

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,

v.

TIMOTHY K. MOORE, in his official
capacity as SPEAKER OF THE NORTH
CAROLINA HOUSE OF
REPRESENTATIVES; PHILIP R. BERGER,
in his official capacity as PRESIDENT PRO
TEMPORE OF THE NORTH CAROLINA
SENATE,

Defendants-Appellees.

From Wake County

BRIEF OF THE NORTH CAROLINA LEGISLATIVE BLACK CAUCUS
AS AMICUS CURIAE SUPPORTING PLAINTIFF-APPELLANT

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ARGUMENT

An impartial judiciary is a cornerstone of healthy democracy. Without it, the crucial protections provided by judicial review of executive and legislative action and the consequent protection of individual liberties would be illusory. As state legislators, the 40 members of the North Carolina Legislative Black Caucus (the “Caucus”) have a representative stake in ensuring that judicial review of legislative action is fair and untainted by even the perception of bias. As elected representatives of the people of North Carolina, the Caucus understands that public trust in the courts is key to their legitimacy. And, as a group committed to promoting the political power of people of color in this state, the Caucus agrees with this Court that “[i]t is the state judiciary that has the responsibility to protect the state constitutional rights of the citizens,” including full access to the ballot by racial minorities. *Corum v. Univ. of N.C. Bd. of Governors*, 330 N.C. 761, 783, 413 S.E.2d 276, 290 (1992).¹

The Caucus has previously submitted an *amicus* brief in this case, supporting Plaintiff-Appellant’s position that a “usurper” General Assembly parlayed a racial gerrymander to propose constitutional amendments that, in part, were designed to further disenfranchise people of color. The Caucus respectfully submits this brief to share its perspective on the important issues of judicial recusal posed by Plaintiff-

¹ No person or entity—other than *amicus curiae*, its members, and its counsel—has directly or indirectly written this brief or contributed money for its preparation.

Appellant’s motion for disqualification and the Court’s Order dated September 28, 2021. Below, the Caucus highlights two aspects of this case of particular concern to its members. First, the majority party of the General Assembly proposed the challenged constitutional amendments as part of a campaign to entrench its power by diluting the political power of people of color. In light of this history, the development of procedural safeguards to ensure that the justices reviewing its actions are impartial is critical. Second, the personal involvement of Justice Berger’s father and Justice Barringer in proposing the challenged constitutional amendments draws into question the legitimacy in the eyes of the public of an impending decision of North Carolina’s highest court, which has the last word on issues of state law. Preserving public trust in our state government requires a transparent process to evaluate and decide requests for judicial recusal.

I. This Appeal Follows Years of Efforts by the Republican Majority of the North Carolina General Assembly Improperly To Entrench Its Power and Disenfranchise Voters of Color

Plaintiff-Appellant’s disqualification motion is yet another consequence of the “most extensive unconstitutional racial gerrymander ever encountered by a federal court.” *Covington v. North Carolina (Covington II)*, 270 F. Supp. 3d 881, 892 (M.D.N.C. 2017). A Republican majority in the General Assembly drew racially gerrymandered districts to concentrate Black voters in as few districts as possible and dilute minorities’ representation in the state legislature.

The gerrymandering produced its intended result—an undemocratic supermajority—beginning in 2012. The supermajority got to work passing an unconstitutional voting law “to entrench itself . . . by targeting voters who, based on race, were unlikely to vote for the majority party.” *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 233 (4th Cir. 2016). After the U.S. Supreme Court affirmed the lower court’s finding of impermissible racial gerrymandering, the majority party “took no action toward remedying the constitutional violation for many weeks” and “otherwise acted in ways that indicate they are more interested in delay than they are in correcting this serious constitutional violation.” *Covington II*, 270 F. Supp. 3d at 897. The supermajority’s attempted coup de grâce to democracy in our state was its rush to propose the state constitutional amendments challenged in this case and pass voter ID legislation before redrawn maps could take effect in 2018. Order ¶ 12.

In this state, “[t]he people . . . reserve the power to amend th[e] Constitution.” N.C. Const. art. XIII, § 2 (emphasis added). Through racial gerrymandering, the majority party of the General Assembly improperly usurped this power for itself—to the detriment of members of the Caucus and voters of color in North Carolina. *See Covington II*, 270 F. Supp. 3d at 897 (“By unjustifiably relying on race to distort dozens of legislative district lines, and thereby potentially distort the outcome of elections and the composition and responsiveness of the legislature, the districting plans interfered with the very mechanism by which the people confer their

sovereignty on the General Assembly and hold the General Assembly accountable.”). The resolution of this appeal will determine the consequences of legislators’ unprecedented gerrymandering and the contours of the state’s constitution. Judicial impartiality is critical in such a case, and requires clear procedures to evaluate whether disqualification is required to avoid even the appearance of favoritism. An unreviewable “honor system” standing alone that entrusts individual justices to self-recuse where required is inadequate, particularly in the case of an appeal that will decide consequential, unsettled questions of popular sovereignty.

II. Disqualification Is Necessary In Light of the Personal Involvement in the Challenged Constitutional Amendments by Justice Barringer and Senator Berger

Senator Berger, Justice Berger’s father, has served as President *Pro Tempore* of the Senate for a decade, and in the Senate for over two decades. Justice Barringer was elected to the Senate in 2012, while the racially gerrymandered Senate map was in place, and defeated in 2018, after the remedial map took effect. Both Justice Barringer and Senator Berger voted as legislators on the constitutional amendments challenged in this appeal. According to their opposition to Plaintiff-Appellant’s disqualification motion, Defendants-Appellees oppose disqualification of Justice Berger because Senator Berger is named in this lawsuit only in his official capacity. They also contend that requiring justices to recuse themselves from legislation

passed during prior public service as legislators would be unworkable. These arguments ignore the powers and responsibilities of the President *Pro Tempore* of the Senate and the critical role Senator Berger and former Senator Barringer played in the events leading up to this appeal.

The President *Pro Tempore* is a constitutional legislative leadership position elected by the members of the Senate. N.C. Const. art. II, § 14. Under current Senate rules, the President *Pro Tempore* has the “exclusive right and authority” to appoint committee members, chairs and vice chairs; establish select committees; and determine the number of committee members of each political party. *See* N.C. Sen. R. 31 & 34. Among many powers and duties, the President *Pro Tempore* may serve as a voting ex officio member of any Senate committee and subcommittee and has the power to appoint a conference committee to resolve legislative differences between the House of Representatives and Senate. *See* N.C. Sen. R. 34(b) & 57. In addition to exercising control and stewardship of Senate business, the President *Pro Tempore* is charged with defending the constitutionality of North Carolina legislation—a duty historically entrusted to the attorney general. Pursuant to legislation passed in 2017, under Senator Berger’s leadership, the President *Pro Tempore* was made a necessary party “in any action in any North Carolina State Court in which the validity or constitutionality of an act of the General Assembly or a provision of the North Carolina Constitution is challenged” and, with the Speaker

of the House of Representatives, has “final decision-making authority” in defending the litigation. N.C. Gen. Stat. § 1-72.2(a); *id.* § 114-2(10).

Senator Berger also leads the North Carolina Republican Senate Caucus, “the political arm for Republican Senators.”² In campaigning, he has touted his role “build[ing] the political operation that led to the 2010 takeover [of the Senate by a Republican majority] and has expanded the Senate’s veto-proof majority”—a majority elected by a racially gerrymandered vote. *See Berger Unanimously Chosen To Lead Senate*, Philberger.org (Dec. 3, 2016), https://www.philberger.org/berger_unanimously_chosen_to_lead_senate.

This is not a lawsuit where a state official sued as the nominal defendant had only passing familiarity with the challenged action. As leader of the Senate and the head of its Republican caucus, Senator Berger oversaw the redistricting process that resulted in an unconstitutional racial gerrymander and, with an improperly constituted supermajority, the passage of the constitutional amendments challenged in this appeal. He also oversaw the enactment of the legislation that empowered him, as President *Pro Tempore*, to defend constitutional amendments in lawsuits such as this one. Justice Barringer was voted into office while the Senate’s unconstitutional district map was in effect and voted to override the governor’s veto

² *About*, North Carolina Republican Senate Caucus, <https://ncstatesenate.com/about/> (last visited Nov. 4, 2021).

of legislation implementing the challenged voter ID amendment in her final days as Senator. *See Senate Roll Call Vote Transcript for Roll Call # 824, SB824: Implementation of Voter ID Const. Amendment* (Dec. 18, 2018), <https://www.ncleg.gov/Legislation/Votes/RollCallVoteTranscript/2017/S/824>.

Nor is this a case where a defendant official has no personal stake in the outcome of the appeal. Because Plaintiff-Appellant asserts that the challenged constitutional amendments are tainted by racial gerrymandering, judicial review of the legislative action has moral dimensions. Absent disqualification, Justices Barringer and Berger will have to consider whether her own actions (in the case of Justice Barringer) or his father's actions (in the case of Justice Berger) were unconstitutional and racially discriminatory. These are more than ample reasons to question their ability to be impartial.

Senator Berger's public statements on this matter only underscore that his involvement goes well beyond the "official" capacity on the case caption and that his interest in the outcome is very personal. He has asserted publicly and emotionally that the trial court's ruling in favor of Plaintiff-Appellant was "absurd" and "lawless" and even charged that "the idea of judicial restraint has completely left the state of North Carolina." Brendan O'Brien, *North Carolina Judge Rules Voter ID, Tax Amendments Unconstitutional*, Reuters (Feb. 22, 2019), <https://www.reuters.com/article/us-north-carolina-amendments/north-carolina->

judge-rules-voter-id-tax-cap-amendmentsunconstitutional-idUSKCN1QC03G;

Rick Henderson, *Election Board's Absentee Ballot Settlement Upheld, Legislature to Appeal*, Carolina Journal (Oct. 2, 2020), <https://www.carolinajournal.com/news-article/election-boards-absentee-ballot-settlement-upheld-legislature-to-appeal/>.

Rather than leaving public statements to the lawyers, expressing disagreement with the legal reasoning, or promising to appeal, Senator Berger has forcefully advocated his personal opinion and even questioned the very legitimacy of the proceedings.

The fact that Senator Berger is the father of Justice Berger is sufficient to require Justice Berger's disqualification under these circumstances. But Senator Berger has further increased the perception of bias through actions benefiting his son. During Justice Berger's 2016 campaign for the Court of Appeals, his first judicial office, Senator Berger voted in favor of legislation that had the effect of putting Justice Berger's name first on the ballot, above the incumbent. *See* Jeff Tiberii, *New State Law Could Benefit Son of Powerful Lawmaker*, N.C. Public Radio (July 6, 2016), <https://www.wunc.org/politics/2016-07-06/new-state-law-could-benefit-son-of-powerful-lawmaker>. And in this matter, Senator Berger has taken a position on the recusal question, by submitting, through his attorneys, a brief opposing disqualification of his son. Senator Berger's affirmative actions to enact the discriminatory legislation central to this action, grant himself authority in the resulting litigation, and take action perceived as benefiting his son's first judicial

campaign underscore the importance of recusal or disqualification of his son, Justice Berger.

In light of this backdrop, leaving the recusal decision to Justices Berger and Barringer will only heighten the regrettable politicization of this case and undermine public confidence in the result. The people of North Carolina deserve assurance that the outcome of this appeal and the important principles it implicates—racial justice and equal access to the ballot box—will turn on respect for the law rather than personal interest, family loyalty, or political affiliation. Such assurance is impossible when the decision to recuse is left to the discretion of (i) the son of a key political architect of the underlying unconstitutional racial gerrymandering scheme, who has opposed recusal and vociferously defended the amendments, and (ii) a former legislator whose decision in this appeal implicates her own political legacy and her legitimacy and integrity as an elected official serving a limited term. Full transparency in the recusal process, including participation of the full bench of this Court in the decision-making, is crucial to maintaining faith in our state courts.

CONCLUSION

For the foregoing reasons, the Caucus respectfully urges the Court to institute a procedure for the Court transparently and impartially to decide Plaintiff-Appellant's motion for disqualification.

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

WALLACE & NORDAN, L.L.P.

/s/ John R. Wallace

John R. Wallace
State Bar No. 7374
Post Office Box 12065
Raleigh, North Carolina 27605
(919) 782-9322 – telephone
(919) 782-8133 – facsimile

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.

WALLACE & NORDAN, L.L.P.

Lauren T. Noyes
State Bar No. 28130
Post Office Box 12065
Raleigh, North Carolina 27605
(919) 782-9322 – telephone
(919) 782-8133 – facsimile

FRESHFIELDS BRUCKHAUS
DERINGER US LLP

Aaron R. Marcu
Shannon K. McGovern
601 Lexington Avenue
New York, NY 10022
Telephone: (212) 277-4000

*Attorneys for Amicus Curiae the
North Carolina Legislative Black
Caucus*

CERTIFICATE OF SERVICE

The undersigned attorneys hereby certify that they served a copy of the foregoing amicus brief upon the parties via e-mail to the attorney for Defendants and Amici named below:

Kimberley Hunter
N.C. Bar No. 41333
David Neal
N.C. Bar No. 27992
Southern Environmental Law Center
601 W. Rosemary Street
Suite 220
Chapel Hill, NC 27516-2356
Phone: (919) 967-1450
Fax: (919) 929-9421
khunter@selcnc.org
dneal@selcnc.org

Irving Joyner
N.C. Bar No. 7830
P.O. Box 374
Cary, NC 27512
Telephone: (919) 319-8353
Facsimile: (919) 530-6339
ijoyner@nccu.edu

Daryl V. Atkinson
N.C. Bar No. 39030
Caitlin Swain
N.C. Bar. No. 57042
Kathleen E. Roblez
N.C. Bar No. 57039
Forward Justice 400 W. Main Street, Suite 203
Durham, NC 27701
Telephone: (919) 323-3889
daryl@forwardjustice.org
cswain@forwardjustice.org
kroblez@forwardjustice.org

Attorneys for Plaintiff-Appellant NC NAACP

Noah H. Huffstetler, III
D. Martin Warf
Nelson Mullins
Glenlake One, Suite 200
4140 Parklake Avenue
Raleigh, NC 27612
Phone: (919) 329-3881
martin.warf@nelsonmullins.com
noah.huffstetler@nelsonmullins.com
Attorney for Defendant-Appellees

Daniel F. E. Smith
Jim W. Phillips, Jr.
Eric M. David
BROOKS, PIERCE, McLENDON,
HUMPHREY & LEONARD, L.L.P.
Suite 2000 Renaissance Plaza
230 North Elm Street (27401)
Post Office Box 26000
Greensboro, NC 27420 6000
Phone: 336-373-8850
dsmith@brookspierce.com
jphillips@brookspierce.com
edavid@brookspierce.com
Attorneys for Roy Cooper, Governor of the State of North Carolina

Robert E. Harrington
Adam K. Doerr
Erik R. Zimmerman
Travis S. Hinman
ROBINSON, BRADSHAW & HINSON, P.A.
101 North Tryon Street, Suite 1900
Charlotte, North Carolina 28246
Phone: (704) 377-2536
rharrington@robinsonbradshaw.com
adoerr@robinsonbradshaw.com
ezimmerman@robinsonbradshaw.com
thinman@robinsonbradshaw.com
Attorneys for the North Carolina Legislative Black Caucus

Colin A. Shive
Robert F. Orr
150 Fayetteville St Suite 1800
Raleigh, NC 27601
cshive@tharringtonsmith.com
orr@rforrlaw.com
Attorneys for North Carolina Professors of Constitutional Law

Jaclyn Maffetore
Leah J. Kang
Kristi L. Graunke
ACLU of North Carolina Legal Foundation P. O. Box 28004
Raleigh, NC 27611-8004
Tel: 919-834-3466
jmaffetore@acluofnc.org
lkang@acluofnc.org
kgraunke@acluofnc.org
Attorneys for ACLU of North Carolina

John J. Korzen
Wake Forest University School of Law PO Box 7206
Winston-Salem, NC 27109-7206
(336) 758-5832
korzenjj@wfu.edu
Attorney for Democracy North Carolina

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

Matthew E. Lee
Whitfield Bryson LLP
900 W. Morgan St.
Raleigh, NC 27603

matt@whitfieldbryson.com

Attorneys for North Carolina Advocates for Justice

R. Daniel Gibson

P.O. Box 1600

Apex, NC 27502

dan@stamlawfirm.com

Attorney for Amicus Curiae John V. Orth

B. Tyler Brooks

N.C. State Bar No. 37604

LAW OFFICE OF B. TYLER BROOKS, PLLC

Telephone: (336) 707-8855

Facsimile: (919) 584-8373

4050 Yellowfield Way

Cary, North Carolina 27518

btb@btylerbrookslawyer.com

Tami L. Fitzgerald

N.C. State Bar No. 17097

NORTH CAROLINA VALUES COALITION

Telephone: (919) 813-6490

9650 Strickland Road, Suite 103-226

Raleigh, North Carolina

tfitzgerald@ncvalues.org

Pressly M. Millen

Womble Bond Dickinson US LLP

555 Fayetteville Street, Suite 1100

Raleigh, NC 27601

Attorney for Amici the Honorable S. Gerald Arnold, the Honorable Wanda G.

Bryant, the Honorable Sidney S. Eagles, Jr., the Honorable John B. Lewis, Jr., and

the Honorable John C. Martin

Ellen Murphy

N.C. Bar No. 28707

1729 Virginia Road

Winston-Salem, NC 27104

Tel. No. 919.529.8035

murphynickles@gmail.com

*Attorney for Amici North Carolina Professors of Professional Responsibility:
Bobbi Jo Boyd, Kenneth Broun, Kami Chavis, Phyllis Craig-Taylor, Eric Fink,
Eric Muller, Ellen Murphy, Suzanne Reynolds, Amy Richardson, and Kenneth
Townsend*

John V. Orth
Center for Civil Rights
CB 3380
Chapel Hill, NC 27599
Telephone: (919) 843-9288
jvorth@email.unc.edu
Attorney for Amici John V. Orth

Jeanette K. Doran
2012 Timber Drive
Raleigh, NC 27604
Telephone: (919) 332-2319
Jeanette.doran@ncicl.org
Attorney for Amici North Carolina Institute for Constitutional Law, et al.

This the 4th day of November 2021.

WALLACE & NORDAN, L.L.P.

/s/ John R. Wallace

John R. Wallace
State Bar No. 7374
Post Office Box 12065
Raleigh, North Carolina 27605
(919) 782-9322 – telephone
(919) 782-8133 – facsimile