

SUPREME COURT OF NORTH CAROLINA

REBECCA HARPER, et al.,

Petitioners,

v.

REPRESENTATIVE DESTIN HALL, IN
HIS OFFICIAL CAPACITY AS CHAIR OF
THE HOUSE STANDING COMMITTEE
ON REDISTRICTING, et al.,

Defendants.

From Wake County
No. 21 CVS 500085

**PETITIONERS' MOTION FOR PROMPT DISQUALIFICATION
OF JUSTICE BERGER, JR., OR, IN THE ALTERNATIVE, FOR DEFERRED
CONSIDERATION OF DISQUALIFICATION FOLLOWING THE COURT'S
RESOLUTION OF PETITION FOR DISCRETIONARY REVIEW PRIOR TO
DETERMINATION BY THE COURT OF APPEALS**

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF NORTH CAROLINA:

Petitioners respectfully submit this motion for prompt disqualification of Justice Philip Berger, Jr., pursuant to Canon 3C(1)(d)(i) of the North Carolina Code of Judicial Conduct, or, in the alternative, for deferred consideration of disqualification following the Court's resolution of the petition for discretionary review prior to determination by the court of appeals, which Petitioners filed today. In support of this motion, Petitioners state as follows:

1. Canon 3C(1)(d)(i) of the North Carolina Code of Judicial Conduct governs disqualification of judges based on the appearance of impartiality, including when a judge has a close enough familial relationship with a party to a case. This Canon provides, in relevant part:

On motion of any party, a judge should disqualify himself/herself in a proceeding in which the judge's impartiality may reasonably be questioned, including but not limited to instances where ... [t]he judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person ... [i]s a party to the proceeding, or an officer, director, or trustee of a party.

2. Disqualification is required in the situations set out in Canon C even if a judge is in fact capable of impartially presiding over the case before them. *See Fie v. State*, 320 N.C. 626, 628-29 (1987).

3. Here, Justice Berger, Jr.'s father, Senator Philip Berger Sr., is a named defendant in this case—"a party to the proceeding." The plain text of Canon 3C(1)(d)(i) thus unequivocally mandates disqualification. The parent-child relationship is a familial relationship of the first degree.

4. Indeed, Canon 3C(1)(d)(i) requires disqualification in situations where the appearance of impartiality is far more attenuated than here. For instance, disqualification would be required if the *spouse* of a judge's *niece or nephew* were a *director* of a *corporation* named as a party in a case. The appearance of impartiality is at its apex when, as here, the judge's own father is a named defendant.

5. It does not matter that Senator Berger is named as a defendant in his official capacity as Senate President *Pro Tempore*. On its face, Canon 3C(1)(d)(i) makes no distinction between a judge's family member named as a party in their personal, official, or any other capacity. It states without exception that disqualification is required if the judge's family member "[i]s a party to the proceeding." The text of Canon 3C(1)(d)(i) reinforces this conclusion by mandating disqualification even where the judge's family member is not themselves a party to the case, but rather is "an officer, director, or trustee of a party." If disqualification is required where a judge's family member is merely an officer or director of a corporation named as a party, *a fortiori* it is required where the judge's own father is named as a defendant in an official capacity. After all, a judge's family member who sits on a corporation's board of directors has no personal interest in the litigation and the disqualification of the judge is solely due to the family member's official role.

6. Moreover, under legislation enacted in 2017, in any case challenging "the validity or constitutionality of an act of the General Assembly," "the General Assembly through the Speaker of the House of Representatives and President Pro Tempore of the Senate jointly shall possess *final decision-making authority with respect to the defense of the challenged act.*" N.C. Gen Stat. § 120-32.6(b) (emphasis added). Thus Senator Berger

is far more than the ordinary governmental defendant who is sued in his official capacity: he has statutory authority to direct the defense of this action.

7. In addition to his status as an official-capacity defendant, with decision-making authority for the defense of the litigation, Senator Berger's personal interests as an individual legislator and candidate are directly at stake. The three-judge panel below consolidated this case with *North Carolina League of Conservation Voters v. Hall*, No. 21-CVS-15426. That case, in which Senator Berger is also a defendant, challenges the constitutionality of North Carolina's legislative districts, including the districts under which citizens elect North Carolina Senators. Plaintiffs in that case have also filed a petition in this Court seeking discretionary review prior to determination by the Court of Appeals.

8. In an abundance of caution, to avoid any later claim of waiver, Petitioners are raising this mandatory basis for disqualification now and seeking prompt disqualification of Justice Berger, Jr., at this time.

9. But time is of the essence in resolving Petitioners' request for immediate discretionary review. As explained in the pending petition, the Executive Director of the State Board of Elections has attested that, absent intervention by the courts, the Board must receive final redistricting plans by 14 December 2022 for use in the 8 March 2022 primary election. This Court must therefore grant review now to enable review in time for the March primary election, or even to enable review in time for a deferred May primary election. Although all litigants in North Carolina courts are entitled to enforcement of the Code of Judicial Conduct provisions ensuring both the reality and appearance of

impartiality, Petitioners' foremost interest is in the Court's prompt resolution of their petition for discretionary review, even if it requires the full Court's participation at this time.

10. Accordingly, if time does not permit consideration of disqualification now, and to avoid any delay that would further jeopardize the State Board's ability to conduct the upcoming elections in orderly fashion, Petitioners request, in the alternative, that consideration of this motion under Canon 3C(1)(d)(i) be deferred until after the Court resolves their pending petition for discretionary review.

CONCLUSION

For the reasons stated herein, Petitioners respectfully request that Justice Berger, Jr. be disqualified promptly from participating in this case, or, in the alternative, that consideration of disqualification be deferred until after resolution of the petition for discretionary review of the prior determination by the Court of Appeals.

Respectfully submitted this 6th day of December, 2021.

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Electronically submitted

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N.C. R. App. P. 33(b) Certification:
I certify that all of the attorneys listed
have authorized me to list their names on
this document as if they had personally
signed it.

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CERTIFICATE OF SERVICE

Pursuant to North Carolina Rule of Appellate Procedure 26, I hereby certify that I have this day served a copy of the foregoing by email, addressed to the following counsel for defendants:

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This the 6th day of December, 2021.

Electronically Submitted
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