No. 261A18-3 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA
****

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

****

DEFENDANT-APPELLEES' SUPPLEMENTAL RESPONSE BRIEF

****

INDEX

TABLE OF CASES AND AUTHORITIES

Statutes

Other Authorities

No. 261A18-3 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA
****

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

****

DEFENDANT-APPELLEES' SUPPLEMENTAL RESPONSE BRIEF

****

INTRODUCTION

Plaintiff effectively concedes that as a matter of current law, the answer to the critical question posed by this Court's September 28th Order is that the Court does not "have the authority to require the involuntary recusal of a justice who does not believe that self-recusal is appropriate." Sept. 28, 2021 Order at 1. As Plaintiff puts the point, under the law currently governing recusal determinations on this Court, "if a justice were not to recuse from a case, despite well-established grounds for disqualification, there would be no specified procedure to remedy the violation." Pl.-Appellant's Supp. Br. at 5 (Nov. 4, 2021) ("Plaintiff's Br."). Instead, Canon 3 of the

North Carolina Code of Judicial Conduct, which Plaintiff acknowledges governs recusal determinations in this Court, *id.* at 5, expressly states that it is up to *the judge or justice in question* to determine whether he or she "should disqualify himself/herself." N.C.C.J.C. Canon 3(C)(1).

Accordingly, the question before the Court boils down to whether it can, and should, *amend* the law governing recusal to provide a *new* mechanism for forcing the recusal of a Justice against his or her own best judgment—and, if so, what the proper method of promulgating such an amendment would be. Plaintiff's answer to this question urges the Court to ignore the constitutional and statutory limits on its authority in this context and join the avant-garde movement by a minority of States that have experimented with involuntary recusal in their courts of last resort. Involuntary recusal may be a favorite of certain special-interest groups—such as *amicus curiae* the Brennan Center—who have steadfastly opposed democratic election of judges. But the practice is a stark departure from the settled practice that endured for centuries of Anglo-American law and is still in place today in a supermajority of States and the U.S. Supreme Court. For multiple reasons, the Court should decline Plaintiff's invitation to depart from this settled practice by joining the ongoing experiment by the few States that have adopted involuntary recusal. And in no event should the Court adopt such a rule in the context of a specific, politically charged case.

As an initial matter, this Court lacks constitutional and statutory authority to adopt an involuntary-recusal rule. Defendants' Initial Supplemental Brief (Nov. 4,

2021) explained why: the North Carolina Constitution assigns *to the General Assembly* the power to establish rules governing the censure or removal of Justices, not this Court. N.C. CONST. art. IV, § 17(2); *see also* Br. of Amicus Curiae Prof. John V. Orth at 4 (Oct. 22, 2021) ("Prof. Orth Amicus Br."); Br. of Amici Curiae N.C. Inst. for Const. Law & The John Locke Found. at 11–14 (Nov. 4, 2021) ("NCICL Amicus Br."). And while the legislature has enacted a partial delegation of its power in this context to the Court, N.C.G.S. § 7A-10.1, it has also exercised that power *itself* to establish a detailed remedial scheme for improper recusal determinations: disciplinary review by the Judicial Standards Commission, *see* N.C.G.S. ch. 7A, art. 30. Under bedrock principles of statutory interpretation and separation of powers, this Court cannot exercise its delegated authority in a way that contravenes or supplements that detailed statutory scheme. Plaintiff's attempts to defend this Court's authority to change the law governing recusal fail to grapple with these constitutional and statutory limits.

Even if the Court did possess authority to promulgate a new involuntary recusal rule, that course of action would not be a prudent one. While placing the review and ultimate determination of a motion to recuse one judge in the hands of a different judge may make sense for lower courts, critical structural considerations, inherent in the nature of a court of last resort make such a practice inappropriate in this context. As the American Bar Association's Commission on Standards of Judicial Administration explained in 1977 and again in 1994,

> In the case of an appellate judge, . . . that procedure would subject the judge to decision of his disinterestedness by official peers with whom he

> may continue to serve in a collegial capacity in deciding the case. Moreover, because an appellate court decides questions of law rather than fact, the question of an appellate judge's "bias" is often practically indistinguishable from the question of his views on the law, which are not properly subject to disputation through the recusal procedure. Given these complications, it is better that the question of recusal be decided by the judge himself.

3 ABA JUDICIAL ADMINISTRATION DIVISION, STANDARDS RELATING TO APPELLATE COURTS 81 (1994). Moreover, as the Chief Justice of the United States Supreme Court further explained in 2011, "if the Supreme Court reviewed [an individual Justice's recusal decisions], it would create the undesirable situation in which the Court could affect the outcome of a case by selecting who among its Members may participate." Chief Justice of the United States, *2011 Year-End Report on the Federal Judiciary* at 9 (2011), https://bit.ly/3DkmN0v. Once again, Plaintiff fails to recognize these fundamental structural considerations supporting the traditional and majority practice of individualized recusal decisions.

Adopting an involuntary recusal rule would open a Pandora's Box of potentially enormous institutional harms to this Body. *See, e.g.*, Prof. Orth Amicus Br. at 5; NCICL Amicus Br. at 3. Litigants in hot-button, closely divided cases would almost inevitably flood the Court with motions to recuse Justices they view as unfavorable in the hopes of altering the composition of the body adjudicating their case. If a majority of non-recused Justices bowed to these requests even occasionally, their exercise of this new power to force one or more of their colleagues off of a case could only lead to an escalating and increasingly embittered struggle for control of the Court—all with incalculable cost to this institution's ability to function and its

reputation for neutral, unbiased decision-making. And these dangers of allowing involuntary recusal—dangers that are severe and, we submit, unacceptable no matter *how* the process is adopted—would be immeasurably higher if the Court granted itself the power of involuntary recusal not through a considered and formal rulemaking process but rather in the context of an ad-hoc order entered in this specific, closely divided and closely watched case. *No court* has ever adopted involuntary recusal in such a manner—not through a formal rulemaking process, but through an order in a pending case claiming the power and simultaneously exercising it to force some of its Members off of the case in a way that will widely be perceived as determining the outcome.

This Court should not be the first to do so. Instead, it should adhere to the method of recusal that it has applied without significant incident for over two hundred years: leaving the determination whether to recuse to the sound judgment of the Justice in question.

ARGUMENT

I. Current Law Does Not Authorize This Court to Involuntarily Recuse One of its Members.

Plaintiff effectively concedes that this Court does not have the authority to require the involuntary recusal of one of its members as a matter of current law. It admits that under current law "if a justice were not to recuse from a case, despite well-established grounds for disqualification, there would be no specified procedure to remedy the violation." Plaintiff's Br. at 5. While Plaintiff asserts that this imperils "the litigants' right to an impartial tribunal," *id.*—a misperception we correct below,

infra Section II.c—the key point for present purposes is that both parties in this case acknowledge that the answer to this Court's most fundamental question is clear: as a matter of current law, this Court does not "have the authority to require the involuntary recusal of a justice who does not believe that self-recusal is appropriate." Sept. 28, 2021 Order at 1.

As explained in our initial supplemental brief, this conclusion follows directly from the North Carolina Code of Judicial Conduct, the only provision of law governing recusal on this Court. Plaintiff admits that the Code governs the recusal of Justices of this Court. Plaintiff's Br. at 5; *see also* Amicus Curiae Br. of Former Chairs of the N.C. Judicial Standards Comm'n at 5 (Oct. 28, 2021) ("Former Chairs Amicus Br."). As we have explained, Canon 3 of the Code states, in clear and unmistakable text, that the decision whether to recuse lies with the "judge . . . himself/herself." N.C.C.J.C. Canon 3(C)(1). Neither Plaintiff nor *any* of the amici supporting it has offered any interpretation of Canon 3 as meaning anything other than what it plainly says: whether to recuse is a decision that is up to the judge or justice in question to decide according to his or her own best judgment.

To be sure, our initial supplemental brief also explained that this Court's case law instructs that in some circumstances, a trial judge should refer a motion to recuse to another judge—in effect, choosing to recuse himself or herself from the decision whether or not to recuse. *See State v. Poole*, 305 N.C. 308, 320, 289 S.E.2d 335, 343 (1982); *see also N.C. Nat'l Bank v. Gillespie*, 291 N.C. 303, 311, 230 S.E.2d 375, 380 (1976); *see also* Amicus Curiae Br. of N.C. Profs. of Pro. Resp. at 11–12 (Nov. 2, 2021)

(citing *Gillespie*) ("Pro. Resp. Profs. Amicus Br."). But that decision whether to refer a motion to recuse is, too, up to the individual judge in question. And when the judge in question is a Justice on this Court, to the extent the same principle applies, there is simply no mechanism under current law for any other Justice, or the Court as a whole, to second-guess his or her decision to neither recuse nor refer the motion to recuse to another decision-maker. Once again, neither Plaintiff nor any of the amici supporting it has offered any interpretation of current law that is contrary to this conclusion.

When the judge whose recusal is sought sits on a lower court, of course, the matter proceeds differently. Then, as several amici have pointed out and as our initial supplemental brief explained, a judge's erroneous decision not to recuse—or erroneous decision not to refer a motion to recuse to a different judge for decision—may be corrected in the ordinary course of appellate review, including in an appeal to this Court. That—and nothing more—is what follows from the decisions by this Court, touted by the Professors of Professional Responsibility supporting Plaintiff, which make clear "that the appellate courts of this state have the power to enter orders of disqualification." Pro. Resp. Profs. Amicus Br. at 12 (citing *Ponder v. Davis*, 233 N.C. 699, 65 S.E.2d 356 (1951), and *State v. Fie*, 320 N.C. 626, 359 S.E.2d 774 (1987)). The North Carolina appellate courts, including this Court, plainly do have authority to order the recusal or disqualification of a lower-court judge in a proceeding that is before them on appeal. *See, e.g., State v. Todd*, 369 N.C. 707, 710, 799 S.E.2d 834, 837 (2017) ("[T]his Court [has the] constitutional authority under

Article IV, Section 12, Clause 1 of the Constitution of North Carolina to exercise jurisdiction to review upon appeal any decision of the courts below."). But it is a necessary result of this Court's position at the very top of the State judiciary that *no state court* has authority to sit in review of the decisions of this Court or its Justices.[1] Yet again, neither Plaintiff nor any of the amici supporting it have pointed to any statute, rule, or decision that is contrary to this conclusion.

Plaintiff and the amici supporting it further concede that the past practice of this Court is consistent with these conclusions. Appendix B to our initial supplemental brief sets forth the fruits of an exhaustive study of this Court's recusal decisions dating back to the earliest recorded order addressing recusal, published in 1832. Plaintiff and the amici supporting it likewise discuss several of these past instances of recusal on this Court. Neither Defendants, Plaintiff, the amici supporting Defendants, nor the amici supporting Plaintiff has identified *a single instance* in which there is any evidence that the Court involuntarily recused one of its members or so much as suggested that is has the authority to do so.

The short of the matter is this: as a matter of both statute and precedent, current law leaves the ultimate decision whether a Justice of this Court should recuse up to the judgment of that Justice himself or herself. All parties before the Court

[1]As explained in our initial supplemental brief and discussed again below, the U.S. Supreme Court has authority to review the recusal determinations of this Court and its Justices when necessary to enforce the federal constitutional guarantee of due process.

agree on that central proposition. If this Court is to have the power to involuntarily recuse one of its Members, it will require a change in the law.

II. The Court Lacks Authority To Enact a New Rule Requiring Involuntary Recusal of a Justice.

The question before the Court thus reduces to whether a majority of the Court can and should *change* the law to grant itself the power to involuntarily recuse its Members against their own best judgment. This Court should not embark on such a portentous course of action, and in fact it lacks the authority to do so. Plaintiff's contrary suggestion that the Court has such authority under "the Constitution and governing statutes of the state" fails to persuade. Plaintiff's Br. at 22.

a. The North Carolina Constitution Vests the General Assembly with the Exclusive Power To Remove Justices of this Court.

As shown in our initial supplemental brief, the standards and procedure governing recusal on this Court fall within the General Assembly's authority over matters of judicial administration, N.C. CONST. art. IV, § 15, as well as within the legislature's clear, specific, and exclusive authority to provide "for the censure and removal of a Justice or Judge . . . for . . . conduct prejudicial to the administration of justice that brings the judicial office into disrepute," *id.* § 17(2); *see also* N.C.C.J.C. Preamble (providing that erroneous failure to recuse "may be deemed conduct prejudicial to the administration of justice that brings the judicial office into disrepute"); *id.* Canon 3(C)(1). Plaintiff's attempt to waive away the General Assembly's authority over the censure and removal of Justices completely fails.

Plaintiff's only answer to Article IV, Section 17's express grant of authority to the legislature is that "disqualification of a judge from a particular case is not equivalent to permanent removal from the Court." Plaintiff's Br. at 21. That ignores the fact that the legislature's authority under Section 17 is not limited to "permanent removal from the Court," *id.*, and instead extends to lesser forms of "censure." N.C. CONST. art. IV, § 17(2). Indeed, this provision was added in 1972 *to remedy* the fact that the previous system included "no provision for the disciplining of any judicial officer except by removal." REPORT OF THE NORTH CAROLINA STATE CONSTITUTION STUDY COMMISSION 100 (1968), https://bit.ly/3kHsXB5. Plaintiff also asserts that the availability of disciplinary proceedings is an insufficient "recourse against a justice who declines to recuse themselves," since it "fail[s] to address the ultimate issue of assuring a fair tribunal in the first instance." Plaintiff's Br. at 27; *see also* Former Chairs Amicus Br. at 2. But the availability of "after-the-fact discipline," Former Chairs Amicus Br. at 2, quite obviously functions to deter judges from abusing their authority over recusal determinations *in the first place*. And under our Constitution's allocation of powers, it is not this Court's role to second guess the legislature's determination that in the unique context of a court of last resort, the goal of a fair, just, and accurate system for deciding questions of recusal is best served by a system of post-decision review and discipline rather than a system of pre-decision review of a Justice's recusal by his or her own colleagues on the Court. *See infra* Section II.b; *see also Duke Power Co. v. Blue Ridge Elec. Membership Corp.*, 256 N.C. 62, 64, 122 S.E.2d 782, 784 (1961) ("Courts have no right to usurp legislative power and by

judicial decrees formulate a public policy not declared by the Legislature."); *Trice v. Turrentine*, 32 N.C. 543, 548 (1849) (explaining that "what particular remedy shall lie in each case; whether it shall be more or less direct or expeditious, within what period it shall be prosecuted, and with or without what reasonable guards against abuses of different modes of proceeding; and many other matters of the like kind, are all proper subjects of legislative discretion").

This conclusion also suffices to dispense with Plaintiff's contention that this Court "has the authority to establish a procedure governing disqualification of justices" under Section 13(2)'s grant of authority to this Court "to make rules of procedure and practice for the Appellate Division." Plaintiff's Br. at 20; *see also* Brief for Amici Curiae Scholars of Judicial Ethics & Pro. Resp. at 17–18 (Nov. 4, 2021) ("Judicial Ethics Scholars Amicus Br."). That general grant of authority to establish rules of appellate procedure cannot be interpreted as authorizing the promulgation of rules providing for involuntary recusal in this Court, because it is necessarily superseded, as to that issue, by the specific constitutional language vesting power over the censure and removal of Justices with the General Assembly, not the Courts. *See State ex rel. Utils. Comm'n v. Lumbee River Elec. Membership Corp.*, 275 N.C. 250, 260, 166 S.E.2d 663, 670 (1969) ("It is a well established principle of statutory construction that a section of a statute dealing with a specific situation controls, with respect to that situation, other sections which are general in their application."); *see also Matter of Alamance Cnty. Ct. Facilities*, 329 N.C. 84, 94, 405 S.E.2d 125, 130

(1991) (the Court's "inherent power" is "curtailed by the constitutional definition of the judicial branch and the other branches of government").

Accordingly, the Constitution vests the General Assembly alone with power to change current law to allow the involuntary recusal of a Member of this Court, and nothing Plaintiff has said shows otherwise.

b. The General Assembly's Delegation to this Court of Power To Prescribe Standards of Judicial Conduct Does Not Authorize The Creation of a New Rule Providing for Involuntary Recusal.

As explained in Defendants' initial supplemental brief, the Constitution's allocation of authority over the matter of involuntary recusal to the legislature rather than this Court is not the end of the analysis, because the General Assembly has delegated to this Court some of its authority over the matter by authorizing it "by rule, to prescribe standards of judicial conduct for the guidance of all justices and judges." N.C.G.S. § 7A-10.1. Plaintiff invokes this delegation as a key source of the Court's purported authority to adopt a new rule authorizing involuntary recusal. Plaintiff's Br. at 21; *see also* Judicial Ethics Scholars Amicus Br. at 17. As our initial supplemental brief also explained, however, this delegation cannot be exercised in a way that explicitly or implicitly conflicts with the General Assembly's own actions, including its establishment of the Judicial Standards Commission. Plaintiff fails to come to grips with this limitation on the Court's delegated authority.

As our initial supplemental brief sets forth at length, the General Assembly exercised its constitutional authority over the discipline of judges and justices under Article IV, Section 17(2) by establishing the Judicial Standards Commission. It vested

that body with exclusive authority to investigate potential violations of the Code of Judicial Conduct—including Canon 3's provisions governing recusal. Only after the Commission has investigated a potential violation of Canon 3 and recommended discipline does this Court have any authority to impose it. N.C.G.S. § 7A-376(b). The promulgation of a new rule allowing the involuntary recusal of a Justice *outside of* this process would be contrary to this specific and detailed legislative scheme, and N.C.G.S. § 7A-10.1's delegation to this Court thus cannot be interpreted as authorizing such an action. Where the legislature has established "a valid statutory method of determining a disputed question," that method "is exclusive and must be first resorted to and in the manner specified therein." *Comm. on Grievances of State Bar Ass'n v. Strickland*, 200 N.C. 630, 633, 158 S.E. 110, 112 (N.C. 1931). Indeed, pursuant to this bedrock principle, in *North Carolina State Bar v. Tillett*, this Court specifically held that the disciplinary scheme set forth by Article 30's establishment of the Judicial Standards Commission excludes alternative remedies. 369 N.C. 264, 794 S.E.2d 743 (2016).

Plaintiff attempts to get around the Judicial Standards Commission's exclusive authority in this area by claiming that "disqualification [is not] a disciplinary action" since the involuntary recusal of a justice "does not mean the judge has done anything wrong." Plaintiff's Br. at 21. But all agree that a judge or justice's decision whether to recuse or disqualify "is governed by the Code of Judicial Conduct," *id.* at 23, and the Code provides that a violation of its provisions "may be deemed conduct prejudicial to the administration of justice that brings the judicial office into

disrepute, or willful misconduct in office, or otherwise as grounds for disciplinary proceedings pursuant to Article 30," N.C.C.J.C. Preamble. Shifting ground, Plaintiff next argues that "regardless, the Supreme Court is the authoritative decisionmaker on the removal of judges for disciplinary reasons." Plaintiff's Br. at 22. True but immaterial. For while disciplinary action under Article 30 *once the Commission has recommended it* is ultimately "within the exclusive jurisdiction of the Supreme Court," *id.*, the fact of the matter is that the Court's authority to take such disciplinary action *only* comes into being, under the statutory scheme, *if and when* the Commission recommends it, N.C.G.S. § 7A-376(b).

Accordingly, this Court lacks authority under N.C.G.S. § 7A-10.1 to promulgate a new rule allowing for involuntary recusal of a Justice, outside the process detailed in Article 30, because such a rule would be contrary to the detailed remedial scheme that the legislature has established in this context. At the very least, any authority the Court has in this matter should be exercised "with a cautious and cooperative spirit," by "bow[ing] to [the] established procedural methods" set forth by Article 30. *Alamance Cnty.*, 329 N.C. at 100–01, 405 S.E.2d at 133.

c. The Due Process Clause Does Not Require or Authorize Involuntary Recusal.

Finally, Plaintiff argues that "this Court *must* have the authority to require disqualification" because a procedure allowing involuntary recusal, it says, is "necessary to safeguard a litigant's constitutional due process rights." Plaintiff's Br. at 22. The amici supporting Plaintiff also repeatedly invoke the Due Process Clause, and the U.S. Supreme Court's decision interpreting it in *Caperton v. A.T. Massey Coal*

Co., 556 U.S. 868 (2009). *See* Former Chairs Amicus Br. at 18–19; Amicus Curiae Br. of N.C. Profs. of Const. Law at 9–13 (Nov. 2, 2021) ("Const. Law Profs. Amicus Br."); Judicial Ethics Scholars Amicus Br. at 8–11. This reliance on the Due Process Clause, and the *Caperton* decision, is misplaced.[2] While the Due Process Clause, as interpreted by the U.S. Supreme Court, "demarks . . . the outer boundaries" of the constitutionally permissible *substantive* "standards for judicial disqualification," *Caperton*, 556 U.S. at 889–90, it has *never* been interpreted as requiring courts to adopt specific procedural rules allowing involuntary recusal when a judge or justice concludes, in the exercise of his or her judgment, that those substantive standards do not require recusal. Such a result would be extraordinary indeed, given that such an involuntary recusal procedure is not available in the highest courts of 32 States *or the U.S. Supreme Court itself*.

In *Caperton*, the U.S. Supreme Court held that the federal Due Process Clause required the recusal of a West Virginia Supreme Court Justice in circumstances where "the probability of actual bias on the part of the [Justice] [was] too high to be constitutionally tolerable." *Id.* at 872 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)). *Caperton* arose out of a West Virginia tort case against A.T. Massey Coal Company. Massey Coal's Chairman, CEO, and President, Don Blankenship,

[2] Plaintiff's motion to disqualify did not invoke the Due Process Clause; rather, it focused on the Code of Judicial Conduct. *See* Motion to Disqualify, p.4,n.1. Thus reliance on the Due Process Clause for a decision on the motion has not been squarely presented. *See Anderson v. Assimos*, 356 N.C. 415, 416, 572 S.E.2d 101, 102 (2002) (a constitutional question is addressed "only when the issue is squarely presented upon an adequate factual record and only when resolution of the issue is necessary.").

contributed around $3 million supporting the election of the state supreme court Justice in question shortly before the court heard the appeal in the case, but the Justice denied the plaintiff's recusal motion, concluding that "he found no objective information to show that this Justice has a bias for or against any litigant" and that the motion was based on "a standard merely of 'appearances,'" which would "subject West Virginia's justice system to the vagaries of the day." *Id.* at 874, 876 (cleaned up).

The U.S. Supreme Court reversed. It held that in extreme circumstances, recusal is required by the Due Process Clause, which imposes "objective standards that do not require proof of actual bias." *Id.* at 883. "Due process requires an objective inquiry" asking whether, under "a realistic appraisal of psychological tendencies and human weakness," the judge's interest at issue "would offer a possible temptation to the average judge to lead him not to hold the balance nice, clear and true." *Id.* at 883, 885 (cleaned up); *see also Williams v. Pennsylvania*, 136 S. Ct. 1899, 1903, 1909–10 (2016) (Due Process Clause required recusal of state supreme court Justice who previously "had been the district attorney who gave his official approval to seek the death penalty" of the plaintiff, because "the objective risk of actual bias on the part of [the] judge" in such a circumstance was at "an unconstitutional level").

Caperton clarifies that the "outer boundaries" imposed by the Due Process Clause on the *substantive standard for recusal* require not just an inquiry into a judge's "actual bias" but also a determination "whether the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.'" *Id.* at 881, 889. *Caperton* also reaffirms that in the "rare instances" where a

state judge's refusal to recuse violates that minimum substantive standard, the U.S. Supreme Court—which has jurisdiction to review state court decisions involving federal constitutional rights—may correct that due process violation. *Id.* at 890. But *nothing* in *Caperton*, *Williams*, or any of the U.S. Supreme Court's other due-process cases suggests, as Plaintiff claims, that "this Court must have the authority to require disqualification" of one of its own members involuntarily. Plaintiff's Br. at 22.

The conclusion that due process requires courts of last resort to provide a system of involuntary recusal would be astonishing indeed, for it would mean that the U.S. Supreme Court itself today operates in flagrant defiance of due process—and has done so throughout the entirety of its history. As explained in our initial supplemental brief, that Court "does not sit in judgment of one of its own Members' decision whether to recuse in the course of deciding a case," *2011 Year-End Report*, *supra*, at 9, nor has it ever done so, John P. Frank, *Disqualification of Judges*, 56 YALE L.J. 605, 612 (1947). Plaintiff, and the amici supporting it, never explain how their reading of *Caperton* as requiring involuntary recusal could even conceivably be squared with this fact; indeed, none of them so much as mentions the U.S. Supreme Court's current and historic rejection of involuntary recusal.

Plaintiff's reading of *Caperton* would be quite startling for the additional reason that it would mean that the highest courts of nearly two-thirds of the States are also operating in defiance of the Due Process Clause—and, again, have done so throughout American history. *See* Appendix A to Def.-Appellees' Init. Supp. Br. (Nov. 4, 2021) (32 out of 50 States do not allow involuntary recusal in their highest courts,

and before 1987 only two States had adopted the practice). Plaintiff, and the amici supporting it, never explain how *Caperton* can plausibly be interpreted as requiring a practice that has been overwhelmingly rebuffed throughout the Nation's history and is still today not followed by a supermajority of States. To the contrary, *Caperton* expressly states that the Due Process Clause "demarks only the outer boundaries of judicial disqualifications" and that its application is "confined to rare instances." 556 U.S. at 889–90. Those assurances would be false and indeed absurd if due process, as interpreted in *Caperton*, in fact, required the overhaul of the recusal process in 32 out of 50 States (not to mention the U.S. Supreme Court itself). Plaintiff's interpretation of *Caperton* as requiring a process for involuntary recusal in courts of last resort is thus completely untenable.

Plaintiff's interpretation of the Due Process Clause, and the *Caperton* decision, is further undermined by the Code of Judicial Conduct, as published by the ABA and adopted in this State. Plaintiff, and the amici supporting it, are effusive in their praise of the Code—which, they say, is "implemented to maintain judicial integrity and public confidence in the courts" Plaintiff's Br. at 11–12, "serve[s] to maintain the integrity of the judiciary and the rule of law," Former Chairs Amicus Br. at 6, and "codif[ies] long-cherished principles that fulfill the requirement of an independent judiciary," Pro. Resp. Profs. Amicus Br. at 2. Yet, as discussed above and in Defendants' opening supplemental brief, the Code *does not provide for involuntary recusal*, and instead vests the decision on recusal in the judge or justice "himself/herself." N.C.C.J.C. Canon 3(C)(1).

Plaintiff insists that involuntary recusal is required by the "maxim," reflected in the Due Process Clause, that "no man is allowed to be a judge in his own cause." Plaintiff's Br. at 23 (brackets omitted) (quoting *Caperton*, 556 U.S. at 876–77). Not so. While this "guiding precept," Judicial Ethics Scholars Amicus Br. at 4, of course, informs the *substance* of the recusal determination—the standard that a justice asking whether he or she should recuse must apply—it does not require the availability of a mechanism for involuntarily recusing a justice who concludes that recusal is unnecessary because this standard has *not been met*. In that circumstance, sitting on the case *would not involve* him impermissibly judging his own case. After all, this maxim has coexisted with the near-universal lack of involuntary recusal *for centuries*. *Compare id.* (tracing the maxim to the 1609 decision in *Dr. Bonham's Case*), *with* Def.-Appellees' Init. Supp. Br. at 21–23 (explaining that involuntary recusal was historically unavailable in courts of last resort at the federal level and in all but two States prior to 1987). The reason for this is obvious: the mere fact that a litigant has moved for the recusal of the judge assigned to its case does not make the judge in question *a party* to that case or imply that the judge is somehow *personally interested in sitting* on the case, such that he or she cannot decide the recusal issue itself in an unbiased way. Indeed, *Plaintiff itself* insists that a judge does not "have a right to hear any particular case," Plaintiff's Br. at 14, a proposition that refutes its own suggestion that a judge deciding whether to recuse is acting as "a judge in his own cause," *id.* at 23. In other words, if a judge does not have any personal right to sit on

a particular case, then by deciding whether to sit on a case the judge is not passing on his or her own rights.

Accordingly, nothing in the Due Process Clause or the case law interpreting it requires a state court of last resort to provide a mechanism for involuntarily recusing its members, and the U.S. Supreme Court and a supermajority of state supreme courts, in fact, do not do so. One of Plaintiff's amici attempts to overcome the shortcomings of its due process argument by asserting that even if the Due Process Clause *itself* does not require involuntary recusal, it somehow vests this Court with "remedial authority" to do so as a matter of "the very nature and structure of constitutional governance." Const. Law Profs. Amicus Br. at 13–14. That argument fails too.[3] Yes, "this Court, like all courts, possesses full *remedial* power to vindicate [constitutional] rights" through the exercise of judicial review. *Id.* at 13–14 (citing *Bayard v. Singleton*, 1 N.C. 5 (1787)). But as this Court has held, when crafting a remedy "for a violation of a particular constitutional right," the courts "must minimize the encroachment upon other branches of government—in appearance and in fact—by seeking the least intrusive remedy available and necessary to right the wrong." *Corum v. Univ. of N.C.*, 330 N.C. 761, 784, 413 S.E.2d 276, 291 (1992). Here,

[3] It is somewhat ironic that in a case about recusal, the Constitutional Law Amici rely on *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), and Chief Justice Marshall's recognition of judicial review. In *Marbury*, "it was Marshall himself who certified the very judicial commission in dispute and it was his brother, James, who failed to make delivery." Ward Zimmerman, *The Political Nature of John Marshall's Fight for the Court in Marbury v. Madison*, 16 The North Carolina State Bar Journal, Fall 2011, Issue 3, 23, at 25 (2011). If Marshall was not required to recuse in these circumstances, then neither Justice Berger nor Justice Barringer should be required to recuse here.

as just explained, the constitutional right to due process *does not require involuntary recusal*, so this Court's authority to remedy constitutional violations simply is not triggered to begin with. *See Simeon v. Hardin*, 339 N.C. 358, 373, 451 S.E.2d 858, 869 (1994) (courts are "empowered to review the constitutionality of the statutes [challenged as unconstitutional] and to fashion an appropriate remedy *should such statutes violate the Constitution*" (emphasis added)).

Indeed, requiring involuntary recusal could itself raise serious due process concerns. As explained in Defendants' initial supplemental brief, an attempt to force one or more Justices off of a case in an *ultra vires* way, or for nakedly political or outcome-driven reasons, would raise grave concerns under the Due Process Clause, since such an exercise of raw power *could itself* create an "unconstitutional 'potential for bias.'" *Caperton*, 556 U.S. at 881. Plaintiff criticizes a variety of *other* constitutional arguments against involuntary recusal, but nothing in its brief or the case law it cites diminishes—or even addresses—these concerns. *See* Plaintiff's Br. at 14–16; *Nevada Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 123–25 (2011) (discussing First Amendment claim); *In re Kemp*, 894 F.3d 900, 906–10 (8th Cir. 2018) (discussing First Amendment, racial-discrimination, and due-process property right claims); *Bauer v. Shepard*, 620 F.3d 704, 709–18 (7th Cir. 2010) (discussing First Amendment and vagueness claims).

In sum, neither the North Carolina Constitution, N.C.G.S. Section 7A-10.1, nor the Due Process Clause authorizes this Court to change the current law governing

recusal by granting itself the power to force one of its Members to recuse against his or her own best judgment.

III. Requiring the Involuntary Recusal of One or More Justices in This Case Would Be Contrary to Sound Principles of Judicial Administration and Would Risk Severe Institutional and Reputational Harm to the Court.

Even if this Court possessed the authority to establish a new rule allowing it to force its own Members off of a case, it ought not to exercise it. That course of action poses enormous peril to this institution—including a severe risk of harm to the very values of judicial integrity and non-partisanship that Plaintiff says it wishes to vindicate.

a. Sound Principles of Judicial Administration and Policy Support Individualized Recusal Determinations in a Court of Last Resort.

1.

As discussed above and in our initial supplemental brief, providing for involuntary recusal in a court of last resort poses grave dangers because of the very nature of such an institution. First, this Court is uniquely charged with the critical duty of maintaining the uniformity of State law and "authoritatively constru[ing] the Constitution and laws of North Carolina with finality." *Lea Co. v. N.C. Bd. of Transp.*, 308 N.C. 603, 610, 304 S.E.2d 164, 170 (1983). Because the recusal of one or more Justices "rais[es] the possibility that, by reason of a tie vote, it will find itself unable to resolve the significant legal issue presented by the case," *Cheney v. U.S. Dist. Ct. for D.C.*, 541 U.S. 913, 928 (2004) (Scalia, J., in chambers), the unchecked nature of

involuntary recusal imperils the core, constitutionally assigned function of this Court in a way that simply does not apply to the lower courts.

Second, because this Court hears every case *en banc*, if a motion to recuse one Justice is decided by his or her colleagues on the Court, it both damages the collegiality of the Court and its ability to function effectively and also entails the "undesirable situation in which the Court could affect the outcome of a case by selecting who among its Members may participate." *2011 Year-End Report*, *supra*, at 9. Again, that is not true of recusal in the lower courts, where a motion to recuse may be referred to another judge who is not himself or herself sitting on the particular case in question.

Third, this same circumstance—determination of every case before it by the Court as a whole—means that litigants before the Court will know, in advance, precisely how a successful motion to recuse will affect the makeup of the Court that will decide their case. And if Plaintiff's procedures are adopted, litigants will also know precisely which Justices will be deciding any motion to recuse. Such a situation is rife with potential for strategic manipulation and abuses too obvious to require discussion.

Plaintiff and the amici supporting it completely fail to meaningfully grapple with these considerations. The Professors of Professional Responsibility, who have filed a brief urging the adoption of involuntary recusal in this Court, fail to recognize these considerations completely, simply asserting that "there is no principled reason to distinguish between the power to disqualify a trial judge and an appellate judge"

or justice. Pro. Resp. Profs. Amicus Br. at 1–2. And Plaintiff, for its part, claims that these considerations are all "resolv[ed]" by the "rule of necessity," which allows otherwise-recused Justices to sit on a case if "a sufficiently large number of justices are disqualified such that the court's quorum is not met." Plaintiff's Br. at 12. That is plainly not so. While the Rule of Necessity prevents recusal requirements from completely frustrating this Court's duty to decide cases in the extreme circumstance where recusal would deprive the Court of a quorum, the rule *does nothing whatsoever* to alleviate the three dangers just discussed.

Another amicus, the Brennan Center, attempts to fill the breach by noting that North Carolina law "authorize[s] the chief justice to select replacement justices" in some circumstances." Br. for Amici Curiae Brennan Center for Justice at 8 (Nov. 4, 2021) ("Brennan Center Amicus Br."). That argument does not resolve the dangers just discussed either, because contrary to the Brennan Center's description, the Chief Justice's power to appoint replacement justices is narrowly limited to three circumstances—(1) receipt of a request by a justice "who has been advised in writing by a reputable and competent physician that he is temporarily incapable of performing efficiently and promptly all the duties of his office," N.C.G.S. § 7A-39.5(a); *see also id.* § 7A-39.13(b), (2) a vacancy on the Court, *id.* § 7A-39.14(a)(1), or (3) a vote by a majority of the Court that one of its Members "is temporarily unable to perform all the duties of his office," *id.* § 7A-39.14(a)(3)—none of which specifically addresses the replacement of a recused Justice in a single case. And even if the Court did have power to replace a Justice who had been involuntarily recused, that would at most

marginally diminish the harms discussed above, not eliminate them. For such a system would still involve the undesirable situation of Justices second-guessing the recusal determinations of one or more of their colleagues sitting on the very same case, and litigants would still know, in advance, which specific Justices would (and would not) be deciding a motion to recuse. And while the identity of the replacement for a recused Justice might not be known in advance, the identity of the Justice who was being forced off the case *would*, as would the identity of the Justice selecting a replacement—and litigants might well conclude that their interests are best served by a roll of the dice.

The Brennan Center tries to address these concerns by offering a second fix—"review of recusal motions by an independent body"—though it admits that "no state has adopted such an approach yet." Brennan Center Amicus Br. at 12. In addition to being completely untested, this novel proposal is even more palpably unconstitutional than the first. The North Carolina Constitution creates a single Supreme Court, N.C. CONST. art. IV, §§ 5, 6, specifically vests it with final jurisdiction over "any decision of the courts below, upon any matter of law or legal inference," *id.* art IV, § 12(1), and explicitly bars the legislature from either "establish[ing] or authoriz[ing] any courts other than as permitted by this Article," *id.* art IV, § 1. The creation of a super-court of recusal, possessed of jurisdiction to sit in review of the decision of this Court's Members and immune from review and reversal by this Supreme Court, would be wholly contrary to these constitutional provisions.

In the final analysis, neither Plaintiff nor the amici supporting it has come close to adequately addressing, much less justifying, the serious harms that authorizing involuntary recusal on this Court would necessarily inflict because of its nature as a court of last resort.

2.

Changing the law to authorize the involuntary recusal of a Justice of this Court would also be in tension with the long-established duty to sit. Plaintiff and its amici recognize the legitimacy of this duty and its important role as a matter of North Carolina law. Plaintiff's Br. at 13–14; Brennan Center Amicus Br. at 9; *see also* N.C.C.J.C. Canon 3 ("The judicial duties of a judge take precedence over all the judge's other activities."). And the significance of the duty to sit is especially pronounced for a court of last resort, where, as discussed above, unnecessary recusal creates the prospect of an equally divided decision, making a decision to recuse "(insofar as the outcome of the particular case is concerned) effectively the same as casting a vote against the petitioner." *Cheney*, 541 U.S. at 916 (Scalia, J., in chambers). While the duty to sit may not "undercut the requirement that justices not consider cases when faced with legitimate grounds for disqualification," Plaintiff's Br. at 14, it serves to underscore the fact that a decision to recuse—particularly in the context of a court of last resort—is not without costs.

3.

The Court should proceed with great caution and hesitancy in adopting an involuntary recusal rule allowing some of its Members to force others off of a case for

the additional reason that establishing such a mechanism would put this Court out of step with the U.S. Supreme Court, a supermajority of other States, and the considered views of the American Bar Association's Judicial Administration Division. As noted above, the highest courts of 32 States, as well as the U.S. Supreme Court, do not allow for the involuntary recusal of their Members. Plaintiff's suggestion that "[t]here is little consistency across the nation," Plaintiff's Br. at 17, is thus incorrect with respect to the fundamental question at issue: as to whether involuntary recusal is appropriate in a court of last resort, there is *remarkable and overwhelming consistency* that the answer should be no. Accordingly, while Plaintiff and its amici assert that there is an "overall trend" towards adopting involuntary recusal in courts of last resort, Plaintiff's Br. at 19; *see also* Brennan Center Amicus Br. at 5, the Court should make no mistake: the overwhelming majority of jurisdictions *have not adopted* this innovation.

Plaintiff is also incorrect to suggest that the U.S. Supreme Court's decision in *Caperton* has created some sort of momentum towards adopting involuntary recusal. Plaintiff's Br. at 17–18; *see also* Brennan Center Amicus Br. at 5. The majority of the 13 States that have adopted formal rules authorizing involuntary recusal in their highest courts did so during the period between 1987 and 2002. *See* Appendix A to Def.-Appellees' Init. Supp. Br. Only five States adopted such rules after *Caperton* was decided in 2009—notably *not* including West Virginia, the State involved in *Caperton* itself. *See* W. VA. R. APP. P. 33(g). And despite the Brennan Center's importuning, *no*

State has adopted the practice in the last five years. Plaintiff's attempt to conjure a "trend" in favor of the procedure it advocates is accordingly a faux pas.

Moreover, one of the States that Plaintiff and the Brennan Center tout as part of the supposed "overall trend" towards adopting involuntary recusal, Plaintiff's Br. at 19, in fact, serves as a cautionary tale of the hazards of such a course of action. While the Michigan Supreme Court's adoption of a procedure authorizing involuntary recusal occurred shortly after the *Caperton* decision—and included an invocation of the case—the broader context of the rule change, recounted at length in our initial supplemental brief, demonstrates that it appears to have been an acrimonious power play by an ideological block of justices who had just obtained a majority in the 2008 judicial election. Far from serving as a glowing model of some principled "trend . . . towards more transparency," *id.*, then, Michigan starkly illustrates the damage that adopting involuntary recusal can cause to a judicial institution's reputation for non-partisanship and its ability to function in an effective and collegial manner.

The supermajority of States that have adhered to the traditional approach of leaving recusal decisions at the highest court to the sound discretion of the Justice in question are also acting in harmony with the consistent position of the ABA's Commission on Standards of Judicial Administration. As noted in Defendants' initial supplemental brief, the ABA's model standards for appellate courts have since 1977 continuously recommended *against* involuntary recusal in a State's highest court for many of the same reasons discussed above. *See* ABA COMM'N ON STANDARDS OF JUDICIAL ADMINISTRATION, STANDARDS RELATING TO APPELLATE COURTS 74 (1977); 3

ABA JUDICIAL ADMINISTRATION DIVISION, *supra*, at 81. Plaintiff neglects to mention this repeated recommendation. It points instead to a 2014 resolution by the ABA encouraging States generally to adopt "a mechanism for the timely review of denials to disqualify or recuse that is independent of the subject judge." American Bar Ass'n, Resolution 105C (2014). As noted in our opening brief, however, this general recommendation does not purport to supersede the model appellate standards' specific discussion of the unique considerations that militate *against* involuntary recusal in courts of last resort.[4] Moreover, in language that tracks Canon 3 of North Carolina's Code of Judicial conduct discussed above, the ABA's model Code of Judicial Conduct continues to expressly provide that the decision whether to recuse lies with the judge "himself or herself." American Bar Ass'n, Model Code of Judicial Conduct Rule 2.11(A) (2020).

This Court should deny Plaintiff's invitation to join the ongoing experiment by a small minority of States with rules authorizing involuntary recusal in their highest courts.

4.

[4] The same reasoning also disposes of the Brennan Center's reliance on Resolution 8 of the Conference of Chief Justices. While that resolution generally "urges [the Conference's] members to establish procedures that incorporate a transparent, timely, and independent review for determining a party's motion for judicial disqualification/recusal," it does not specifically recommend that such a procedure be applied to courts of last resort—and in fact, the Resolution specifically notes that "disqualification/recusal rules may require different procedures for trial courts, intermediate appellate courts, and courts of last resort." Conference of Chief Justices, Resolution 8 (Jan. 29, 2014), https://bit.ly/3wxv3rP.

For the reasons noted above and discussed at greater length in Defendants' initial supplemental brief, adopting a rule authorizing some Members of this Court to force others off of a case is fraught with enormous risk of irretrievable harm to this institution and the people of the State whom it serves. *See also* Prof. Orth Amicus Br. at 5; NCICL Amicus Br. at 3–5, 10–11. Again, the existence of such a procedure would create a significant risk of strategic gamesmanship by litigants and would threaten untold damage to the collegiality of the Court and its ability to function smoothly and effectively. As the example of the Michigan Supreme Court demonstrates, the adoption of an involuntary recusal rule—in response to the decision by two Justices not to recuse in a closely divided case with obvious partisan implications—would inevitably be perceived as a deeply political act, both by those Justices who opposed the move and by the North Carolina public. It is not difficult to foresee that such an act could create an escalating struggle over control of the Court, with litigants filing an increasing number of strategic recusal motions and shifting majorities of Justices exercising the new-found power in a way that would effectively dictate the outcome of closely divided cases.

The tragic irony of these predictable consequences is that they would seriously harm the very values that Plaintiff says it wishes to vindicate. Plaintiff laments that "[i]n recent years our judiciary has become increasingly politicized," leading to an "erosion of public confidence in the independence of the judiciary." Plaintiff's Br. at 4, 10. The Brennan Center's amicus brief supporting Plaintiff likewise speaks at length about the risk of "damage [to] the judiciary's capacity to perform its constitutional

functions" and the growing loss of "trust in the judiciary." Brennan Center Amicus Br. at 2. Yet it is difficult to conceive of a step better calculated to further undermine the public's trust in this Court, and the Court's ability to perform its constitutional functions, than the adoption of a rule allowing some Justices effectively to dictate the outcomes in contentious cases by forcing the recusal of one or more of their colleagues.

5.

A rule authorizing some Justices to force others off of a case would also be contrary to the democratic principles that led North Carolina to embrace judicial elections. The adoption of judicial elections alters the implications of a decision by some justices on a court of last resort to involuntarily recuse others. As noted by the ABA, "the question of an appellate judge's 'bias' is often practically indistinguishable from the question of the judge's views on the law." 3 ABA JUDICIAL ADMINISTRATION DIVISION, *supra*, at 81. And because North Carolina judicial candidates are free to discuss their judicial philosophies and views on the law during their campaigns, the decision to force the recusal of an elected judge will often be little more than a deliberate repudiation of the voters' judgment on these matters. *See* NCICL Amicus Br. at 3–5, 10. As noted earlier, if a particular Justice hears a matter in violation of the Code of Judicial Conduct, *that Justice* faces accountability not only from the Judicial Standards Commission but also North Carolina citizens at the ballot box. Quite the opposite though, if this Court acts to involuntarily recuse a Justice there are few mechanisms, if any, for the people to hold the Court *as an institution* accountable.

Indeed, Plaintiff scarcely attempts to conceal its contempt for North Carolina's adoption of judicial elections. It gratuitously criticizes what it calls "the surge in the amount of money pouring into North Carolina's judicial races"—campaign expenditures that under binding Supreme Court case law constitute core constitutionally protected political expression—and it assails recent legislation providing for the partisan affiliation of judicial candidates to be listed on the ballot as "politicizing judicial elections" and "increasing the danger of erosion of public confidence in the independence of the judiciary." Plaintiff's Br. at 9, 10. The Brennan Center, one of the amici curiae supporting Plaintiff, is also a prominent opponent of judicial elections. *See, e.g.*, BRENNAN CENTER FOR JUSTICE, CHOOSING STATE JUDGES: A PLAN FOR REFORM (2018), https://bit.ly/3H4zgbt. But the People of North Carolina have elected their judges since the Constitution of 1868, and it is not up to the Brennan Center, Plaintiff, or even this Court to second-guess that decision or adopt rules undermining their choice.

6.

Plaintiff and its amici point to certain psychological research purporting to demonstrate that all people—including judges—are susceptible to a "bias blind spot," whereby they tend to see bias in others but not in themselves. *See, e.g.*, Plaintiff's Br. at 24–27; Brennan Center Amicus Br. at 6–7; Judicial Ethics Scholars Amicus Br. at 13–14. They argue that this phenomenon counsels in favor of a process for evaluating recusal requests independent of the challenged justices because those justices are "ill-suited to effectively analyze the situation." Plaintiff's Br. at 24. Plaintiff's reliance on

this research, however, undermines its own position. If, as Plaintiff says, people believe that they are more objective than others, see themselves as more ethical and fairer than others, and tend to see bias in others but not in themselves, *id.* at 25, then preventing a challenged justice from evaluating a recusal motion for herself in favor of the entire court deciding the motion will not solve the alleged issue because the justices considering a motion to involuntarily recuse a fellow justice will be unable to perceive *their own* biases against the challenged justice. Especially in politically charged cases like this one, recusal procedures that allowed the full Court to involuntarily recuse a fellow justice would do nothing to remove the non-challenged justices' biases, heightening the likelihood that any forced recusal would be perceived as equally biased. Furthermore, psychological research suggests that "people differ in their propensity to exhibit the bias blind spot" and that it "appears to be independent of general decision-making competence." Irene Scopelliti et al., *Bias Blind Spot: Structure, Measurement, and Consequences*, 61 MGMT. SCI. 2468, 2468 (2015), https://bit.ly/3qnGi55. Plaintiff cannot rely on generalizations that fail in specific cases to advocate for new rules applicable to this case, especially where nearly two-thirds of the states—32 out of 50—and the U.S. Supreme Court still adhere to the traditional practice of leaving recusal determinations to the affected justice, without any provisions for involuntary recusal, thereby recognizing that justices take seriously their duty to objectively determine whether recusal is warranted in any given case.

b. Even if the Court Concludes that the Promulgation of Rules Providing for Involuntary Recusal Is Authorized and Appropriate, It Should Promulgate Such Rules Through an Orderly and Transparent Process, not Through an Ad Hoc Order Entered in the Context of a Specific Controversial Case.

At a bare minimum, the considerations just discussed show that this Court should not take action to require involuntary recusal directly in the context of this pending case. As noted above, and as Plaintiff does not dispute, authorizing involuntary recusal would require a change in the current law governing recusal. And the Court should not make such a change (even assuming it had the authority to do so) without undertaking careful study and following a formal rulemaking process.

1.

Even if the Court concludes that the serious hazards posed by the creation of a mechanism for involuntary recusal on this Court do not require the rejection of such a course of action outright, at the very least the dangers discussed above counsel an extraordinary degree of caution. One option, if the Court concludes that it can and should venture down this path, is to call for further study of the matter. For instance, the Chief Justice could request the State Judicial Council to investigate and prepare a report on the issue, under his authority to request that body to "[a]dvise or assist" him "on any . . . matter concerning the operation of the courts." N.C.G.S. § 7A-409.1(a)(7). Such a study could identify, analyze, and discuss all of the various risks and considerations bearing on the availability of involuntary recusal in courts of last resort in a far more detailed and comprehensive way than is possible in a round of supplemental briefing conducted by the litigants in this case.

The North Carolina Commission on the Administration of Law & Justice ("NCCALJ") provides another example of the type of commission that could study the issue of rules regarding involuntary recusals and issue recommendations for this Court's consideration. The NCCALJ was convened in 2015 by former Chief Justice Mark Martin and was "an independent, multidisciplinary commission that undertook a comprehensive evaluation of [North Carolina's] judicial system and made recommendations for strengthening [the State's] courts within the existing administrative framework." *North Carolina Commission on the Administration of Law & Justice*, N.C. JUDICIAL BRANCH, https://bit.ly/3F4Hr5R (last visited Nov. 24, 2021). After 15 months of "focused inquiry, informed dialogue, robust discussion, and extensive collaboration," the NCCALJ issued a final report with recommendations for strengthening North Carolina's court system. As with the NCCALJ, a commission convened to study involuntary recusal rules would be able to research the issues, gather facts, take public comments, and make recommendations on whether rules should be implemented and in what form. The commission would be able to fully explore the various possibilities that Plaintiff and its amici propose, among others, instead of this Court simply adopting one approach without further research.

2.

If, after further study, the Court still concludes that it can and should take action to establish a process for the involuntary recusal of its Members, any such action should take the form of a formal rulemaking by the entire Conference of the

Court—not an ad hoc order entered and employed in this specific case to retroactively resolve a pending dispute over recusal.

Both of the provisions Plaintiff has proposed as sources of this Court's purported authority to require involuntary recusal require any change of this kind to take place through formal rulemaking. The Court's constitutional authority under Article IV, Section 13 "to make rules of procedure and practice for the Appellate Division," N.C. CONST. art. IV, § 13, is, as this Court has described, the authority "to *promulgate* rules of appellate procedure," *In re Brown*, 358 N.C. 711, 713, 599 S.E.2d 502, 503 (2004) (emphasis added)—*i.e.,* to establish rules through a formal rulemaking process—not to establish new rules through ad hoc orders entered in discrete, pending cases. This Court's consistent practice has been to promulgate such rules after careful study through an order entered by the whole Conference of the Court that applies only prospectively to appeals noticed after their adoption. *See, e.g.*, *North Carolina Rules of Appellate Procedure*, 287 N.C. 671, 671 (1975); *North Carolina Rules of Appellate Procedure*, 363 N.C. 901, 901 (2009); *North Carolina Rules of Appellate Procedure*, 369 N.C. 763, 763 (2016).

Similarly, to the extent the Court instead locates any authority it concludes it possesses in this context in N.C.G.S. Section 7A-10.1's delegation of power to prescribe rules of judicial conduct, that statute requires formal rulemaking too: it expressly requires any standards of judicial conduct to be prescribed "by rule," not by an order in a specific, pending case. Again, and as Plaintiff acknowledges, this means that any rule authorizing involuntary recusal "would need to be adopted by the whole

conference of the Court." Plaintiff's Br. at 23. And again, a formal rule authorizing involuntary recusal on this Court could apply only prospectively. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("[A] statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms.").[5]

The extraordinary and controversial nature of this case, and of the dispute over recusal, underscores the imperative of adhering to these proscribed procedures rather than justifying a departure from them. The U.S. Supreme Court has recognized this principle. In *Hollingsworth v. Perry*, the constitutional challenge to California's "Proposition 8" banning same-sex marriage, the trial judge expressed his desire, shortly before the trial in the case was set to commence, to video broadcast the trial proceedings, contrary to the court's then-current local rules. When one of the parties objected to that course of action, the district court, as the U.S. Supreme Court later recounted, "attempted to revise its rules in haste, contrary to federal statutes and the policy of the Judicial Conference of the United States," in a way that "complied neither with existing rules or policies nor the required procedures for amending them," so as "to allow broadcasting of this high-profile trial without any considered

[5] To the extent the Court concludes that it has *inherent* authority to promulgate a rule authorizing involuntary recusal, rather than authority vested and limited by either of these provisions, formal and deliberate rulemaking procedures would still be required. For the Court's inherent authority must be exercised "with a cautious and cooperative spirit" by "bow[ing] to established procedural methods." *Alamance Cnty.*, 329 N.C. at 100, 405 S.E.2d at 133.

standards or guidelines in place." 558 U.S. 183, 196 (2010) (per curiam). The U.S. Supreme Court ultimately entered an emergency stay blocking the district court's action, explaining that the law "requires a district court to follow certain procedures to adopt or amend a local rule," and that the district court had acted contrary to those established procedures. *Id.* at 191. "Courts enforce the requirement of procedural regularity on others, and must follow those requirements themselves." *Id.* at 184. Indeed, the Court explained,

> By insisting that courts comply with the law, parties vindicate not only the rights they assert but also the law's own insistence on neutrality and fidelity to principle. Those systematic interests are all the more evident here, where the lack of a regular rule with proper standards to determine the guidelines for broadcasting could compromise the orderly, decorous, rational traditions that courts rely upon to ensure the integrity of their own judgments.

Id. at 196–97. These same considerations of neutrality and fidelity to principle require, here, that if the Court does elect to authorize the practice of involuntary recusal, it must do so through established formal rulemaking procedures.

3.

Even if this Court could establish the practice of involuntary recusal through an ad-hoc order in this case, rather than through a considered and formal rulemaking process, such a step would be unwise. As discussed above, if this Court grants itself the power to force the recusal of its own Members—no matter what process it uses—it will risk triggering a fundamental transformation of the institution, leading to the very politicization of the Court that Plaintiff assails. And if it does so through an order entered directly in the context of this specific case, rather than through a formal

and deliberative rulemaking process, these harmful dynamics would be dramatically intensified. The underlying substance of this case is consequential, contentious, and bears an obvious political valence. The case is being closely watched by the North Carolina public. A move by some Justices on the Court to force the recusal of two of their colleagues would widely be perceived as seeking to determine the outcome of the case. And doing so in a manner that is unprecedented and unauthorized by current law, without following a transparent, formal, and deliberative process, would also widely be perceived as a raw political act. Again, it is precisely in high-stakes contexts such as this one that adhering to formal, transparent, and established processes is the most imperative.

In *all* of the States where (1) involuntary recusal is expressly authorized in the court of last resort, and (2) the practice was adopted by the state's highest court itself, rather than by statute, the courts established the practice through a formal rulemaking process, rather than through asserting the power in the context of a specific pending case. *See* Appendix A to Def.-Appellees' Init. Supp. Br. This Court should not adopt involuntary recusal to begin with, for the reasons discussed above, and it certainly should not be the first court to do so by directly creating and exercising the power in a case pending before it.

c. Entering an Order Adopting Involuntary Recusal Would Certainly Be Inappropriate in this Case, Since Recusal of Justices Barringer and Berger Is Not Necessary or Appropriate as a Substantive Matter.

Even if a Justice's refusal to recuse in any given case could ever conceivably justify the adoption, and retroactive application, of a new involuntary recusal rule,

this is not such a case, since the substantive arguments in favor of the recusal of Justices Barringer and Berger clearly fail on the merits. This Court's order requested supplemental briefing limited to "the question of the *procedure* that the Court should implement in considering a recusal motion," including "any additional *procedure-related* issues that any party deems appropriate," Sept. 28, 2021 Order at 1 (emphasis added). For that reason, we did not discuss the substance of the underlying dispute over recusal in our initial supplemental brief, and we will not do so at length here. However, several amici did offer substantive arguments in favor of Justice Barringer's and Justice Berger's recusal—largely reiterating the same arguments that Plaintiff offered in favor of recusal, which Defendants have already demonstrated fail. *See* Def.-Appellees' Resp. to Pl.'s Mot. to Disqualify Justice Barringer & Justice Berger (Aug. 2, 2021) ("Defs.' Merits Br."). As with Plaintiff's merits briefing, amici do not "demonstrate objectively that grounds for disqualification actually exist." *Lange v. Lange*, 357 N.C. 645, 649, 588 S.E.2d 877, 880 (2003).

First, amici contend that Justice Berger must recuse under N.C. Code of Judicial Conduct Canon 3C(1)(d)(i) because Senator Berger is his father. Knowing that Defendants have conclusively demonstrated that Senator Berger is named in this case in his official capacity only, however, and therefore that the suit is actually against the State of North Carolina, not Senator Berger as an individual, *see* Def.-Appellees' Init. Supp. Br. at 3, amici pivot to weakly asserting that this fact does not matter because of Senator Berger's purportedly personal interest in this case. For

example, the North Carolina Legislative Black Caucus argues that Justice Berger must recuse because Senator Berger does not have merely a "passing familiarity with the challenged action," Amicus Br. of N.C. Legis. Black Caucus at 6 (Nov. 4, 2021) ("Legis. Black Caucus Amicus Br."), but that his interest in the case is "personal" and "goes well beyond the 'official' capacity on the case caption," *id.* at 7, because he led the Republican Senate caucus and voted in favor of proposing the constitutional amendments challenged in this case. The Professors of Professional Responsibility similarly contend that because Plaintiff purportedly named Senator Berger as a defendant "because of his leadership role in marshalling the amendments to a vote and his votes as a member of the Senate," this circumstance overcomes the fact that Senator Berger is a party to this case in his official capacity only. Pro. Resp. Profs. Amicus Br. at 7. The former chairs of the North Carolina Judicial Standards Commission argue that Justice Berger must recuse because the statutes requiring the President Pro Tempore to be a party to cases challenging the validity of a North Carolina statute or a provision of the North Carolina Constitution were enacted during Senator Berger's tenure—and with his approval. Former Chairs Amicus Br. at 23–24. They also argue that Senator Berger's participation in the case is not "nominal" because "he jointly asserts with the House Speaker . . . final decision-making authority" over the case. *Id.*

Try as they might, amici simply cannot overcome the uncontestable fact that Senator Berger is a party to this action only in his *official capacity as an agent of the state*. *See, e.g.*, NCICL Amicus Br. at 7–8. The individual "Philip Berger" is not a

defendant at all. When a plaintiff names a government official as a defendant in his or her official capacity, the suit is actually against the State, not the individual. *White v. Trew*, 366 N.C. 360, 363, 736 S.E.2d 166, 168 (2013); *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989) ("[A] suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. As such, it is no different from a suit against the State itself."). North Carolina law confirms this conclusion. Rule 19(d) of the North Carolina Rules of Civil Procedure requires 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." N.C.G.S. § 1A-1, Rule 19(d) (emphasis added); *see also id.* §§ 120-32.6(b), 1-72.2(a). To be sure, in the underlying case, Plaintiff is not seeking the remedy of voiding two constitutional amendments against just two statesmen but instead against the State of North Carolina.

Indeed, courts often distinguish between official capacity suits and suits against an individual when considering recusal motions. For example, in *United States v. Black*, 490 F. Supp. 2d 630, 647 (E.D.N.C. 2007), the district court judge denied a motion to recuse filed on the basis that the judge had previously represented Republican legislators in redistricting litigation that had named the defendant in the case as a party in his official capacity. The district court explained that "when a state officer is named as a defendant in his official capacity, the party suing is not seeking

relief against the defendant personally, but against the Government." *Id.* Justice Scalia made a similar point in rejecting the Sierra Club's motion seeking his recusal on the grounds that he was friends with Vice President Cheney in a case where Vice President Cheney was a defendant in his official capacity. *See Cheney*, 541 U.S. at 916 (Scalia, J., in chambers) ("But while friendship is a ground for recusal of a Justice where the personal fortune or the personal freedom of the friend is at issue, it has traditionally *not* been a ground for recusal where *official action* is at issue, no matter how important the official action was to the ambitions or the reputation of the Government officer."). The same is true in this case, where Senator Berger is named as a defendant only in his official capacity as an agent of the State.

Furthermore, as Defendants have already explained in their brief on the merits of the recusal motion, it is misleading for amici to allege that Senator Berger has decision-making power over the litigation. Defs.' Merits Br. at 5 n.2. This case is not in the trial court where facts still might need to be developed, witnesses chosen, or theories developed. The matter has proceeded through the trial court and the Court of Appeals and briefing at this Court is complete. There are virtually no more decisions that either party can make at this point.

Second, amici maintain that Justice Barringer must recuse under Canon 3C(1)(a) because she was a Senator serving in the General Assembly when the General Assembly enacted the legislation at issue in this case. Amici argue that Justice Barringer must recuse because she voted in favor of placing on the ballot the amendment to the North Carolina Constitution that is being challenged in this case,

including voting to override the governor's veto. *See* Legis. Black Caucus Amicus Br. at 6–7; Pro. Resp. Profs. Amicus Br. at 6–7. They further contend that because she was a member of the General Assembly that passed the legislation at issue in this case, and because the General Assembly constitutes the State of North Carolina for purposes of this case, she is a former party to the case because of her former status as a Senator, and therefore that she must recuse. *See* Pro. Resp. Profs. Amicus Br. at 6; Former Chairs Amicus Br. at 24–25. Amici relatedly maintain that her alleged "first-hand" knowledge of factual issues in the case and her "earlier role" in the matter at issue in the case require her recusal. Former Chairs Amicus Br. at 25.

Justice Barringer's former status as a Senator does not disqualify her from hearing this case. Many courts have explicitly considered this issue and held that "a judge is not automatically disqualified from a case on the basis of having sponsored or voted upon a law in the state legislature that he is later called upon to review as a judge." *Buell v. Mitchell*, 274 F.3d 337, 346 (6th Cir. 2001); *see also Newburyport Redevelopment Auth. v. Commonwealth*, 401 N.E.2d 118, 144 (Mass Ct. App. 1980) (rejecting the contention that a judge should have recused himself since he was a member of the Massachusetts legislature when the bill that was subject of litigation was enacted); *Williams v. Mayor & Council of City of Athens*, 177 S.E.2d 581, 581 (Ga. Ct. App. 1970) (trial judge not required to recuse himself where, while previously serving as city attorney, he drafted an ordinance banning possession and operation of a pinball machine in city limits and defendant appearing before him was charged with violation of that ordinance); *In the Matter of Thomas W. Sullivan*, 219 So. 2d

346, 353 (Ala. 1969) ("A judge is not disqualified to try a case because he had been a member of the legislature enacting a statute involved in litigation before him."). In *Laird v. Tatum*, 409 U.S. 824, 831–32 (1972) (Rehnquist, J., in chambers), then-Justice Rehnquist recounted examples of U.S. Supreme Court Justices as support for the principle that a former legislator need not disqualify as a judge in a case involving legislation that passed when the judge was a legislator. For example, while Justice Black was a U.S. Senator, he was one of the principal authors of the Fair Labor Standards Act, but nevertheless sat in a case which upheld the constitutionality of that Act and in later cases construing it. The notion that former legislators turned judges must recuse in cases involving legislation that passed while they were legislators is simply not a requisite, *see Buell*, 274 F.3d at 347, and would be difficult to administer and ill-advised as a policy matter regardless.

Furthermore, although there are not many examples of former legislators becoming judges in North Carolina, there are two outstanding ones: Justice Willis Whichard and Chief Justice Henry Frye. Prior to serving on the Court of Appeals and Supreme Court, Justice Whichard served in the North Carolina House and Senate.[6] While he was a Justice on the Court of Appeals, he participated in cases in which the court considered the constitutionality of legislation, including a probation law which had been revised several times during his years in the General Assembly. *See State v. Stanley*, 79 N.C. App. 379, 339 S.E.2d 668 (1986). He even authored the court's decision. And while he was a justice on the Supreme Court, Justice Whichard wrote

[6] *See Portrait Ceremony of Justice Whichard*, 367 N.C. 926-27.

an opinion upholding the constitutionality of certain economic development incentives by relying on two constitutional amendments from the 1970s, during which time he was serving as a legislator. *See Maready v. City of Winston-Salem*, 342 N.C. 708, 467 S.E.2d 615 (1996).

Chief Justice Frye also served in the North Carolina House and Senate before becoming a Supreme Court Justice.[7] Like Justice Whichard, then-Justice Frye also participated in deciding *Maready*, despite the fact that he had served in the House during the 1970s when the General Assembly had passed the constitutional amendments Justice Whichard relied on in the case. And then-Justice Frye authored the Court's decision in *Black v. Littlejohn*, 312 N.C. 626, 325 S.E.2d 469 (1985), in which the Court upheld the constitutionality of a statute of limitations provision that was enacted during his tenure in the House. *See also, e.g.*, *Tetterton v. Long Mfg. Co.*, 314 N.C. 44, 332 S.E.2d 67 (1985) (decision authored by then-Justice Frye upholding constitutionality of the products liability statute of limitations that was amended during his time in the House). Chief Justice Frye and Justice Whichard are strong examples refuting amici's claim that Justice Barringer must recuse from this case.

Accordingly, amici have failed to "demonstrate objectively that grounds for disqualification actually exist." *Lange*, 357 N.C. at 649, 588 S.E.2d at 880. The Court should not adopt a rule authorizing involuntary recusal—either through a formal rulemaking process or through an order entered in this pending case—for all of the

[7] *Portrait of Former Chief Justice Henry Frye Dedicated at Supreme Court*, N.C. JUDICIAL BRANCH (Dec. 8, 2015), https://bit.ly/30EzzJs.

reasons discussed above. And it *certainly* should not do so where recusal is unnecessary and inappropriate as a substantive matter anyway.[8]

d. The Specific Procedures Proposed by Plaintiff and its Amici Illustrate why a Rule Authorizing Involuntary Recusal Should Only Be Adopted, If At All, After Careful Study and a Formal Rulemaking Process.

Plaintiff and its amici all urge this Court to adopt procedures for the involuntary recusal of Members of this Court, but they disagree on the specific contours of their proposed rules, thereby illustrating the danger of this Court adopting these procedures without careful study and a formal rulemaking process. Specifically, Plaintiff and its amici generally agree that this Court should adopt procedures providing that a challenged justice does not have the final determination on his or her own recusal and that decisions regarding recusal are made in writing or on the record with detailed reasoning in a form available to the public. *See* Plaintiff's Br. at 28–30; Judicial Ethics Scholars Amicus Br. at 15–16; Pro. Resp. Profs. Amicus Br. at 9–14; Legis. Black Caucus Amicus Br. at 9; Former Chairs Amicus Br. at 14–19; Brennan Center Amicus Br. at 11–12. Plaintiff and its amici disagree regarding

[8] To the extent this Court agrees with Plaintiff that it has the authority to adopt involuntary recusal and insists on applying newly minted rules to this pending case, there is no reason why Justices Barringer and Berger should be the only justices bearing the brunt of such an unprecedented review. As an alternative prayer to denying Plaintiff's Motion for Disqualification and simply having all seven Justices hear this case, this Court should also analyze the impartiality of Justices Earls. As Plaintiff's counsel indicates, upon inquiry of the Clerk's Office of the North Carolina Supreme Court, no Justice had declared his or her intention to recuse. Appellant's Supp. Br. p.3. Defendants, therefore, will formally request this alternative prayer for relief through a motion to disqualify Justice Earls should Justices Berger and Barringer be forced off this case.

whether a challenged justice may decide a motion to recuse in the first instance or whether the motion should automatically go to the full court, whether the challenged justice may participate in a decision on the motion to recuse before the full court, or even whether an entirely independent body should have jurisdiction to determine all motions to recuse. *See id.* Furthermore, Plaintiff and its amici give short shrift or entirely fail to discuss critical issues, such as whether fact-finding on motions to recuse is warranted; if so, what best practices for conducting that fact-finding the Court should adopt (only Plaintiff addresses these issues); and whether or how involuntarily recused justices should be replaced (which only the Brennan Center addresses). *See* Plaintiff's Br. at 28–29 (briefly addressing findings of fact for recusal motions); Brennan Center Amicus Br. at 8 (briefly addressing replacing recused justices).

Further illustrating the deep disagreements present among Plaintiff and its amici, one amicus brief (incorrectly) contends that North Carolina law *already contemplates* a process by which this Court could involuntarily recuse one of its Members, thereby seemingly obviating the need for this Court to adopt specific procedures at all. Pro. Resp. Profs. Amicus Br. at 9–14. In fact, the Professors (incorrectly) argue that this Court has made a process for involuntary recusal "part of the common law of North Carolina." *Id.* at 14. These disagreements demonstrate the fatal flaws inherent in any effort by this Court to adopt rules governing involuntary recusal in an ad hoc manner in the context of this case.

CONCLUSION

For the foregoing reasons, Defendants respectfully submit that the Court should continue to follow the Code of Judicial Conduct's direction that each individual Justice must determine for himself or herself whether it is necessary and appropriate to recuse.

Respectfully submitted this 24th day of November, 2021.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: /s/ Electronically submitted
D. Martin Warf
N.C. State Bar No. 32982
Tel: (919) 329-3800
martin.warf@nelsonmullins.com
4140 Parklake Avenue, Suite 200
Raleigh, NC 27612

N.C. R. App. P. 33(b) Certification: I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

Noah H. Huffstetler, III
N.C. State Bar No. 7170
noah.huffstetler@nelsonmullins.com
4140 Parklake Avenue, Suite 200
Raleigh, NC 27612

Counsel for Defendant-Appellees Philip E. Berger, in his official capacity as President Pro Tempore of the North Carolina Senate, and Timothy K. Moore, in his official capacity as Speaker of the North Carolina House of Representatives

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that he served a copy of the foregoing **Defendant-Appellees' Supplemental Response Brief** upon the parties via e-mail to the attorneys of record named below:

Kimberley Hunter
David Neal
Southern Environmental Law Center
khunter@selcnc.org
dneal@selcnc.org
Counsel for Plaintiff-Appellant NC NAACP

Irving Joyner
jjoyner@nccu.edu

Daryl V. Atkinson
Kathleen F. Roblez
Forward Justice
daryl@forwardjustice.org
kroblez@forwardjustice.org
Counsel for Plaintiff-Appellant NC NAACP

and upon amici curiae via email to the attorneys of record named below:

Daniel F. E. Smith
Jim W. Phillips, Jr.
Eric M. David
Kasi W. Robinson
Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P.
dsmith@brookspierce.com
jphillips@brookspierce.com
edavid@brookspierce.com
krobinson@brookspierce.com
Counsel for Roy Cooper, Governor of the State of North Carolina

Robert E. Harrington
Adam K. Doerr
Erik R. Zimmerman
Travis S. Hinman
rharrington@robinsonbradshaw.com
adoerr@robinsonbradshaw.com
ezimmerman@robinsonbradshaw.com
thinman@robinsonbradshaw.com
Counsel for North Carolina Legislative Black Caucus

Colin A. Shive
Robert F. Orr
cshive@tharringtonsmith.com
orr@rforrlaw.com
Counsel for North Carolina Professors of Constitutional Law

Jaclyn Maffetore
Leah J. Kang
Kristi L. Graunke
ACLU of North Carolina Legal Foundation
jmaffetore@acluofnc.org
lkang@acluofnc.org
kgraunke@acluofnc.org
Counsel for ACLU of North Carolina

John J. Korzen
Wake Forest University School of Law
korzenjj@wfu.edu
Counsel for Democracy North Carolina

Mary Ellen Murphy
murphyme@wfu.edu
Counsel for North Carolina Professors of Professional Responsibility

R. Daniel Gibson
Stam Law Firm PLLC
Dan@Stamlawfirm.com

Douglas B. Abrams
Noah B. Abrams
Abrams & Abrams
dabrams@abramslawfirm.com
nabrams@abramslawfirm.com

Prof. John V. Orth
University of NC School of Law Center
Center for Civil Rights
jvorth@email.unc.edu
Counsel for John V. Orth

Matthew E. Lee
Whitfield Bryson LLP
matt@whitfieldbryson.com
Counsel for NC Advocates for Justice

Pressly M. Millen
Womble Bond Dickinson (US) LLP
Press.Millen@wbd-us.com
Counsel for Former Chairs of the North Carolina Judicial Standards Commission

Jeanette Doran
NC Institute for Constitutional Law
jeanette.doran@ncicl.org
Counsel for North Carolina Institute for Constitutional Law and The John Locke Foundation

John Wallace
Lauren T. Noyes
Wallace & Nordan, LLP
jrwallace@wallacenordan.com
ltnoyes@wallacenordan.com

Lindsey W. Dieselman
Paul Hastings, LLP
lindseydieselman@paulhastings.com
Counsel for Brennan Center for Justice at New York University School of Law

Aaron R. Marcu
Shannon K. McGovern
aaron.marcu@freshfields.com
Shannon.McGovern@freshfields.com
Counsel for North Carolina Legislative Black Caucus

Christopher J. Heaney
Law Office of Christopher J. Heaney, PLLC
Chris.heaney@heaneylawoffice.onmicrosoft.com
Counsel for Scholars of Judicial Ethics and Professional Responsibility

This the 24th day of November, 2021.

/s/ Electronically submitted
D. Martin Warf
N.C. State Bar No. 32982
Tel: (919) 329-3800
martin.warf@nelsonmullins.com
4140 Parklake Avenue, Suite 200
Raleigh, NC 27612

No. 261A18-3 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA
****

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

****

APPENDIX TO
DEFENDANT-APPELLEES' SUPPLEMENTAL RESPONSE BRIEF

****

INDEX

WEST VIRGINIA JUDICIARY

Rules of Appellate Procedure

Search *Search*

Part VII. Motions and Other Requests for Relief

TABLE OF CONTENTS **Full Table of Contents**

PART VII. MOTIONS AND OTHER REQUESTS FOR RELIEF

Rule 28. Stays.

(a) Stay of circuit court order pending appeal. Any person desiring to present an appeal under Rule 5 may make an application for a stay of proceedings to the circuit court in which the judgment or order desired to be appealed was entered. Such application must be made by notice in writing to the opposite party at any time after the entry of the judgment or order to be appealed. The circuit court shall grant such stay in a criminal case as provided by West Virginia Code § 62-7-1, and may grant a stay suspending the execution of a judgment or order, modifying, restoring, or granting an injunction, or staying the execution of a criminal sentence or fine beyond the time mandated by statute. Such stay shall be effective: (1) until the expiration of the time provided by law for presenting an appeal; and (2) any additional period after an appeal has been perfected pending final disposition of the appeal, unless sooner modified by such court or by the Supreme Court.

(b) Application in Supreme Court for stay of circuit court order pending appeal. If the circuit court should refuse to grant a stay, or if the relief afforded is not acceptable, the applicant may, upon written notice to the opposite party, apply to the Supreme Court for a stay. Such application shall show the reasons assigned by the circuit court for denying a stay or other relief, and further show the reasons for the relief requested and the grounds for the underlying appeal. If

(3) a table of authorities with references to the pages of the brief where they are cited;

(4) a concise statement of the identity of the amicus curiae, its interest in the case, and the source of its authority to file;

(5) except for briefs presented as a matter of right on behalf of an amicus curiae listed in subdivision (a) of this Rule, a brief filed under this Rule shall indicate whether counsel for a party authored the brief in whole or in part and whether such counsel or a party made a monetary contribution specifically intended to fund the preparation or submission of the brief, and shall identify every person other than the amicus curiae, its members, or its counsel, who made such a monetary contribution. The disclosure shall be made in the first footnote on the first page of text.

(6) The argument, exhibiting clearly the points of fact and law presented and citing the authorities relied on, under suitable headings.

An appendix must comply with the format, page numbering and general requirements of Rule 7 insofar as applicable.

(f) Oral argument. A motion of an amicus curiae to participate in the oral argument of a case on the Rule 20 docket will be granted only for extraordinary reasons.

Rule 31. Motions to dismiss the appeal.

(a) By party. At any time after the filing of an appeal, any party to the action appealed from may move the Supreme Court to dismiss the appeal on any of the following grounds: (1) failure to properly perfect the appeal; (2) failure to obey an order of the Court; (3) failure to comply with these rules; (4) lack of an appealable order, ruling, or judgment; or (5) lack of jurisdiction. Such motion shall be filed and served in accordance with Rule 37.

(b) By Court. The Supreme Court may on its own motion notify any party who is in violation of the grounds set out in subsection (a) and fashion appropriate sanctions including the dismissal of the appeal.

(c) Hearing. No oral argument shall be held on such motion, unless requested by the Court.

Rule 32. Intervention.

Upon timely motion, anyone shall be permitted to intervene in an original jurisdiction proceeding pending in this Court or in a case pending before this Court on a direct appeal from an administrative agency, but only when (1) a statute of this State confers an unconditional right to intervene; or (2) the representation of the applicant's interest by existing parties is or may be inadequate, and the applicant is or may be bound by judgment in the action. Intervention may be permitted in other cases in the discretion of the Supreme Court. A party to the case may respond to a motion to intervene within ten days of the date the motion was filed.

Rule 33. Disqualification of a justice.

(a) Duty to inform. Upon appearance in any case in this Court, counsel of record must inform the Clerk, by letter with a copy to the opposing parties, of any circumstance presented in the case in which a disqualifying interest of a Justice may arise under Canon 2, Rule 2.11 of the Code of Judicial Conduct.

(b) Grounds for disqualification. A Justice shall disqualify himself or herself, upon proper motion or sua sponte, in accordance with the provisions of Canon 2, Rule 2.11 of the Code of Judicial Conduct or, when sua sponte, for any other reason the Justice deems appropriate.

(c) Motions for disqualification. A party to a proceeding in this Court may file a written motion for disqualification of a Justice within thirty days after discovering the ground for disqualification and not less than seven days prior to any scheduled proceedings in the matter. If a motion for disqualification is not timely filed, such delay may be a factor in deciding whether the motion should be granted.

(d) Contents of motion. The motion shall be addressed to the Justice whose disqualification is sought and shall state the facts and reasons for disqualification, including the specific provision of Canon 2, Rule 2.11 of the Code of Judicial Conduct asserted to be applicable, and shall be accompanied by a verified certificate of counsel of record or unrepresented party that: (1) he has read the motion and that to the best of his knowledge, information, and belief formed after reasonable inquiry that it is well grounded in fact and is warranted by existing law or good faith argument for the extension, modification, or reversal of existing law; and (2) that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

(e) Sanctions for improper motion. If a motion is signed in violation of paragraph (d) of this rule, the Court, with or without the participation of the Justice whose disqualification was sought, upon motion or upon its own initiative, may refer the matter to the appropriate disciplinary authority or may impose upon the person who signed it, an unrepresented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of reasonable expenses incurred because of the filing of the motion, including reasonable attorney fees.

(f) Filing of motion. The number of copies of the motion required by Rule 38 shall be filed with the Clerk with service on all parties. Upon filing of the motion, the Clerk shall examine it to determine whether it conforms with the requirements of paragraph (d) and, retaining the original for the record, shall return the copies to the movant with instructions for correction of any nonconformity. The movant thereafter shall promptly advise the Clerk in writing of the abandonment of the motion or shall file the required number of copies of a corrected motion, with service on all parties. Once a proper motion is received, the Clerk shall promptly deliver a copy of the motion to each of the Justices.

(g) Decision on motion. As soon as practicable, the Justice sought to be disqualified shall notify the Clerk of his or her decision on the motion for disqualification and the Clerk shall promptly notify the other Justices and the parties of such decision.

(h) Appointment of substitute Justice. When any Justice is disqualified pursuant to the provisions of this Rule, the Chief Justice or Acting Chief Justice may, in his or her discretion, assign a senior justice, senior judge, or circuit judge to service for the disqualified Justice. The Chief Justice shall promptly notify the Clerk of the decision regarding the necessity of the appointment of a substitute Justice and the Clerk shall promptly notify the other Justices and the parties of such decision.

Rule 34. Post-conviction bail.

Summary petitions for post-conviction bail shall be filed in accordance with the provisions of West Virginia Code § 62-1C-1. The petitioner shall file an original and the number of copies required by Rule 38 of the petition with the Clerk and shall serve a copy of the petition upon the prosecuting attorney in accordance with the provisions of Rule 37. The prosecuting attorney shall file a response and the number

Model Code of Judicial Conduct: Canon 2

Canon 2

A judge shall perform the duties of judicial office impartially, competently, and diligently.

- Rule 2.1
  Giving Precedence to the Duties of Judicial Office
- Rule 2.2
  Impartiality and Fairness
- Rule 2.3
  Bias, Prejudice, and Harassment
- Rule 2.4
  External Influences on Judicial Conduct
- Rule 2.5
  Competence, Diligence, and Cooperation
- Rule 2.6
  Ensuring the Right to Be Heard
- Rule 2.7
  Responsibility to Decide
- Rule 2.8
  Decorum, Demeanor, and Communication with Jurors
- Rule 2.9
  Ex Parte Communications
- Rule 2.10
  Judicial Statements on Pending and Impending Cases
- Rule 2.11
  Disqualification
- Rule 2.12
  Supervisory Duties

AMERICAN BAR ASSOCIATION COMMISSION ON STANDARDS OF JUDICIAL ADMINISTRATION

STANDARDS RELATING TO

Appellate Courts

1977

AMERICAN BAR ASSOCIATION COMMISSION ON STANDARDS OF JUDICIAL ADMINISTRATION

STANDARDS RELATING TO

Appellate Courts

1977

3.41 Responsibilities of Judges and Lawyers. Every appellate judge is responsible for participating in the administration of the court and the deliberations and decisions in cases to which he is assigned, and for performing his share of the work of his court. Every lawyer is responsible for timely performance of his obligations in the preparation and presentation of cases before an appellate court in which he acts as counsel, and for performing his role as advocate to the best of his professional ability.

Commentary

As stated in the commentary to § 2.31, Standards Relating to Trial Courts:

> The Code of Judicial Conduct, applying to judges, and the Code of Professional Responsibility, applying to lawyers, impose personal responsibilities for accomplishing the work of the courts expeditiously. Fulfilling these responsibilities requires not only willingness and sincerity of purpose but also good organization of time and effort. A judge should observe a business-like working schedule, confine his vacations and other days away from court within authorized limitations, and promptly and resolutely dispose of matters under submission to him. He should adjust his working habits to the requirements of the court as a whole and coordinate his effort with other judges and with auxiliary court staff. While every judge should be steadfastly independent in his judicial functions, he should perform them in conformity with the procedures governing the administration of his court.
>
> A lawyer has corresponding duties. He should manage his cases so that he can attend anticipated appearances and hearings, be timely and adequately prepared in required presentations, and avoid unwarranted delays or excuses. If he is associated with a firm or agency, he should see that it has business-like procedures for management of its case portfolio and for transferring responsibility for a case when the lawyer having charge of it cannot comply with court scheduling rules.

Because appellate judges work in cooperation with other judges in the decisional process, they must be especially mindful of the need to accommodate their work procedures to the requirements of the court as a whole and the time problems of counsel.

Appellate counsel are primarily responsible for the preparation

of cases for decision by the appellate court. Their delay in arranging for prompt production of transcripts and in submitting briefs contributes to the long disposition time characteristic of appellate litigation. Counsel who recurrently are guilty of delay should be subject, after warning, to appropriate sanctions, including public reprimand and loss of the right to appear before the appellate courts. Advocacy before an appellate court entails a responsibility to aid the court in reaching a timely decision on a well-informed basis. Counsel's briefs and arguments should be concise, technically well grounded in the law, and clearly reasoned.

Appellate courts observe that many cases before them lack substantial merit. This suggests that the bar does not give sufficient attention to the lawyer's professional responsibility to refrain from prosecuting an appeal unless it rests on substantial grounds. Counsel has a duty to discourage an unwarranted appeal and, in extreme cases, except where appointed counsel is legally bound to present an appeal, to refuse his services to a client who wishes to persist in such a case.

3.42 Disqualification of Judges. A judge of an appellate court should be subject to disqualification on the grounds set forth in the Code of Judicial Conduct recommended by the American Bar Association, and in any case in which the judgment under review is one by a court in whose decision he participated as a judge in a lower court.

Commentary

An appellate judge should be subject to challenge for cause on the same grounds as a trial judge, and also when an appeal involves a review of his own decision. The most difficult problem concerns the procedure to be employed. As in the challenge of a trial judge, if the challenge is sufficient on its face and any reasonable doubt of the judge's disinterestedness is suggested, the judge may be expected to disqualify himself. If he does not do so, in the case of a trial judge factual issues relating to disqualification should properly

be determined by another judge. See § 2.32, Standards Relating to Trial Courts. In the case of an appellate judge, however, that procedure would subject the judge to decision of his disinterestedness by official peers with whom he may continue to serve in a collegial capacity in deciding the case. Moreover, because an appellate court decides questions of law rather than fact, the question of an appellate judge's "bias" is often practically indistinguishable from the question of his views on the law, which are not properly subject to disputation through the recusal procedure. Given these complications, it is better that the question of recusal be decided by the judge himself. If he is a judge of an intermediate appellate court, there remains the remedy of appeal from a decision in which he participates; if he is a judge of a supreme court, reliance must be placed on his recognition that a court should not only be disinterested but that it should appear to be so.

In some jurisdictions, peremptory challenge of a trial judge is permitted. See Commentary to §2.32(b), Standards Relating to Trial Courts. This procedure is inappropriate in the case of an appellate judge. In the collegial decision-making of an appellate court an individual judge's purely personal views are of less significance than they would be in a trial court and he is subject to collegial restraint should he be inclined to act on them; an appellate judge has few occasions for exercising the broad discretion reposing in a trial judge; and in appellate litigation there is no occasion for the intense personal interaction between the judge and the lawyers and litigants that may occur in a trial court. Moreover, an appellate judge's established views on law and justice, at least up to a point, are a proper element of the contribution he makes to the function of an appellate court, particularly in the development of the law. A peremptory challenge might easily be abused to exclude a judge solely because a litigant disagreed with his views.

References:

American Bar Association Code of Judicial Conduct (1972).

3.43 Responsibilities of the Presiding Judge. The presiding judge of an appellate court should be responsible for its administration, subject to the policies adopted by the court and those promulgated for the court system as a whole. His responsibilities should include:

(a) Exercising continuous leadership in management of the court's case assignment and processing system and, in multi-panel courts, of the court's established system for assigning judges among panels;

(b) Presiding at argument and in conference when the court acts *en banc*, and in a panel of which he is a member;

(c) Initiating development of policy concerning the court's internal operations;

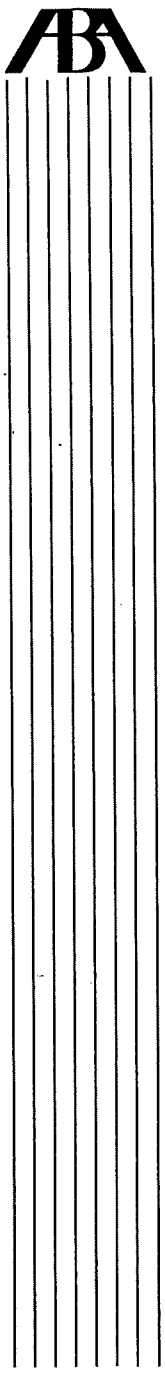
(d) Administering regulations concerning such matters as timely disposition of cases and judges' leaves of absence, attendance at meetings and conferences, and vacations;

(e) Supervising the court's administrative director in management of the court's budget, staff, facilities, and information system;

(f) Representing the court in its relations with other agencies of government, the bar, and general public, the news media, and in ceremonial functions.

Commentary

The presiding judge serves as chairman of the court when it sits *en banc* and as chairman of a panel of which he is a member. See § 3.40. As chairman, he is an equal with his fellow judges in decisional authority but is primarily responsible for the orderly management of the court's agenda. In most appellate courts, the presiding judge also acts as general administrative supervisor of his court, but in some courts such functions are delegated to another judge. Providing for an office of administrative judge is one way to have a chairman who is selected on the basis of his judicial experience while placing the court's administrative affairs in the hands of a



American Bar Association
Judicial Administration Division

JAD

Standards of Judicial Administration
Volume III

STANDARDS RELATING TO APPELLATE COURTS

1994

SJI State Justice Institute

The Standards Relating to Appellate Courts were first approved by the American Bar Association House of Delegates in February, 1977 and were amended by the American Bar Association House of Delegates in August, 1994.

The Standards Relating to Appellate Courts 1994 Edition do not necessarily represent the policies or views of the State Justice Institute.

The commentary contained herein does not necessarily represent the official position of the ABA. Only the text of the black-letter standards has been formally approved by the American Bar Association House of Delegates as official policy. The commentary, although unofficial, serves as a useful explanation of the black-letter standards.

Library of Congress Number: 95-077114

ISBN 1-57073-164-0

appeal unless it rests on arguable grounds. Counsel has a duty to discourage an unwarranted appeal and, in extreme cases, except where appointed counsel is legally bound to present an appeal, to refuse services to a client who persists in prosecuting a frivolous appeal.

References

William H. Adkins, "Could He Go Faster Than He Could: Ruminations on the Time Lapse From Oral Argument to Opinion Filing in the Court of Appeals of Maryland," 51 *Md. L. Rev.* 205 (1992).

Thomas J. Moyer, "Judges on Judging: State of the Ohio Judiciary," 51 *Ohio St. L.J.* 269 (1990).

Donna Stienstra and Joe S. Cecil, The Role of Staff Attorneys and Face to Face Conferencing in Non-Argument Decisionmaking: A View from the 10th Circuit Court of Appeals (1989).

Gary Toohey, "Informing the Voters in Missouri's Retention Elections," 76 *Judicature* 264 (1993).

Stephen L. Wasby, "Into the Soup: The Acclimation of Ninth Circuit Appellate Judges," 73 *Judicature* 10 (1989).

Section 3.42 Disqualification of Judges. A judge of an appellate court should be subject to disqualification on the grounds set forth in the American Bar Association, *Model Code of Judicial Conduct* (1990) and in any case in which the judgment under review is one in which the judge participated as a judge in a lower court.

Commentary

An appellate judge should be subject to challenge for cause on the same grounds as a trial judge, and also when an appeal involves review of that judge's decision. The most difficult problem concerns the procedure to be employed. As in the challenge of a trial judge, if the challenge is sufficient on its face and any reasonable

doubt of the judge's disinterestedness is suggested, the judge may be expected to act favorably on the recusal. If the judge does not do so, at the trial level, factual issues relating to disqualification should properly be determined by another judge. See Section 2.32. In the case of an appellate judge, however, that procedure would subject the judge to a decision of disinterestedness by peers with whom that judge continues to serve in a collegial capacity in deciding the case. Moreover, because an appellate court decides questions of law rather than fact, the question of an appellate judge's "bias" is often practically indistinguishable from the question of the judge's views on the law, which are not properly subject to challenge through the recusal procedure. Given these complications, it is better that the question of recusal be decided by the challenged judge. There remains the remedy of appeal at the supreme court level from the decision in which the judge participates; if the challenged judge is a justice of the supreme court, reliance must be placed on the justice's recognition that a court should not only be disinterested but that it should appear to be so.

In the collegial decision-making of an appellate court, an individual judge's purely personal views are of less significance than they would be in a trial court and are subject to collegial restraint should the judge be inclined to act upon them; an appellate judge has few occasions for exercising the broad discretion reposed in a trial judge; and in appellate litigation there is no occasion for the intense personal interaction between the judge and the lawyers and litigants that may occur in a trial court. Moreover, an appellate judge's public views on law and justice, to a certain extent, are a proper element of the contribution the judge makes to the function of an appellate court, particularly in the development of the law.

References

Ruggero J. Aldisert, et al., "What Makes a Good Appellate Judge? Four Views," 22 *Judges' J.* 14 (Spring 1983).

John D. Feerick, "Disqualification of Judges (The Sarokin Matter): Is It a Threat to Judicial Independence?," 58 *Brook. L. Rev.* 1063 (1993).

Charles Gardner Geyh, "Informal Methods of Judicial Discipline," 142 *U. Pa. L. Rev.* 243 (1993).

Susan B. Hoekema, "Questioning the Impartiality of Judges: Disqualifying Federal District Court Judges Under 28 U.S.C. § 455(a)," 60 *Temp. L.Q.* 697 (1987).

William W. Kilgarlin and Jennifer Bruch, "Disqualification and Recusal of Judges," 17 *St. Mary's L.J.* 599 (1986).

Michael J. Lebow, "Judicial Disqualification for Bias or Prejudice," 72 *Mich. B.J.* 684 (1993).

Daniel Luchsigner, "Committee Impeachment Trials: The Best Solution?," 80 *Georgetown L.J.* 163 (1991).

Joseph T. McLaughlin, et al., *Disqualification of Attorneys and Judges*, C380 ALI/ABA 651 (1989).

Judith Resnick, "On the Bias, Feminist Reconsiderations of the Aspirations for Our Judges," 61 *S. Cal. L. Rev.* 1877 (1988).

Michael E. Solomine, "Removal, Remands, and Reforming Federal Appellate Review," 58 *Mo. L. Rev.* 287 (1993).

Section 3.43 Responsibilities of the Chief Justice or Chief Judge. The chief should provide leadership for the court, direct its administration, and be the principal intermediary between the court and the judicial system of which it is a part, the other branches of government, and the public.

(a) The chief justice and chief judge for their respective courts should:

(i) Set an example in performance of judicial and administrative functions;

(ii) Exercise leadership in managing the court's case assignment and processing system and, in multi-panel courts, the court's system for assigning judges among panels;

(iii) Call and preside over meetings of the court, including presiding at argument and in conference when the court acts *en banc* and when a member of a panel;

(iv) Initiate policy concerning the court's internal operations and its position on external matters affecting the court;

OPENING REMARKS and RECOGNITION OF JAMES R. SILKENAT by CHIEF JUSTICE SARAH PARKER

The Chief Justice welcomed the guests with the following remarks:

Good morning, Ladies and Gentlemen. I am pleased to welcome each of you to your Supreme Court on this very special occasion in which we honor the service on this Court of Associate Justice Willis P. Whichard.

The presentation of portraits has a long tradition at the Court, beginning 126 years ago. The first portrait to be presented was that of Chief Justice Thomas Ruffin on March 5, 1888. Today the Court takes great pride in continuing this tradition into the 21st century. For those of you who are not familiar with the Court, the portraits in the courtroom are those of former Chief Justices, and those in the hall here on the third floor are of former Associate Justices.

The presentation of Justice Whichard's portrait today will make a significant contribution to our portrait collection. This addition allows us not only to appropriately remember an important part of our history but also to honor the service of a valued member of our Court family.

We are pleased to welcome Justice Whichard and his wife Leona, daughter Jennifer and her husband Steve Ritz, and daughter Ida and her husband David Silkenat. We also are pleased to welcome grandchildren Georgia, Evelyn, and Cordia Ritz; Chamberlain, Dawson, and Thessaly Silkenat; and Ida's in-laws Elizabeth and James Silkenat.

Today we honor a man who has distinguished himself not only as a jurist on this Court and the Court of Appeals, but also as a lawyer legislator serving in both Chambers of the General Assembly, as Dean of the Campbell Law School, and as a scholar. Through his outstanding record of public service, Justice Whichard has enhanced the jurisprudence and the legal profession.

long into the community life of Durham, joining the Durham Jaycees, leading March of Dimes campaigns, and serving on the Red Cross board. Two years after joining the law firm, Willis and Leona Whichard welcomed their first child, Jennifer. Life in Durham was very full.

Yet somewhere deep in his soul, like the distant horn calls in a Richard Strauss tone poem, the clarion voices of President Friday and Chancellor Aycock sounded the leitmotiv of service in a wider sphere. An appointment to the North Carolina General Statutes Commission in 1969 led the young Durham lawyer, just three years into his private practice and with every prospect of financial success and a comfortable career, to offer himself as a candidate for the North Carolina House of Representatives. With the support of his law firm (for E.K. Powe had himself served two terms in the legislature in the 1950s), in 1970, at the age of 30, Whichard ran successfully for the House. Four years later, a seat in the State Senate for a larger Durham-based district became available, and Whichard was elected to three successive terms in the upper house.

That Willis Whichard was a superb legislator does not seem to be in any doubt. A later colleague on the Supreme Court, then an Assistant Attorney General, recalled how draft bills were sent from the legislature to the Department of Justice for vetting in days before the General Assembly had its own bill drafting staff. Representative and Senator Whichard's bills never required any change whatsoever; they were perfect from the moment they arrived from Jones Street. He chaired or served on numerous legislative committees and commissions, including the Senate Committee on Courts of Judicial Districts and the Judicial Planning Committee of the Governor's Crime Commission. Among his proudest legislative accomplishments was the passage of the Coastal Area Management Act of 1974, which provided for the protection, preservation, orderly development and management of North Carolina's coastal resources, covering the 20 coastal counties, adjacent ocean waters, the Outer Banks and other barrier islands, and all the state's inlets, sounds and estuarine waters. The act gave policymaking authority to a fifteen-member Coastal Resources Commission, made up primarily of coastal residents nominated by local governments and appointed by the governor.

Senator Whichard's legislative service was graced by the addition to his family of a second daughter, Ida, in 1976.

Towards the end of his third term in the upper house, in September 1980, Senator Whichard was appointed to the North Carolina

THE NORTH CAROLINA STATE BAR

JOURNAL

FALL
2011

IN THIS ISSUE

The Political Nature of John Marshall's Fight for the Court in *Marbury v. Madison*

By Ward Zimmerman

Justice wears a blindfold. That is how we know her. That is how we expect her. It is with covered eyes that this personification has proudly marched down the annals of our jurisprudence.[1] By obscuring her vision, she has been granted a greater insight and power—for it is this covering vestment that breathes life into the allegory of impartiality and bestows authority to the tools in her hands: the scale of judgment and the sword of dominion. Without it, she remains a marble ghost.

In Federalist 51, a young James Madison writes: "If men were angels, no government would be necessary."[2] Likewise, if judges were perfect, they would not need to don figurative blindfolds. But as justice's ambassadors are human, they take pains to preserve impartiality. For even a perceived bias weakens the force of a judicial ruling. As the Preamble to our North Carolina Code of Judicial Conduct counsels: "An independent and honorable judiciary is indispensable to justice in our society."[3]

Judicial recusal is one of the chief means of ensuring impartiality. If a judge has a personal interest in the matter before her, she takes a pass. We want her to take a pass. We admonish that a judge:

> disqualify himself/herself in a proceeding in which the judge's impartiality may reasonably be questioned, including but not limited to instances where. . . [t]he judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceedings.[4]

This practice preserves confidence in our system.

Yet, can circumstances justify setting aside this bedrock legal principle of judicial impartiality, potentially shaking the very public confidence upon which the court's authority is built? Indeed, to engage in such heresy would require a counterweight of the heaviest magnitude. Despite this great burden, it seems that just such a weight was present for those involved in *Marbury v. Madison*.[5]

Yes, that *Marbury v. Madison*. The seminal case that established the foundational American principle of judicial review: the power of the judiciary to pass judgment upon the constitutionality of the actions of the legislature and of the executive.[6] This is a monumental power, and just the sort of leaden counterweight to tip the scales away from preserving impartiality above all else. Without exaggeration, the power of judicial review forever resculpted our nation's political landscape by elevating the judiciary to a commensurate position among its fellow, coequal branches of government.

Just as judicial impartiality breathes life into justice, so too does judicial review into our political system of separation of powers, which includes a vibrant judiciary. Without judicial review, our high court is merely the last appellate stop on the track. With judicial review, the Supreme Court is conferred as the great protector of our most noble document, the United States Constitution. Armed with this power, the judiciary can brandish justice's sword against unconstitutional dragons.

From where did this mighty power spring? Judicial review is absent in English common law. Even to this day, our robed—and wigged—cousins across the Atlantic cannot sit in judgment on Acts of Parliament.[7] Likewise, this power is nowhere to be found in the Constitution. So, then, from where? John Marshall's pen.

Chief Justice Marshall was the first to apply the principle of judicial review in *Marbury*.[8] In accomplishing this great feat, Marshall's leadership and statesmanship were on full display. Foremost, the chief justice understood political nature. He fully grasped the importance of the court presenting a unified position and slowly worked his associate justices into a banded whole, through a mix of reason and charm.[9] In the end, Marshall attained unanimous support from his brethren for his opinion.

Thus, from this most undemocratic of origins, the judiciary was bestowed with its greatest power. However, if the principle of judicial impartiality had been strictly applied, through the practice of recusal, Marshall would have lost the opportunity to write this famous opinion. For he was intimately involved in the specific events that led to the suit later before him as chief justice.

To appreciate fully Marshall's involvement, it is necessary to grasp the greater historical landscape. The opinion in *Marbury* was but one skirmish in a protracted political war. This was a war for the very soul of our young nation; and the veteran soldier Marshall, who had experienced the intense suffering at Valley Forge, once again placed himself squarely among the fiercest fighting.

The election of 1800 pitted the rising tide of Thomas Jefferson's Republicans against incumbent President John Adams' Federalists. After 12 years of Federalist control, the national political pendulum had finally swung. The result was a drubbing. Thomas Jefferson won the presidency. The Federalists were routed in the "People's House;" even the stalwart Senate, whose members were chosen by the various state legislatures, was torn from Federalist hands.[10] This "Revolution of 1800"[11] left the banished Federalists grasping for power on their retreat from the battlefield. They set their sights on the federal judiciary.

Jefferson's inauguration date was set for March 4, 1801, leaving only a short time for the lame-duck Federalists to entrench themselves within the third branch. However, these veterans of the Revolution were far from timid folk. Not limiting themselves to simply stacking available vacancies, they moved with unrepentant audacity to reshape the very body itself. On February 13, they passed the Judiciary Act of 1801,[12] which fortified their hold on the Supreme Court by eliminating one seat, upon the retirement of the next justice, so as not to be filled by an incoming Republican. Furthermore, they doubled the number of federal circuit courts, paving the way for the lifetime appointment of 16 new judges.[13]

But these holdover Federalist insurrectionists were not finished. On February 27, with five days left in power, they passed the Organic Act of the District of Columbia,[14] which authorized, among other things, the appointment of "such number of discreet persons to be justices of the peace, as the president of the United States shall from time to time think expedient." President Adams thought it expedient to appoint 42 of his friends. Moreover, these were five-year, remunerative posts that allowed the recipients to hold courts "in personal demands to the value of twenty dollars, exclusive of costs." On March 3, the last day of Adams' presidency, the Senate stamped the appointment list given to them the day before. The final step in the confirmation process was to have the secretary of state affix the great seal of the United States and to deliver the commissions to the appointees.[15] This is where the story gets really interesting.

For central among the Federalist judicial strategy was the placement of a political apostle to lead the high court. The Federalists did not have to look far. On February 4, 1801, Secretary of State John Marshall[16] was sworn in as chief justice of the Supreme Court.[17] Upon assuming his seat on the Court, however, Marshall did not relinquish his position as secretary of state. In fact, he served simultaneously as both United States Secretary of State and chief justice of the Supreme Court for the next month—until his second cousin once removed, Thomas Jefferson, became president.[18]

To thicken matters further, as secretary of state, John Marshall was responsible for certifying and delivering the commissions to the "midnight judges" of the newly-enlarged judiciary. Upon affixing the nation's seal, Marshall's brother, James, volunteered to help with delivery.[19] Fraternal loyalty aside, this was a bad choice. By the next day when Thomas Jefferson repeated the presidential oath of office given by none other than John Marshall (this time, in his role as chief justice), James had failed to deliver a handful of the justice of the peace commissions, including one made out to William Marbury.

History is replete with individuals plucked from certain obscurity to serve a greater purpose. Such was William Marbury.[20] By 1801, Marbury was a middling political loyalist of the party in exile. Originally from down the road at Annapolis, Marbury was among the first batch of political staffers drawn by the potential for patronage to the nascent capital. Before the election of 1800, he had served loyally as an aide to the first secretary of the navy. Now shunned by the new principals, he hung all hope upon the consolation prize granted by the former president for allegiance rendered. But his promised judicial commission seemed to have gotten lost in transit. Marbury petitioned the new secretary of state, James Madison, for delivery. At the direction of President Jefferson, Madison refused.

Marbury then turned to the courts. On December 17, 1801, he, through his lawyer, former-attorney general and close friend of the chief justice, Charles Lee, filed suit in the presumably-sympathetic United States Supreme Court seeking a writ of mandamus to compel delivery of his signed and certified commission.[21] This matter met a responsive crowd, and the following day, Marshall delivered the Court's preliminary ruling: (1) Marbury's suit could proceed, (2) Secretary Madison must "show cause," if "any he hath," why the Court should not compel delivery, and (3) a formal hearing, consisting of the presentation of evidence and argument, was calendared for the Court's next term in June 1802.[22] Marbury, however, would have to wait for intervening events to run their course, for the new Republican majority was presently engaged in a frontal assault on their vanquished opponent's remaining bastion.

To the new president, the federal judiciary posed the greatest threat to the democratic will of the people. Writing the day after Marshall announced the high court's preliminary ruling in *Marbury*, Jefferson despondently observed that the Federalists "have retired into the judiciary as a stronghold . . . and from that battery all the works of Republicanism are to be beaten down and erased."[23] While this prediction may have been a bit inflated, his reason for fear was tangible. Whereas the elected branches of government blow in political winds, the appointed branch is more firmly rooted.

Moreover, apart from the competitive political rivalry, the two parties held a fundamental disagreement as to the role of the courts. The Republicans held a visceral distrust for imperious fixtures, such as a non-

elected judiciary, which they dismissed as remnants from the Anglo split.[24] Furthermore, the federal courts were seen to promote the interests of a strong national government, so feared by Republican proponents of states' rights.[25] In his first annual message to Congress, President Jefferson placed the third branch of government directly in his party's crosshairs: "The judiciary system of the United States, and especially that portion of it recently erected, will, of course, present itself to the contemplation of Congress."[26] These words were understood by all as a rallying cry against this last Federalist holdout. The Republican Congress marched into action.

In 1802, the Circuit Judge Act of the previous year was repealed, abolishing the recently-created circuit court judgeships now stacked with Federalists—including a post held by the chief justice's brother, James, who had failed to deliver Marbury's commission the year earlier.[27] Additionally, not to be outdone by their opponent's earlier brazenness, the Republicans attacked the high court itself. In an act of retribution and intimidation, Congress passed a law that sent the high court into recess for the entire year of 1802.[28]

Therefore, it was not until 1803, two years after first being filed, that the Court finally heard the matter of William Marbury's appointment. By this time, however, the Court's authority sat upon shifting sand. It had only just survived its most recent onslaught, and could expect much more to follow. Moreover, without the support of either the executive's sword or the legislature's purse to enforce its rulings, the Court was left impotent. Thus, the branch of government created by the third article of the Constitution was relegated to an administrative afterthought, eclipsed by the shadows of its two siblings.

How then to proceed? During his time in exile, Marshall had contrived a brilliant strategy that involved a retreating feint. If properly executed, this maneuver would turn the enemy upon itself—conscripting his opponents into the Court's own ranks by issuing a ruling that would not, could not, be evaded.

Marbury's logic began with the premise that it is fundamental to our society that the Constitution is "the supreme law of the land."[29] Hence, the "constitution controls any legislative act repugnant to it [and, as such, . . .] an act of the legislature, repugnant to the Constitution, is void."[30] Since "[i]t is emphatically the province and duty of the judicial department to say what the law is"[31] and since the Supreme Court is the final arbiter of the judicial department, it is therefore the duty of the Supreme Court to define as null (i.e., judicially review) any political act that violates the Constitution. Such was the case, said Marshall, when the Federalist Congress attempted to enlarge the high court's authority to issue writs of mandamus to the political branches. Thus, the Court was left powerless to order Madison to deliver Marbury's commission. Into this conclusion, Marshall's opponents would eagerly sink their teeth.

In accepting this result, however, the Republicans were forced to swallow the decision whole, including what Jefferson termed the "*obiter* dissertation."[32] By this hook, Marshall had them. By stripping itself of power, the Supreme Court could publically condemn the president's actions, which it did vigorously, without being exposed to the calamitous situation of issuing an order that would be disregarded.[33] Therein was the beauty. They would cede victory to the Republicans in the minor skirmish to reestablish a footing in the greater war. In one masterstroke, Marshall reconstituted the authority of the judiciary in our system of governance by formalizing the power of judicial review; and *Marbury* set off down the path of fame.

But what about the initial question of why the chief justice sat for the case in the first place? Under even the mildest standard of judicial recusal, Marshall should have stepped away from *Marbury*.[34] He had "a personal bias or prejudice concerning"[35] not just one, but all parties involved. Moreover, he clearly had "personal knowledge of disputed evidentiary facts concerning the proceedings," for it was Marshall himself who certified the very judicial commission in dispute and it was his brother, James, who failed to make delivery. So why then did those involved in this case allow Justice's blindfold to slip from her eyes?

The answer to this question may be more easily gleaned from the pages of *The Prince* than from the annals of law.[36] Marshall was allowed to sit for *Marbury* because all of those involved wanted him there. These were men, not angels, who came laden with experience, personality, and bias. They were active political founders, who tended to place pragmatism above theory. They understood that while government can exist without justice, it can never be the other way around. Therefore, when thrown into conflict, political principle won out over judicial principle. Consequently, each of the four main actors believed that having the chief justice participate in the ruling better served their interests.

First, William Marbury's wishes go without saying.

Second, the Republicans thought that Marshall's presence could result in a final, fatal misstep by the Court. By 1803, the Supreme Court was so emaciated politically that few took their actions seriously. The first chief justice, John Jay, remarked that the Court by the turn of the century lacked "the energy, weight, and dignity which are essential to its affording due support to the national government, nor [the] public confidence and respect which, as the last resort of the justice of the nation, it should possess."[37] Thus, Marshall's presence on such an enfeebled panel seemed inconsequential. But there was more. The Republicans' desire to have Marshall remain may have also come from the belief that his presence was better than just a neutral variable—it could turn into a fortuitous positive. For the power of the executive and the legislature was so overwhelming relative to the judiciary that the Republicans seemed to be arrogantly savoring a showdown with the Court and its chief justice. By ignoring or, better yet, acting directly against an opinion that ordered the political branches into action, the Republicans could decisively undercut the Court's authority.[38] If this opportunity arose, the victory would be a more resounding swipe if it included the entire bench, with its head attached.

Third, the chief justice wanted the fight.[39] As one historian writes, Marshall "ought to have disqualified himself, but his fighting spirit was aroused, and he was in no mood to back out."[40] Prior to assuming his seat on the high court, John Marshall had been a soldier and statesman, founder and partisan, but never a judge. Foremost, he was a political realist.[41] By the spring of 1803, Marshall thought that his beloved government, with a fully-participating judiciary, hung in the balance.[42] In this time of exigency, he made the cool calculation that the gains to be had by pursuing the political principle of establishing judicial review outweighed the harms to be suffered by setting-aside the judicial principle of impartiality through recusal.

Fourth, Marshall's robed brethren wanted their friend and able leader on the field at this

decisive moment.[43] The philosophical question of whether Marshall's presence would weaken the Court's resulting authority seems to have been sent to the rear during the urgency of combat.

Thus, all interests pointed towards burying the question of recusal—and that is precisely what happened. The judicial principle of preserving impartiality was temporarily set-aside to make way for the political principle of establishing judicial review. Marshall remained and a momentous battle ensued whereby the Republicans' superior political forces were outflanked by a more nimble opponent. But for Marshall's strategic genius, *Marbury* could have been a deathblow. Instead, Marshall brought the Court back from the edge of exhaustion and reestablished it among the governing trinity created in the first three Articles of our founding document. The Supreme Court had found its first champion. The United States Constitution was conferred an intrepid institutional protector. Justice was bestowed her political sword. ■

Ward Alexander Zimmerman is an assistant attorney general in the North Carolina Department of Justice. He can be reached at (919) 716-6600 or wzimmerman@ncdoj.gov.

Endnotes

1. The artist Hans Gieng's 1543 statue in Bern, Switzerland, is the first known allegorical representation of blindfolded justice. Since then, the blindfold "has become a ubiquitous element in western portrayals of justice." William Kloss & Diane K. Skvarla, S. Doc. 107-11: *United States Senate Catalogue of Fine Art,* 228 (US GPO 2002). As one eminent iconographer has explained this symbolism: "The white robes and bandage over her eyes allude to incorrupt justice, disregarding every interested view, by distributing of justice with rectitude and purity of mind, and protecting the innocent." Id. quoting George Richardson, *Iconology* (1789) as found in Vivien Green Fryd, *Art and Empire: The Politics of Ethnicity in the United States Capitol, 1815–1860* 179 (Yale Univ. Press 1992).
2. *The Federalist,* No. 51 (James Madison).
3. NC Code of Judicial Conduct (amend. 2006).
4. *Id.* at Canon 3C(1)(a); *see also* 28 U.S.C. § 455 (2011).
5. 5 US (1 Cranch) 137 (1803).
6. *See Cooper v. Aaron*, 358 U.S. 1, 17 (1958) ("[Marbury] declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the country as a permanent and indispensable feature of our constitutional system."); *United States v. Nixon*, 418 U.S. 683 (1974); William H. Rehnquist, *The Supreme Court*, 34-5 (Knopf new ed. 2006) ("The proposition for which [Marbury] stands in United States constitutional law—that a federal court has the authority under the Constitution to declare an act of Congress unconstitutional—was not seriously challenged by contemporary observers, and has remained the linchpin of our constitutional law ever since [it] was handed down."); but cf. Samuel R. Olken, *The Ironies of Marbury v. Madison and John Marshall's Judicial Statesmanship*, 37 J. Marshall L. Rev. 391, 394 (2004) (noting that a more accurate interpretation of Marbury's importance was its ability to crack the door through which the firm establishment of judicial review would later pass, through subsequent cases).
7. Erwin Chemerinsky, *Constitutional Law,* 1 (Aspen 2001).
8. Cf. Olken, *supra* note 7, at 403-9 (noting that the theory of judicial review had predated its application in Marbury); *see, e.g.*, *The Federalist*, No. 51 (James Madison), No. 78 (Alexander Hamilton).
9. *See* R. Kent Newmyer, *John Marshall as an American Original: Some Thoughts on Personality and Judicial Statesmanship*, 71 U. Colo. L. Rev. 1365, 1376-82 (2000); Olken, *supra* note 7, at 414-5; Cliff Sloan and David McKean, *The Great Decision: Jefferson, Adams, Marshall, and the Battle for the Supreme Court*, 80-1, 83 (Public Affairs 2009).
10. *See Biographical Directory of the United States Congress,* 1774-2005 (Joint Comm. on Printing rev. ed. 2006).
11. Many years after leaving the office of the presidency, Thomas Jefferson mused on the electoral victory that heralded his party into power as the "Revolution of 1800,. . . as real a revolution in the principles of our government as that of 1776 was in its form." Letter from Thomas Jefferson to Spencer Roane (Sept. 6, 1819), in vol. 10 *The Writings of Jefferson*, 140 (Paul L. Ford ed., 1892-1899); *see generally* Susan Dunn, *Jefferson's Second Revolution: The Electoral Crisis of 1800 and the Triumph of Republicanism* (Houghton Mifflin 2004).
12. Judiciary Act of Feb. 13, 1801, ch. 4, 2 Stat. 89 (1801), repealed by Judiciary Act of Mar. 8, 1802, ch. 8, 2 Stat. 132 (1802). Prior to assuming his post as secretary of state, Congressman Marshall had been a prominent voice on a US House committee tasked with review of the judiciary, whose recommendations later formed the basis for the Judiciary Act of 1801. *See* R. Kent Newmyer, *John Marshall and the Heroic Age of the Supreme Court*, 134 (Louisiana State Univ. Press 2001).
13. In Jefferson's view, any judicial appointment made by President Adams following his electoral defeat on December 12, 1800, was to be considered an "outrage of decency" and a perversion of the democratic process. Letter from Thomas Jefferson to Henry Knox (Mar. 27, 1801), in vol. 10 *The Writings of Jefferson,* 241, at 247 (Andrew A. Lipscomb ed., 1903); *see also* Letter from Thomas Jefferson to Benjamin Rush (Mar. 24, 1801), in vol. 10 *The Writings of Jefferson*, 241, at 241-4 (Andrew A. Lipscomb ed., 1903). Furthermore, among these newly appointed circuit judges was James Marshall, brother of the current secretary of state and chief justice, John. *See* Sloan & McKean, *supra* note 10, at 61 (offering a brief biographical sketch of James Marshall).
14. Judiciary Act of Feb. 27, 1801, ch. 15, 2 Stat. 103 (1801).
15. *Marbury*, 5 US at 157-9.
16. After achieving national fame for his role in the XYZ affair, John Marshall served in the Sixth Congress as a representative from the Richmond area of Virginia before being nominated on May 7, 1800, by President John Adams to serve as secretary of war. Two days later, however, President Adams changed Marshall's nomination to that of secretary of state. *See* Newmyer, *supra* note 13, at 141.
17. President Adams' initial choice for this chief post was the first chief justice, John Jay, who was now serving as governor of New York. Before Jay's letter declining the offer reached Washington, however, the president had taken the step of submitting his name to the Senate, who had subsequently confirmed his reappointment. Avoiding a second such awkward moment, the president next turned to someone able to confirm acceptance in person: his closest advisor, the secretary of state. *See* Lawrence Goldstone, *The Activist: John Marshall, Marbury v. Madison, and the Myth of Judicial Review,* 150-2 (Walker 2008).
18. Marshall's great-grandfather and Jefferson's grandfather were brothers, hailing from one of the elite dynasties of Virginia: the Randolphs. *See* Sloan & McKean, *supra* note 10, at 42. Moreover, they both studied law in Williamsburg under the esteemed legal scholar George Wythe. *See* James F. Simon, *What Kind of Nation: Thomas Jefferson, John Marshall, and the Epic Struggle to Create a United States*, 24 (Simon & Schuster 2002).
19. James Marshall assumed the role of courier under his authority as one of the recently-commissioned federal circuit judges—a supposedly life-tenured position that was to be shortly abolished, along with his 15 new brethren, by the incoming Republican Congress. *See* Newmyer, *supra* note 13, at 159, 161. While many of the specifics of this enigmatic failed-delivery have been lost to history, one piece of evidence to support its occurrence is found in the Reporter's Notes of *Marbury* at 1803 U.S. LEXIS 352, 17-8, whereby an affidavit of James Marshall is noted to have been read into the court record, recounting that on March 4, 1801, "finding [that James] could not conveniently carry the whole [of the commissions], he returned several of them. . ." Presumably, Marbury's commission was among this lot.
20. *See* Rehnquist, *supra* note 7, at 35 ("Madison, of course, would have been remembered equally well in American history as the father of the Constitution, drafter of the Bill of Rights, and two-term Republican president, even if he had delivered William Marbury's commission and thereby avoided the lawsuit of the latter. But William Marbury has been saved from historical obscurity only by the fact that he was the plaintiff in the most famous case ever decided by the United States Supreme Court."); *see generally* David F. Forte, *Marbury's Travail: Federalist Politics and William Marbury's Appointment as Justice of the Peace,* 45 Cath. U.L. Rev. 349 (2001) (setting forth an excellent biographical sketch of William Marbury).
21. In fact, William Marbury was one of four plaintiffs, along with Dennis Ramsay, Robert Hooe, and William Harper, to file suit for being denied delivery of a certified justice of the peace commission. *See* Sloan & McKean, *supra* note 10, at 94-5. Regarding Marbury's decision to sue directly in the high court, former-Attorney General Lee argued that under the authority of Section 13 of the Judiciary Act of 1789, the Supreme Court had both original jurisdiction for claims arising thereunder and the power to issue a writ of mandamus to "persons holding office, under the authority of the United States" (i.e. Secretary Madison). Reporter's Notes at 1803 U.S. LEXIS 352, 21-2, Marbury, 5 U.S. (1 Cranch) 137.
22. *See* Sloan & McKean, *supra* note 10, at 99.
23. Letter from Thomas Jefferson to John Dickinson (Dec. 19, 1801), in vol. 10 *The Writings of Jefferson,* 241, at 302 (Andrew A. Lipscomb ed., 1903).
24. *See* Newmyer, *supra* note 13, at 150-1.
25. James A. O'Fallon, Marbury, 44 Stan. L. Rev. 219, 222 (1992).
26. 11 A*nnals of Congress,* 11, 15 (1801). Moreover, in private correspondence, Jefferson was even more open about his true antipathy towards Marshall and the Federalist

Court: "nothing should be spared to eradicate this spirit of Marshallism." Letter from Thomas Jefferson to James Monroe (Apr. 12, 1800), in vol. 14 *The Writings of Jefferson* (Andrew A. Lipscomb ed., 1903).

27. Judiciary Act of Mar. 8, 1802, ch. 8, 2 Stat. 132 (1802).
28. Judiciary Act of Apr. 29, 1802, ch. 31, 2 Stat. 156 (1802); *see* Newmyer, *supra* note 13, at 153.
29. *Marbury*, 5 U.S. at 180.
30. *Id.* at 177.
31. *Id.*
32. Letter from Thomas Jefferson to Benjamin Rush (Mar. 24, 1801), in vol. 16 *The Writings of Jefferson* 241 (Andrew A. Lipscomb ed., 1903).
33. As characterized by one prominent, and often cited, legal scholar, Marshall's opinion in *Marbury* was a "masterwork of indiscretion, a brilliant example of Marshall's capacity to sidestep danger while seeming to court it, to advance in one direction while his opponents are looking in another." Robert G. McCloskey, *The American Supreme Court,* 40 (Univ. of Chicago Press 1960); *see also* Olken, *supra* note 7, at 414.
34. In fact, Marshall did recuse himself in a case decided six days after *Marbury, Stuart v. Laird*, 5 U.S. (1 Cranch) 308 (1803), due to his involvement in the lower court proceedings. Additionally, in *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816), Marshall recused himself due to personal involvement, along with his brother James, in the potential purchase of a portion of the realty at issue in the case. Thus, the idea of recusal seems to have been alive and well in the Chief Justice's mind. *See* Sanford Levinson and Jack M. Balkin, *Marbury at 200: A Bicentennial Celebration of Marbury v. Madison: Marbury as History: What Are the Facts of Marbury v. Madison?*, 20 Const. Commentary 255, 260 (2003) ("The juxtaposition of Marshall's recusal in *Stuart v. Laird* with his notable failure to recuse himself in *Marbury v. Madison* is particularly striking."); Sloan & McKean, *supra* note 10, at 170.
35. While the NC Code of Judicial Conduct was certainly not in existence at the time of *Marbury*, its fundamental underpinnings are timeless guards of judicial authority. *See* Michael Stokes Paulsen, *Marbury at 200: A Bicentennial Celebration of Marbury v. Madison: Marbury's Errors?: Marbury's Wrongness*, 20 Const. Commentary 343, 350 (2003) ("[T]he principle that makes it self-evident, today, that a judge should not sit on a case in which the propriety or legal effect of his own acts or omissions in a different, non-judicial capacity, on precisely the same specific transaction at issue in the case, are themselves the basis for the legal claim, was just as sound a principle in 1803 as it is today. That principle should have led Marshall not to participate.").
36. *See* O'Fallon, *supra* note 26, at 221 ("To understand *Marbury* fully, we must appreciate it not simply as a case deciding a legal dispute between William Marbury and James Madison, but as a political act contributing to the establishment of a discourse of constitutionalism in which the realms of law and politics merge.").
37. Letter from John Jay to John Adams (Jan. 2, 1801), in *The Correspondence and Public Papers of John Jay* 284 (Henry P. Johnston ed., 1890-3); accord Simon, *supra* note 19, at 138-9, 151 (noting the weakness of the early Court); *see also* Olken, *supra* note 7, at 392.
38. *See* Newmyer, *supra* note 13, at 160 ("Certainly the Court's dilemma was readily visible: If it issued a mandamus, as Marbury requested, the president and secretary of state would delight in ignoring it, leaving the Court helpless and humbled; if it didn't, the justices would be damned by their own caution."); *see also* Jean Edward Smith, John Marshall: Definer of a Nation, 318 (Holt & Co. 199).
39. *See* Sloan & McKean, *supra* note 10, at 170; Simon, *supra* note 19, at 182.
40. John A. Garraty, *Marbury v. Madison: The Case of the 'Missing' Commissions,* American Heritage Magazine (June 1963; Volume 14, Issue 4).
41. *See* Olken, *supra* note 7, at 410-23; accord Levinson & Balkin, *supra* note 35, at 262.
42. Newmyer, *supra* note 13, at 150 (Marshall "saw Jefferson as the evil genius behind the rising states' rights movement, which Marshall sincerely believed threatened to destroy the Constitution and the federal Union.").
43. *See* Newmyer, *supra* note 10, at 1378 ("Ironically, Jefferson's determination to crush the Court and exterminate the spirit of 'Marshallism' was an important factor because it encouraged the justices to 'circle the wagons.'").

President's Message (cont.)

funding for programs such as the Equal Access to Justice Commission and the Legal Aid offices throughout North Carolina. It is during these difficult times that we can participate even more than we have in the past to assure that our most vulnerable citizens have access to justice. Fulfilling your obligation of Rule 6.1 regarding Pro Bono Publico Service with a commitment to enabling equal access to justice is crucial at this time. Participation in the "Call4All" program of the North Carolina Bar Association, which coordinates private attorney involvement with Legal Aid of North Carolina, is an opportunity that will provide invaluable legal assistance to those in need, fulfill your Rule 6.1 obligation, enhance professionalism within our practice, and simply make you feel better for doing so.

This is the last time that I will have the pulpit to address the more than 24,000 lawyers who are licensed to practice law in North Carolina. With an editorial deadline of one week after the conclusion of each quarterly meeting, and with the demands of a small town general practice in Boone, I must admit that I am not saddened to pass the pulpit to my well-qualified successor, Jim Fox of Winston-Salem. However, I can truly say that it has been an honor and privilege for me to serve as your president. I will cherish the experience, the friendships, and the knowledge that has been verified by the experience that the lawyers of the state of North Carolina are dedicated to the polar star of our practices—professionalism—and we do so each day when we turn the lock to open the door of our offices to help the citizens of our state in their time of need. ■

Anthony S. di Santi is a partner with di Santi Watson Capua & Wilson in Boone.