No. 261A18-3 TENTH DISTRICT

NORTH CAROLINA SUPREME COURT

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

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BRIEF OF AMICI CURIAE NORTH CAROLINA INSTITUTE FOR CONSTITUTIONAL LAW AND THE JOHN LOCKE FOUNDATION[1]

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[1] No person or entity other than these amici curiae and their counsel, directly or indirectly, either wrote this brief or contributed money for its preparation.

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QUESTION PRESENTED

I. Whether the Involuntary Recusal or Compelled Disqualification of an Elected Justice of the Supreme Court of North Carolina Impairs the Rights of Voters and Compromises the Constitutionally Mandated Selection of Justices by Statewide Election?

INTEREST OF AMICI CURIAE

Amicus North Carolina Institute for Constitutional Law ("NCICL") is a 501(c)(3) corporation established to conduct research, and to educate and advise the general public, policy makers, and the Bar on the rights of citizens under the constitutions of the State of North Carolina and the United States of America. NCICL engages in litigation as necessary to further these goals. Its mission is to ensure compliance with constitutional restraints on government and protect the rights of North Carolinians. NCICL has conducted research and written on issues of election law, voters' rights, and election integrity. It thus has a strong interest in this Court's ruling on the Motion to Disqualify two recently elected Justices of the Court from this case.

Amicus The John Locke Foundation ("JLF") was founded in 1990 as an independent, nonprofit thinktank. It employs research, journalism, and outreach to promote its vision of North Carolina—of responsible citizens, strong families,

successful communities. It is committed to individual liberty, limited constitutional government, and fair, meaningful elections. The JLF has a long history of researching, analyzing, and reporting about elections. It thus has a strong interest in this Court's ruling on the Motion to Disqualify two recently elected Members of the Court from this case.

ARGUMENT

On 28 September 2021, own its own motion, the Supreme Court of North Carolina authorized briefs addressing the question of the procedure that the Court should implement in considering a recusal motion.[1] The Court laid out a series of issues to be briefed and welcomed "any additional procedure-related issues." Among the issues listed in the Court's 28 September 2021 Order, is the following:

> 6. What effect should any "duty to sit" have in the process of deciding whether a justice of a court of last resort should be recused? *Does the fact that a justice of a state court of last resort is elected,*

[1] Plaintiff-Appellant captioned its motion as a "Motion to Disqualify" and this Court's 28 September 2021 Order used "recuse" throughout. Most modern judicial and scholarly authority treat "recusal" and "disqualification" as synonymous. *See, e.g.,* RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES § 20.8, at 604 (2d ed. 2007) (noting traditional connotative distinction but using terms interchangeably throughout treatise); Debra Lyn Bassett, *Judicial Disqualification in the Federal Appellate Courts*, 87 IOWA L. REV. 1213 (2002) (same); and Randall J. Litteneker, Comment, *Disqualification of Federal Judges for Bias or Prejudice*, 46 U. CHI. L. REV. 236, 237 n.5 (1978) (same).

> *rather than appointed, have any bearing upon the recusal analysis?* Does an elected justice have an individual constitutional right to participate in deciding every case that comes before the Court and, if so, what is the source and extent of such right? Does the involuntary recusal of a justice have any impact upon the constitutional or statutory rights of any party to the underlying case?
>
> (28 September 2021 Order p.2)(italics added).

Amici argue below that the fact a Justice is elected, rather than appointed, is of critical significance, not only to the rights and duties of the Justice at issue, but also to voters. Amici believe that involuntary recusal of an elected justice would impair the rights of voters and compromise the constitutionally mandated selection of Justices by statewide election. Forcing the disqualification or recusal of a Justice would message to voters that their votes do not matter, that the Supreme Court could effectively override election results on a case-by-case basis, and that voters in future elections should not bother to participate in judicial elections. That should not be the Court's message.

A. The Constitutional Requirement for Statewide Election of Justices by the Qualified Voters is Longstanding and Warrants Solemn Respect.

The North Carolina Constitution places the selection of Justices firmly in the hands of voters: "Justices of the Supreme Court … shall be elected by the qualified voters and shall hold office for terms of eight years and until their successors are elected and qualified. Justices of the Supreme Court … shall be

elected by the qualified voters of the State." N.C. Const. Art. IV, § 16.[2] The election of Justices is not a suggestion, it is a constitutional mandate. Involuntary recusal would unconstitutionally violate the right of the people to elect Justices in violation of Article IV, § 16.

The Court asked in its 28 September 2021 Order whether the fact a Justice is elected, rather than appointed, has any bearing on the recusal analysis. The answer to that question is a resounding "Yes!" The people elect Justices in a statewide election, and their votes matter. The fact that Justices are elected must be part of this Court's calculus.

The significance of the election of judges has been noted before, albeit in the context of a district judge, rather than Supreme Court Justice. In the first case decided after the creation of the Judicial Standards Commission, Justice Lake took special note that the district court judge in question "was elected by the people of his district to preside." *In re Crutchfield*, 289 N.C. 597, 606 (1975) (Lake, J., *dissenting)* (majority opinion issuing censure of district court judge for ex parte orders; dissenting opinion based on Due Process and Equal Protection

[2] Vacancies on the Supreme Court are filled by the Governor, but "the appointees shall hold their places until the next election for members of the General Assembly that is held more than 60 days after the vacancy occurs. N.C. Const. Art. IV, § 19. Even where a Justice is not elected, the term of office is abbreviated, and voters are soon back in the selection process.

principles).

"The right to vote is at the foundation of a constitutional republic." *Texfi Indus., Inc. v. City of Fayetteville*, 301 N.C. 1, 13 (1980). The right to vote is not, *per se*, a fundamental liberty interest; however, when citizens are permitted to vote, "the right to vote on equal terms is a fundamental right" protected by the Equal Protection Clause found in Article I, § 16. *Stephenson v. Bartlett*, 355 N.C. 354, 378 (2002) (*quoting*: *Northampton County Drainage District Number One v. Bailey*, 326 N.C. 742, 747 (1990); *see also Preston v. Martin,* 325 N.C. 435, 454 (1989); *Texfi Indus., Inc¸* 301 N.C. at 12. A forced recusal would amount to the Court elevating its seven votes over the votes of all other North Carolinians in determining who shall sit on the Court.[3]

Under the 1776 constitution, judges were elected by the General Assembly and served for life; the 1868 constitution first provided for direct election and eight-year terms. John V. Orth & Paul Martin Newby, *The North Carolina Constitution* 138 (2d ed. 2013). The State Constitution authorizes the citizens of North Carolina to "alter or abolish their Constitution and form of government

[3] It is unclear whether all Justices would participate in the determination of a motion to disqualify. *See* 28 September 2021 Order p.2, #5 ("Should the justice who is the subject of the recusal motion participate in the determination of that motion by the full court and, if so, on what authority?"). For purposes of this argument, amici assume all justices would participate, but amici's argument is even stronger if the justices who are the subject do not participate, and the motion is decided by only five justices.

whenever it may be necessary to their safety and happiness." N.C. Const. Art. I, § 3. Though the citizens of North Carolina have amended the present version of the State Constitution many times since 1868, they have zealously safeguarded their right to select justices and judges through popular election.

While judges are not representatives in the truest sense (i.e., they do not advocate the interests of their constituents), they are elected governmental officials, nonetheless. Once elected, judges' actions impact the lives of the people who elect them, and judges' philosophy, temperament, conduct in and out of office, residency, education, experience, and a whole host of other factors are undoubtedly important to the voters who elect them. Though reasonable minds may differ as to the appropriateness of North Carolina's system of electing judges, this is the system the people have consistently chosen and maintained for well over a century, and it is the function and duty of the Court to protect this system.

B. Voters' Electoral Decisions were Informed by Knowledge of the Candidates and the Timing of this Case, a Case of Significant Public Interest.

Judicial elections do not exist in a vacuum. To educate the electorate, candidates for judicial office are authorized to campaign. Judicial candidates can and do campaign. These campaigns often emphasize the unique role of the judiciary in our three-branch system of government.

Voters were aware of the professional and personal histories of the Justices which now form the basis of Plaintiff-Appellant's Motion to Disqualify. According to Plaintiff-Appellant, Justice Barringer "should be disqualified because she served in the General Assembly when the challenged legislation was adopted, she voted on the challenged legislation, and she was a defendant." (Motion p. 3) . As a candidate, Justice Barringer cited her professional experience as an attorney and professor; she also spoke of her experience as a legislator. For example, the Voter Guide published by the State Board of Elections included not only Justice Barringer's term as a Senator but also her service as Chair of a Senate Committee. https://www.ncsbe.gov/mailers/2020/judicial-voter-guide/candidate-profiles#barringer (last visited 30 October 20221). She repeatedly referenced her service as a Senator in her Candidate Statement for the Voter Guide: "I felt compelled to run for the N.C. Senate," "I authored and advocated successfully for 32 bills," and "my primary legislative success." *Id.* Her work as a Senator was hardly a secret hidden from voters. Justice Barringer, and presumably the millions of voters who elected her, considered her legislative experience a feature, not a bug.

The Motion also asserts Justice Berger should be disqualified because his father is a defendant in this case and thus Justice Berger is "within a third-degree familial relationship with a defendant." (Motion p. 6). This argument is specious. Justice Berger's father is named a defendant *in his official capacity only* as President

Pro Tempore of the North Carolina Senate. The State is sued by an action filed against state officials. In this case, that includes the President Pro Tempore of the Senate. Rule 19(d) of the North Carolina Rules of Civil Procedure states 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. Gen. Stat. § 1A-1, Rule 19(d) (emphasis added). The Speaker of the House of Representative and the President Pro Tempore of the Senate, as agents of the State, are necessary parties to any action challenging the validity or constitutionality of a state or the Constitution. N.C. Gen. Stat. § 120-32.6(b).

Voters were aware of Justice Berger's relationship to Senator Berger. The two men have the same name, other than the suffix "Junior" to distinguish son from father. Justice Berger has been a well-known fixture in North Carolina law and politics from at least 2007 when the people of the 17A Prosecutorial District elected him District Attorney. He ran for the United States House of Representatives in 2014. Two years later, the people of North Carolina elected him to the Court of Appeals. As for the father, Senator Berger was first elected to the Senate in 2000, became minority leader in 2004 and was elected President Pro Tempore in 2010.

See https://www.philberger.org/about_phil_berger. Neither Justice Berger nor his father is an unknown figure to North Carolina voters.

The voters elected Justice Barringer and Justice Berger at the 3 November 2020 elections. The results, as posted on the State Board of Elections website, show their ballot counts and percent of the vote:

Name	Ballot Count	Percent
Phil Berger, Jr.	2,723,704	50.67%
Lucy Inman	2,652,187	49.33%
Tamara Barringer	2,746,362	51.21%
Mark Davis	2,616,265	48.79%

https://er.ncsbe.gov/?election_dt=11/03/2020&county_id=0&office=JUD&contest=0 (last visited 30 October 2021). Combined, Justices Barringer and Berger received *a total of 5,470,066 votes*, votes Plaintiff-Appellant now asks this Court to ignore.

Voters elected Justice Barringer and Justice Berger merely a year ago. This case has been at this Court since Plaintiff-Appellant filed its Notice of Appeal on 14 October 2020, *before the November 2020 election in which Justices Barringer and*

Berger were elected. The Complaint for Declaratory and Injunctive Relief was filed on 6 August 2018. Voters were aware of this case—including the appeal now at this Court—before they elected Justice Barringer and Berger, justices whose professional and personal lives were well-known. This timing is critical. The United State Supreme Court, concluding recusal was warranted where a justice received campaign support from a party, observed, "The temporal relationship between the campaign contributions, the justice's election, and the pendency of the case is also critical." *Caperton v. A.T. Massey Coal Co*, 556 U.S. 868, 886 (2009).

A forced recusal of either Justice would be a repudiation of the constitutional right of the qualified voters of the State to elected justices. It would be a slap in the face of voters who took time to educate themselves about the candidates and to participate in the electoral process. It would discourage voter participation in future elections, especially judicial elections. As voter participation, particularly for lower turnout races like judicial races, is a regular area of concern for those across the political spectrum,[4] this Court should not lose sight of the message its decision on the Motion to Disqualify will have. The Court must not forsake its duty to uphold the constitutional right of the voters to elect the Justices of North Carolina.

[4] Shana Reilly and Carol Walker, *The Justice System Journal, Vol. 31, No. 2* (2010) (reporting ballot drop-off in judicial elections).

This case, though putatively a challenge to Session Law 2018-119 and Session Law 2018-128 putting forth two constitutional amendments to voters, is really an attack on the voters' ratification of the Voter ID Amendment and the Tax Cap Amendment. Just as the Plaintiff-Appellant seeks to overturn the ratification of photo identification and income tax amendments, it seeks to override the voters' election of two Justices.

C. Forced Recusal or Disqualification of a Justice would be the Functional Equivalent of an Unlawful Removal.

The very term "involuntary recusal" is a contradictory phrase. According to the Legal Information Institute of Cornell Law School, "Recusal means the *self-removal* of a judge or prosecutor because of a conflict of interest." https://www.law.cornell.edu/wex/recusal (last visited 30 October 2021) (italics added). Recusal is the *voluntary* withdrawal of a Justice from consideration of a particular case. *Black's Law Dictionary* 1467 (10th ed. 2014) (defining recusal as the "removal *of oneself* as a judge or policy-maker in a particular matter, esp. because of a conflict of interest") (italics added). The Code of Judicial Conduct speaks to a judge's self-disqualification by repeatedly using "himself/herself" in reference to the judge's recusal. *See* N.C. Code Jud. Conduct Canons C and D. Involuntary recusal would amount to the temporary removal of a Justice from office.

The Constitution restricts the removal of Justices by limiting the power to

remove and by limiting the circumstances justifying removal. These limitations preserve and protect the integrity of judicial elections. The power to remove a Justice of the Supreme Court rests with the General Assembly, which may remove a Justice for mental or physical incapacity by joint resolution of two-thirds of all the members of each house. "Removal from office by the General Assembly for any other cause shall be by impeachment." N.C. Const. Art. IV, § 17 (1).

The General Assembly also bears the responsibility to create a procedure for the removal of Justices for "mental or physical incapacity." That incapacity is qualified by the language that it be one "interfering with the performance of his duties which is, or is likely to become, permanent." The General Assembly is also required to prescribe a procedure for removal or censure of a Justice for other reasons, but these too are tightly defined. Failure to perform judicial duties must be "willful and persistent" to justify removal. Only crimes of "moral turpitude" are deemed severe enough for removal. Removal for "conduct prejudicial to the administration of justice" may warrant removal only if it "brings the judicial office into disrepute. N.C. Const. Art. IV, § 17 (2).

Carrying out the duties of Article IV, § 17 (2), the General Assembly created the Judicial Standards Commission and established procedures for the investigation and resolution of complaints concerning the conduct of any justice or judge of the General Court of Justice. N.C. Gen. Stat. § 7A-374.1. "Censure,"

"public reprimand," "Removal," and "Suspension" are each defined as "a finding by the Supreme Court, based upon a written recommendation of the Commission," doling out a particular consequence for a violation of the Code of Judicial Conduct. *Id*. All enforcement of the Code of Judicial Conduct by the Judicial Standards Commission, including recommendations to this Court, is after-the-fact. N.C. Gen. Stat. § 7A-376.

The legislature has the power of impeachment and address, and the duty to create a statutory system for censure and removal. The Constitution places the responsibility for the procedural framework for disqualification of a Justice in the hands of the General Assembly. That responsibility is manifest at N.C. Gen. Stat. § 7A-10.1, which specifies that "[t]he Supreme Court is authorized, by rule, to prescribe standards of judicial conduct for the guidance of all justices and judges of the General Court of Justice," and in the creation of the Judicial Standards Commission and the statutes governing the investigation of Justices found at Chapter 7A, Article 30 of the General Statues. The statutes provide a specific process for removal and even suspension of a Justice. This Court has described "the crucial terms" of Article IV § 17 (2) and Chapter 7A, Article 30 as the "gravamen in any proceeding to censure or remove a judge." *In re Nowell*, 293 N.C. 235, 248 (1994).

It is also notable that the General Assembly has established a specific

statutory process for disqualification of a judge in a "criminal trial or other criminal proceeding." N.C. Gen. Stat. §15A-1223. This process requires that a party's motion to disqualify a judge must be submitted in writing, must have supporting affidavits, and must be filed at least five days before the trial unless there is good cause for delay. The failure to follow those rules can be the basis for denying the motion. *State v. Poole*, 305 N.C. 308, 321 (1982). The legislature has not enacted a similar law for civil trials or specific to an appeal. The absence of a statute creating a process for compelling disqualification in a civil proceeding suggests that disqualification cannot be compelled in a civil appeal to the State's court of last resort.[5]

D. Plaintiff-Appellant's Delay in Requesting Disqualification Operates as a Waiver.

Even if the Court could order the recusal of two duly elected Justices, it should refrain from doing so where, as here, the movant delayed in requesting disqualification. Justices Barringer and Berger were elected in November 2020, but Plaintiff-Appellant did not file its Motion to Disqualify until July 2021, little

[5] Should the Court determine that forced recusal of an elected Justice is ever a possibility, the Court should adopt a procedure formalizing the process for a party to request disqualification and establishing the process by which the Court will consider such a motion, including publication of the votes of individual Justices as to the motion. Transparency and voter accountability depend on the public knowing which Justices permit their fellow elected Justices to serve and which Justices deny voters the right to have their elected Justices serve.

more than a month before the case was set for oral argument and many months after briefing. That delay constitutes a waiver. The Court of Appeals determined that a party could not force the disqualification of a judge in a civil case where the party did not raise the recusal question until months after the supposed basis for recusal became known. *In re Pedestrian Walkway Failure*, 173 N.C. App. 237, 252 (2005) (motion for the judge's disqualification was not filed until months after the judge's disclosure of his daughter's summer employment with the opposing law firm).

Neither the Constitution nor a statute authorizes the Supreme Court to remove or suspend a Justice from participation in a case. The Constitution requires selection of Justices by the qualified voters of the State. Forced removal of a Justice by the Court risks reducing the Court to a fraternity-style, "we-pick-our-own-members" club.

The people have created in the Constitution an architecture for North Carolina's government. They declared that the legislative, executive, and judicial powers "shall be forever separate and distinct from each other." N.C. Const. Art. I, § 6. The duties and responsibilities of each branch is set out in an article of the Constitution, as is the manner of selecting office holders for each branch. The Supreme Court's appellate judicial power derives from the people through the Constitution. N.C. Const. Art. IV, §§ 1, 5, and 6.

Voters select the Justices of the Supreme Court. A forced recusal of a Justice elected by the voters would operate as a removal or, at the least, a suspension of that Justice. The law does not authorize the Court to disqualify a Justice from participation in a case. The voters selected the current Court members and have a right to see that those Justices will be permitted to do the job the people elected them to do.

CONCLUSION

For the reasons stated above, Amici respectfully request the Court deny Plaintiff-Appellant's Motion to Disqualify.

Respectfully submitted, this the 4th day of November 2021.

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CERTIFICATE OF SERVICE

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