No. 417P19 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

COMMON CAUSE, et al.,

Plaintiffs,

v.

DAVID LEWIS, IN HIS OFFICIAL CAPACITY AS SENIOR CHAIRMAN OF THE HOUSE SELECT COMMITTEE ON REDISTRICTING, et al.,

Defendants.

From Wake County
18 CVS 014001

****

PLAINTIFFS-APPELLANTS' RESPONSE TO LEGISLATIVE DEFENDANTS' MOTION TO RECUSE JUSTICE ANITA EARLS

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PLAINTIFFS-APPELLANTS' RESPONSE TO LEGISLATIVE DEFENDANTS' MOTION TO RECUSE JUSTICE ANITA EARLS

****

Plaintiffs respectfully submit the following response to Legislative Defendants' motion to recuse Justice Earls.

ARGUMENT

Legislative Defendants cannot meet their burden under North Carolina law "to demonstrate objectively that grounds for disqualification actually exist." *State v. Scott*, 343 N.C. 313, 325, 471 S.E.2d 605, 612 (1996). None of their asserted bases for recusal suggests any reason—let alone the necessary "substantial evidence"—of "a personal bias, prejudice or interest on the part of the judge that [s]he would be unable to rule impartially." *Id.* The standard for recusal under the Due Process

Clause is even higher: Legislative Defendants must show "extreme facts that created an unconstitutional probability of bias." *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 887 (2009). Justices of the Supreme Court, more so than lower court judges, should be especially wary of needless recusals. *Cheney v. U.S. Dist. Court for D.C.*, 541 U.S. 913, 915 (2004) (Scalia, J., in chambers); *accord Microsoft Corp. v. United States*, 530 U.S. 1301, 1303 (2000) (Rehnquist, J., in chambers). Unlike lower courts, recusal here would risk a tie vote and thus would be "effectively the same as casting a vote against the petitioner." *Cheney*, 541 U.S. at 915.

I. There Is No Overlap Between This Appeal and any Litigation in Which Justice Earls Served as an Attorney

Canon 3(C)(1) of the North Carolina Code of Judicial Conduct provides that "a judge should disqualify []herself in a proceeding in which the judge's impartiality may reasonably be questioned, including but not limited to instances where … [t]he judge served as lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter." Justice Earls was never involved "in the matter in controversy" here, and thus there is no basis for recusal under Canon 3(C)(1)(b).

1. Legislative Defendants irresponsibly speculate, without any substantiation, that Justice Earls "likely helped conceive and plan this case." Mot. 15; *see also id.* at 18 ("It is plausible, if not likely, that Justice Earls was involved in planning this lawsuit."). They further speculate, again without basis, that Justice Earls likely "discussed this partisan-gerrymandering challenge with Mr. Speas." *Id.* at 18; *see also id.* at 19. These assertions are unequivocally false.

None of the Plaintiffs, nor any of their counsel, has ever discussed this lawsuit with Justice Earls, either before the case was filed or any time thereafter. Legislative Defendants offer zero evidence supporting their charge. None exists.

"The decision whether a judge's impartiality can reasonably be questioned is to be made in light of the facts as they existed, and not as they were surmised." *Cheney*, 541 U.S. at 914 (citation and internal quotation marks omitted). Legislative Defendants' motion rests on baseless surmise, not facts.

2. Legislative Defendants are flat wrong (at 18) that this case "carries forward" *Covington v. North Carolina*, 15-cv-399 (M.D.N.C.). They argue (at 19) that "the plans challenged here were enacted as part of the *Covington* litigation." But the districts challenged here were enacted *in 2019* as part of the remedial phase of this litigation. By definition, these 2019 remedial districts were not at issue in *Covington*. For this reason alone, Justice Earls was not—and could not have been—a "lawyer in the matter in controversy" for purposes of Canon 3(C)(1).

While Legislative Defendants list (at 21-22) issues relating to the *Covington* remedial phase that were raised in the trial of this case, none of those issues is relevant to this appeal. This appeal centers on the 2019 remedial plans, not whether Legislative Defendants misled the *Covington* court and the public in 2017.

3. Even if this appeal did involve the 2017 plans at issue in the liability phase of this case, there still would be no overlap with *Covington*. The plaintiffs in *Covington* challenged 28 specific districts enacted in 2011 as unconstitutional racial gerrymanders. All of those districts were struck down in *Covington* and ordered

redrawn. This case did not involve any of those 28 districts drawn in 2011. To the contrary, while Plaintiffs in this case challenged certain districts drawn in 2011, "[t]he *Covington* litigation *did not involve any of the districts drawn in 2011 that are at issue in the present case*." *Common Cause v. Lewis*, No. 18 CVS 014001, 2019 WL 4569584, at *5 (N.C. Super. Sep. 03, 2019) (emphasis added).

Nor do Plaintiffs here challenge the districts that the *Covington* plaintiffs objected to during that case's remedial phase. The *Covington* plaintiffs objected to seven House districts and two Senate districts in the remedial plans there:

- House districts 21 and 57, and Senate districts 21 and 28, on the ground that they did not cure the racial gerrymanders
- House districts 36, 37, 40, 41, and 105, on the ground that they violated the North Carolina Constitution's prohibition on mid-decade redistricting
- House districts 10, 82, and 83, on the ground that they did not comply with *Stephenson* North Carolina Constitution's Whole County Provision and equal-population requirements set forth in *Stephenson v. Bartlett*, 355 N.C. 354, 383-84, 562 S.E.2d 377, 396-97 (N.C. 2002) ("*Stephenson I*")

Pls.' Objections to Defs.' Remedial Districts, 15-cv-399, ECF No. 187 (M.D.N.C. Sept. 15, 2017).

The *Covington* court sustained the objections to the four districts challenged on racial gerrymandering grounds and ordered them redrawn by a Special Master. Plaintiffs in this case did not challenge any of those four districts redrawn by the *Covington* Special Master. *See Common Cause*, 2019 WL 4569584, at *10. As for the other objections raised in *Covington*, Plaintiffs in this case never asserted any violation of the mid-decade redistricting provision or of *Stephenson*.

Legislative Defendants point to a sentence in one of the *Covington* plaintiffs' briefs asserting that the remedial districts there were partisan gerrymanders in violation of the federal constitution. Mot. 18-20 & n.7. But the *Covington* plaintiffs *expressly declined* to object to any of the 2017 remedial districts on partisan gerrymandering grounds. Pls.' Objections to Defs.' Remedial Districts at 42-43, 15-cv-399, ECF No. 187 (M.D.N.C. Sept. 15, 2017). Thus, whether the 2017 districts were partisan gerrymanders was never part of the "controversy" in *Covington*. What's more, a lawyer's passing statement on behalf of a client that districts not at issue here violate a constitutional provision not at issue here does not warrant recusal.

Under the federal recusal statute materially identical to Canon 3(C), courts have held that representing a party *in the very same case* does not require recusal, so long as the representation occurred 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."). This case is far more attenuated.

4. The other cases Legislative Defendants identify as meriting recusal are even further afield. As Legislative Defendants acknowledge, *Dickson v. Rucho* involved a racial gerrymandering challenge to 2011 districts—again, *none* of which were at issue even at the liability phase of this case, much less at the remedial phase, which is the focus of this appeal. And *Common Cause v. Rucho* was a *federal*

gerrymandering challenge to 2011 *congressional districts*, not state legislative districts. In any event, Justice Earls did not represent Common Cause in the *Rucho* case or in any other redistricting case. And Justice Earls has never represented the North Carolina Democratic Party. Neither Common Cause nor the North Carolina Democratic Party were even parties in *Dickson* and *Covington*.

5. Legislative Defendants urge this Court to take a "functional," "holistic" approach to examining the "relationship between the judge's work as a lawyer and the controversy that later comes before the same person." Mot. 17-18, 27. They say that Justice Earls just did too much voting-rights work to adjudicate a voting-rights case. If applied seriously, Legislative Defendants' standardless, freewheeling approach to recusal would hobble the judiciary and would disqualify entire categories of lawyers from becoming judges—former public defenders, for example, should recuse in all criminal cases, as their "constant refrain" as lawyers (Mot. 29) was surely hostile toward prosecutors. That is not the law.

Legislative Defendants also cite statements Justice Earls made years ago about voting rights and politics more generally. Mot. 29-30. Those statements have nothing to do with this case. And in any event they could not warrant recusal. *See Republican Party of Minnesota v. White*, 536 U.S. 765, 768 (2002); *see also League of Women Voters of Pennsylvania v. Commonwealth*, 645 Pa. 341, 361, 179 A.3d 1080, 1091-92 (2018) (Wecht, J.) (declining to disqualify in partisan gerrymandering case based on in part on *White*; though Justice had expressed "concern[s] about extreme

partisan gerrymandering," he was "confident in [his] determination to judge each case on its individual merits").

II. The North Carolina Democratic Party's Financial Support for Justice Earls Does Not Warrant Recusal

North Carolina's 2018 judicial elections were partisan, and thus candidates invariably received financial support from their respective political parties. It is thus unsurprising that the North Carolina Democratic Party (NCDP)—a plaintiff in this case—was the largest donor to Justice Earls' campaign. The same was true of her Republican opponent—the North Carolina Republican Party was her largest donor. None of this requires recusal here. If it did, then moving forward, it is not clear how any justice or judge in this State could hear any case in which their political party is a litigant.

Past precedent is relevant to the recusal inquiry, *see Cheney*, 541 U.S. at 924-26, and Justices of this Court have declined to recuse in cases involving expenditures far more significant than those here. In *Dickson v. Rucho*, the plaintiffs moved to recuse Justice Paul Newby in part based on campaign contributions from the Republican State Leadership Conference (RSLC). *See* Pl.-Appellants' Mot. Recusal of Justice Paul Newby, *Dickson v. Rucho*, No. 201PA12-2 (Oct. 11, 2013). RSLC, through its agent, had drawn the very legislative plans challenged in the case. *Id.* at 3. And, immediately before the election—with the election closely contested and with an appeal involving RSLC's plans pending—RSLC had contributed hundreds of thousands of dollars to his campaign. *Id.* In total, RSLC contributed a total of $1.17 million to a political action committee that

supported Justice Newby's campaign, and that those contributions amounted to well over half of the money spent on advertising in support of Justice Newby. *Id.* at 27-29. The amount spent to support Justice Newby was a huge proportion of the total money spent by both candidates: Independent expenditures for Justice Newby were over three times greater than the total expenditures of both campaigns. *Id.* at 28-29. Polling data also strongly suggested that the influx of last-minute spending changed the result. *Id.* at 29. The Court nonetheless summarily denied the motion for recusal. *See* Order, *Dickson v. Rucho*, No. 201P1-2 (Nov. 13, 2013).

NCDP's financial support for Justice Earls' campaign come nowhere close to the spending at issue in *Dickson*—not in absolute terms, not relative to total spending supporting her candidacy, and, critically, not relative to total spending to support the three candidates running for her seat. The candidates in 2018 received donations totaling some $2 million, with Justice Earls alone raising over $1.5 million.[1] NCDP's contributions thus amounted to less than 15% of Justice Earls' fundraising total, and they made up only 11.6% of the grand total. Contrast *Dickson*, where RSLC's contributions amounted to well over half of the money spent on advertising in support of Justice Newby. Moreover, in the 2018 cycle an estimated $1.3 million was spent on television advertising—a figure that alone

[1] *See Earls for Justice: Political Committee Disclosure Report, 2018 Fourth Quarter*, N.C. State Bd. Elecs., https://cf.ncsbe.gov/CFOrgLkup/ReportDetail/?RID=163811&TP=SUM; *Re-Elect Justice Jackson Comm: Political Committee Disclosure Report, 2018 Fourth Quarter*, N.C. State Bd. Elecs., https://cf.ncsbe.gov/CFOrgLkup/ReportDetail/?RID=168511&TP=SUM.

dramatically overshadows NCDP's spending.[2] The magnitude of NCDP's expenditures relative to *other individual* supporters is irrelevant, *contra* Mot. 33-34), because that figure says nothing about whether the money "had a significant and disproportionate influence on the electoral outcome." *Caperton*, 556 U.S. at 885. Rather, what matters is whether NCDP's expenditures—"in comparison to the *total* amount contributed to the campaign, as well as the *total* amount spent in the election." If the contributions in *Dickson* were insufficient, then surely NCDP's are, too.

Dickson aside, NCDP's contributions do not remotely approach the "extraordinary" contributions that drove the Supreme Court's decision in *Caperton*. The defendant in that high-profile case had spent over $3 million in support of the Justice's campaign—"more than the total amount spent by all other … supporters"; "three times the amount spent by [the Justice's] own committee"; and "$1 million more than the total amount spent by the campaign committees of both candidates combined." *Id.* at 880. The Court found that the outsize spending had "a significant and disproportionate influence on the outcome" of the election.

It is impossible to argue that NCDP's spending had any such effect on Justice Earls' election. *See Ryan, Ex. rel. Watson-Green v. Wake Cty. Bd. of Educ.*, 207 N.C. App. 526, 700 S.E.2d 249 (2010) (rejecting "speculative allegations of bias and unfairness" as insufficient to establish bias under *Caperton*). Legislative

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[2] *Buying Time 2018—North Carolina*, Brennan Ctr. for Justice (Oct. 8, 2018), https://www.brennancenter.org/our-work/research-reports/buying-time-2018-north-carolina.

Defendants contend that the election was "close." Mot. 35. But Justice Earls won by more than 15 points over the runner-up.

As Legislative Defendants explained when opposing Justice Newby's recusal in *Dickson*, requiring recusal based on run-of-the-mill financial support would "effectively shut out" entities from "participating in the political process in the future out of fear that doing so could cause members of this Court to recuse should they or their donors or organizers find themselves as a litigant in a matter that must be decided by this Court." Legislative Defs.' Resp. at 19-20, *Dickson*, No. 201PA12 (Dec. 3, 2012). Indeed, if NCDP's financial support were enough to warrant recusal, then all cases involving a political party in North Carolina will require recusal of all judges of that political party.

CONCLUSION

Legislative Defendants' motion should be denied.

Respectfully submitted this 7th day of November, 2019.

POYNER SPRUILL LLP

By: s/ Edwin M. Speas, Jr.
Edwin M. Speas, Jr.
N.C. State Bar No. 4112
espeas@poynerspruill.com
P.O. Box 1801
Raleigh, NC 27602-1801
Telephone: 919.783.2881
Facsimile: 919.783.1075

Counsel for Common Cause, the North Carolina Democratic Party, and the Individual Petitioners

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.

POYNER SPRUILL LLP

By: s/ Caroline P. Mackie
Caroline P. Mackie
N.C. State Bar No. 41512
cmackie@poynerspsruill.com
P.O. Box 1801
Raleigh, NC 27602-1801
Telephone: 919.783.1108
Facsimile: 919.783.1075

Counsel for Common Cause, the North Carolina Democratic Party, and the Individual Petitioners

ARNOLD AND PORTER KAYE SCHOLER LLP

R. Stanton Jones*
David P. Gersch*
Elisabeth S. Theodore*
Daniel F. Jacobson*
601 Massachusetts Ave. NW
Washington, DC 20001-3743
(202) 954-5000
stanton.jones@arnoldporter.com

Counsel for Common Cause and the Individual Petitioners

**Pro Hac Vice Motions Forthcoming*

PERKINS COIE LLP

Marc E. Elias*
Aria C. Branch*
700 13th Street NW
Washington, DC 20005-3960
(202) 654-6200
melias@perkinscoie.com

Abha Khanna*
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
(206) 359-8000
akhanna@perkinscoie.com

Counsel for Common Cause and the Individual Petitioners

**Pro Hac Vice Motions Forthcoming*

CERTIFICATE OF SERVICE

Pursuant to Rule 26 of the North Carolina Rules of Appellate Procedure, I hereby certify that the foregoing document has been filed with the Clerk of the North Carolina Supreme Court by electronic submission. I further certify that a copy of this document has been duly served upon the following counsel of record by email and U.S. First Class Mail:

Amar Majmundar
Stephanie A. Brennan
Paul M. Cox
NC Department of Justice
P.O. Box 629
114 W. Edenton St.
Raleigh, NC 27602
amajmundar@ncdoj.gov
sbrennan@ncdoj.gov
pcox@ncdoj.gov
Counsel for the State Board of Elections and its members

Phillip J. Strach
Michael McKnight
Alyssa Riggins
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
4208 Six Forks Road, Suite 1100
Raleigh, NC 27609
Phillip.strach@ogletree.com
Michael.mcknight@ogletree.com
Alyssa.riggins@ogletree.com
Counsel for the Legislative Defendants

John E. Branch III
Nathaniel J. Pencook
Andrew Brown
Shanahan Law Group, PLLC
128 E. Hargett Street, Suite 300
Raleigh, NC 27601
jbranch@shanahanlawgroup.com
npencook@shanahanlawgroup.com
abrown@shanahanlawgroup.com
Counsel for the Defendant-Intervenors

E. Mark Braden
Richard B. Raile
Trevor M. Stanley
Baker & Hostetler, LLP
Washington Square, Suite 1100
1050 Connecticut Ave., N.W.
Washington, DC 20036-5403
rraile@bakerlaw.com
mbraden@bakerlaw.com
tstanley@bakerlaw.com
Counsel for the Legislative Defendants

This the 7th day of November, 2019.

s/ Edwin M. Speas, Jr.
Edwin M. Speas, Jr.