NO. 261A18-3 TENTH JUDICIAL 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 No. COA19-384

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AMICUS CURIAE BRIEF
(Former Chairs of the North Carolina Judicial Standards Commission)

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THE AMICI

The Amici herein, the Honorable S. Gerald Arnold, the Honorable Wanda G. Bryant, the Honorable Sidney S. Eagles, Jr., the Honorable John B. Lewis, Jr., and the Honorable John C. Martin (collectively the "Former Chairs of the North Carolina Judicial Standards Commission"), are retired judges of the North Carolina Court of Appeals whose years of judicial service to the courts of North Carolina total well over 100 years. Each of the Amici are former Chairs of the North Carolina Judicial Standards Commission who served in that role for a total of over 34 years of the period from 1982 to 2020.[1]

The Judicial Standards Commission was created pursuant to the passage of the Judicial Standards Commission Act in 1971, now codified at Article 30 of Chapter 7A of the North Carolina General Statutes. The stated purpose of the Commission is to "provide for the investigation and resolution of inquiries concerning the qualification or conduct of any judge or justice of the General Court of Justice." N.C. Gen. Stat. § 7A-374.1.

As more fully described below, in addition to the creation of the Judicial Standards Commission, and to fully implement an integrated system for ensuring the ethical conduct of North Carolina's judges and justices, the North Carolina Supreme

[1] No person or entity other than the Amici or their counsel directly or indirectly wrote this brief or contributed money for its preparation.

Court in 1973 adopted the state's first Code of Judicial Conduct. 283 N.C. 711 (1973). The Judicial Standards Commission is charged in its work with implementing the provisions of the Code of Judicial Conduct. *See*, *e.g.*, N.C. Gen. Stat. §7A-376. The Commission works to protect the integrity of the judicial process and to preserve public confidence in North Carolina's judiciary.

The sole enforcement mechanism available to the Judicial Standards Commission with respect to disqualification is after-the-fact discipline. *See* N.C. Gen. Stat. § 7A-376. Such a "remedy" is clearly deficient in that it provides no relief to the party aggrieved by the failure to recuse and only punishes the judge or justice retrospectively without offering the judge any mechanism for correction of a potentially improper subjective decision before it becomes irrevocable.

This Amicus Brief reflects the experience and knowledge of these Amici in their work in the Judicial Standards Commission operating under the direction of the Code of Judicial Conduct.

QUESTIONS PRESENTED

This amicus brief seeks to address the questions and issues posed by the Court in its Order of 28 September, 2021.[2]

[2] This brief does not seek to prescribe answers to the ultimate questions of the recusals sought by the pending motion. Instead, it seeks to provide the Court with a useful framework for the consideration of the motion.

SUMMARY OF POSITION OF AMICI

As the U.S. Supreme Court held in *Caperton v. A.T. Massey Coal, Co.*, 556 U.S. 868, 876 (2009), "[i]t is axiomatic that a fair trial in a fair tribunal is a basic requirement of due process" (internal quotation omitted). The "citizen's respect for judgments depends in turn upon the issuing court's absolute probity." *Id*. at 889. "Judicial integrity is, in consequence, a state interest of the highest order." *Id*.

In order to maintain judicial integrity, as discussed herein and consistent with the North Carolina Constitution, the precedent of the United States Supreme Court and the North Carolina Supreme Court, and the North Carolina Code of Judicial Conduct, these Amici urge the Court to consider the requirement of impartiality as assessed objectively, and, in appropriate circumstances, with judicial review beyond an individual justice's self-assessment.

POSITION OF AMICI

I. The History of Disqualification and Recusal in America.

Although the concept of required judicial recusal for bias did not exist in England during the time of the founding of our Nation, the U.S. Congress in 1792 adopted a statute compelling federal district court judges "to recuse themselves when they have an interest in the suit or have been counsel to a party." *See Liteky v. United States*, 510 U.S. 540, 543-44 (1994) (citing Act of May 8, 1792, ch. 36, § 11, 1 Stat. 278). Early in the nineteenth century, the "basis of recusal was expanded to include all judicial relationship or connection with a party that would in the judge's opinion

make it improper to sit." *Id*. at 544. Over one hundred years ago, in 1911, Congress enacted a provision "requiring district-judge recusal for bias *in general*." *Id*. (emphasis in original). That law, in its current form, is codified at 28 U.S.C. § 144. *Id*. It requires, among other things, the filing of a "timely and sufficient affidavit" by the party seeking disqualification, and requires the assigned judge to "proceed no further therein" so that "another judge shall be assigned to hear such proceeding." 28 U.S.C. § 144.

In that same early twentieth century period, the American Bar Association promulgated its first comprehensive code of judicial ethics. *See* Ronald D. Rotunda, *Judicial Ethics, the Appearance of Impropriety, and the Proposed New ABA Code*, 34 Hofstra L. Rev. 1337, 1350 n.67 (2006) (noting prior unsuccessful ABA attempts in 1909 and 1917 to promulgate canons of ethics and the ABA's approval of a commission to draft rules in 1922). Over the course of the last century, more and more states adopted versions of the ABA's Code of Judicial Conduct. *See id.* at 1351-52.

As more fully described below, while North Carolina did not adopt a Code of Judicial Conduct until 1973, a common law of judicial recusal operated in North Carolina's courts prior to that adoption. *See*, *e.g.*, *Barlow v. Norfleet*, 72 N.C. 535, 540 (1875) (holding that an interested probate judge should be disqualified,

notwithstanding the lack of a statute, based on "[a] revered maxim of the common law").

II. The Substantive North Carolina Law Concerning Disqualification and Recusal is Found in the Code of Judicial Conduct.

A. The Adoption of the Code of Judicial Conduct

In March, 1973, the General Assembly enacted N.C. Gen. Stat. § 7A-14 (now § 7A-10.1) which provided that "[t]he Supreme Court is authorized, by rule, to prescribe standards of judicial conduct for the guidance of all justices and judges of the General Court of Justice." 1973 S.L. Ch. 89. Six months later, on 26 September 1973, the Supreme Court adopted the North Carolina Code of Judicial Conduct. 283 N.C. 771 (1973). In that adoption, the Court stated that it was "[e]xercising the authority vested in it by the Constitution of North Carolina and by Chapter 89, Session Laws of 1973." *Id*. The Court also affirmed that "the following standards of judicial conduct" were "prescribe[d] for the guidance of *all justices and judges of the General Court of Justice*." *Id*. (emphasis added). Thus, the Supreme Court, in adopting the Code, set out a unitary standard for judicial conduct that applied to all levels of the judiciary, not excluding itself. That unitary standard, of course, is also consistent with the General Assembly's enabling statute for the Code which required that any standards adopted by the Court be "for the guidance of *all*." N.C. Gen. Stat. § 7A-10.1 (emphasis added).

For its part, the U.S. Supreme Court has recognized that the state codes of judicial conduct – like North Carolina's – "serve to maintain the integrity of the judiciary and the rule of law." *Caperton*, 556 U.S. at 889. The codes are the "principal safeguard" against the forces that "threaten to imperil public confidence in the fairness and integrity of the nation's elected judges." *Id*. (internal quotation omitted).

Since 1973, the Supreme Court has amended the Code of Judicial Conduct no fewer than nine times.[3] In none of those amendments, however, has the Court purported to adopt a set of standards for itself different from those applied to judges of the lower courts of the General Court of Justice. Nor has the Supreme Court amended the Code other than by formal process requiring a majority of its Conference. Thus, for example, the most recent amendments to the Code indicated that they were "[a]dopted unanimously by the Court." 368 N.C. 1029 (2015). And while the Court maintains the right – both constitutional and statutory – to make further amendments to the Code of Judicial Conduct, such amendments, as in the past, would need to be adopted by vote of a Conference of the Court as a whole. *See* 283 N.C. at 782. As a necessary corollary, both the content and interpretation of the

[3] *See* 286 N.C. 729 (1974); 289 N.C. 733 (1976); 308 N.C. 807 (1983); 331 N.C. 771 (1992); 346 N.C. 806 (1997); 347 N.C. 685 (1998); 357 N.C. 717 (2003); 360 N.C. 676 (2006); 368 N.C. 1029 (2015).

Code of Judicial Conduct is a matter for the Court as a whole rather than for any individual justice.

B. The Content of the Code of Judicial Conduct Concerning Disqualification/ Recusal.

Canon 3 of the North Carolina Code of Judicial Conduct states that a "judge should perform the duties of the judge's office impartially and diligently." N.C. Code Jud. Conduct, Canon 3. Section C of that Canon states that "[o]n motion of any party, a judge should disqualify himself/herself in a proceeding in which the judge's impartiality may reasonably be questioned." *Id*. at Canon 3(C). That general statement provides that it is "including but not limited to instances where" four specific circumstances – (a) through (d) – are set forth.

Those four specific circumstances concern (a) a judge's "personal bias" toward a party or "personal knowledge of disputed evidentiary facts;" (b) the judge having served as a lawyer in the matter; (c) a financial or fiduciary interest in the matter; or (d) the "judge or the judge's spouse, or a person within the third degree of relationship to either of them" is a party, lawyer, is otherwise interested, or likely to be a material witness.[4] The specific circumstances set out in the Code are virtually identical to the mandatory disqualification procedures applicable in federal courts. *See* 28 U.S.C. § 445(b)(1)-(5) (not including the additional circumstance where the

[4] Canon 3(C)(2) further states that a judge should be informed of his own and his spouse's financial and fiduciary interests. N.C. Code Jud. Conduct, Canon 3(C)(2).

judge has served in related governmental employment present in the U.S. Code, 28 U.S.C. § 445(b)(3).).

Section D to Canon 3 – entitled "Remittal of disqualification" – states that self- disqualification by a judge is not precluded by the provisions of the Canon. N.C. Code Jud. Conduct, Canon 3(D) ("Nothing in this Canon shall preclude a judge from disqualifying himself/herself from participating in any proceeding upon the judge's own initiative.").

In sum, the North Carolina Code of Judicial Conduct (1) permits a judge to self-disqualify, N.C. Code Jud. Conduct, Canon 3(D), (2) sets out four specific circumstances in which a judge should, on motion, disqualify himself/herself, *id*. at 3(C)(1)(a)-(d), and (3) retains a general residual category for disqualification for circumstances "in which the judge's impartiality may reasonably be questioned" *id*. at 3(C)(1). Not surprisingly, the residual category provides the greatest scope for debate and disagreement.

C. The Appearance of Impartiality and the Maintenance of Public Confidence in the Judiciary.

As the U.S. Supreme Court held in 1988, the "guiding consideration is that the administration of justice should reasonably appear to be disinterested as well as be so in fact." *Liljeberg v. Health Services Acquisition*, 486 U.S. 847, 869-70 (1988) (quoting *Public Utilities Comm'n of D.C. v. Pollak*, 343 U.S. 451, 466–467 (1952)). As early as 1951, even before the advent of North Carolina's Code of Judicial

Conduct, this Court adopted a similar standard. *See Ponder v. Davis*, 233 N.C. 699, 705, 65 S.E.2d 356, 360 (1951) (holding that tribunals "shall not only be impartial in the controversies submitted to them but…shall also appear to be impartial").

III. The Lessons From *Caperton*.

While it might be tempting to dismiss the U.S. Supreme Court's decision in *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009), as concerned solely with the most egregious circumstances relating to judicial-election fund raising, it is, in fact, that Court's most comprehensive treatment of disqualification in the context of a state court of last resort. At least as pertinently, it presents a cautionary case study of how the failure to have and apply appropriate standards for judicial disqualification can lead to the loss of confidence by the lay public, and even the national disrepute of a state court. Courts ignore *Caperton* at their peril.

The basic facts of the case are fairly well-known. Massey Coal had a pending challenge to a $50 million verdict before the West Virginia Supreme Court of Appeals, that state's highest court. 556 U.S. at 872-73. Don Blankenship, the company's CEO, provided $3 million in campaign contributions to a challenger for a seat on the court, Brent Benjamin. Blankenship's contributions swamped all other contributions to Benjamin, were three times greater than the amount spent by Benjamin's own committee, and were $1 million more than the total spent by the committees of both candidates. *Id*. at 873.

After his election, Benjamin rejected multiple motions for his self-recusal in Massey Coal's case "under the Due Process Clause and the West Virginia Code of Judicial Conduct." 556 U.S. at 873-74. Even after "photos had surfaced" of *another* justice "vacationing with Blankenship in the French Riviera while the case was pending," Benjamin refused to recuse. *Id*. at 874. (That other justice did grant the plaintiff's recusal motion. *Id*.) As a different justice noted in a recusal memorandum: "Blankenship's bestowal of his personal wealth, political tactics, and 'friendship' have created a cancer in the affairs of this Court." *Id*. at 875. Benjamin, nevertheless, again declined that "suggestion and denied [plaintiff's] recusal motion." *Id*.

In explaining his decision, Benjamin "indicated that he 'carefully considered the bases and accompanying exhibits proffered by the movants,'" but he found 'no objective information ... to show that this Justice has a bias for or against any litigant, that this Justice has prejudged the matters which comprise this litigation, or that this Justice will be anything but fair and impartial." 556 U.S. at 874. Benjamin decried the prospect of "[a]dopting a standard of merely appearances," which, he contended, "seems little more than an invitation to subject West Virginia's justice system to the vagaries of the day – a framework in which predictability and stability yield to supposition, innuendo, half-truths, and partisan manipulations." *Id*. at 876. Yet, as

reported in the decision, a public opinion poll found that "over 67% of West Virginians doubted Justice Benjamin would be fair and impartial." *Id*. at 875.

After the West Virginia court reversed the jury verdict against Massey Coal as sought by Blankenship, the U.S. Supreme Court granted *certiorari* to consider the question of "whether the Due Process Clause of the Fourteenth Amendment was violated when one of the justices in the majority [*i.e.* Benjamin] denied a recusal motion." 556 U.S. at 872. The Supreme Court ultimately found Benjamin's approach to recusal unconstitutional.

In considering the issue, the Court began by examining its own precedents, noting that there were "objective standards that require recusal when the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." 556 U.S. at 872 (internal quotation omitted). Those precedents, among other things, provided "that a judge must recuse himself when he has a direct, personal, substantial, pecuniary interest in a case" which "reflect the maxim that '[n]o man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity.'" *Id*. at 876 (quoting The Federalist No. 10, p. 59 (J. Cooke ed.1961) (J. Madison)). The Court also noted that "[a]s new problems have emerged," the "Court has identified additional instances which, as an objective matter, require recusal." *Id*. at 877. These are circumstances "in which experience teaches that the probability of actual

bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Id*.

The U.S. Supreme Court's inquiry focused not on Benjamin's "actual bias," but instead its "probability." 556 U.S. at 877. Thus, the Court was "not required to decide whether in fact [the justice] was influenced." *Id*. at 879 (brackets in original). Instead, "[t]he proper constitutional inquiry is "whether sitting on the case…would offer a possible temptation to the average ... judge to ... lead him not to hold the balance nice, clear and true." *Id*. (internal quotation omitted, second and third ellipses in original). The Court also recognized, based on its precedents, "that 'what degree or kind of interest is sufficient to disqualify a judge from sitting cannot be defined with precision.'" *Id*. (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)). Because those "disqualifying criteria cannot be defined with precision….[c]ircumstances and relationships must be considered." *Id*. at 880 (quoting *Murchison*).

The Court stressed, however, that "it was important that the test have an objective component." 556 U.S. at 879. Thus, the "Court asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is likely to be neutral, or whether there is an unconstitutional potential for bias." *Id*. at 881 (internal quotation omitted). The U.S. Supreme Court, in the context of federal statutory recusal, had earlier required that "all" grounds of "interest or relationship"

and "bias or prejudice" be "evaluated on an *objective* basis, so that what matters is not the reality of bias or prejudice, but its appearance." *Liteky*, 510 U.S. at 548 (emphasis in original) (Scalia, J.). In Justice Scalia's words, "[q]uite simply and quite universally, recusal was required whenever impartiality might reasonably be questioned." *Id*. (internal quotation omitted).

The *Caperton* Court conceded that "Benjamin conducted a probing search into his actual motives and inclinations; and he found none to be improper." *Id*. at 882. The Court, moreover, did "not question his subjective findings of impartiality and propriety…[n]or [did it] determine whether there was actual bias." *Id*. Rather, the "difficulties of inquiring into actual bias, and the fact that the inquiry is often a private one, simply underscore the need for objective rules." *Id*.

The Court's skepticism of regarding this private inquiry also points to a procedure that goes beyond individual "self-recusal." In that case,

> there may be no adequate protection against a judge who simply misreads or misapprehends the real motives at work in deciding the case. The judge's own inquiry into actual bias, then, is not one that the law can easily superintend or review, though actual bias, if disclosed, no doubt would be grounds for appropriate relief. In lieu of exclusive reliance on that personal inquiry, or on appellate review of the judge's determination respecting actual bias, the Due Process Clause has been implemented by objective standards that do not require proof of actual bias.

556 U.S. at 883. For that reason, the individual judge's "search for actual bias" is "just one step in the judicial process" of applying "objective standards [that] may also require recusal whether or not actual bias exists or can be proved." *Id*. at 886.

Ultimately, the Court ruled that due process required Benjamin's recusal and the West Virginia court's ruling was reversed by the U.S. Supreme Court. *Id*. at 889-90.

The analysis of the U.S. Supreme Court in *Caperton* provides instructive guidance to this Court in considering issues relating to disqualification and recusal of its justices:

1. The fundamental inquiry is not the presence of actual bias but instead the "probability" of or "potential" for bias. 556 U.S. at 872, 877, 881.
2. The appropriate inquiry is an objective, not subjective, one, *id*. at 877, 879, 881-82, and there is a "need for objective rules." *Id*. at 883.
3. The individual "judge's own inquiry into actual bias," 556 U.S. at 883, is "just one step" in a "judicial process" that should include further steps. *Id*. at 886.

IV. Suggested Procedures for Disqualification/Recusal in the Supreme Court.

A. Written Procedures

The Code of Judicial Conduct and the precedents of this Court and the U.S. Supreme Court suggest certain procedures that should be followed in considering

disqualification of justices of the North Carolina Supreme Court. As early as 1986, the U.S. Supreme Court described as "[t]he more recent trend" in the States "towards adoption of statutes that permit disqualification for bias or prejudice." *Aetna Life Ins. v. Lavoie*, 475 U.S. 813, 820 (1986) (vacating decision of Alabama Supreme Court after an interested justice refused to disqualify himself).

Those authorities are also in line with Resolution 8 of the Conference of Chief Justices adopted on 29 January 2014, "Urging Adoption of Procedures for Deciding Judicial Disqualification/Recusal Motions."[5] That Resolution, which specifically referenced the U.S. Supreme Court's *Caperton* decision, stated that "all states and territories should have in place clearly articulated procedures for handling disqualification/recusal motions which provide for an independent review of denials of such motions."

In the view of these Amici, the Supreme Court should implement clear procedures including independent review as suggested below. These procedures are also consistent with the suggested Judicial Recusal Procedures of the Institute for the Advancement of the American Legal System (2017) (the "IAALS Rep.").[6]

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[5] Found at: https://ccj.ncsc.org/__data/assets/pdf_file/0018/23724/01292014-urging-adoption-procedures-deciding-judicial-disqualification-recusal-motions.pdf.

[6] Found at: https://iaals.du.edu/sites/default/files/documents/publications/judicial_recusal_procedures.pdf

(Former Chief Justice Mark D. Martin was one of 17 convening participants for the IAALS Report, including other judges, law professors, and practitioners.)

B. A Two-Step Process.

While the Code of Judicial Conduct itself mentions a "motion" for disqualification referenced in Canon 3(C) as its sole procedural component – and even that in only the most general fashion – the Code implicitly endorses a basic procedural approach. Canon 3(D)'s explicit refusal to preclude a judge from disqualification "on his own initiative," implies that the first step in any disqualification consideration is the particular judge or justice's examination of his own potential bias, however subjective that necessarily may be. That reading, moreover is consistent with Canon 3(C)(2)'s requirement that a judge take steps to inform himself of his personal and fiduciary financial interests. In other words, the Code mandates that a judge should have working knowledge of the sources of potential biases and freely encourages a judge to recuse when he detects such bias.

As a result of that first step, potential violations of the Code are avoided by self-policing of the judiciary in the mill-run of cases. That observation is consistent with the experience of the Judicial Standards Commission. That first-step, however, does not – and should not – end the inquiry in all cases. *See* IAALS Rep. 5-7.

C. The Need for a Second Review Step and Other Related Procedures

In the words of the U.S. Supreme Court in *Williams v. Pennsylvania*, __ U.S. __, 136 S. Ct. 1899 (2016), "[b]ias is easy to attribute to others and difficult to discern in oneself." There is always the prospect for the "serious risk that a judge would be influenced by an improper, if inadvertent motive." *Id*. at 1905. Indeed, in *Liljeberg*, the U.S. Supreme Court affirmed the vacating of a judgment rendered by a judge who was concededly unaware of the conflict at the time he rendered it. 486 U.S. at 870. In that case, "the judge [wa]s not called upon to perform an impossible feat" of disqualifying himself "based on facts the judge does not know," but instead was "called upon to rectify an oversight and to take the steps necessary to maintain public confidence in the impartiality of the judiciary." *Id*. at 861. So too with West Virginia's Justice Benjamin who "conducted a probing search into his actual motives and inclinations," *Caperton*, 556 U.S. at 882, but was nevertheless required to be disqualified. *Id*. at 890.

It is for that reason that the courts of the United States, and the U.S. Supreme Court in particular, have eschewed a purely subjective standard that relies solely on the assessment of the judge sought to be disqualified and, instead applied "an objective standard that, in the usual case, avoids having to determine whether actual bias is present." *Williams*, 136 S. Ct. at 1905. Again, "no man can be a judge in his own case." *Id*. (quoting *Murchison*, 349 U.S. at 136). As a result, what is required

is "an enforceable and workable framework" for "apply[ing] an objective standard." *Id*. In the words of the *Williams* Court, there is a "need for objective rules preventing the operation of bias." *Id*. at 1907.

As noted above, the federal district-court recusal statute, 28 U.S.C. § 144, requires another judge to hear to the disqualification motion. More importantly, the U.S. Supreme Court has found in related circumstances that judges ought to recuse in favor of allowing other decisionmakers. Thus, for example, in *Mayberry v. Pennsylvania*, 400 U.S. 455, 466 (1971), the U.S. Supreme Court held that due process required that "a defendant in criminal contempt proceedings should be given a public trial before a judge other than the one reviled by the contemnor." The North Carolina Supreme Court actually prefigured that ruling by some 20 years when it ruled in 1951 in *Ponder*, 233 N.C. at 704, 65 S.E.2d at 359, that the judge should have transferred contempt proceedings to another judge. *See also* IAALS Rep. 5 ("Allowing the judge who is the subject of the recusal motion to make a dispositive decision denying that motion flies in the face of the oft-invoked, age-old proposition that no person should be a judge in his own case.").

The requirement for impartiality and review beyond a subjective self-assessment is even higher in the context of a multimember court like the North Carolina Supreme Court:

> A multimember court must not have its guarantee of neutrality undermined, for the appearance of bias demeans the reputation and

> integrity not just of one jurist, but of the larger institution of which he or she is a part. An insistence on the appearance of neutrality is not some artificial attempt to mask imperfection in the judicial process, but rather an essential means of ensuring the reality of a fair adjudication. Both the appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself. When the objective risk of actual bias on the part of a judge rises to an unconstitutional level, the failure to recuse cannot be deemed harmless.

Williams, 136 S. Ct. at 1909-10.

In addition to allowing for independent review, as suggested by IAALS, courts should explain their decisions in writing. IAALS Rep. at 10.

V. Suggested Considerations for the Pending Recusal Motion.

The foregoing authorities also suggest the following considerations with respect to the pending motion.

A. Electoral Issues

With regard to the question of elected versus appointed judges, the federal perspective is instructive. On the one hand, theoretical discipline by the voters at an election subsequent to an egregious circumstance regarding failure to recuse is a possibility. That check, however, is dependent on the judge or justice at issue seeking a further term (as opposed to voluntarily retiring or required retirement). It also presupposes a level of awareness on the part of voters that is likely unrealistic.

Federal judges holding lifetime appointments under Article III of the U.S. Constitution, of course, do not face elections (or re-elections), but are, as a result,

freed from a variety of potentially improper influences. Indeed, in her concurrence in *Republican Party of Minnesota v. White*, 536 U.S. 765, 792 (2002), Justice O'Connor provided a litany of "risks to judicial bias" that states have "voluntarily taken on" by utilizing judicial elections. (O'Connor, J., concurring). Those included the temptation to bend to the public will rather than apply the law in highly publicized cases, the need for campaign funds, and the related potential for favoring donors. *Id*. 788-90. That particular risk, of course, hit home in 2009 in *Caperton*.

B. Relationship Issues

At the most simple (even simplistic) level, on the one hand, there is no question that the current President Pro Tempore of the Senate is a named "party" in the case at issue and within the literal definition of the Code of Judicial Conduct's proscription as a "party to the proceeding who is "a person within the third degree of relationship" to a justice of the Court.[7] N.C. Code Jud. Conduct, Canon(C)(1)(d)(i). On the other hand, however, one might consider that the party is a nominal party only by virtue of his "official capacity" role.

As in many difficult cases, the answer does not immediately suggest itself, and a court considering the issue should heed the U.S. Supreme Court's admonition

[7] The President Pro Tempore also meets Canon 3(C)(d)(1)'s further definition of being "an officer" of party. N.C. Code Jud. Conduct, Canon 3(C)(d)(1). Section 14(1) of Article II of the North Carolina Constitution defines the President Pro Tempore as an "officer of the Senate."

that because "disqualifying criteria cannot be defined with precision…. [c]ircumstances and relationships must be considered." *Caperton*, 556 U.S. at 880. Thus, an examination of how the President Pro Tempore became a party in his official capacity may be pertinent to the inquiry.

Prior to June 28, 2017, the President Pro Tempore would not have been a required real party in interest in this action. It was on that date that Senate Bill 257 (S.L. 2017-57) became law over the governor's veto. That law amended N.C. Gen. Stat. § 1-72.2 ("Standing of legislative officers") to explicitly state that "[i]t is the public policy of the State of North Carolina that in any action in any North Carolina State court in which the validity or constitutionality of an act of the General Assembly or a provision of the North Carolina Constitution is challenged, *the General Assembly, jointly through the Speaker of the House of Representatives and the President Pro Tempore of the Senate, constitutes the legislative branch of the State of North Carolina* and the Governor constitutes the executive branch of the State of North Carolina, *and when the State of North Carolina is named as a defendant in such cases, both the General Assembly and the Governor constitute the State of North Carolina*." *Id*. at § 1-72.2(a) (emphasis added).

In subsection (b) of that same statute, the President Pro Tempore and House Speaker "as agents of the State, by and through counsel of their choice, including private counsel, shall jointly have standing to intervene on behalf of the General

Assembly as a party in any judicial proceeding challenging a North Carolina statute or provision of the North Carolina Constitution." N.C. Gen. Stat. § 1-72.2(b).

Senate Bill 257 also amended Rule 19 of the North Carolina Rules of Civil Procedure to add a new subsection (d) called "Necessary Joinder of House of Representatives and Senate" which provided that "[t]he Speaker of the House of Representatives and the President Pro Tempore of the Senate, as agents of the State through the General Assembly, must be joined as defendants in any civil action challenging the validity of a North Carolina statute or provision of the North Carolina Constitution under State or federal law."

In the same Senate Bill, N.C. Gen. Stat. § 120-32.6(b) was amended to reflect that "the Speaker of the House of Representatives and the President Pro Tempore of the Senate, as agents of the State through the General Assembly, shall be necessary parties and shall be deemed to be a client of the Attorney General for purposes of that action as a matter of law," and that "the Speaker of the House of Representatives and President Pro Tempore of the Senate jointly shall possess final decision-making authority with respect to the defense of the challenged act of the General Assembly or provision of the North Carolina Constitution." At the same time, N.C. Gen. Stat. § 120-32.6(c) was amended to reflect that "in the defense of the challenged act of the General Assembly or provision of the North Carolina Constitution," the President Pro Tempore may designate counsel "employed by the General Assembly

as lead counsel" who shall "possess final decision-making authority with respect to the representation, counsel, or service for the General Assembly."

Finally, Senate Bill 257 created a new duty of the Attorney General, now codified at N.C. Gen. Stat. § 114-2(10), to "abide by and defer to the final decision-making authority exercised by the Speaker of the House of Representatives and the President Pro Tempore of the Senate, as agents of the State through the General Assembly, in defending any State or federal action challenging the validity or constitutionality of an act of the General Assembly or a provision of the North Carolina Constitution." That provision also requires that "[i]f for any reason the Attorney General cannot perform the duty specified herein, the Attorney General may recuse personally from such defense but shall appoint another attorney employed by the Department of Justice to act at the direction of the Speaker of the House of Representatives and the President Pro Tempore of the Senate."

The provisions of Senate Bill 257, now embodied in the General Statues, indicate that the role now played by the President Pro Tempore of the Senate in constitutional challenges to litigation is not a vestigial remnant of some ancient legal doctrine, but a more recent development that came about during the tenure of the current President Pro Tempore and with his approval. (Senate Bill 257 is signed by him.) Nor can the control that he jointly asserts with the House Speaker – *i.e.*, with designated standing as a necessary "real party in interest," with "final decision-

making authority," and the ability to hire and designate lead counsel (and even seek recusal of Attorney General) – be considered "nominal" in any normal use of that word. In addition, in considering the issue, the identity of the particular President Pro Tempore – at the time of passage of the amendments, at the time of the institution of the pending challenge, and now – is a salient issue that cannot be entirely ignored. The adoption of Senate Bill 257, therefore, clearly has ramifications for any disqualification inquiry in this case.

In the end, the inquiry for the Court is not whether a justice related within the third degree to a party in that circumstance is actually biased. Instead, it is whether sitting on the case "would offer a possible temptation to the average…judge to… lead him not to hold the balance, nice, clear and true." *Caperton*, 556 U.S. at 879 (ellipses in original, quoting *Lavoie*, 475 U.S. at 825).

With respect to a former member of the General Assembly at the time of the challenged legislation, the pertinent inquiry necessarily concerns the fact that the body in which that justice then served is deemed – by virtue of the enactment of Senate Bill 257 in 2017 – to "constitute" the State of North Carolina for purposes of both standing and real party in interest. Those concerns are further underscored by the fact that the North Carolina Constitution – in its Article I Declaration of Rights – explicitly recognizes what is only implicit in the U.S. Constitution, namely, that the "legislative, executive, and supreme judicial powers of the State government

shall be forever separate and distinct from each other." N.C. Const. Art. I, § 6. A single individual who both participates in the passage of legislation and later passes on its constitutionality is arguably contravening the constitution's prescription for separation of powers.

In addition, the knowledge of factual issues regarding the case derived from first-hand experience (as opposed to through the regular court proceedings), could also be problematic. *See* Canon 3(C)(1)(a), N.C. Code Jud. Conduct (enumerating "personal knowledge of disputed evidentiary facts" as a circumstance for recusal/disqualification).

In addition, the U.S. Supreme Court's disqualification rulings recognize, as part of the general bias inquiry, the concerns that necessarily exist when a state supreme court justice played an "earlier role" in a matter which was "direct" and "personal." *Williams*, 136 S. Ct. at 1906, 1907. The overarching concern is that "[i]n these circumstances, there remains a serious risk that a judge would be influenced by an improper, if inadvertent, motive to validate and preserve the result." *Id*. at 1907. That concern is not obviated by the "involvement of multiple actors and the passage of time." *Id*. As stated above, the key is to conduct an objective assessment "to ensure the neutrality of the judicial process in determining the consequences" that a judge or justice's own earlier, critical decision may have set in motion." *Id*.

CONCLUSION

For the reasons stated above, the Former Chairs of the North Carolina Judicial Standards Commission urge the Court to consider the requirement of impartiality as assessed objectively, and, in appropriate circumstances, with judicial review beyond an individual justice's self-assessment.

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