NO. 261A18-3 TENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

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NORTH CAROLINA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, Plaintiff-Appellant, v. TIM MOORE, in his official capacity, PHILIP BERGER, in his official capacity, Defendant-Appellees.	)	From Wake County No. 18 CVS 9806

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AMICUS CURIAE BRIEF
(NORTH CAROLINA PROFESSORS OF CONSTITUTIONAL LAW)

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INTRODUCTION

We are North Carolina professors of constitutional law, appearing as *amici curiae* in this matter.[1] Looking through the Court's eight numbered questions on recusal, posed to the parties in *NAACP v. Moore* in the Order on September 28, 2021, ("Order"), we confess our lack of expertise to address a number of those questions, which are more properly remitted to the parties and to *amici* with deeper learning on judicial ethics.

However, we do recognize a very familiar overall pattern in the questions, one that recalls the famous framing of the most celebrated case in American constitutional history. As this Court remembers, Chief Justice Marshall, addressing the mandamus writ filed by William Marbury in the Supreme Court, identified a threefold tier of questions for resolution:

1. Has the applicant a right to the commission he demands?
2. If he has a right, and that right has been violated, do the laws of his country afford him a remedy?
3. If they do afford him a remedy, is it a mandamus issuing from this court?

[1] No person or entity—other than *amici curiae* and their counsel—have directly or indirectly written this brief or contributed money for its preparation.

Marbury v. Madison, 5 U.S. (1 Cranch) 137, 138 (1803).

In the recusal matter now before this Court, we see a similar, if expanded tier of issues. The Court must first determine whether the plaintiffs' recusal motion is grounded in some cognizable right, whether constitutional, statutory, or administrative. (Order, questions 1 and 4). The Court must next determine whether the continued participation of two Associate Justices challenged on this appeal would violate those rights. (Order, questions 1, 4, and 6). Assuming plaintiffs' rights would be violated, the Court must then assure itself that it possesses the authority to direct a remedy. (Order, question 2 and 6) The final and most uncharted question is what that precise remedy ought to look like. (Order, questions 1, 2, 3, 5, 6, 7 and 8).

As professors of constitutional law, we offer the Court our thoughts on the first and the third of these questions. We affirm that the plaintiffs have a fundamental right to a fair and impartial tribunal, and we believe the Court has full authority to remedy any violation of the right. Our analysis of the leading cases, moreover, suggests that the continued presence on this appeal of the two Associate Justices under challenge would violate plaintiffs' rights (though we leave detailed examination of

those issues to other parties). We have virtually no advice to share on the specific internal procedures the Court should adopt and follow here. We are aware that an eminent group of professional responsibility professors from North Carolina law schools intends to address those questions, and we commend their comments to the Court's attention.

I. The Plaintiffs Have a Right to A Fair and Unbiased Tribunal Under the Federal Due Process Clause As Well As Under State Statutes and Canons

The history of judicial recusal extends back at least eight centuries in English law.[2] In the 13th Century, Henry de Bracton's great treatise urged that judges might be recused on several grounds including mere 'suspicion' of partiality prompted by a judge's relationship to a party or by prior participation as counsel in an earlier phase of a lawsuit.[3] Bracton's views, however, did not forever prevail. Indeed, some five hundred years later, in the 1750s, William Blackstone insisted that the only ground then permitting recusal was a prospective judge's direct, pecuniary interest in the outcome of a pending case.[4]

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[2] Professor John P. Frank provides an excellent review of the history of judicial recusal in his article, "Disqualification of Judges," 56 YALE L.J. 605 (1947). *See also* Harrington Putnam, "Recusation," 9 CORNELL L. Q. 1 (1923).

[3] Frank, 56 YALE L.J. 609-10 and n.13, citing 4 BRACTON, DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE 281 (Woodbine's ed. 1942).

[4] 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 361.

Blackstone's narrow reading of English common law did not itself survive long in the growing United States, however, where state legislators, suspicious of unchecked judicial authority, framed a number of statutes that permitted and/or required judicial recusal in a variety of circumstances, including when a judge was related, even to a third or fourth degree (a common great-great grandparent), to a party to a pending lawsuit,[5] or where the judge had been involved as counsel in a lawsuit at an earlier period.

The Supreme Court of the United States first took up these issues as a constitutional matter in *Tumey v. Ohio*, 273 U.S. 510 (1927), where Chief Justice Taft held that a municipal mayor who sat as a magistrate to adjudicate minor criminal cases violated the federal Due Process Clause, since the magistrate's village was entitled to fifty percent of all fines imposed for any conviction, and since the mayor/magistrate himself

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[5] *See Moses v. Julian*, 45 N.H. 52, 56 (1863) (examining cases); *Petrey v. Holliday*, 178 Ky. 410, 419 (1917) (requiring recusal of a judge whose nephew by blood was one of the parties to the matter, noting that "in nearly all the states there is either a constitutional or statutory provision expressly prohibiting a judge from sitting in a case in which he is related to either of the parties, and these provisions have uniformly been construed with great strictness in order to prevent the suspicion of unfairness that would taint a judgment given in favor of a relative, however just it might be.") (citations omitted).

was entitled to recoup his 'financial costs' from that local fund, which would grow, of course, only from convictions, not acquittals.

> Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused denies the latter of due process of law.

Id. at 532.[6] Chief Justice Taft's opinion ventured beyond a narrow common law focus on the mayor/magistrate's personal financial interest. Instead, it observed that, as chief village administrator, the mayor was ultimately responsible for the financial health of the village, which had collected more than $20,000 in fines during the previous seven months alone:

> A situation in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial, necessarily involves a lack of due process of law in the trial of defendants charged with crimes before him.

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[6] The Brief of Amicus Curiae Professor John V. Orth, suggesting that any involuntary recusal "violates the constitutional integrity of the judicial system and interferes with the separation of powers," Brief, at 3, is therefore contrary to a century of federal Supreme Court doctrine, binding under the Supremacy Clause. U.S. CONST. Art. VI, cl. 2.

Id. at 534.[7]

In 1972, the Supreme Court in *Ward v. Village of Monroeville*, 409 U.S. 57 (1972), reaffirmed *Tumey*'s broader recusal principle. Under the system practiced in the Village of Monroeville, the village regularly received the proceeds of fines, even though the mayor/judge himself was ineligible for a salary supplement from a conviction.

> The fact that the mayor [in *Tumey*] shared directly in the fees and costs did not define the limits of the principle. . . . [T]he test is whether the mayor's situation is one 'which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clean, and true . . . . Plainly that 'possible temptation' may also exist when the mayor's executive responsibilities for village finances may make him partisan to maintain the high level of contribution from the mayor's court."

Id. at 60.

In addition to cases involving direct pecuniary gain, by the 1950s the Supreme Court had identified another circumstance requiring recusal: when a judge had earlier acted in a matter which later came before him or her for further judicial consideration. The Court, in *In re*

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[7] Despite his expansion of common law principles, Taft observed in passing that "not all questions of judicial qualification . . . involve constitutional validity. Thus matters of kinship, personal bias, state policy, remoteness of interest, would seem generally to be matters merely of legislative discretion." *Id.* at 523.

Murchison, 349 U.S. 133 (1955), examined a Michigan law that allowed a state judge first to act as a 'one-man grand jury' and thereafter, if the suspect was indicted, to try the resulting case. In *Murchison*, it was not, however, the indicted defendant who objected to this procedure, but two witnesses who had appeared before the judge during the grand jury proceeding, the first of whom, the judge concluded, had lied in his testimony, and the second of whom had refused to testify at all. When the judge thereafter proceeded to try the two for contempt of court, the witnesses unsuccessfully sought his recusal.

The Supreme Court agreed that recusal was required under the Due Process Clause. Justice Black, writing for the Court, reasoned as follows:

> Having been a part of that process a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused. . . . As a practical matter it is difficult if not impossible for a judge to free himself from the influence of what took place in his 'grand-jury' secret session. His recollection of that is likely to weigh far more heavily with him than any testimony given in the [subsequent] open hearing.

Id. at 137.

In setting the standard for judicial recusal, the Supreme Court has repeatedly clarified that Due Process does not require proof of actual bias.

The proper test is instead an 'objective' one that looks to the "possible temptation" afforded by the circumstances of the case. In *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986), an unhappy party to an insurance policy dispute challenged an Alabama supreme court justice who had participated in an appeal which resolved an issue of first impression in Alabama—whether a legal action lay against an insurer for its bad-faith refusal to pay an insurance claim. When the unhappy party later learned that the justice had himself quietly filed suit in two lawsuits against insurance companies while considering the unresolved claim, the litigant sought relief in the federal Supreme Court.

Chief Justice Burger found it unnecessary

> to decide whether, in fact, [the justice] was influenced, but only whether sitting on the case then before the Supreme Court of Alabama, 'would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true,'"

id. at 825, citing Justice Black's opinion in *Ward v. Village of Monroeville*, 409 U.S. at 60. The Chief Justice added a further principle drawn from the Court's decision in *In re* Murchison, 349 U.S. 133 136 (1955):

> The Due Process Clause may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending

> parties. But to perform its high function in the just way, justice must satisfy the appearance of justice.

Id.

The leading modern case on judicial recusal under the federal Due Process Clause is *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009) which considered a recusal challenge against a West Virginia justice who ruled on an appeal from a jury verdict. The jury had awarded some $50 million in damages against the defendant, Massey Coal Co. While the appeal was pending, Massey's chairman and chief executive officer actively began supporting a private attorney, Benjamin, as a candidate for a pending seat on the Supreme Court of Appeals of West Virginia. Defendant Massey's CEO eventually donated nearly $2.5 million to a political organization supporting candidate Benjamin, and he spent an additional $500,000 on print, direct mailing, and media buys to support his candidacy. Benjamin won the election, displacing an incumbent justice on the West Virginia high court. As a new Justice he then refused to recuse himself, heard defendant Massey Coal's appeal and later joined an opinion reversing the verdict against Massey.

In a 5-to-4 decision, Justice Anthony Kennedy held that Justice Benjamin's refusal to recuse himself violated the Due Process Clause.

Although he observed that "most matters relating to judicial disqualification [do] not rise to a constitutional level," *id.* at 876, Justice Kennedy declined to be bound by prior dicta, adding that "[a]s new problems have emerged that were not discussed at common law, . . . the Court has identified additional instances which, as an objective matter, require recusal." *Id.* at 877.

Justice Kennedy acknowledged that Justice Benjamin had been

> careful to address the recusal motions and explain his reasons why, on his view of the controlling standard, disqualification was not in order. In four separate opinions issued during the course of the appeal, he explained why no actual bias had been established. . . . In other words, based on the facts presented by Caperton, Justice Benjamin conducted a probing search into his actual motives and inclinations; and he found none to be improper.

Id. at 882.

Yet Justice Kennedy did not parse Justice Benjamin's "subjective findings of impartiality and propriety [, n]or . . . determine whether there was actual bias." *Id.* at 882. Instead, he invoked the Court's reliance on objective standards, acknowledging that "[d]ue process may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between the contending parties." *Id.* at 886.

Viewed together, he reasoned, the financially significant contributions made by Massey Coal's chief executive officer to Benjamin's judicial campaign and the close temporal relationship between Benjamin's election and his subsequent decision on Massey Coal's appeal, "'offer[ed] a possible temptation to the average judge to lead him not to hold the balance nice, clear and true'," *id.*, 885-86, citing *Lavoie*, 475 U.S. at 825, and adding that "[o[n these extreme facts, . . .the probability of actual bias rises to an unconstitutional level." *Caperton*, 556 U.S. at 886-87.[8]

Seven years after *Caperton*, the Supreme Court decided another recusal case, *Williams v. Pennsylvania*, 579 U.S. 1, 136 S.Ct. 1899 (2016), this time involving a Chief Justice of the Pennsylvania Supreme Court who sat to consider a federal habeas petition brought by a death-sentenced inmate. Thirty years earlier, when he had been District Attorney in Philadelphia, the chief justice had officially approved a

[8] Chief Justice Roberts, joined by Justices Scalia, Thomas, and Alito, dissented in *Caperton*, lamenting that the Court had never previously held that the Due Process Clause requires recusal because of "factors that could give rise to a 'probability' or 'appearance' of bias." *Id.* at 890. The Chief Justice's dissent offered a roster of some 40 unanswered questions about the scope and limits of the majority decision, *id.* at 893-98, contending that the Court's new rule had an "inherently boundless nature," *id.* at 899, that it would "come to regret." *Id.* at 900.

request by his trial staff to pursue a death sentence against the selfsame inmate. Reviewing these facts, Justice Kennedy, writing once again for a divided Court, pointed to "a risk that the judge 'would be so psychologically wedded to his or her previous position as a prosecutor that the judge would consciously or unconsciously avoid the appearance of having erred or changed position.'" 136 S.Ct. at 1906, quoting *Withrow v. Larkin*, 421 U.S. 35, 57 (1975).

> Even if decades intervened before the former prosecutor revisits the matter as a jurist, the case may implicate the effects and force of his or her original decision. In these circumstances, there remains a serious risk that a judge would be influenced by the improper, if inadvertent, motive to validate and preserve the result obtained through the adversary process.

Id. at 1907.

Beyond these controlling federal precedents, we note in passing the substantial body of state law that, contrary to the contentions put forward in the *Amicus Curiae* Brief of Professor Orth, also recognizes a state right to demand recusal where a judge's impartiality may reasonably be questioned[9] In addition, Canons 3(c) & (d) (1) of the North

[9] See, e.g., *Ponder v. Davis*, 233 N.C. 699 (1951); *Crump v. Board of Education*, 326 N.C. 603 (1990); *State v. Fie*, 320 N.C. 626 (1987).

Carolina Code of Judicial Conduct obligate a judge to "disqualify himself in a proceeding in which the judge's impartiality may reasonably be questioned, including but not limited to instances where . . . [t]he judge . . . or a person within the third degree of relationship . . . [i]s a party to the proceeding, or an officer, director, or trustee of a party." We suggest that these obligations imposed on North Carolina judges establish a correlative right for any party who moves timely for recusal under those circumstances, and thus the Canon itself provides another state basis for asserting a cognizable right.

II. This Court Has Long Recognized Its Independent Role To Provide Judicial Remedies for Evident Constitutional Wrongs

The Court poses the question whether it has "the authority to require the involuntary recusal of a justice who does not believe that self-recusal is appropriate," asking "upon what legal principles does that authority rest?" The question is understandable, since neither the language of the North Carolina Constitution nor any statute or prior court rule has ever precisely addressed this question.

Yet once a constitutional right and a violation have been shown, there is ample authority to insist that this Court, like all courts,

possesses full *remedial* power to vindicate those rights. Obviously, the Court often locates its remedial authority in express statutory or constitutional directives; in other cases, it looks to long-observed precedents. Yet in certain key moments, the Court must and long has located its remedial authority by reflecting on the very nature and structure of constitutional governance.

In perhaps this Court's most famous case, *Bayard v. Singleton*, the post-Revolutionary General Assembly had adopted a statute that expressly required the North Carolina judicial branch to dismiss summarily any lawsuit for possession of real property "where the defendant makes affidavit that he holds the dispute property under a sale from a commissioner of forfeited estates." 1 N.C. 5, 5 (1787). Just such a lawsuit was later brought by the daughter of a former North Carolina resident, a Loyalist who had fled the colony to Great Britain during the war but purported to deed his New Bern land holdings to his daughter. After 1783, the daughter, who remained a citizen of North Carolina, sued as titleholder to claim her father's former property, which had been seized and resold by North Carolina's commissioners of forfeited estates.

If the express terms of the legislative statute had been followed, the daughter would have been entitled to no judicial review at all. Moreover, no constitutional text offered her express support. Yet this Court found that the very nature of constitutional governance provided sufficient reasons to reject the express legislative bar and instead to require that the case be tried before a jury. The Justices acknowledged "the great reluctance" they felt "against involving themselves in a dispute with the Legislature of the State," yet concluded that

> no object of concern or respect could come in competition or authorize them to dispense with the duty they owed the public, in consequence of the trust they were invested with under the solemnity of their oaths.
>
> . . .[B]y the Constitution every citizen has undoubtedly a right to a decision of his property by a trial by jury. For that if the Legislature could take away this right, and require him to stand condemned in his property without a trial, it might with as much authority require his life to be taken away without a trial by jury . . . [Yet n]o act they could pass could by any means repeal or alter the Constitution, because if they could do this, they would at the same instant of time destroy their own existence as a Legislature, and dissolve the government thereby established. Consequently, the Constitution . . . stand[s] in full force as the fundamental law of the land, notwithstanding the [General Assembly's statute].

Id. at 6-7. In essence, the Court reasoned from the nature of constitutional government that it was judicially obligated to recognize

and protect Bayard's rights that the Constitution had assured to all citizens for the resolution of legal disputes.

A similar obligation, of course, was a central principle guiding Chief Justice's Marshall's affirmation in *Marbury v. Madison* that constitutional rights necessarily demand an adequate remedy: "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right." 5 U.S. (1 Cranch) at 163.[10]

In sum, since the plaintiffs have a clear right here to an impartial tribunal, the Court must assure them one. To do so, on this occasion, requires judicial recusal. That necessity, however judicially awkward, offends no rights. Nowhere does the federal nor state constitution promise individual judges that they may always sit in judgment in every case, whether elected or appointed. Indeed, the unmistakable premise of federal and state recusal decisions is that no judge or justice has a "right" to sit in every case if some inescapable conflict of interest would

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[10] *See generally* Walter E. Dellinger, "Of Rights and Remedies: The Constitution as a Sword," 85 Harv. L. Rev. 1532 (1987).

compromise his or her impartiality. Any holding to the contrary would render recusal itself nothing more than a personal choice, something to be ignored at a judge's whim -- even if the judge had a direct pecuniary interest in the outcome.

CONCLUSION

The Court has never developed formal procedures to guide its course if justices do not voluntarily act to recuse themselves despite circumstances that warrant it. Though perhaps unwelcome, that time has now arrived. As judicial heirs of *Bayard v. Singleton*, the Court must announce those procedures in this case. North Carolina General Statute §7A-10.1 authorizes the Court "by rule, to prescribe standards of judicial conduct for the guidance of all justices and judges of the General Court of Justice." We commend that task to the wisdom of the Court.

Respectfully submitted this 2nd day of November 2021.

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