NO. 261A18-3 TENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

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.	)	<u>From Wake County</u> No. COA19-384

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RESPONSE TO DEFENDANT-APPELLEES' MOTION IN THE ALTERNATIVE TO DISQUALIFY JUSTICE EARLS

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RESPONSE TO DEFENDANT-APPELLEES' MOTION IN THE ALTERNATIVE TO DISQUALIFY JUSTICE EARLS

****

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Plaintiff-Appellant, North Carolina State Conference of the National Association for the Advancement of Colored People ("NC NAACP"), respectfully files this Response to the Motion in the Alternative of Defendant-Appellees Speaker of the House Tim Moore and Senate President Pro Tempore Philip Berger for the Disqualification of Justice Earls.

I. This Court should adopt clear and consistent standards for disqualification.

In its supplemental brief to the Court, the NC NAACP requested that the Court adopt clear, consistent standards for disqualification. Pl.-Appellant's Suppl. Br. at 4-10, 20-28. Defendants' late-arriving motion requesting "in the alternative" that Justice Earls be disqualified in this case further cements the need for such rules and procedures. Litigants should have a clear process they can follow when they think disqualification is appropriate, and clear timelines to adhere to so that disqualification motions are not filed—as this one was—in a way that disrupts the orderly progress of the litigation.

Defendants' suggestion that the need for this late-filed motion only occurred to them now because they previously believed all disqualification decisions should be initiated only by Justices themselves rings hollow. *See* Def.-Appellees' Mot. for Alternative Relief to Disqualify Justice Earls at 9. Defendants have moved for Justice Earls' disqualification via motion in the past. *See* Legislative Defendants' Mot. to Recuse Justice Earls, *Common Cause v. Lewis,* No. 417P19 (Nov. 6, 2019). Moreover, Defendants mischaracterize Plaintiff's position when they suggest that NC NAACP

has asserted that disqualification may only be initiated via a motion from parties. *See* Def.-Appellees' Mot. for Alternative Relief to Disqualify Justice Earls at 1-2. NC NAACP makes no such suggestion. Instead, NC NAACP referenced many states with clear procedures for disqualification that include schemes for both judge-initiated and party-initiated recusal. *See, e.g.*, Mich. Ct. R. 2.003(B) ("A party may raise the issue of a judge's disqualification by motion or the judge may raise it."). A similar approach would be appropriate in North Carolina.

The simple truth is Defendants have yet to identify any objective, reasonable grounds that would merit disqualification of Justice Earls under the North Carolina Code of Judicial Conduct. Had they identified legitimate grounds for disqualification, there is no reason to think that they would not have filed their motion before the case was scheduled for argument.[1] A review of Defendants' arguments by the full court will make clear that Justice Earls does not need to be disqualified from this case.

II. Justice Earls was not counsel in the matter before the court.

Despite Defendants' implications to the contrary, Justice Earls was not involved in the case that is now before this Court. Nor did she ever represent NC NAACP in this case or in the prior *Covington* litigation. The fact that related legal issues were raised in a case where Justice Earls was counsel does not require her recusal.

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[1] The timing of Defendants' Motion in the Alternative for Disqualification is particularly odd in this instance, given the allied brief of amici curiae Institute for Constitutional Law and John Locke Foundation, which argued that Plaintiff's Motion for Disqualification should be denied under a theory of "waiver" for being filed too late. Presumably Defendants now disavow the waiver argument, given that their Motion for Disqualification was filed four months after Plaintiff's Motion.

Under the North Carolina Code of Judicial Conduct, there is no requirement that judges be disqualified or recuse themselves when they previously advocated for a particular legal position in separate litigation that is similar or related to a position before the Court. *See* N.C. Code of Jud. Conduct Canon 3(C)(1). More broadly, the mere "fact that a judge actively advocated a legal, constitutional or political policy or opinion before being a judge, is not a bar to adjudicating a case that implicates that opinion or policy." *Wessmann by Wessmann v. Boston Sch. Comm.*, 979 F. Supp. 915, 917 (D. Mass. 1997) (citing *Laird v. Tatum,* 409 U.S. 824, 830 (1972)) (Rehnquist, J., declining to recuse) (mem.) (holding that a judge's prior membership in a civil rights organization that engaged in school desegregation cases did not create a reasonable basis for questioning the judge's impartiality in this case, though the judge ultimately decided to recuse given potential knowledge of disputed material facts from involvement in a related case).

By the same token, under the federal recusal statute, courts have held that even representing a party in the very same case does not require recusal, so long as the representation was at "an earlier stage of the case" and on "different issues." *Little Rock Sch. Dist. v. Armstrong*, 359 F. 3d 957, 958-59 (8th Cir. 2004); *see also United States v. Lovaglia*, 954 F. 2d 811, 815 (2d Cir. 1992) ("A judge's prior representation of one of the parties in a proceeding . . . does not automatically warrant disqualification."). Importantly, Justice Earls did not represent NC NAACP in the *Covington* case at all, and as set forth in more detail below, did not advocate for the position at issue in this case.

Defendants attempt to stretch the rule regarding having "served as lawyer in the matter in controversy" from Canon 3(C)(1)(b) to include cases that are "sufficiently related." Def.-Appellees' Mot. for Alternative Relief at 6 (citing *Little Rock Sch. Dist. v. Pulaski Cnty. Special Sch. Dist. No. 1*, 839 F.2d 1296, 1302 (8th Cir. 1988)). But the Eighth Circuit in *Little Rock School District* did not adopt such an overbroad "sufficiently related" gloss on the "matter in controversy" rule, and North Carolina courts have not done so either. The sole support relied upon by Defendants for stretching Canon 3(C)(1)(b) beyond its plain terms was actually just the Eighth Circuit summarizing the argument made by one of the parties to that case. Instead, the court found: "Even if we accept appellants' argument that different cases may constitute the same 'matter in controversy' . . . the question of what kinds of cases are sufficiently related for the purposes of [the federal disqualification statute] would remain a question of judgment and degree." *Little Rock Sch. Dist.*, 839 F.2d at 1302. Thus, the court was not convinced that different cases could constitute the same matter in controversy under the federal disqualification statute and said that even if it were to adopt that standard, the scope of a "matter in controversy" would remain fact-dependent. *Id.*

A later Eighth Circuit case makes plain that the court did not conclude that different cases can necessarily constitute the same "matter in controversy" just because they are related. *See In re Apex Oil Co.*, 981 F.2d 302 (8th Cir. 1992). In *Apex Oil*, the court concluded that a judge's disqualification was not necessary from a case involving claims in a bankruptcy proceeding following an oil spill, even though

the judge had previously served as a lawyer in a different case seeking compensation related to that same oil spill. *Id.* There is even less reason here, in a case with no financial interests at stake, to attempt to stretch the rule regarding a "matter in controversy" to subsequent cases with different parties.

Finally, it is important to note that Justice Earls' role as counsel for the *Covington* plaintiffs focused on whether legislative districts in North Carolina were the result of an illegal racial gerrymander. The courts ruled that they were and required district maps to be redrawn as a cure. Those legal questions are all settled.

The matter before this Court is a separate issue, which arose from the *fact* of the gerrymander declared by the *Covington* court but which presents a distinct legal question. This case challenges whether a legislative body that relied on votes from the illegally gerrymandered districts to achieve a supermajority had the authority to amend the North Carolina Constitution. *See* Pl.-Appellant's New Br. While it is true that the *Covington* plaintiffs identified the fact that there was a "risk" that legislative actions taken while legislators were not elected from legal districts "could be subject to challenge under state law," the issue was not further expanded upon by the plaintiffs in briefing or at argument and was not resolved by the court.[2] *See* Def.-Appellees' New Br. at App. 7-8; *Covington v. North Carolina*, 270 F. Supp. 3d 881 (M.D.N.C. 2017). To suggest that a judge is barred from adjudicating legal issues he

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[2] In fact, the court stated that the extent to which the legislature was empowered to act was an "unsettled question of state law . . . more appropriately directed to North Carolina courts." *Covington*, 270 F. Supp. 3d at 901.

or she has mentioned in pleadings filed on behalf of different parties in separate litigation would effectively render former litigators unable to serve as judges.

Justice Earls' prior legal work in *Covington* and any positions articulated during the course of that prior litigation do not disqualify her under the Code of Judicial Conduct and would not disqualify her under related federal ethical guidelines. *See Laird*, 409 U.S. at 830 (declining to hold that a Justice ought to be disqualified for previously expressing a "public view as to what the law is or ought to be").

III. Justice Earls was not engaged in this matter as a plaintiff.

It is no surprise that Justice Earls, a longtime champion of racial equity and herself a woman of color, has been a member of the national NAACP. It is well established, however, that disqualification based on race, lived experience, or participation in the civil rights movement is not a basis upon which judges should recuse from a case. In *United States v. Alabama*, for instance, the Eleventh Circuit squarely rejected litigants' suggestion that a judge was biased and should be disqualified because his children would theoretically benefit from a ruling that the plaintiff class of children of color had been unconstitutionally deprived of equal educational opportunities based on race; indeed, the court held that "[t]o disqualify [the judge] on the basis of his children's membership in the plaintiff class . . . would come dangerously close to holding that minority judges must disqualify themselves from all major civil rights actions." 828 F.2d 1532, 1542 (11th Cir. 1987), *cert. denied*, 487 U.S. 1210 (1988).

So too here. To suggest that Justice Earls cannot be impartial because she is a member of the community served by the NAACP—*see* Def.-Appellees' Mot. for Alternative Relief to Disqualify Justice Earls at 7-8—comes dangerously close to suggesting that no jurist of color whose own rights might be protected by litigation to safeguard minorities' constitutional rights is fit to judge such cases. And, of course, "[t]o disqualify minority judges from major civil rights litigation solely because of their minority status is intolerable." *United States v. Alabama*, 828 F.2d at 1542; *see also Melendres v. Arpaio*, No. CV–07–2513–PHX–MHM, 2009 WL 2132693, at *8 (D. Ariz. July 15, 2009) (rejecting the notion that a Hispanic judge should not preside over a controversial case involving discrimination against Hispanic individuals as "repugnant to the notion that all parties are equal before the law, regardless of race"); *MacDraw, Inc. v. CIT Grp. Equip. Fin., Inc.*, 157 F.3d 956, 963 (2d Cir. 1998) (noting that "it is intolerable for a litigant, without any factual basis, to suggest that a judge cannot be impartial because of his or her race and political background"); *Pennsylvania v. Loc. Union 542, Int'l Union of Operating Eng'rs*, 388 F. Supp. 155 (E.D. Pa. 1974).

Courts have also repudiated the argument that a judge should be disqualified based on prior work as a civil rights lawyer. *United States v. Alabama*, 828 F.2d at 1543; *United States v. Black*, 490 F. Supp. 2d 630, 661 (E.D.N.C. 2007) (noting that "former civil rights attorneys are not necessarily barred from presiding as a judge in civil rights cases"); *United States v. Fiat*, 512 F. Supp. 247, 252 (D.D.C. 1981) (collecting cases in which courts rejected arguments that a judge should recuse from

discrimination cases based on prior advocacy for civil rights and racial justice causes). The fact that Justice Earls has been honored by the NAACP in the past for her work as a legal advocate in the civil rights movement offers nothing to a discussion about disqualification.

Legislative Defendants have offered no facts to suggest that Justice Earls has been in any way engaged as a member of the North Carolina State Conference of the NAACP in this litigation or the facts underpinning it. *See* Def.-Appellees' Mot. for Alternative Relief to Disqualify Justice Earls at 7-8. Nor could they. Justice Earls is not charged with judging her own case because she is not, and never has been, a participant in the case, nor will she receive any particular benefit from its resolution. Thus, unlike Justice Barringer, who undisputedly voted on the constitutional amendments at issue while part of a racially gerrymandered body and was a member of the legislature at the time this suit was filed, Justice Earls has never been a party to this proceeding and is not in violation of the Code of Judicial Conduct Canon 3(C)(1) by declining to recuse.

If the Court accepts this late motion, the full Court should review the Legislative Defendants' arguments in support of disqualification, just as they should with Justices Berger and Barringer. Justice Earls should be able to offer any additional factual evidence necessary to counter the unsupported claims. After review, it will be clear that disqualification of Justice Earls would be unnecessary and improper.

CONCLUSION

This Court should adopt clear, consistent procedures to assess disqualification. Where disqualification is of concern, parties should be able to offer arguments in briefing, and the challenged justice should be able to offer relevant facts. The Court should then rule on the motion for disqualification and make its reasoning public. In this instance, because Legislative Defendants have not identified any grounds which would require the disqualification of Justice Earls, she should remain on the Court and adjudicate this case.

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The undersigned attorneys hereby certify that they served a copy of the foregoing Response to Defendant-Appellees' Motion in the Alternative to Disqualify Justice Earls upon the parties via e-mail and by the filing system to the attorney for Defendants and Amici named below:

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