NO. 261A18-3 TENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

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NORTH CAROLINA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, Plaintiff-Appellant, v. TIM MOORE, in his official capacity, PHILIP BERGER, in his official capacity, Defendant-Appellees.	)	From Wake County No. COA19-384

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PLAINTIFF - APPELLANT'S RESPONSE TO AMICUS

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PLAINTIFF - APPELLANT'S RESPONSE TO AMICUS

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TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Plaintiff the North Carolina State Conference of the NAACP ("NC NAACP") submits this response to the amicus brief submitted by former Supreme Court Justices Edmunds and Jackson, and former Chief Justice Martin.

INTRODUCTION

Former Supreme Court Justices submitted an amicus brief to this Court posing the following question: "Should the established rule for resolving judicial disqualification and recusal questions be changed during a specific case rather than through the Court's customary administrative rule-making process?"[1] In response, the NC NAACP first notes that Plaintiff did make a request for this Court to establish rules for determining disqualification motions during the pendency of its litigation, as amici suggest.[2] Rather, this Court, *on its own motion*, invited the parties to respond to questions about ideal disqualification rules and practices, as is the right of this Court. Order of Sept. 28, 2021.

As a party, the NC NAACP is eager to swiftly resolve the merits of this case, which center on unresolved questions about the North Carolina Constitution that

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[1] It is unclear from amici's submission what pleading the amicus brief is attached to. Amici reference the NC NAACP's "motion" in the amicus brief. Br. of Amici Edmunds, Jackson, and Martin at 3. Presumably this refers to the NC NAACP's motion to disqualify which was filed and briefed last summer. (Pl.-Appellant's Mot. to Disqualify Justice Barringer and Justice Berger.) Any amicus related to that motion should have been timely filed, at the latest, on August 31, 2021, along with Respondant's principal brief. Amici, however, cite deadlines associated with this Court's request for supplemental briefing (Mot. of Amici Edmunds, Jackson, and Martin for leave to file Amicus Curiae Br. at 3) yet make no mention of the Court's order in their brief. Regardless, N.C. Rule of Appeallate Procedure 28 (i)(3) requires amicus briefs that do not support either party to be submitted alongside appellee's principal brief, which was filed on November 5, 2021. This amicus submission was thus untimely.

[2] Br. of Amici Edmunds, Jackson, and Martin at 2, 10.

have been pending for more than three and a half years. The stakes of this case were already high: The NC NAACP seeks to vindicate the rights of North Carolinians to a Constitution untainted by illegal amendments and make clear that the North Carolina General Assembly is prohibited from relying on illegally racially gerrymandered districts to change this state's Consitution.

Nonetheless, the NC NAACP recognizes that this case has also brought to light the Court's lack of an established, consistent rule to resolve disqualification questions. The NC NAACP, along with state and national experts in judicial ethics and constitutional law along, and other interested parties, have diligently answered the Court's thorough questions about disqualification practices and possible procedures. Following supplemental briefing on those questions, the Court is well-positioned to establish a transparent, consistent procedure for fairly deciding disqualification issues. Doing so will strengthen the impartiality of the Supreme Court and enhance the independence of the judiciary.

The NC NAACP wholeheartedly agrees that this Court should consider "the broader, long-term consequences"[3] of how it assesses disqualification decisions, as well as the impact such decisions have "on the public's perception of [the Court's] independence, integrity, and impartiality."[4] Decisionmaking without an explanation of how the decisions are reached invites suspicion and distrust. Adopting clear, transparent practices that ensure disqualification decisions are impartial and

[3] Br. of Amici Edmunds, Jackson, and Martin at 3.

[4] *Id.*

protect litigants' consitutional right to a fair tribunal will reinforce and uphold faith in our judicial system, at a time marked by increasing concerns over public faith in the judiciary and separation of powers between North Carolina's branches of government.

ARGUMENT

I. This Court has had no consistent practice to resolve disqualification issues, and this Court should implement one as soon as possible.

The centerpiece of the argument made by the former Justices is that the "established rule" for resolving questions of judicial disqualification should not change in the midst of a specific case.[5] If a clear "established rule" or procedure existed, the NC NAACP might agree. However, there is no evidence that there has been a consistent rule or an established practice for resolving these questions, as the Court's request for supplemental briefing itself reinforces. As the NC NAACP noted in its Supplemental Brief, there is compelling evidence that the Court has not followed a consistent practice. Pl.-Appellant's Suppl. Br. at 5-8.

The NC NAACP has already cited examples of cases in which disqualification decisions were decided by the Court rather than a single justice. For example, two Justices who were the subject of a motion to disqualify did not participate in consideration of the motion that was then decided by the rest of the Court in *State v. Meyer*, 583 S.E.2d 43 (N.C. 2003) (mem.). ("[Chief Justice] Lake and [Justice] Brady recused from voting on this motion [to disqualify Chief Justice Lake and Justice

[5] *See* Br. of Amici Edmunds, Jackson, and Martin at 9-12.

Brady]"). Other recusal decisions have been reported as decisions of the Court in conference, not as decisions by individual justices in isolation. *See, e.g.*, *Coombs v. Sprint Communications, et al.,* 543 S.E.2d 125 (N.C. 2000) (mem.).

Indeed, the practice of full court review of disqualification motions, as the NC NAACP and aligned amici recommend this court adopt as a rule, would not be a new practice for this Court. Upon information and belief, during the tenure of immediate-past Chief Justice, Cheri Beasley, the Court practiced a policy where motions for disqualification were reviewed by the entire Court. Upon information and belief, prior to the adoption of that policy, motions for disqualification were handled on a case-by-case basis, rather than through a single consistent practice or formal policy governing the Court's approach to such motions.

While this Court's procedures have changed over time, with no single written rule in place, the need for consistent practices governing disqualification has become all the more pressing. *See* Pl.-Appellant's Suppl. Br. at 20-22 (discussing at length the various changes that make consistent, impartial rules on disqualification necessary). Judicial races have become increasingly political in recent years, and the election of the son of the current Senate President *pro tempore* to this Court has brought the issue into sharp focus.[6] In this context, the Court is facing increasing questions about disqualification practices and should waste no time in adopting clear, transparent, and consistent rules so that those questions may be answered fairly.

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[6] *See* Pet'r's Mot. for Prompt Disqualification of Justice Berger, Jr., *Harper v. Hall*, No. 413P21 (N.C. Dec. 6, 2021).

Recognizing that the questions raised in this case do not require the Court to change an "established rule,"[7] it is also not unusual for a court to make generally applicable law in the context of a given case. The entire body of common law is based on the idea that cases will be carefully decided and that the rule of law used in a given case may be applicable to future cases. As amici point out, North Carolina was the first state to adopt the principle of judicial review—a generally applicable principle of law developed in a particular contested case.[8] Under the principle of *stare decisis*, "where a principle of law has become settled by a series of decisions, it is binding on the courts and should be followed in similar cases." *State v. Ballance*, 229 N.C. 764, 767 (1949).

In other words, general principles of law follow from decisions of the Court made in particular cases. Developing a generally applicable rule now, when directly faced with the question of what that rule should look like, is no different from developing generally applicable rules of law in the course of rendering any other judicial decision. There is no reason the public should have confidence in the Court's application of common law when rules have developed in particular, litigated cases, but should have no confidence in the Court's decision to adopt generally applicable procedures for handling disqualification now that the Court is faced with a live controversy. Indeed, deferring a decision on what procedure the Court should follow

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[7] Indeed, if anything, the NC NAACP suggests that the Court formally adopt a consistent policy akin to the one that was, upon information and belief, most recently in place.

[8] Br. of Amici Edmunds, Jackson, and Martin at 9 (citing *Bayard v. Singleton*, 1 N.C. (Mart.) 5 (1787)).

until after the issue becomes moot in this case (and other pending cases) is more likely to call into doubt the integrity of the Court's decision-making.[9]

II. The Judiciary should exercise its power to implement consistent practices for disqualification.

Amici suggest that there is no need to adopt clear rules on disqualification because judicial conflicts rarely rise to the level of constitutional due process violations.[10] As a primary matter, the fact that some disqualification issues may not raise due process concerns in no way lessens the need for a remedy when a conflict *does* constitute a due process violation. And this Court is not limited to addressing the most egregious failures to recuse; the Court has broad inherent authority to "do all things that are reasonably necessary for the proper administration of justice." *Beard v. N.C. State Bar*, 357 S.E.2d 694, 696 (N.C. 1987); *see also* Pl.-Appellant's Suppl. Resp. Br. at 4-5. The proper administration of justice requires a panel free from justices whose impartiality may reasonably be questioned.

Second, amici propose no mechanism for addressing due process violations when they do in fact occur. If there are no consistent, transparent procedures governing disqualification, parties and the public will have no mechanism to ensure that the requirements of due process are met.

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[9] North Carolinians are paying attention to what is happening at North Carolina's courts. According to a poll this month, a majority of North Carolinians—from both parties—believe that Justice Berger should not participate in cases involving his father. Public Policy Polling, *North Carolina Survey Results* at 2, 17 (Dec. 6-7, 2021), https://progressncaction.org/wp-content/uploads/2021/12/NorthCarolinaResults.pdf (reporting that 72% of respondents, including 80% of those identifying as Democrats and 62% of those identifying as Republicans, believe Justice Berger should recuse himself from cases involving his father). Waiting to resolve these issues at a later date risks serious harm to the public's perceptions of the fairness of North Carolina's courts.

[10] Br. of Amici Edmunds, Jackson, and Martin at 5-6.

Most importantly, although there are no clear *procedures* governing disqualification, North Carolina has set clear *standards* for disqualification in the Code of Judicial Conduct. Whether or not a particular failure to recuse when required to do so under the Code rises to the level of a due process violation, it still constitutes a violation of the Code, and North Carolina needs a system that ensures the Code is fairly adhered to.

The authority to adopt rules governing disqualification procedures lies with this Court. Plaintiff NC NAACP has already noted in its Supplemental Brief and response that disqualification is an entirely separate matter from judicial discipline. Pl.-Appellant's Suppl. Br. at 21-22; Pl.-Appellant's Suppl. Resp. Br. at 6-8. The fact that power to remove or discipline a judge or justice lies with the legislature has no bearing on how this Court decides when justices should or should not be disqualified. The NC NAACP and supportive amici have further already documented that this Court has the authority to create rules to govern disqualification. Pl.-Appellant's Suppl. Br. at 20-22. The Court should waste no time in doing so.

CONCLUSION

For the foregoing reasons, this Court should adopt clear, transparent rules to govern questions of disqualification and ensure that disqualification decisions are made in an impartial manner. Because questions of judicial disqualification are arising with increasing frequency, this Court should not wait to put rules in place.

The sooner the Court acts, the sooner it can reinforce public faith in our judiciary and the commitment of this Court to ensuring a fair tribunal.

Respectfully submitted this 22nd day of December 2021.

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