IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
Case No. 1:23-CV-734

ANITA S. EARLS, Plaintiff, v. NORTH CAROLINA JUDICIAL STANDARDS COMMISSION; THE HONORABLE CHRIS DILLON, in his official capacity as Chair of the North Carolina Judicial Standards Commission; THE HONORABLE JEFFERY CARPENTER, in his official capacity as Vice Chair of the North Carolina Judicial Standards Commission, and the following Members of the North Carolina Judicial Standards Commission, each in his or her official capacity: THE HONORABLE JEFFERY B. FOSTER; THE HONORABLE DAWN M. LAYTON; THE HONORABLE JAMES H. FAISON, III; THE HONORABLE TERESA VINCENT; MICHAEL CROWELL; MICHAEL T. GRACE; ALLISON MULLINS; LONNIE M. PLAYER JR.; JOHN M. CHECK; TALECE Y. HUNTER; DONALD L. PORTER; and RONALD L. SMITH, Defendants.	)	**AMICI CURIAE BRIEF BY PROFESSORS OF LEGAL ETHICS IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION**

Certain professors of law who specialize in legal ethics, who are identified by name, title, and institutional affiliation below, submit this brief as amici curiae in support of Plaintiff's motion for preliminary injunction.[1]

[1] Pursuant to LR 7.5(d), the amici state that: (1) no party's counsel authored this brief in whole or in part; (2) no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and (3) no person, other than the amici and their counsel, contributed money intended to fund preparing or submitting this brief.

STATEMENT OF INTEREST

The proposed amici are the following professors of law, listed in alphabetical order by name, along with their titles and institutional affiliations:

Name	Title	Institution
Bobbie Jo Boyd	Associate Professor of Law	Campbell University Norman Adrian Wiggins School of Law
Kathryn Webb Bradley	Professor Emerita of the Practice of Law	Duke Law School
Kenneth S. Broun	Henry Brandis Professor of Law Emeritus	University of North Carolina School of Law
S. Hannah Demeritt	Clinical Professor of Law	Duke Law School
Eric M. Fink	Associate Professor of Law	Elon University School of Law
Marilyn R. Forbes	Clinical Professor of Law	Duke Law School
Michael J. Gerhardt	Burton Craige Distinguished Professor of Jurisprudence	University of North Carolina School of Law
Charles Geyh	Distinguished Professor and John F. "Jack" Kimberling Chair	Maurer School of Law, Indiana University
Stephen Gillers	Elihu Root Professor of Law Emeritus	NYU Law School
Bruce Green	Louis Stein Chair of Law	Fordham University School of Law
Kevin Lee	Intel Social Justice and Racial Equity Professor of Law	North Carolina Central University School of Law
Nicole Ligon	Assistant Professor of Law	Campbell University Norman Adrian Wiggins School of Law

David J. Luban	University Professor	Georgetown University Law Center
Steven Lubet	Edna B. and Ednyfed H. Williams Memorial Professor of Law Emeritus	Northwestern University Pritzker School of Law
Thomas B. Metzloff	Professor of Law	Duke Law School
Ellen Murphy	Professor of Practice	Wake Forest University School of Law
Theresa A. Newman	Charles S. Rhyne Clinical Professor Emerita of Law	Duke Law School
Philip G. Schrag	Delaney Family Professor of Public Interest Law	Georgetown University Law Center
W. Bradley Wendel	Edwin H. Woodruff Professor of Law	Cornell Law School
Richard Zitrin	Emeritus Lecturer	University of California San Francisco School of Law

This list includes professors from each of the six North Carolina law schools, as well as professors from a host of other law schools across the United States. Each of these professors specializes in legal ethics, including the ethical rules and principles governing the conduct of lawyers and judges. In recent years, many of the amici have focused professional attention on the application of those rules and principles to high-profile situations involving public commentary by lawyers or judges. Each of the amici has an interest in ensuring that the ethical rules governing judges are properly interpreted and fairly applied, consistent with both the principles underlying those rules and the protections of the First Amendment. They support Plaintiff in this matter because they believe that the

applicable ethical rules and principles not only allow but encourage the statements and actions of Plaintiff in this case, as does the First Amendment. The proposed amici have no view as to the particular form that a preliminary injunction or final judgment might take in this case, or as to any other substantive or procedural issues raised by the parties. Rather, their interest is in ensuring that judges like Plaintiff are not constrained in their ability to make the kind of statements Plaintiff made in this matter.

SUMMARY OF ARGUMENT

The North Carolina Code of Judicial Conduct provides no basis for the North Carolina Judicial Standards Commission to investigate, much less sanction, Plaintiff for comments she made to a reporter in June 2023. Relevant ethical rules and principles not only permit but encourage a judge to speak publicly, as Plaintiff did, about the administration of justice in North Carolina. The rules relied upon by the Commission in the Notice of its investigation refer to conduct by a judge that calls into question the judge's own impartiality, something not implicated here.

The Commission's investigation is likewise improper because it violates Plaintiff's First Amendment rights. As an elected official, Plaintiff has the right, and indeed the obligation, to speak on matters of public concern, as she did here. The chilling effect imposed by this investigation on Plaintiff's speech—and on the speech of other judges who seek to fulfill their ethical obligations through commentary that may be critical of the judiciary itself—cannot withstand the strict scrutiny mandated for a state's restrictions on core political speech like that at issue here.

For these reasons, Plaintiff's Motion for Preliminary Injunction should be granted.

ARGUMENT

I. The Relevant Ethical Rules and Principles Not Only Allow But Encourage the Type of Statements Made by Plaintiff.

At issue in this case are isolated statements made by Plaintiff in a June 2023 interview with *Law360*, an online publication focused on current legal issues. The questions posed to Plaintiff were prompted by a May 2023 article written by North Carolina Solicitor General Ryan Park and published by the North Carolina Bar Association that discussed the lack of gender and racial diversity among oral advocates in North Carolina appellate courts. *See* Ryan Park, Mary Gen Sanner, & Emma Ritter, "Diversity and the North Carolina Supreme Court: A Look at the Advocates," *North Carolina Lawyer*, May 2023. The article noted that the lack of diversity among appellate advocates has been an issue of concern in other jurisdictions and concluded that, in North Carolina, "[b]y any measure, women and minority attorneys are starkly underrepresented among attorneys appearing at our state's highest court." *Id.* In publishing this article, Solicitor General Park, the chief legal advocate for the State, honored his ethical obligation as a member of the bar to "seek improvement of the law, access to the legal system, the administration of justice, and the quality of service rendered by the legal profession." N.C. Rules of Professional Conduct, Preamble at [6].

Plaintiff's actions in responding to questions about the implications of Solicitor General Park's article likewise honored her ethical obligations as a member of the judiciary to ensure that the rule of law is applied fairly to all. *See* N.C. Code of Judicial Conduct, Canon 1 ("A judge should uphold and promote the independence, integrity, and

impartiality of the judiciary."); ABA Model Code of Judicial Conduct, Canon 1 ("A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary …."); *id.* at Preamble, at [1] ("[T]he judiciary plays a central role in preserving the principles of justice and the rule of law."). Indeed, Plaintiff's comments were expressly permitted by the ethical rule allowing a judge to "speak . . . concerning the economic, educational, legal, or governmental system, or the administration of justice." N.C. Code of Judicial Conduct, Canon 4(A); *see also* Code of Conduct for United States Judges, Canon 4(A) (same). A judge is not only permitted but "encouraged" to speak on these topics, since "[a]s a judicial officer and a person specially learned in the law, a judge is in a unique position to contribute to the law, the legal system, and the administration of justice." *Id.* at Canon 4, Commentary; *see also* ABA Model Code of Judicial Conduct, Rule 1.2, Comment 2[4] ("Judges should participate in activities that promote ethical conduct among judges and lawyers, support professionalism within the judiciary and the legal profession, and promote access to justice for all."); *see generally* Committee on Codes of Conduct Advisory Opinion No. 93: Extrajudicial Activities Related to the Law, *Guide to Judiciary Policy*, Vol. 2B, Ch. 2, pp. 154-55 (Judicial Conference of the United States) (permitting judicial participation in activities where "a judge brings to bear a special expertise" by virtue of the judicial status and the "beneficiary of the activity is the law or legal system itself").

Plaintiff's responses to the questions posed by the *Law360* reporter spoke directly to the administration of justice in North Carolina. When asked about the reason for the marked gender and racial imbalance among appellate advocates noted by Solicitor General

Park, Plaintiff recalled instances in which she had witnessed female and Black advocates being cut off and in which she herself had been interrupted during oral argument. Hannah Albarazi, "North Carolina Justice Anita Earls Opens Up About Diversity," *Law360* (June 20, 2023) (attached as Exhibit B to Plaintiff's Complaint). She opined that the reason for this conduct was "implicit bias" rather than any "conscious, intentional, racial animus" on the part of any of the unnamed interrupters, and she suggested that the existing "culture of our court" likely contributed to the disparity highlighted by Solicitor General Park. *Id.* She further explained, "I do think that our court system, like any other court system, is made up of human beings and I believe the research shows that we all have implicit biases." *Id.*

As Plaintiff understood, experiences like those she recounted are by no means peculiar to North Carolina courts. Judicial systems across the country have acknowledged the ubiquity of implicit bias within the courts and are taking steps to address it. *See, e.g.*, Jennifer K. Elek & Andrea I. Miller, "The Evolving Science on Implicit Bias: An Updated Resource for the State Court Community," National Center for State Courts (2021) (describing the need for judicial leadership in addressing implicit bias in state courts); Jason A. Cantone, "Federal and State Court Cooperation: Reducing Bias," Federal Judicial Center, https://www.fjc.gov/content/337735/reducing-bias (providing resources relating to state and federal collaborative efforts to identify and reduce implicit bias among judicial employees and attorneys); Katheryn L. Yetter & Brian M. Lee, "Judging the Book by More Than its Cover: A Symposium on Juries, Implicit Bias, and The Justice System's Response," National Judicial College (2021) (focusing on addressing implicit bias among jurors).

The recognition of implicit bias in the courts, and judicial commentary on it, has extended to the United States Supreme Court. A recent landmark study found that female Supreme Court Justices were interrupted at a "markedly higher rate during oral arguments than men." Tonja Jacobi & Dylan Schweers, "Justice, Interrupted: The Effect of Gender, Ideology, and Seniority at Supreme Court Oral Arguments," 103 Va. Law Rev. 1379, 1482 (2017). The study further found that ideology played a role in oral argument dynamics, noting that "conservatives are more likely to interrupt liberals than vice versa." *Id.* at 2483. The article and the data it analyzed generated extensive public commentary, including from Justice Sonia Sotomayor, who confirmed that her experiences on the bench matched those detailed in the study. Maya Yang, "Let Her Finish: Interruptions of Female Justices Led to New Supreme Court Rules," *The Guardian*, Oct. 15, 2021. As a result of this study, the Supreme Court modified its practices for oral argument to allow for more equitable questioning by all Justices, something designed to improve the administration of justice at the Court. *Id.* Plaintiff's comments to *Law360* similarly were focused on improving justice in North Carolina courts, consistent with her ethical obligations as a member of the judiciary.

Remarkably, the Judicial Standards Commission utterly failed to mention Canon 4 in its August 15, 2023 Notice informing Plaintiff of the investigation into her comments to the *Law360* reporter. Instead, the Commission cited two canons of the North Carolina Code of Judicial Conduct—Canon 2A and Canon 3(A)(1)—neither of which is relevant to Plaintiff's statements.

Canon 2 declares that "[a] judge should avoid impropriety in all the judge's activities." N.C. Code of Judicial Conduct, Canon 2; *see also* Code of Conduct for United States Judges, Canon 2 (same); ABA Model Code of Judicial Conduct, Canon 1. By its terms, Canon 2's focus is on conduct by a judge that calls into question ***the judge's own impartiality*** as a decisionmaker. Each of the sub-canons has this same focus: Canon 2A exhorts a judge to "***conduct himself/herself*** at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary"; Canon 2B cautions a judge against ***personal*** conflicts of interest; and Canon 2C restricts a ***judge's*** membership in organizations that practice unlawful discrimination. N.C. Code of Judicial Conduct, Canons 2A, 2B, 2C; *see also* Code of Conduct for United States Judges, Canons 2A, 2B, 2C (same); *id.* at Canon 2A, Commentary ("An appearance of impropriety occurs when reasonable minds … would conclude that ***the judge's*** honesty, integrity, impartiality, temperament, or fitness to serve as a judge is impaired." (emphasis added)); *see generally* ABA Model Code of Judicial Conduct Rule 1.2, Comment [1] (focus is on the "professional and personal conduct ***of a judge***" (emphasis added)). Here, Plaintiff's comments in no way call into question her impartiality as a decisionmaker.

Likewise, the mandate in North Carolina Canon 3(A)(1) that "[a] judge should be unswayed by partisan interests, public clamor, or fear of criticism" concerns a judge's own performance of "adjudicative duties." N.C. Code of Judicial Conduct, Canon 3(A)(1); *see* Code of Conduct for United States Judges 3(A)(1) (same). Again, nothing in Plaintiff's comments raised any concern about how she decides cases. To the contrary, by focusing on the need to treat all litigants fairly, Plaintiff sought to fulfill her adjudicative

responsibility to "accord to every person who is legally interested in a proceeding, or the person's lawyer, full right to be heard according to the law." N.C. Code of Judicial Conduct, Canon 3(A)(4); *see* Code of Conduct for United States Judges 3(A)(4) (same); *see also* ABA Model Code of Judicial Conduct Rule 2.3(A) ("A judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice."). Significantly, in recounting her experiences, Plaintiff named no specific case or judicial colleague, revealed no confidential information, and did not suggest that any decision of the Court had been influenced by improper considerations. *Cf. In re Inquiry Concerning a Judge*, No. 17-143, 372 N.C. 123 (2019) (issuing public reprimand to judge for, among other things, "a pattern of pervasive complaints attacking the personal integrity and fairness" of another judge). Thus, there is no basis for suggesting that Plaintiff violated the relevant ethical rules and principles governing her conduct as a judge.

II. Plaintiff's Statements Are Protected by the First Amendment.

The investigation into Plaintiff's comments to *Law360* violates her First Amendment right to speak out on matters of public concern regarding the administration of justice in North Carolina and risks creating a chilling affect for other judges. *See* Avalon Zoppo, "Could Probe into Judge's Diversity Comments Have a 'Chilling Effect'?", law.com (Oct. 13, 2023) (discussion by legal ethics experts of First Amendment concerns raised by investigation of Plaintiff).

The Supreme Court has made clear that elected judges like Plaintiff do not abandon their First Amendment rights upon assuming office. *See Republican Party of Minn. v. White*, 536 U.S. 765, 781-82 (2002). Furthermore, the speech involved in this case is "core

political speech" for which the First Amendment's protection is "at its zenith." *Buckley v. Am. Const. Law Found., Inc.*, 525 U.S. 182, 186-87 (1999). As the Court recognized in *Republican Party of Minnesota*, the "role that elected officials," including elected judges, "play in our society makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance," such as the issues involved here. 536 U.S. at 781-82.

Other cases, before and after *Republican Party of Minnesota*, make clear that judges are entitled to First Amendment protections, even for—perhaps especially for—criticisms of the judicial system. Thus, in *Scott v. Flowers*, 910 F.2d 201 (5th Cir. 1990), decided before *Republican Party of Minnesota*, the court expunged a reprimand by the Texas Commission on Judicial Conduct of an elected justice of the peace who wrote an "open letter" circulated to the local press that "attacked the district attorney's office and the county court-at-law" for its appellate practices, and thereafter told a reporter that "the county court system is not interested in justice." *Id*. at 204-05.

In that case, the Texas commission contended that the comments by the justice of the peace "served only to 'cast public discredit upon the judiciary'" and advised the subject "to be 'more restrained and temperate in written and oral communications in the future.'" *Id*. at 204. As Plaintiff has done here, the justice of the peace brought an action under 42 U.S.C. § 1983 and "sought a declaration that portions of the reprimand violated his first amendment rights." 901 F.2d at 205. In considering those claims, the court had "no difficulty in concluding that . . . the open letter, and the comments he made in connection with it, address matters of legitimate public concern," since the comments "dealt with the

administration of the county justice system by county officials, a matter about which [the justice], as an elected judge from that county, was likely to have well-informed opinions." *Id*. at 211. The court further concluded that "the state's interest in suppressing [the justice's] criticism" was "much weaker" because "he was an elected official, chosen directly by the voters of his justice precinct, and, at least in ordinary circumstances, removable only by them." *Id*. at 211-12. The Fifth Circuit ultimately held that the Texas commission could not carry the "very difficult burden" of justifying its actions in abridging "core first amendment values." *Id.* at 212. The court discounted the rationale also put forward by the Judicial Standards Commission here, namely, "promoting an efficient and impartial judiciary," holding that "those interests are ill-served by casting a cloak of secrecy around the operations of the courts, and that by bringing to light an alleged unfairness in the judicial system, [the justice] in fact furthered the very goals that the Commission wishes to promote." *Id*. at 213. That principle is equally compelling here.

In a case after *Republican Party of Minnesota*, the Fifth Circuit considered a sanction by the same Texas commission of a judge who held a press conference critical of an attorney's abuse of the judicial process in a case then pending before another judge. *Jenevein v. Willing*, 493 F.3d 551, 554-55 (5th Cir. 2007). The court rejected discipline based on "appearance of impropriety," holding that "[s]uch invocations…seductively take the state into content-based regulation of political speech," and "leave judges speechless, throttled for publicly addressing abuse of the judicial process," which "ill serves the laudable goal of promoting judicial efficiency and impartiality." *Id*. at 560. A commission censure "shutting down all communication between the Judge and his constituents" could

not stand since "application of this canon to [the judge] is not narrowly tailored to [the commission's] interests in preserving the public's faith in the judiciary." *Id*.

The same constitutional principles apply here. The comments by Plaintiff, as an elected Justice of North Carolina's highest court, on the issue of diversity were focused on improving the quality of justice in North Carolina courts, something directly within her duties as an elected judge, and are well within the bounds of core political speech closely guarded by the First Amendment. Allowing this investigation to continue not only would violate Plaintiff's constitutional rights, but also would send a signal to other North Carolina judges that they likewise are at risk if they speak out about similar issues of public concern. Such a chilling effect on core political speech cannot be countenanced.

Finally, even if the investigation here never resulted in any sanction, the mere fact of the investigation harms Plaintiff and creates a chilling effect on her and other judges. Thus, it is no answer for the Commission merely to claim that the investigation should run its course. The First Amendment prohibits government actions like the investigation here that chill core political speech, without requiring that those harmed wait until the threatened censorship has been fully effected.

CONCLUSION

For the foregoing reasons, the Court should grant Plaintiff's motion for preliminary injunction.

This the 20th day of October, 2023.

By: /s/ Mark R. Sigmon
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CERTIFICATION OF WORD COUNT

Pursuant to Local Rule 7.3(d)(1), I hereby certify that this memorandum, including headings and footnotes, contains fewer than 6,250 based on the word count feature of Microsoft Word, and therefore complies with the Rule.

October 20, 2023 /s/ Mark R. Sigmon