No. 261A18-3 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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NORTH CAROLINA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, Plaintiff-Appellant, v. TIM MOORE, in his official capacity, PHILIP BERGER, in his official capacity, Defendant-Appellees.	)	From Wake County

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AMICI CURIAE BRIEF OF THE HONORABLE ROBERT H. EDMUNDS JR. (RET.), HONORABLE BARBARA A. JACKSON (RET.), AND HONORABLE MARK MARTIN (RET.)[1]

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[1] No person or entity other than these amici curiae and their counsel, directly or indirectly, either wrote this brief or contributed to its preparation. All efforts were *pro bono publico*.

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STATEMENT OF INTEREST

Amici are three former justices of the Supreme Court of North Carolina. Collectively, their judicial experience totals fifty-eight years, including forty-four years on the Supreme Court.

Amici have devoted years of service toward improving the legal profession. They have led state and national organizations committed to serving appellate judges, such as the Appellate Judges Education Institute. They have chaired and served on state and national committees dedicated to judicial ethics and improving the administration of justice. These committees include the Professionalism and Competence of the Bar Committee of the Conference of Chief Justices, the North Carolina Commission on the Administration of Law and Justice, and the ABA's Appellate Judges Conference. They have participated in numerous panel discussions on preserving and promoting the rule of law. These issues lie at the heart of the proposed rule change now before the Court.

QUESTION PRESENTED

Should the established rule for resolving judicial disqualification and recusal questions be changed during a specific case rather than through the Court's customary administrative rule-making process?

INTRODUCTION & ARGUMENT SUMMARY

Procedures matter. They matter to the parties and their advocates. They matter to the public. And they matter to this honorable Court. Due process of law provides a foundational pillar of the rule of law and the rights enshrined in our Constitution. *See McNabb v. United States*, 318 U.S. 332, 347 (1943) ("The history of liberty has largely been the history of observance of procedural safeguards.").

Plaintiff invites this Court to depart from established procedures in two extraordinary ways. First, it asks this Court to eschew nearly fifty years of consistent practice and adopt a new rule for determining recusal and disqualification. Second, it asks this Court to do so in connection with a specific case—and not as part of its administrative rule-making process.

It is entirely appropriate for plaintiff to make such a request in pursuit of its interests. The Court, however, has the responsibility of

considering the broader, long-term consequences of granting such a request. The Court should begin by scrutinizing the impact that allowing this motion would have on the public's perception of its independence, integrity, and impartiality. *See* N.C. Const. art. I § 35 ("A frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty.").

Adopting a policy that allows a certain number of justices to require the involuntary recusal of one or more of their colleagues in this case threatens to upend these core principles. Absent a compelling reason for this departure from custom, the public likely would conclude that the rule change is motivated by its anticipated impact on the case's outcome.

This Court should decline plaintiff's invitation on two interrelated grounds. First, there is no compelling reason to adopt a new rule for recusal and disqualification. Neither state nor federal law demands involuntary recusal. Instead, individual justices on North Carolina's court of last resort subject to recusal and disqualification motions have decided those motions without incident for at least forty-eight years.

Second, departing from the longstanding rule in the middle of a specific case would erode public trust and confidence in our courts. This

Court should not impose upon itself such a high price. Prudence counsels strongly in favor of retaining the established rule during the pendency of a specific case.

ARGUMENT

I. There Is No Compelling Reason To Adopt A New Rule Using An Unconventional Process.

In 1973, the General Assembly permitted the Supreme Court to "prescribe standards of judicial conduct" that would bolster public trust and confidence in the courts. *See* An Act to Authorize the Supreme Court to Promulgate a Code of Judicial Conduct for the Guidance of the Judges of the General Court of Justice, ch. 89, § 1, 1973 N.C. Sess. Laws 71, 71. Later that year, the Court adopted the North Carolina Code of Judicial Conduct. 283 N.C. 771 (1973). The Code enumerates ethical principles to guide judges' personal and professional conduct, including their decisions on recusal. While the Code does not set forth a specific process for deciding questions of disqualification or recusal at the Supreme Court, the Court has followed a consistent practice. For forty-eight years, and "[w]ithout exception," the Court has "deferred to the judgment of the individual justice or justices being asked to recuse." Hon. James G. Exum Jr., Hon. Burley B. Mitchell Jr., & Hon. Mark D. Martin, *On Recusals,*

the NC Supreme Court Has Relied on Honor, News & Observer, Oct. 24, 2021, at B15 [hereinafter Exum et al.].[2]

If this longstanding recusal procedure is to be revised, the full Court with all seven members participating should do so only in administrative session without any nexus to a particular case.[3] As other amici suggest, such rules are typically adopted unanimously in administrative session. *See* Br. of Amicus Curiae Former Chairs of the North Carolina Judicial Standards Commission at 6 (highlighting the unanimous adoption of the most recent revisions to the Code). These rule changes ordinarily apply prospectively to appeals filed after a particular date.[4] Doing so ensures that the Court's rule-making authority is exercised fairly and impartially—in appearance and in fact.

The United States Constitution does not demand this departure from established norms. Due process requires "[a] fair trial in a fair

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[2] This op-ed was also published online under a different title at https://www.newsobserver.com/opinion/article255204911.html.

[3] Amici express no opinion on the relative policy merits of either approach, though they harbor concerns about the implications of involuntary recusals.

[4] *E.g.*, 375 N.C. 1034, 1077–78 (2020); 372 N.C. 902, 904–05 (2019); 371 N.C. 974, 1035 (2018); *see also* Order Amending the Rules of Appellate Procedure (Oct. 13, 2021) (noting that the changes adopted on October 13, 2021 would not go into effect until January 1, 2022), https://www.nccourts.gov/assets/inline-files/Order-Amending-the-Rules-of-Appellate-Procedure-Approved-13-October-2021.pdf.

tribunal." *In re Murchison*, 349 U.S. 133, 136 (1955). But "most matters relating to judicial disqualification [do] not rise to a constitutional level." *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009) (quoting *FTC v. Cement Inst.*, 333 U.S. 683, 702 (1948)). Due Process requires recusal only in the most "extreme" circumstances. *See id.* at 887 (citing *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825–826 (1986); *Mayberry v. Pennsylvania*, 400 U.S. 455, 465–466 (1971); and *Murchison*, 349 U.S. at 137). "[M]atters of kinship, personal bias, [and] state policy"—the issues raised in plaintiff's motion—have long rested beyond the reach of the Due Process Clause. *Id.* (quoting *Tumey v. Ohio*, 273 U.S. 510 (1927)).

This Court's unbroken adherence to self-recusal also is consistent with—and perhaps compelled by—state law. Self-recusal respects the coequal status of the seven members of the Court. *See* N.C. Const. art. IV § 6(1). Our Constitution permits only the General Assembly to determine the process by which to remove a sitting justice. *Id.* § 17(1). The General Assembly has exercised this authority by creating the Judicial Standards Commission. Only upon recommendation of the Commission may the Supreme Court remove a justice—and even then, only for conduct that has already occurred. N.C.G.S. § 7A-376(b); *see also*

North Carolina State Bar v. Tillett, 369 N.C. 264, 276, 794 S.E.2d 743, 751 (2016) (Martin, C.J., concurring) (explaining that this disciplinary process is the "*sole mechanism*" by which the Court may remove sitting judges (emphasis added)).

Self-recusal has endured through at least nine revisions of the Code. *E.g.*, 368 N.C. 1029 (2015); 331 N.C. 771 (1992); 286 N.C. 729 (1974). It also has endured through legislative efforts to strengthen the rules of recusal and disqualification. An Act to Amend the Laws Related to Criminal Procedure, ch. 711, § 1, 1977 N.C. Sess. Laws 853, 859 (codified at N.C.G.S. § 15A-1223). Neither this Court nor the General Assembly has acted to change this process since the Code was first adopted. Moreover, amici do not recall any instance during their tenures when the Judicial Standards Commission recommended changing the existing procedure.

No reason requires such a change now. The Commission ensures justices have both the information and the incentives necessary to make ethical decisions. Justices can—and often do—solicit advisory opinions "as to whether conduct, actual or contemplated, conforms to the

requirements of the Code." *See* Jud. Standards Comm'n, R. 8 (2021).[5] The Commission has authority to investigate alleged judicial misconduct, *id.* R. 10, and to recommend disciplinary action. *Id.* R. 22.

A bipartisan coalition of former chief justices recently expressed "strong" confidence in this process.[6] Exum et al., at B15. As they explained, "[a]ny approach to recusal and disqualification is bound to have its shortcomings." *Id.* But "[o]nly the individual justice can examine her or his conscience. Only the individual justice knows

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[5] In a 2016 case challenging a different Voter ID law, the trial judge decided to seek election to higher judicial office following his assignment to that case. When questioned about his decision not to recuse, the judge responded that he had consulted with the Commission and had been assured that he could continue to preside over the case. *Voter ID Trial Put On Hold Due to Federal Ruling*, WITN (Aug. 10, 2016), https://www.witn.com/content/news/Trial-on-voter-ID-in-North-Carolina-set-aside-for-now-389704622.html.

Had that trial judge recused, he would have been replaced by another trial judge. The justices of our state's court of last resort, however, are not fungible. When a justice recuses, the Court proceeds with fewer voting members. The Institute for the Advancement of the American Legal System (IAALS) has emphasized the importance of being able to replace judges and justices who are involuntarily recused. Russell Wheeler & Malia Reddick, *Judicial Recusal Procedures: A Report on the IAALS Convening* 5 (2017) [hereinafter IAALS Report], available at https://iaals.du.edu/sites/default/files/documents/publications/judicial_recusal_procedures.pdf. In North Carolina, that would likely require a change in law. *See* N.C. Const. art. IV §§ 6, 16; *see also* IAALS Report at 3 ("Adopting and implementing [involuntary recusal] may, in some states, require changes in court rules, statutes, and even constitutional provisions.").

[6] The collective tenure on the Court of these three chief justices spans forty-four unbroken years.

whether she or he can overcome any bias and render a fair and objective decision." *Id.*

Perhaps this explains why two-thirds of American courts of last resort employ a similar approach to questions of recusal and disqualification. In 2017—eight years after *Caperton*—self-recusal remained the established process in thirty-five state supreme courts and the Supreme Court of the United States. Exum et al., at B15; IAALS Report at 5. The existing process works. There is no compelling reason for the Court to jeopardize the public's perception of its integrity by revising this process in connection with a specific case.

II. Changing Rules And Procedures In Connection With A Case Would Erode Public Confidence In This Court's Integrity And Impartiality.

North Carolina's attorneys and judges are the guardians of the rule of law. We universally prize the integrity of our courts. We relish our bragging rights as the first American jurisdiction to adopt judicial review. *See generally Bayard v. Singleton*, 1 N.C. (Mart.) 5 (1787). And we place great faith in our courts to wield that power fairly and impartially when resolving sensitive constitutional questions such as those presented in this case.

Each generation of justices and judges bears a weighty responsibility to preserve and protect that faith. Judicial integrity is a "vital state interest." *Caperton*, 556 U.S. at 889. The efficacy of judicial power rests "upon the respect accorded to [a court's] judgments." *Id.* (quoting *Republican Party of Minn. v. White*, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring)). That respect hinges on the "court's absolute probity," both real and perceived. *See id.* (quoting *White*, 536 U.S. at 793 (2002) (Kennedy, J., concurring)). Accordingly, our jurists must comport themselves in ways that "promote[ ] public confidence in the integrity and impartiality of the judiciary." Code Jud. Conduct Canon 2A.

Plaintiff's request to change the recusal rule, if granted, jeopardizes public confidence in this Court's integrity and impartiality. To change a longstanding internal rule in connection with a particular case would be extraordinary by any measure. In light of this case's sensitive nature and national profile, this Court should demand a compelling justification before taking that step.

No such justification exists. If this Court changes its customary recusal rule here, the public will almost certainly perceive that a desire to achieve a particular outcome motivated the change. Few actions could

undermine public confidence in the Court's impartiality more than changing the Court's internal processes merely to alter a single case's result. The effect would be "stunning and destabilizing." Editorial Board, *Scorched-Earth Judging in North Carolina*, Wall St. Journal (Oct. 3, 2021).[7]

This Court generally disapproves of parties' efforts to reshape their case on appeal. North Carolina case law is replete with examples of this Court's chastising parties who attempt to "swap horses between courts in order to get a better mount in the Supreme Court." *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934); *see also Matter of W.I.M.* 374 N.C. 922, 927, 845 S.E.2d 77, 81 (2020) (invoking this language from *Weil*). Just as parties cannot alter their substantive arguments on appeal, so too their attempts to alter procedural rules in the midst of their appeal should be denied.

If the Court wishes to change its recusal procedure, it should do so through its administrative rule-making process. Plaintiff's motion, made in the context of a specific case, denies the entire Court the opportunity

[7] Available at https://www.wsj.com/articles/north-carolina-2018-election-court-gerrymandering-income-tax-cap-voter-id-naacp-moore-11633276080.

to review and debate alternative processes in a transparent and dispassionate manner with a view towards achieving consensus and administrative unanimity.[8] By allowing plaintiff's motion, the Court would unnecessarily raise questions as to its perceived independence, integrity, and impartiality.

CONCLUSION

This Court should resolve plaintiff's motion to disqualify using the same process it has employed for at least a half-century. Changes to the recusal and disqualification process should be adopted prospectively in administrative session, separate and apart from the resolution of any specific case.

24 November 2021

Respectfully submitted,

/s/ Michael G. Schietzelt
Michael G. Schietzelt

[8] The Court's administrative rule-making function emphasizes collegiality, consensus, and decisional unanimity. Internal and external stakeholders routinely support this process. The Judicial Standards Commission, the Bar Association Appellate Rules Committee, and the public at large typically provide input. Such input would be invaluable here. After all, IAALS acknowledges the significant hazards inherent in the involuntary policy. IAALS Report at 8 ("[A]llowing justices to review a colleague's ethics could impair collegiality or, alternatively, encourage strategic justices to use a motion requesting recusal of a colleague in an important case to effect a temporary change in the composition of the court and thus manipulate the court's law-declaring function.").

N.C. State Bar No. 53599
1625 Upper Park Road
Wake Forest, NC 27587
(336) 260-7271
Mike.Schietzelt@gmail.com
Counsel for Amici Curiae

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy the foregoing brief was served upon all counsel listed below via e-mail:

Kimberley Hunter
David Neal
Southern Environmental Law Center
601 W. Rosemary Street
Suite 220
Chapel Hill, NC 27516-2356
Phone: (919) 967-1450
Fax: (919) 929-9421
khunter@selcnc.org
dneal@selcnc.org

Irving Joyner
P.O. Box 374
Cary, NC 27512
ijoyner@nccu.edu

Daryl V. Atkinson
Caitlin Swain
Kathleen E. Roblez
Forward Justice
400 W. Main Street, Suite 203
Durham, NC 27701
daryl@forwardjustice.org
cswain@forwardjustice.org
kroblez@forwardjustice.org

Counsel for Plaintiff-Appellant NC NAACP

D. Martin Warf
Nelson Mullins
Glenlake One, Suite 200
4140 Parklake Avenue
Raleigh, NC 27612

martin.warf@nelsonmullins.com

Counsel for Defendants

Daniel F. E. Smith
Jim W. Phillips, Jr.
Eric M. David
Kasi W. Robinson
Brooks, Pierce, Mclendon, Humphrey & Leonard, L.L.P.
Suite 2000 Renaissance Plaza
230 North Elm Street (27401)
Post Office Box 26000
Greensboro, NC 27420 6000
dsmith@brookspierce.com
jphillips@brookspierce.com
edavid@brookspierce.com
krobinson@brookspierce.com

Counsel for Amicus Roy Cooper, Governor of the State of North Carolina

Robert E. Harrington
Adam K. Doerr
Erik R. Zimmerman
Travis S. Hinman
Robinson, Bradshaw & Hinson, P.A.
101 North Tryon Street, Suite 1900
Charlotte, North Carolina 28246
rharrington@robinsonbradshaw.com
adoerr@robinsonbradshaw.com
ezimmerman@robinsonbradshaw.com
thinman@robinsonbradshaw.com

John R. Wallace
Lauren T. Noyes
Post Office Box 12065
Raleigh, North Carolina 27605
Wallace & Nordan, L.L.P.

jrwallace@wallacenordan.com
ltnoyes@wallacenordan.com

Aaron R. Marcu
Shannon K. McGovern
601 Lexington Avenue
New York, NY 10022
Freshfields Bruckhaus Deringer US LLP
aaron.marcu@freshfields.com
shannon.mcgovern@freshfields.com

Counsel for Amicus North Carolina Legislative Black Caucus

Colin A. Shive
Robert F. Orr
150 Fayetteville St Suite 1800
Raleigh, NC 27601
cshive@tharringtonsmith.com
orr@rforrlaw.com

Counsel for Amici North Carolina Professors of Constitutional Law

Jaclyn Maffetore
Leah J. Kang
Kristi L. Graunke
ACLU of North Carolina Legal Foundation
P. O. Box 28004
Raleigh, NC 27611-8004
jmaffetore@acluofnc.org
lkang@acluofnc.org
kgraunke@acluofnc.org

Counsel for Amicus ACLU of North Carolina

John J. Korzen
Wake Forest University School of Law
PO Box 7206

Winston-Salem, NC 27109-7206
korzenjj@wfu.edu

Counsel for Amicus Democracy North Carolina

Douglas B. Abrams
Noah B. Abrams
Abrams & Abrams
1526 Glenwood Avenue
Raleigh, NC 27608
dabrams@abramslawfirm.com
nabrams@abramslawfirm.com

Matthew E. Lee
Whitfield Bryson LLP
900 W. Morgan St.
Raleigh, NC 27603
matt@whitfieldbryson.com

Counsel for Amicus North Carolina Advocates for Justice

B. Tyler Brooks
Law Office of B. Tyler Brooks, PLLC
901 Kildaire Farm Rd Suite C1-b
Cary, North Carolina 27511-3937
btb@btylerbrookslawyer.com

Tami L. Fitzgerald
North Carolina Values Coalition
9650 Strickland Road, Suite 103-226
Raleigh, North Carolina 27615
tfitzgerald@ncvalues.org

Pressly M. Millen
Womble Bond Dickinson (US) LLP
555 Fayetteville Street, Suite 1100
Raleigh, NC 27601
Press.Millen@wbd-us.com

Counsel for Amici Former Chairs of the North Carolina Judicial Standards Commission

R. Daniel Gibson
Stam Law Firm, PLLC
P.O. Box 1600 Apex, NC 27502
dan@stamlawfirm.com

Counsel for Amicus Professor John V. Orth

Ellen Murphy
1729 Virginia Road
Winston-Salem, NC 27104
murphynickles@gmail.com

Counsel for Amici North Carolina Professors of Professional Responsibility

Jeanette K. Doran
2012 Timber Drive
Raleigh, NC 27604
jeanette.doran@ncicl.org

Counsel for Amici North Carolina Institute for Constitutional Law and The John Locke Foundation

Christopher J. Heaney
The Law Office of Christopher J. Heaney, PLLC
116 Donmoore Court
Garner, NC 27529
Chris.heaney@heaneylawoffice.onmicrosoft.com

Debo P. Adegbile
Wilmer Cutler Pickering Hale & Dorr, LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007

Debo.Adegbile@wilmerhale.com

Counsel for Amici Scholars of Judicial Ethics and Professional Responsibility

Lindsey W. Dieselman
Nathaniel B. Edmonds
Thomas Jordan
Mary E. Rogers
Paul Hastings, LLP
2050 M St. NW
Washington, DC 20036
lindseydieselman@paulhastings.com
nathanieledmonds@paulhastings.com
thomasjordan@paulhastings.com
maryrogers@paulhastings.com

Douglas Keith
Alicia L. Bannon
The Brennan Center for Justice at NYU School of Law
120 Broadway Suite 1750
New York, NY 10271-0202
keithd@brennan.law.nyu.edu
bannona@brennan.law.nyu.edu

Counsel for Amicus Curiae Brennan Center for Justice at New York University School of Law

24 November 2021

/s/ Michael G. Schietzelt
Michael G. Schietzelt
N.C. State Bar No. 53599