalidating the Panel's comprehensive and well-supported findings of fact which, in turn, are the only substantive basis for the relief requested in their Petition. As such, the Petition should be denied in its entirety.

1. Appellants have failed to show any basis for invalidating the Panel's findings of fact with respect to the Forsyth-Yadkin County Grouping.

The Forsyth-Yadkin County Grouping, like the other county groupings in the Remedial House Plan, was created by unpairing incumbents who were paired by Dr. Chen's Simulation Set 1 map, which was agreed to be the base map for the Remedial House Plan by "unanimous and bipartisan approval by the House Redistricting Committee after thorough debate in public." (Appellants' Appx. p 4). The base map paired two incumbents in House District 75 of the base map and two incumbents in House District 72 of the base map. (Appellants' Appx. 19). Only one VTD was moved to unpair the incumbents in base map House District 72—the VTD in which the Republican incumbent resides was moved to enacted House District 74. (Petition p 14). This was the least alterations possible to unpair these incumbents. (Appellants' Appx. p 22).

Unpairing the incumbents in base map House District 75 was more complicated because each of the incumbents "resided two VTDs away from the nearest border of the base district." (Appellants' Appx. p 19). Rep. Lambeth, the Republican incumbent who was paired with Rep. Evelyn Terry, the Democratic

incumbent, in base map House District 75. Rep. Lambeth initially asked that base map House District 75 be taken "out to Kernersville" because he represented it in the past. (Appellants' Appx. p 20). Rather than taking base map House District 75 "out to Kernersville," the Remedial House Map extended base map House District 74 to gather the two districts—which the Panel said were "Republican-leaning VTDs", but which appear to include one Republican-leaning VTD and one Democratic-leaning VTD if Appellants' maps are accurate[2]—to unpair Rep. Lambeth and Rep. Terry. (*Compare* Appellants' Appx. 20 *with* Petition 14).

Despite the Panel's well-grounded findings of fact, Appellants now claim that nothing has changed since their Complaint. (Petition p 12). While they claim that the Remedial Map for the Forsyth-Yadkin County Grouping still "traverses and extremely narrow passageway on the border of Forsyth County" in order "to join Republican VTDs," (Petition p 12–13), that is simply untrue—the "narrow passageway" Appellants complain of is the shape of the VTD in which Rep. Lambeth lives, and it is the terminal end at the southwest part of Remedial House Plan House District 75. Unlike the Remedial House District 75, the previous House District 75 continued on to the southwestern-most portion of Forsyth County, which contained more Republican VTDs. This District plainly does not "recreate the specific features of the prior gerrymander." (Petition p 12). Furthermore, the Remedial House District

[2] It must be noted that Plaintiffs' description of the maps in their Petition for Discretionary Review is not entirely accurate. (Petition p 13). If the maps are the same as those prepared by Blake Esselstyn in the Expert Report of Dr. Christopher Cooper, the maps take into account partisan preference of each VTD, but is also "normalized by acreage," meaning that the maps will appear to reflect a lesser political preference for VTDs encompassing more acreage, even if the voters in that VTD express a strong preference for one political party over another. (App. at 143).

75 does not "wrap around the city [of Winston-Salem] to include Republican-dominated VTDs on either side of Forsyth County." (Petition p 13). In fact, Remedial House District 75 is only on the eastern side of Forsyth County, and it does not "wrap around" Winston-Salem to any meaningful degree more than the base map by Dr. Chen. (*See* Petition p 14).

Appellants claim in their Petition that Rep. Lambeth's comment about Kernersville demonstrates an intent to preserve the core of the invalidated 2017 Plans, claiming that the Panel made a "finding that the incumbents' manual revisions" to the Forsyth-Yadkin base map were made with partisan considerations in mind. (Petition p 17). This is simply untrue, and mischaracterizes the Panel's Approval Order. In its analysis approving the Remedial House Maps for the Forsyth-Yadkin County Grouping, the Panel made certain assumptions—but did not make any findings, contrary to Appellants' argument in their Petition (Petition p 18)—about the motivations behind the unpairing of Reps. Lambeth and Terry, including that the incumbent representatives were aware of the partisan leanings of the shifted VTDs and the potential to place those incumbents in districts that leaned towards the opposing party. (Appellants' Appx. p 20–21). The Panel concluded, however, that even if those assumptions were true, the unanimous bipartisan support for these changes abrogated Appellants' concerns. (Appellants' Appx. p 21–22). The Panel also concluded that the incumbent unpairing provision in the Judgment provided the General Assembly a "degree of legislative discretion . . . and, indeed, a degree of political discretion," and the challenged unpairing was done in accordance with the

"self-imposed limitations on the Redistricting Committee's discretion that the Court has found to be appropriate and uniformly applied." (Appellants' Appx. p 21–22; *see also* Appellants' Appx. p 13). As a result of the proper application of the traditional redistricting criteria of incumbency protection to Dr. Chen's base map, the Remedial House Plan Forsyth-Yadkin County Grouping contained five compact house districts with no paired incumbents. *See Rucho v. Common Cause*, 139 S. Ct. 2484, 2500 (2019).

For the foregoing reasons, Appellants' claim that the General Assembly sought to "perpetuate the prior unconstitutional plan" through "bipartisan gerrymandering" in the Forsyth-Yadkin Remedial Plan is entirely unavailing, and a transparent attempt to manufacture an "issue of public importance" for the Court arising out of findings made by the Panel clearly supported by the record. The issues identified by Appellants do not support certification under N.C. Gen. Stat. § 7A-31.

2. Appellants have failed to show any basis for invalidating the Panel's findings of fact with respect to the Robeson-Columbus-Pender County Grouping.

Remarkably, Appellants also claim that the redrawn Robeson-Columbus-Pender county grouping is "a straight Republican gerrymander." However, this argument cannot withstand judicial scrutiny. (Appellants' Appx. p 58).

Put simply, the Approval Order lays out five, clear reasons for upholding the Legislature's redraw of these three districts that eviscerate any basis for Appellants to make this claim. First, the Panel found as fact that the remedial map in this grouping was created "through a process that the Court has found to reasonably

comply with its mandate." (Appellants' Appx. p 24). Second, the Panel found as fact that the three districts within the grouping comply with traditional redistricting requirements, specifically equal population, contiguity, the *Stephenson* county grouping and traversals rule, compactness, minimizing split precincts, and consideration of municipal boundaries. (Appellants' Appx. p 24). Third, the Panel found as fact that the remedial map complied with the legislature's criteria of altering the base maps only to districts affected by double-bunking of incumbents. (Appellants' Appx. p 24). Fourth, the Panel found as fact that the decision to place Whiteville and Chadbourn in different districts was reasonable given the traditional redistricting criteria at play. (Appellants' Appx. p 24). And Fifth, the Panel found as fact that Plaintiffs failed to offer any alternative map. (Appellants' Appx. p 24).

These five findings of fact, each of which is sufficient on its own to uphold the validity of the grouping, are "conclusive on appeal" unless Appellants can show that the findings were not supported by competent evidence. *See Lumbee River Elec. Membership Corp.*, 309 N.C. at 741, 309 S.E.2d at 219. Appellants have not shown any basis in the record to invalidate the Panel's findings. Instead, Appellants revisit their experts' conclusions and the Panel's findings regarding the 2017 maps—which, again, are not at issue here. Appellants' conclusory and unsubstantiated claim that the Legislature "reinstate[d] the prior gerrymander," (Petition p 20), is without support as (1) the new map was created from the Chen base map, not the 2017 map; and (2) the six precincts changed from district 16 to 46 or vice versa between the 2017 map and the 2019 map. Appellants also attempt to prop-up this claim by arguing

that they *could have* supplied Chen maps to the Panel (they didn't) or that the Panel *could have* had the Referee redraw the grouping (there was no reason to do so). (Petition p 20). They also note two alternative maps proposed by Representative Darren Jackson, but they neglect to mention the fact that both of these alternatives would have resulted in a higher number of split VTDs or double-bunking. (Petition p 20; App at 23-24). Even then, to the extent that any of these arguments by Appellants constitute evidence to the contrary of the Panel's findings, the mere existence of contrary evidence in the record is still legally insufficient to invalidate the findings supported by competent evidence. *See Lumbee River Elec. Membership Corp.*, 309 N.C. at 741, 309 S.E.2d at 219.

In reality, Appellants' argument rests on a singular, disproportionate focus on an imagined criteria that Chadbourn and Whiteville be kept in the same district, regardless of the ramifications of such an effort on any other redistricting criteria.[3] For example, although Dr. Chen's (flawed) Simulation Set 3 may keep Chadbourn and Whiteville together in many instances, over 60% of Dr. Chen's simulated maps were less compact than the Proposed Plan. (Chen Report at 16-18). Moreover, nearly one-third of Dr. Chen's maps split more municipalities than the Proposed Plan, while the remaining 2/3 split the exact same number as the Proposed Plan – none split fewer. (Chen Report at 19). And of course, changes were made to the base map in the first place to address issues with double-bunked incumbents – a factor expressly

[3] Interestingly, this appears to be some sort of amorphous community-of-interest-like standard, which Appellants summarily dispatched in their Objections to the Remedial Plan. (App. at 21 ("Communities of interest is not a permissible criterion under the Court's Decree...")).

validated by the Judgment, *see Common Cause* at *133, 136, regardless of Appellants' distaste for it. Nothing in this Court's precedent nor in the Judgment require the approach or result that Appellants suggest in their Petition.

Appellants' claim that this county grouping is unconstitutional relies on nothing more than conjecture and the theoretical possibility that either the Legislature or the Panel could have adopted an alternative map that would have given Democrats, at most, a 1.9 percentage increase in the Democratic Vote Share in District 46, a district that already exhibits a sizeable Democratic advantage. (Chen Report at 13). To borrow a phrase from Appellants, their argument with respect to the Robeson-Columbus-Pender grouping simply "does not withstand scrutiny" and certainly does not support granting Appellants' Petition or their request to suspend the Appellate Rules. Appellants' Petition should be denied in its entirety.

B. Considerations Specific to Election Law Cases Counsel Against Certification.

The United States Supreme Court has repeatedly held that judicial intrusion into elections must take account of "considerations specific to election cases." *Purcell*, 549 U.S. at 4. These considerations include the fact that "[c]ourt orders affecting elections . . . can themselves result in voter confusion and consequent incentive to remain away from the polls." *Id.* at 4–5. "As an election draws closer, that risk will increase." *Id.* at 5. Courts must therefore weigh such factors as "the harms attendant upon issuance or nonissuance of an injunction," the proximity of the upcoming election, the "possibility that the nonprevailing parties would want to seek" further review, and the risk of "conflicting orders" from such review. *See id.*; *see also Pender*

County v. Bartlett, 361 N.C. 491, 510, 649 S.E.2d 364, 376 (2007) (finding a North Carolina constitutional violation but refusing to order the General Assembly to redistrict in August 2007 due to the potential effect on the 2008 elections). The *Pender County* Court cited, approvingly, *Reynolds v. Sims*, 377 U.S. 533, 585 (1964) for the prospect that "[w]ith respect to the timing of relief, a court can reasonably endeavor to avoid a disruption of the election process which might result from requiring precipitate changes that could make unreasonable or embarrassing demands on a State in adjusting to the requirements of the court's decree." *Pender County*, 361 N.C. at 510, 649 S.E.2d at 376; *see also Beech Mt. v. Genesis Wildlife Sanctuary*, 247 N.C. App. 444, 459, 786 S.E.2d 335, 346 (2016) (acknowledging that North Carolina courts are first and foremost bound by decisions of the United States Supreme Court) (citing *Pender Cty.*, 361 N.C. at 516, 649 S.E.2d at 380).

The United States Supreme Court has expressed a hesitation to intrude into the conduct of elections like the *Pender County* Court. The United States Supreme Court has long rejected just the sort of last-minute changes to elections Appellants are requesting here, even when faced with constitutional violations. *See, e.g., Wells v. Rockefeller*, 394 U.S. 542, 547 (1969) (affirming decision of district court permitting election to proceed under map with constitutional infirmities because "primary election was only three months away"); *Kilgarlin v. Martin*, 386 U.S. 120, 121 (1967) (per curiam) (affirming district court's action permitting 1966 Texas election to continue under a "constitutionally infirm" plan due to the proximity of the election date). As the United States Supreme Court stated in *Reynolds v. Sims*:

> In awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws and should act and rely upon general equitable principles. With respect to the timing of relief, a court can reasonably endeavor to avoid a disruption of the election process which might result from requiring precipitate changes that could make unreasonable or embarrassing demands on a State in adjusting to the requirements of the court's decree.

Reynolds, 377 U.S. at 585.

In *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam), the United States Supreme Court vacated an injunction issued by the Ninth Circuit prohibiting Arizona from enforcing its voter identification law. *Id.* at 3. The *Purcell* Court held that "[g]iven the imminence of the election and the inadequate time to resolve the factual disputes, [its] action. . . shall of necessity allow the election to proceed without an injunction suspending the voter identification rules." *Id.* at 5–6. Through *Purcell* and *Reynolds v. Sims*, the United States Supreme Court has made clear that, even when faced with constitutional violations, eleventh-hour disruptions to elections must be avoided. Even in *Common Cause v. Rucho*, a case that was later overturned by the United States Supreme Court on the merits, the three-judge district court, after finding that North Carolina's 2016 Plan constituted an unconstitutional partisan gerrymander, concluded that there was "insufficient time for [it] to approve a new districting plan and for the State to conduct an election using that plan prior to the seating of the new Congress in January 2019." *Common Cause v. Rucho*, 2018 U.S. Dist. LEXIS 152428, *3–*4 (M.D.N.C. Sept. 4, 2018) (per curiam). It further found "that imposing a new schedule for North Carolina's congressional elections would, at th[at] late juncture, unduly interfere with the State's electoral machinery and likely

confuse voters and depress turnout." *Id.* at *4. Accordingly, that court declined to enjoin use of the 2016 Plan in the November 6, 2018, general election. *Id.*

This matter is far more extreme than *Pender County* and *Common Cause v. Rucho* given that we are now mere weeks, not months, away from candidate filing, and still do not know what the House district lines will look like for the Yadkin-Forsyth and Robeson-Columbus-Pender groupings. Potential candidate decisions to run in state legislative races are not made overnight. Deciding whether to run as a political candidate for a state House seat is essentially a decision on whether to take on another full-time (or more) job. Indeed, according to the National Institute on Money in Politics at http://www.followthemoney.org, almost $33 million was spent just on candidate contributions to North Carolina House of Representatives candidates in the 2018 election cycle. *See* https://www.followthemoney.org/tools/election-overview?s=NC&y=2018 (last visited on November 5, 2019). This amount does not include money spent by third-party groups during that period of time. The decision to run for office takes significant consideration and long-term planning, and it is impossible to perform due diligence on potentially running for elected office if the potential candidate does not know what the boundaries of her or his district would be mere weeks before candidate filing opens. As such, North Carolina law, Federal law, and the practical realities of conducting modern political campaigns all counsel in favor of the Court's denial of Appellants' Petition.

REPONSE IN OPPOSITION TO APPELLANTS' MOTION TO SUSPEND APPELLATE RULES

For the same reasons that the N.C. Gen. Stat. §7A-31(b) certification should not issue, Intervenor-Appellees respectfully request that the Court deny Appellants' Motion to Suspend the Appellate Rules.

CONCLUSION

For the foregoing reasons, Intervenor-Appellees respectfully request that the Court deny Appellants' Petition for Discretionary Review in its entirety.

This the 6th day of November 2019.

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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 Mail:

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