Nos.411A94-6, 548A00-2, 441A98-4, 130A03-2 TWELFTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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STATE OF NORTH CAROLINA	)	
v.	)	From Cumberland County
MARCUS REYMOND ROBINSON,	)	No. 91-CRS-23143
Defendant	)	
	)	
STATE OF NORTH CAROLINA	)	
v.	)	From Cumberland County
CHRISTINA SHEA WALTERS	)	No. 98-CRS-34832, 35044
Defendant	)	
	)	
STATE OF NORTH CAROLINA	)	
v.	)	From Cumberland County
TILMON CHARLES GOLPHIN	)	No. 97-CRS-4312, 47314, 47315
Defendant	)	
	)	
STATE OF NORTH CAROLINA	)	
v.	)	From Cumberland County
QUINTEL AUGUSTINE	)	No. 01-CRS-65079
Defendant	)	

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AMICUS CURIAE BRIEF

NATIONAL ASSOCIATION FOR PUBLIC DEFENSE

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AMICUS CURIAE **BRIEF**
NATIONAL ASSOCIATON FOR PUBLIC DEFENSE *

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* This brief was prepared by Janet Moore, Professor of Law, University of Cincinnati College of Law, with assistance from rising third-year University of Cincinnati law students Caitlyn Idoine and Kristi Murphy.

Pursuant to Rule 28(i) of the North Carolina Rules of Appellate Procedure, the National Association for Public Defense submits this brief as *amicus curiae* in support of Petitioners Marcus Reymond Robinson, Christina Shea Walters, Tilmon Charles Golphin, and Quintel Augustine.

SUMMARY OF ARGUMENT

The orders vacating the death sentences in these cases properly applied the governing law to uncontroverted evidence. Those orders remedied the racial bias that blocked African Americans from a quintessential form of local democratic self-governance: jury service. The orders, and the law that governed when they became final, also exemplify a long-term, nationwide effort by policymakers and judges to remedy two problems that undermine the reliability of case outcomes and the legitimacy of criminal legal systems. The first problem involves the racialized antidemocratic impacts of criminal legal systems, that is, the ways that these systems disenfranchise people, interfere with their participation in democratic self-governance, and impose these harms disproportionately upon people of color. By exposing the sordid history and persistence of racial bias in North Carolina's capital jury selection process, the record in these cases illustrates the second problem that further undermines verdict reliability and system legitimacy. That problem is racism's adaptability. Racism operates both structurally (through social systems that reinforce racial hierarchies) and at an individual level (through unconscious or unintentional bias as well as through overt, deliberate discrimination). These problems are complex and recalcitrant, but North Carolina is not alone in recognizing them and seeking solutions. The orders vacating these sentences are

among many efforts across the nation to strengthen criminal legal systems by revealing and remedying past wrongs and by discouraging their future recurrence. These curative interventions are occurring at every phase of criminal legal proceedings, including jury selection. By seeking to turn back time and undo that cure, the judgment below runs afoul of core constitutional guarantees, undermines the legitimacy of North Carolina's criminal legal system, and encourages resurgent racism. The judgment below should be reversed.

ARGUMENT

THIS COURT SHOULD REVERSE THE JUDGMENT BELOW BECAUSE RACIAL BIAS INTERFERED WITH THE DEMOCRATIC FUNCTIONING OF THESE CAPITAL JURIES, UNDERMINES THE RELIABILITY OF THE VERDICTS, AND WEAKENS THE LEGITIMACY OF NORTH CAROLINA'S CRIMINAL LEGAL SYSTEM.

When Benjamin David was President-Elect of the North Carolina Conference of District Attorneys, he stated that prosecutors are "the conscience for the community" who should confront "race and justice" as "a great social issue that has been years in the making and is bigger than any of us." Benjamin David, *Community-Based Prosecution in North Carolina: An Inside-Out Approach to Public Service at the Courthouse, on the Street, and in the Classroom*, 47 Wake Forest L. Rev. 373, 374-76 (2012). David later confronted this great social issue by condemning a predecessor's race-based elimination of qualified African-American jurors from service in a high-profile criminal case, stating, "Where, as here, the process that was in place to search for the truth is determined to be so

fundamentally flawed that we cannot know it, the verdict cannot stand the test of time." Anne Blythe, *Perdue Pardons Wilmington 10*, Raleigh News & Observer (Jan. 1, 2013).[2]

The instant cases are similarly tainted with overwhelming, uncontroverted evidence that racial bias prevented qualified African-Americans from participating as jurors. The resulting death sentences were properly vacated because they, too, are "fundamentally flawed" and unable to "stand the test of time." Moreover, while these cases were decided under the Racial Justice Act that governed the proceedings when final orders of relief were issued, they share grim similarities with cases such as *Miller-El v. Dretke*, 545 U.S. 231 (2005) and *Foster v. Chatman*, 136 S. Ct. 1737 (2015)—capital cases in which relief was ordered for unconstitutional racial bias in jury selection. Here, as in *Miller-El*, prosecutors exploited a training program specifically designed to nullify constitutional protections through the strategic use of canned, pretextual excuses for race-based strikes. *Compare, e.g., State v. Robinson*, Cumberland County 91 CRS 23143 (Order of April 22, 2012) ¶ 227 *with Miller-El*, 545 U.S. at 266; *see also Wilson v. Beard*, 426 F.3d 653 (3d Cir. 2005) (vacating murder conviction and life sentence based on infamous "McMahon tape" *Batson*-evasion training). Here, as in *Foster*, notes from prosecutorial files, targeted questioning, and disparate treatment of equally qualified African Americans demonstrates that racial bias excluded them from the jury box. *See, e.g., State v. Augustine*, Cumberland County 01-CRS-65079 Jury Selection Tpp. 112-13, 174, 190-91, 651-

[2] David's condemnation of race-based jury strikes belies his earlier criticism of the Racial Justice Act as a remedy. 47 Wake Forest L. Rev. at 397.

52, 715-16, 827-29, 914-17, 928-32 (documenting racially disparate treatment of jurors); *id*., Joint RJA HDE98-103 (file notes); *Foster*, 195 L.Ed.2d at 14-16 (same).

Chief Justice Frye, the first African American Chief Justice of this Court, predicted such continued patterns of racially biased juror exclusion in the wake of *Batson v. Kentucky*, 476 U.S. 79 (1986). As an Associate Justice, he warned that prosecutors could continue with "business as usual" by creating juror "'profiles' that may be constructed in a manner so as to systematically exclude blacks" from jury service. *State v. Jackson,* 322 N.C. 251, 260, 368 S.E.2d 838, 843 (1988) (Frye, J., concurring). His prediction captured one of the most direct and harmful examples of the antidemocratic impacts that criminal legal systems disproportionately impose on people of color.

These antidemocratic impacts are well documented. A comprehensive study by the National Academy of Sciences found that "a growing proportion of U.S. citizens—especially from poorer and minority communities—is now excluded from key aspects of civic and political life" as a direct result of how criminal legal systems operate. Nat'l Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences* 307 (2014); *see also id*. at 91-103, 233-58, 303-13 (discussing racially disparate creation of lower categories of citizenship); Vesla M. Weaver et al., *Detaining Democracy? Criminal Justice and American Civic Life*, 651 Ann. Am. Acad. Pol. & Soc. Sci. 6-21 (2014) (same). These antidemocratic impacts deepen a preexisting democracy deficit by reducing the already hindered abilities of people and communities of color to participate in the generation and administration of the governing law. Albert W. Dzur et al., *Punishment and Democratic Theory: Resources for a Better Penal Politics*, Democratic

Theory and Mass Incarceration 1, 6-10 (2016). Jury service is a critical form of such local self-governance—so much so that Article I, section 26 of the North Carolina Constitution enshrines the right to participate without hindrance from racial bias.

Unfortunately, as acknowledged in a study commissioned under the leadership of this Court's Chief Justice, racial discrimination has evolved over time in ways that can evade prevention and remedy. N.C. Comm'n on the Admin. of Law, *Final Report* 68-69, 84 (2017) [hereinafter "NCCAL Report"]. The NCCAL further acknowledged that such bias undermines justice system legitimacy. *Id*. at 15-16. Additional research demonstrates the strong connection between system illegitimacy and cynicism about the need to comply with system demands. Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 Crime and Just. 283 (2003). Thus, as this Court has stated, the "integrity of the judicial system is at stake" when racial bias infects jury selection; that bias "entangles the courts in a web of prejudice and stigmatization [and] put[s] the courts' imprimatur on attitudes that historically have prevented blacks from enjoying equal protection of the law." *State v. Cofield*, 320 N.C. 297, 303-304, 357 S.E.2d 622, 625-27 (1987).

These problems intensified after the Civil Rights era of the mid-twentieth century. With the dismantling of overt, de jure practices that maintained white supremacy, race prejudice took more covert, indirect forms that impede progress toward racial equality. Eduardo Bonilla-Silva, *Rethinking Racism: Toward a Structural Interpretation*, 62 Am. Soc. Rev. 465, 470 (1997). Today, no one—no matter what their racial identity—can be free of racism, because it is too deeply ingrained in the structure of our society. Michael Omi and Howard Winant, *Racial Formation in the United States* 266 (3rd Ed. 2015). As the NCCAL

Report to this Court stated, everyone is susceptible to implicit biases, that is, attitudes and stereotypes that unconsciously affect an individual's understanding, actions, and decisions in all aspects of life. NCCAL Report, *supra*; *see also Miller-El,* 545 U.S. at 268 (Breyer, J., concurring) (racial bias "may be invisible even to the prosecutor exercising the challenge"); *see generally* Cheryl Staats et al., *State of the Science: Implicit Bias Review, Race and Ethnicity: Views from Inside the Conscious Mind* (Kirwan Institute, 2017). Thus, decisions to live in a particular neighborhood, send children to a particular school, or hire particular workers have racial undertones, as historical patterns of systematic government-supported and private racism shape not only the context within which such decision making occurs but also the minds and hearts that make those decisions. Bonilla-Silva, *supra* at 470 n. 21.

The result is structural racism, "a comprehensive system of advantages and disadvantages—economic, political, cultural, and psychological" that suffuses U.S. society. Omi and Winant, *supra*. Tackling structural racism requires coordinated effort to encourage antiracist behaviors and practices across realms of work, school, politics, law, family, and culture. *Id.* However, such coordinated efforts require acknowledgment that structural racism exists. Unfortunately, individuals and institutions often react defensively to evidence that racist attitudes are widely held and fostered. *See generally* Robin Diangelo, *White Fragility* (2018).

The Ohio Supreme Court's Commission on Racial Fairness acknowledged the complicity of the bench and bar in such defensiveness and resistance: "Americans

continue to be singularly uncomfortable when it comes to discussing issues of racial fairness candidly and constructively. Judges and lawyers are not immune to this aversion." *Report of the Comm'n on Racial Fairness* 44-45 (1999), **Error! Hyperlink reference not valid.** [hereinafter "*Ohio Report*"). Unfortunately, by framing analysis in terms of intentional racism, *Batson* promotes defensiveness and resistance which, in turn, impede remediation and prevention. *See Robinson* Order, ¶ 228 (citing prosecutor affidavits swearing to purportedly race-neutral reasons for strikes that are flatly contradicted by the record); *Foster*, 195 L.Ed.2d at 14-16 (rejecting "false" explanations prosecutor presented to trial court); *Miller-El*, 545 U.S. at 265 (proffered prosecutor explanations "are so far at odds with the evidence" as to reveal "the very discrimination [they] were meant to deny"). Defensiveness and resistance also feed backlash and regression. *See* Gen. Assembly of the Commonwealth of Penn., Joint State Gov't Comm'n, *Capital Punishment in Pennsylvania: The Report of the Task Force and Advisory Committee* 66-67 (June 2018) [hereinafter "*Capital Punishment in Pennsylvania"*] (noting that the success of North Carolina's Racial Justice Act "might have contributed to its repeal.") Attempts to turn back the clock by reinstating the death sentences in these cases exemplify such regression and backlash.

Anticipating similar hostility toward identification and remediation of racial bias in criminal legal systems, the Ohio Supreme Court Commission cited above "strongly urge[d]" the state Supreme Court and Bar Association to

> require that the members of the legal profession put the issue of racial fairness on their professional agendas … to force this discussion out into the open and to keep it there until the juxtapositioned attitudes of the criminal justice system and the disaffected minority community are addressed and reconciled.

Ohio Report, supra, at 45. Only such focused attention and effort can expose and remedy the intertwined problems of structural racism, implicit bias, and their contribution to the antidemocratic impacts of criminal legal systems.

Fortunately, such efforts have been increasing over time, thanks to strong leadership from state Supreme Courts and Chief Justices. A 1993 study of interventions in five states revealed a shared focus on reducing racial bias in jury selection. Suellyn Scarnecchia, *State Responses to Task Force Reports on Race and Ethnic Bias in the Courts,* 16 Hamline L. Rev. 923, 937 (1993). More recently, Pennsylvania's comprehensive review of its death penalty regime included a recommendation for enactment of a RJA and the use of statistical evidence to correct and prevent racial bias in capital jury selection. *Capital Punishment in Pennsylvania, supra,* at 12, 148-149. The North Dakota Supreme Court Commission to Study Racial and Ethnic Bias also emphasized the need to identify and address the causes and consequences of racial disparities in jury service:

> Exclusion may result from: conscious bias from court officials against a particular group; indirect bias in policies that leads to a disparate racial impact; or unconscious bias from court decision makers. Consideration of these potential negative influences is a necessary initial step to ensure adequate jury representation. Efforts directed toward achieving fairness in jury selection also help secure a positive reputation for the judiciary and improve its legitimacy in the eyes of the public.

N.D. Sup. Ct. Comm'n to Study Racial and Ethnic Bias in the Courts, *Final Report* 17-18 (2012), https://www.ndcourts.gov/court/committees/bias_commission/FinalReport 20122.pdf.

As similar state Supreme Court initiatives blossomed across the country,[3] the National Conference of Chief Justices and the Conference of State Court Administrators joined forces to create a nationwide network that includes 37 states. Nat'l Consortium on Racial and Ethnic Fairness in the Courts, http://www.national-consortium.org/About/ History.aspx (last visited July 5, 2018); Conf. of Chief Justices, Res. 18 (2004), http://ccj.ncsc.org/~/media/microsites/files/ccj/ resolutions/01212004-access-fairness-national-consortium-task-forces-commissions-racial-ethnic-fairness-courts.ashx; Conf. of State Court Adm'rs, *Position Paper on State Courts' Responsibility to Address Issues of Racial and Ethnic Fairness* (2001), http://cosca.ncsc.org/~/media/Microsites/Files/ COSCA/Policy%20Papers/racialethnicwhitepapr.ashx.

As discussed below, examples of resulting interventions include a Washington Supreme Court rule which responds directly, as did the RJA, to the *Batson*'s manifest failures. However, these nationwide interventions extend beyond jury selection. With mounting evidence of racial bias in judicial decision-making, *see* Justin D. Levinson et al., *Judging Implicit Bias: A National Empirical Study of Judicial Stereotypes*, 69 Fla. L. Rev. 63 (2017), the National Center for State Courts created tools for managing the "complex and bias-rich situation" of the typical American courtroom. Jerry Kang, *Implicit Bias: A Primer for Courts* 6 (National Center for State Courts 2009). Evidence of race disparity in charging, *see* Jawjeong Wu, *Racial/Ethnic Discrimination and Prosecution: A Meta-Analysis,* 43 Crim. Just. & Behav. 437 (2016), inspired North Carolina prosecutors to

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[3] Examples range from Indiana, https://www.in.gov/judiciary/fairness/2391. htm, to Missouri, https://www.courts.mo.gov/ page.jsp?id=95153, and Washington, https://www.courts.wa.gov/?fa=home.sub&org= mjc&page=chair&layout=2.

participate in the Vera Institute of Justice Prosecution and Racial Justice Program, which produced a guide for prosecutors to identify and remedy the influence of race on their decision making. Vera Inst. of Just., *A Prosecutor's Guide For Advancing Racial Equity* 14-16 (2014), https://cdpsdocs.state.co.us/ccjj/Resources/Ref/prosecutors-advancing-racialequity_Nov2014.pdf. Lawmakers have also amended sentencing laws to address their racially disparate impacts. U.S. Sentencing Comm'n, *Report to the Congress: Fair Sentencing Act of 2010* (2015), https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/201507_RtC_Fair-Sentencing-Act.pdf. Recognizing that collateral consequences of convictions also have racially disparate impacts, states are removing barriers to housing, education, employment, and transportation—all of which are necessary to function as a productive member of society. *See* Darren Wheelock, *Collateral Consequences and Racial Inequality: Felon Status Restrictions as a System of Disadvantage*, 21 J. Contemp. Crim. Just. 82 (2005); *see also* American Civil Liberties Union et al., *State Reforms Reducing Collateral Consequences for People with Criminal Records: 2011-2012 Legislative Round-Up* (2012), http://hirenetwork.org/sites/default/files/State%20Collateral%20Consequences%20Legislative%20Roundup%20Sept%202012.pdf; American Legislative Exchange Council, *The Collateral Consequences Reduction Act* (2017), https://www.alec.org/model-policy/the-collateral-consequences-reduction-act/.

Thus, North Carolina's RJA and the orders vacating these death sentences are part of a broader, nationwide effort to reveal, remedy, and prevent racial bias in criminal legal systems. However, the RJA and the orders granting sentencing relief comprise especially

direct remedies for the antidemocratic impact of racial bias in these systems. This is so because the jury is a key component of local democratic self-governance and an important check on concentrated governmental power. James E. Coleman, Jr., *The Persistence of Discrimination in Jury Selection: Lessons from North Carolina and Beyond*, The Champion, 1, 13-14 (forthcoming 2018). Furthermore, the experience of serving on a jury positively influences citizen-jurors' impression and perceived knowledge of the criminal legal system. Jimin Pyo, *The Impact of Jury Experience on Perception of the Criminal Prosecution System*, 52 Int'l J. of Law, Crime & Just. 176, 182 (2018).

Unfortunately, study after study demonstrates systemic failure in securing jury venires and petit juries that reflect the racial and ethnic composition of their local communities in compliance with the Sixth and Fourteenth Amendments. Jacinta M. Gau, *A Jury of Whose Peers? The Impact of Selection Procedures on Racial Composition and the Prevalence of Majority-White Juries, 39* J. of Crime and Just., 80 (2016); Ronald Randall et al., *Racial Representativeness of Juries: An Analysis of Source List and Administrative Effects on the Jury Pool, 29 The Just. Sys. J.*, 71 (2008). These patterns of exclusion remain despite strong public support for multiracial juries to ensure fair, reliable outcomes and to shore up the waning legitimacy of criminal legal systems. Gau, *supra*, at 75-78.

This public support is corroborated by social science, which reveals that juror diversity promotes consideration of important insights and perspectives. Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. Rev. 1124, 1180 (2012) (discussing Samuel R. Sommers, *On Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Delib*eration, 90 J. Personality & Soc. Psychol. 597 (2006)).

Unfortunately, people of color are disproportionately excluded from the jury venires from which petit juries are drawn. Gau, *supra*, at 78. Even that early-phase exclusion has statistically significant impacts on case outcomes; all-white venires are more conviction-prone than venires with at least one Black member. Shamena Anwar et al., *The Impact of Jury Race in Criminal Trials*, 127 Q.J. Econ. 1017, 1019-20 (2012).

Yet in capital cases, even if people of color make it into the venire, the process of death qualification disproportionately excludes them from jury service. *Capital Punishment in Pennsylvania, supra,* at 10-12, 143-148. Their exclusion intensifies racial bias among seated white jurors as well as the support of those seated jurors for death verdicts. Justin D. Levinson et al., *Devaluing Death,* 89 N.Y.U. L. Rev. 513, 557-563 (2014). Whites also tend to be more punitive toward defendants of color, particularly when whites constitute the numerical majority on the petit jury. Gau, *supra*, at 76. More specifically, all-white juries have a greater tendency to sentence defendants to death. *Id.* at 78.

Sadly, this Court has deepened these racialized, antidemocratic, and delegitimizing impacts of jury selection by failing to enforce the rights of qualified African American jurors to participate in this critically important form of local self-governance. Daniel R. Pollitt & Brittany P. Warren, *Thirty Years of Disappointment: North Carolina's Remarkable Appellate Batson Record*, 94 N.C. L. Rev. 1957 (2016). This Court's quiescence encourages "business as usual" exclusionary practices predicted by then-Associate Justice Frye. *Jackson, supra*. Supporting evidence extends beyond the record in these cases. For example, Professors Ronald Wright and Kami Chavis at Wake Forest University School of Law reviewed data from all non-capital felony trials in North Carolina occurring between

2011 and 2012—a data set comprising 29,000 potential jurors—and found that prosecutors struck jurors of color at twice the rate of white jurors overall and, in the state's urban areas, nearly three times as often. Ronald F. Wright et al., *The Jury Sunshine Project: Jury Selection Data as a Political Issue,* 2018 U. Ill. L. Rev. (forthcoming 2018).

It is time for this Court to reject "business as usual" and rejoin Courts around the country in acknowledging and rooting out the pernicious taint of racial bias from jury selection. In addition to the efforts of Court-led commissions, task forces, and the National Consortium discussed above, the latest model for productive action is General Rule 37 issued by the Supreme Court of Washington. GR 37 tracks key aspects of the RJA as applied in the final orders vacating these death sentences. First, GR 37(a) embodies the same strong commitment to enforcing equal rights of participation in local governance through jury service. Second, GR 37(e) eliminates *Batson*'s requirement of proving purposeful discrimination in the exercise of peremptory strikes. Instead, GR 37(e) prohibits strikes if "an objective observer could view race or ethnicity as a factor," and GR 37(f) defines "objective observer" as a person who is aware of "implicit, institutional, and unconscious biases." Third, GR 37(g) allows presentation of statistical evidence to show bias. GR 37 also plugs other gaping holes left by *Batson*, which prosecutors exploit to avoid enforcement of qualified jurors' constitutional rights. Thus, GR 37(h) presumes that strikes are invalid if motivated by purportedly "race-neutral" reasons prosecutors inculcate (including through the North Carolina Conference of District Attorneys "Top Gun" training) to shield racial bias from detection and correction. These presumptively invalid reasons include prior contact with law enforcement, distrust of law enforcement

due to racial profiling, living in a high-crime neighborhood, and having an objectionable demeanor. *Id.*

The new Washington Supreme Court rule underscores the propriety of the orders granting relief from these death sentences under the law that governed when those final orders issued because that rule adopts the same strategies for identifying, correcting, and eliminating racial bias in jury selection. As one of many signposts marking a national trend toward restoring fairness and legitimacy to criminal case outcomes and to the legal systems that produce them, the rule also points clearly to the right result in this case: reversal of the judgment below.

CONCLUSION

The Court's choice is stark. Nothing less than the "integrity of the judicial system is at stake" where, as here, courts are "entangle[d] … in a web of prejudice and stigmatization" woven by the racially biased exclusion of qualified jurors from jury service. *Cofield*, 320 N.C. at 303-304. Affirming the decision below would "put the courts' imprimatur on attitudes that historically have prevented blacks from enjoying equal protection of the law." *Id.* There can be no blinking at the regressive consequences of putting this Court's imprimatur on the State's attempt to turn back the clock. Affirmance would deepen the racialized antidemocratic impacts of North Carolina's jury selection processes, embolden the race-based exclusion of qualified jurors of color from a core function of local self-governance, and undermine the legitimacy of the courts and criminal legal system in a state once lauded as a national leader in court reform. It is this Court's duty to enforce fundamental guarantees of liberty and equality that are enshrined

in the Fifth, Sixth, Eighth, and Fourteenth Amendments, Article I of the North Carolina Constitution, and the statute that governed the final orders granting sentencing relief in these cases. The judgment below should be reversed.

Respectfully submitted, this the 12th day of July, 2018.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the North Carolina Rules of Appellate Procedure, undersigned counsel certifies that the body of this brief, including footnotes and citations, contains fewer than the 3,750 words permitted for *amicus* briefs.

CERTIFICATE OF SERVICE

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