

NORTH CAROLINA SUPREME COURT

NORTH CAROLINA STATE
CONFERENCE OF THE NATIONAL
ASSOCIATION FOR THE
ADVANCEMENT OF COLORED
PEOPLE

From Wake County

v.

TIM MOORE, in his official capacity,
PHILIP BERGER, in his official
capacity

BRIEF OF AMICUS CURIAE PROFESSOR JOHN V. ORTH¹

¹ No person or entity other than this amicus curiae and his counsel, directly or indirectly, either wrote this brief or contributed money for its preparation.

QUESTION PRESENTED

- I. Whether the Constitution of North Carolina Permits the Involuntary Recusal of a Justice of the Supreme Court of North Carolina.

INTEREST OF AMICUS CURIAE

Amicus John V. Orth is a legal historian and the William Rand Kenan, Jr. Professor of Law (emeritus) at the University of North Carolina School of Law, where he served as a faculty member for forty-three years.² He is the author of numerous books and scholarly articles and has devoted a substantial portion of his career to the study of the North Carolina Constitution. Amicus has a strong professional and scholarly interest in the proper interpretation of the state constitution, specifically including the provisions at issue in this case.

ARGUMENT

On 28 September 2021, the Supreme Court of North Carolina authorized briefs concerning the involuntary recusal of a Supreme Court Justice. Amicus believes that involuntary recusal would violate the Constitution of North Carolina. Amicus takes no position concerning the appropriateness of voluntary recusal.

² Law school affiliation is provided for informational purposes only. The views expressed in this brief are the author's own.

ANALYSIS

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). Involuntary recusal would constitute the temporary removal of a Justice from active service. As such, it violates the constitutional integrity of the judicial system and interferes with the separation of powers between the judicial and legislative branches of government.

The number of Justices that constitute the Supreme Court of North Carolina is determined by the North Carolina Constitution: “The Supreme Court shall consist of a Chief Justice and six Associate Justices.” N.C. Const. Art. IV, § 6.³ The selection of those Justices and their terms of office are also established by the Constitution: “Justices of the Supreme Court... shall be elected by the qualified voters and shall hold office for terms of eight years.” N.C. Const. Art. IV, § 16. Involuntary recusal would unconstitutionally reduce the number of Justices deciding a particular case and interrupt their terms of service in violation of Article IV, §§ 6 and 16.

³ The Constitution authorizes the General Assembly to increase the number of Associate Justices to not more than eight, but the General Assembly has not exercised this authority.

The North Carolina Constitution confers the authority to remove Justices of the Supreme Court on the General Assembly, which may proceed directly by impeachment or address. N.C. Const. Art. IV, § 17 (1). In addition to impeachment and address, the General Assembly, acting pursuant to a constitutional amendment adopted in 1972, now Article IV, § 17 (2), created the Judicial Standards Commission to provide for the removal of Justices for “mental or physical incapacity” or for “willful misconduct in office” or “conduct prejudicial to the administration of justice.” Removal of a Justice by act of the Supreme Court would violate Article IV, § 17.

The power exercised by all branches of North Carolina government – legislative, executive, and judicial – is drawn directly from the people: “All political power is vested in and derived from the people,” who have the “exclusive right” of regulating the State’s “internal government and police.” N.C. Const. Art. I, §§ 2 and 3. The Constitution of North Carolina expresses the people’s will with respect to the distribution of power among the branches. The Supreme Court’s appellate judicial power derives from the people through the Constitution. N.C. Const. Art. IV, §§ 1, 5, and 6. Similarly, the people through the Constitution vest the State’s legislative power in the General Assembly. N.C. Const. Art. II, § 1. The people have declared that these powers “shall be forever separate and distinct from each other.” N.C. Const. Art. I, § 6. “A frequent recurrence to fundamental principles is

absolutely necessary to preserve the blessings of liberty.” N.C. Const. Art. I, § 35. Removal of a Justice by the Supreme Court would exceed the power conferred on the Court by the Constitution and violate the fundamental principle of separation of powers prescribed by the Constitution.

Any constitutional violation would be dangerous. Involuntary recusal would be particularly dangerous. As an interpretation of the North Carolina Constitution by the Supreme Court of North Carolina, it is unclear how it could be reviewed and corrected. And it would set a precedent pregnant of many harms.

Respectfully submitted,

22 October 2021

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I certify that the lawyers below have authorized me to list their names on this document as if they had personally signed it.

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CERTIFICATE OF SERVICE

I certify that today I caused the attached document to be served on all counsel by email addressed to:

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