

No.

TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

NORTH CAROLINA STATE CONFERENCE OF)
THE NAACP, COMMON CAUSE, MARILYN)
HARRIS, GARY GRANT, JOYAH BULLUCK, and)
THOMASINA WILLIAMS,)

Plaintiffs-Petitioners,)

v.)

PHILIP E. BERGER *in his official capacity as*)
President Pro Tempore of the North Carolina Senate;)
TIMOTHY K. MOORE *in his official capacity as*)
Speaker of the North Carolina House of)
Representatives; RALPH E. HISE, JR., WARREN)
DANIEL, PAUL NEWTON, in their official)
capacities as Co-Chairmen of the Senate Committee)
on Redistricting and Elections; DESTIN HALL, in)
his official capacity as Chairman of the House)
Standing Committee on Redistricting; THE STATE)
OF NORTH CAROLINA; THE NORTH CAROLINA)
STATE BOARD OF ELECTIONS; DAMON)
CIRCOSTA, in his official capacity as Chair of the)
State Board of Elections; STELLA ANDERSON, in)
her official capacity as Secretary of the State Board)
of Elections; STACY EGGERS IV, in his official)
capacity as Member of the State Board of Elections;)
JEFF CARMON III, *in his official capacity as*)
Member of the State Board of Elections; TOMMY)
TUCKER, *in his official capacity as Member of the*)
State Board of Elections; KAREN BRINSON BELL,)
in her official capacity as Executive Director of the)
State Board of Elections,)

From Wake County
No. 21 CVS 014476

Defendants-Respondents.

PLAINTIFFS-PETITIONERS' MOTION FOR
DISQUALIFICATION OF JUSTICE BERGER, JR.

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Petitioners, North Carolina State Conference of the NAACP, Common Cause, Marilyn Harris, Gary Grant, Joyah Bulluck, and Thomasina Williams, respectfully submit this Motion for Disqualification of Justice Philip Berger, Jr., pursuant to Canon 3C(1)(d)(i) of the North Carolina Code of Judicial Conduct. Disqualification is appropriate because Justice Berger, Jr.'s father is Senate President *Pro Tempore* in the North Carolina General Assembly and is a named Legislative Respondent in this case. In support of this Motion, Petitioners state as follows:

1. This matter arises from Legislative Respondents' unprecedented disregard of state Constitutional requirements in the decennial redistricting for state legislative districts. Specifically, in their 29 October 2021 Verified Complaint, Petitioners allege that Legislative Respondent Philip E. Berger and his fellow Legislative Respondents orchestrated a redistricting process that violated the express directive of this Court, in *Stephenson v. Bartlett*, that state legislative districts "required by the VRA shall be formed prior to" all others to ensure compliance with the Supremacy Clauses in Article I, Sections 3 and 5 of our state Constitution. *Stephenson v. Bartlett*, 355 N.C. 354, 383 (2002); *Stephenson v. Bartlett*, 357 N.C. 301, 305 (2003). *See generally* App. 210 (Verified Complaint).¹

2. On 3 December 2021, the Honorable A. Graham Shirley issued a written Order granting Legislative Respondents' Motion to Dismiss and denying Petitioners'

¹ Citation to "App." indicates a reference to the Appendix of materials from the record in this matter appended to Petitioners' Petition for Discretionary Review, incorporated by reference and filed concomitantly with this Motion.

Motion for Preliminary Injunction. App. 267. Petitioners promptly filed a Notice of Appeal on 6 December 2021, and, concomitantly with this Motion, Petitioners have also filed a Motion pursuant to Rule 2 of the Rules of Appellate Procedure to Expedite Consideration of Decision in the Public Interest and a Petition for Discretionary Review of the Superior Court's Order.

3. Petitioners respectfully contend that consideration of these claims requires the disqualification of Justice Berger Jr., whose father is a named Legislative Respondent and whose actions underlie the alleged violations of state Constitutional law at issue in this matter. Canon 3C(1)(d)(i) of 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.

4. Thus, Canon 3C(1)(d)(i) directs disqualification of a judge when a judge's close family member is a party to the proceeding. Such is the case here, where Justice Berger, Jr.'s father, Senator Berger, Sr., is a named Legislative Respondent in this case.

5. A judge should be disqualified if there is "sufficient force in the allegations contained in [the] motion to proceed to find facts." *N. Carolina Nat. Bank*

v. Gillespie, 291 N.C. 303, 311 (1976). The party moving for recusal has the burden of objectively demonstrating that there are actual grounds for disqualification. *In re Nakell*, 104 N.C. App. 638, 647 (1991). But, once the movant presents evidence of “sufficient force” to require findings of fact, the judge whose recusal is requested should disqualify themselves. *See, e.g., N. Carolina Nat. Bank*, 291 N.C. at 311.

6. Disqualification in this matter is warranted based on the plain meaning of Canon 3C(1)(d)(i) as well as due to the exceptional circumstances of this matter.

7. First, Justice Berger, Jr.’s father, Senator Berger, Sr., is a named Defendant in this case, also known as “a party to the proceeding.” Canon 3C(1)(d)(i). Senator Berger, Sr. and Justice Berger, Jr. have a parent-child relationship, a familial relationship of the first degree. Thus, the plain text of Canon 3C(1)(d)(i) is unequivocal and requires the disqualification of Justice Berger, Jr. from Petitioners’ proceeding on appeal before this Court. This fact requires disqualification notwithstanding that Legislative Respondent Berger is named as a Defendant in his official capacity as Senate President *Pro Tempore*, as Canon 3C(1)(d)(i) makes no distinction between the familial relationship and their personal or official capacity.² Without disqualification, there will not be the appearance of impartiality in this matter, especially where the case caption itself reads as “*N.C. NAACP, et al. v. Berger, et al.*” Accordingly, disqualification is still required under Canon 3(C)(1)(d)(i) even if the judge is capable of impartially presiding over the case before them. *See State v.*

² President *Pro Tempore* also meets Canon 3(C)(d)(1)’s further definition of being “an officer” of party. Canon 3(C)(d)(1). Section 14(1) of Article II of the North Carolina Constitution defines the President *Pro Tempore* as an “officer of the Senate.”

Fie, 320 N.C. 626, 628-29 (1987); *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 886 (2009) (“Due process may sometimes bar trial judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties”) (internal citations omitted).

8. Secondly, and more importantly, the exceptional circumstances in this matter would require recusal notwithstanding Canon 3(C)(1)(d)(i)’s clear language. Legislative Respondent Berger’s role in this matter is not a mere formality. Rather, his alleged actions in orchestrating the decennial redistricting process at issue underlie the alleged state Constitutional violations that will be considered by the Court. App. 212, 219 (Compl. ¶¶ 2-3, 24). As President Pro Tempore of the Senate, Legislative Respondent Berger “has the exclusive right and authority to appoint the membership of all committees, regular and select, and to appoint committee chairs and vice-chairs[.]” *See* North Carolina General Assembly, Senate Rules and Directory – 2021-22 Session, Rule 31, at p 80.³ The President Pro Tempore also has “the exclusive right and authority to determine the total number of members and the number of members of each political party of each committee.” *Id.* at Rule 34(a), p 82. And Legislative Respondent Berger has utilized this prerogative, setting both the leadership and membership of the Senate Redistricting and Elections Committee, as well as modifying its membership during the legislative session.⁴ All of this serves to

³ Available at <https://www.ncleg.gov/DocumentSites/SenateDocuments/2021-2022%20Session/2021%20Senate%20Rules%20Directory.pdf>.

⁴ Compare Senator Berger Press Shop, Senator Berger Announces Committee Appointments, Jan. 7, 2021, <https://bergerpress.medium.com/senator-berger-announces-committee-appointments-35c47eef55db>, with North Carolina General Assembly, Senate Redistricting and Elections

underscore the obvious: Legislative Respondent Berger is not just a nominal defendant in this case – he has exercised an enormous amount of control over the legislature’s unlawful redistricting process.

9. It is therefore reasonable to conclude Legislative Respondent Berger has an interest that could be “substantially affected by the outcome of the proceeding,” Canon 3(C)(d)(1)(iii), especially any finding that he and his fellow Legislative Respondents were derelict in their duties in redistricting as required by the state Constitution and any order compelling them to undergoing the first step of *Stephenson* as Petitioners have requested. App. 247-48 (Compl. “Prayer for Relief”). Likewise, Legislative Respondent Berger may very well be a material witness in this matter, depending on the outcome of any asserted legislative privilege. *See* Canon 3(C)(d)(1)(iv). Finally, Legislative Respondent Berger has the power (and in this matter has) jointly designated with the Speaker Moore lead counsel in this matter, thus exercising “final decision-making authority with respect to the representation, counsel, or service for the General Assembly” pursuant to Section 120-32.6(c) of the General Statutes. In other words, Legislative Respondent Berger’s role in this matter is active, substantive, and determinative of the defense of this case and no mere formality.

10. In sum, without recusal or disqualification of Justice Berger, Jr., Petitioners will be denied a fair judicial process and denied their fundamental rights

Committee – Membership,
<https://www.ncleg.gov/Committees/CommitteeInfo/SenateStanding/154> (last visited Dec. 6, 2021).

because “an impartial judge” is a “prime requisite[] of due process.” *Ponder v. Davis*, 233 N.C. 699, 704 (1951); *see Caperton*, 556 U.S. at 876 (“It is axiomatic that a fair trial in a fair tribunal is a basic requirement of due process.”) (internal citations omitted).

11. Time is of the essence in the matters Petitioners present before this Court because “once the election occurs, there can be no do-over and no redress.” *Holmes v. Moore*, 270 N.C. App. 7, 35 (2020) (internal citations omitted). Therefore, Petitioners seek prompt disqualification of Justice Berger, Jr. as needed to allow this case to proceed on an expedited basis.

CONCLUSION

For the reasons stated herein, Petitioners respectfully request that Justice Berger, Jr. be disqualified from participating in this case.

Respectfully submitted, this the 6th day of December, 2021.

SOUTHERN COALITION FOR SOCIAL
JUSTICE

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N.C.R. App. P. 33(b) Certification:
I certify that all of the attorneys listed 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

The undersigned certifies that the foregoing document was filed to the electronic-filing site at <https://www.ncappellatecourt.org> and served upon all parties by electronic mail and, if requested, by United States Mail, addressed to the following:

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This, the 6th day of December, 2021

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