No. 20-12003

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Kelvin Leon Jones, *et al.*,

Plaintiffs-Appellees,

v.

Ron DeSantis, in his official capacity
as Governor of the State of Florida, *et al.*,

Defendants-Appellants.

On Appeal from the United States District Court for the
Northern District of Florida, Case No. 4:19-cv-300-RH/MJF

APPELLEES' REPLY IN SUPPORT OF MOTION TO DISQUALIFY JUDGES ROBERT LUCK AND BARBARA LAGOA

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CERTIFICATE OF INTERESTED PERSONS

Plaintiffs-Appellees hereby certify that the disclosure of interested parties submitted by Defendants-Appellants Governor of Florida and Secretary of State of Florida on July 14, 2020 is, to the best of my knowledge, complete and correct, except for the following additional persons or entities:

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4. Consovoy, William S., *Counsel for Amicus Curiae*
5. Fitch, Lynn, Attorney General of Mississippi, *Counsel for Amicus Curiae*
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The State's response to Appellees' disqualification motion is wrong on the law and facts, and only underscores why disqualification is necessary here.[1] The Court should reject the State's invitation to invert the legal standard for disqualification, and to deem the State prejudiced if judges who pledged to recuse adhere to that commitment.

For more than a year, the State has argued plainly, as it did in its opening merits brief to this Court, that the state supreme court proceedings should dictate the outcome in the federal litigation. Now, for purposes of Appellees' recusal motion, it suddenly argues that the two are completely unrelated. The State cannot have it both ways.

ARGUMENT

I. Judges Luck and Lagoa Are Disqualified Pursuant to their Recusal Commitments, the Code of Conduct, and Federal Law.

Judges Luck and Lagoa are disqualified from participating in this case by their own recusal pledges, the Code of Conduct, and federal law. The State begins its

[1] The State's caustic rhetoric in response to Appellees' straightforward motion only underscores the weakness of its position. A disqualification motion, relying upon public statements of judges, the Code of Conduct of United States Judges, and the federal statute regarding disqualification, does not constitute an "attack," or "intimidat[ion];" nor is it a "threat[ ]," "danger," "[v]erbal assault," or "trap." Opp. at 1, 11. Rather, a party raising disqualification concerns advances important interests: "The impartiality of judges, and the appearance of impartiality, are important for ensuring public confidence in our federal courts." Ex. C at 15-16 (Luck QFR Responses).

argument by attacking a strawman: that 28 U.S.C. § 47—which prohibits judges from reviewing their own decisions on appeal—is not triggered here, and that one court has construed 28 U.S.C. § 455(b)(3) to apply strictly to the "case"—*i.e.*, the particular docket number—before it. But Appellees did not invoke these provisions, and the cases applying them are inapposite. Rather, Appellees invoked the judges' own recusal pledges, the Code of Judicial Conduct, and the catchall requirement of 28 U.S.C. § 455(a), which provide distinct grounds for disqualification and are broader than the authorities discussed by the State. The State's failure to engage with the authorities raised by Appellees' motion renders its response largely irrelevant. Addressing the actual authorities relied upon by Appellees, the reasons for recusal are plain.

First, regardless of whether federal law *required* them to do so, Judge Luck and Judge Lagoa broadly pledged to recuse themselves from any case "involving the Supreme Court of Florida," Mot. Ex. A at 24 (Lagoa QFR Responses), or in which they "ever played any role," Mot. Ex. D at 56 (Luck Questionnaire responses). This case plainly "involves" the Supreme Court of Florida during Judge Lagoa's tenure there. And it is likewise one in which Judge Luck has "ever played any role." An objective lay observer would certainly reach that conclusion, and would likewise question the judges' impartiality were they to abandon these pledges to participate

in this matter—particularly as a matter of choice and not random assignment. For that reason, 28 U.S.C. § 455(a) requires their disqualification.

The State's only response is that the Florida Supreme Court proceeding was, strictly speaking, a different "case." But the judges' pledges did not make this distinction. Judge Lagoa pledged to recuse from cases *involving* the Florida Supreme Court while she was a justice. *This case* involved the Florida Supreme Court while she was a justice—and the State does not (and cannot) contend otherwise. In fact, the State has characterized the Florida Supreme Court's proceeding as "go[ing] to the very heart of th[is] case[ ]." State Mot. to Stay, *Jones v. DeSantis*, No. 4:19-cv-00300 (N.D. Fla. Sept. 10, 2019), ECF No. 138 at 5. The unambiguous statement in Judge Lagoa's pledge requires disqualification.

Judge Luck pledged to recuse from cases in which he *ever played any role*. The State's contention that Judge Luck's pledge should be strictly limited to the particular docket number before the Court rests on far too thin a reed. Section 455(a) is concerned with how a "lay observer" who is not "trained in the law" would view the issue, *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1524 & n.12 (11th Cir. 1988), because "[t]he very purpose of § 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible," *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 865 (1988). No lay observer would conclude that Judge Luck's pledge is inapplicable because the Florida Supreme

Court assigned a different docket number and caption to a matter the State concedes is at "the very heart of th[is] case[ ]," ECF No. 138 at 5, "concerned the same legal issues," Opp. at 4, and was "part of a single controversy," *id.* at 7.[2]

Moreover, the State's argument would render the judges' pledges meaningless. Every matter that comes before the Florida Supreme Court has a different case number and caption than matters before the Eleventh Circuit. The Eleventh Circuit does not review decisions from the Florida Supreme Court. An objective observer would conclude that the purpose of the judges' pledges was to capture *precisely* this circumstance—parallel cases that "concern[ ] the same legal issues," Opp. at 4, and are "part of a single controversy," *id.* at 7. Such a lay observer would question the judges' impartiality if they were to adopt an interpretation of their pledges that rendered them not only inapplicable to this case but a nullity. Section 455(a) thus mandates disqualification.

Second, the State disregards the plain text of the Code of Conduct, and instead conflates it with § 455(b)(3). *See* Opp. at 7. But the two authorities are not coterminous, and this Court requires disqualification where the Code's requirements are triggered. *See* 11th Cir. IOP 9 (11th Cir. L.R. 47). Unlike § 455(b)(3), Canon

[2] The State's attack on their motivations notwithstanding, it is certainly relevant that ten members of the Senate Judiciary Committee (including senators who voted to confirm the judges) have made clear that they too understand the judges' pledges to apply to cases like this one.

3(C)(1) expressly applies to situations in which judges "participated as a judge (in a previous judicial capacity) . . . concerning the proceeding." Proceeding is defined to include "other stages of litigation," and stands in contrast to the phrase "the particular case in controversy," which appears in the same sentence of the Canon 3(C)(1). *See* Canon 3(C)(1)(e) (requiring disqualification where judge "has expressed an opinion concerning the merits of the particular case in controversy"). If the Code's drafters intended "proceeding" to mean "particular case in controversy," they knew how to say so. Instead, they broadly defined it to include any other stage of litigation. This case certainly *concerns* another stage of the litigation of this matter.

The State relies primarily on the Seventh Circuit's decision in *United States v. Lara-Unzueta*, 735 F.3d 954 (7th Cir. 2013), where the judge served as counsel for INS when the agency instituted deportation proceedings against a person in 1997, and later presided as a federal district judge over a subsequent criminal case against the same person in 2011. *Id.* at 959. *Lara-Unzueta* is nothing like this case. First, it did not involve the Code of Conduct, which expressly applies to prior judicial roles and must therefore include prior related proceedings to have any temporal logic. Second, it involved an executive branch proceeding (in which the judge did not actually participate) *fourteen years* before a subsequent criminal judicial proceeding. Conversely, this litigation included simultaneous arguments before the state and

federal judiciary, the same parties, the same counsel, and—as the State puts it—"a single controversy," Opp. at 7, at "the heart of th[is] case[ ]," ECF No. 138 at 5. Whatever the outer boundary of the Code's reference to "other stage[s] of litigation," Canon 3(C)(3)(d), the Florida Supreme Court's Advisory Opinion proceeding falls squarely within its bounds.

Likewise, the State's citation to *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004) (*en banc*), is misplaced. In declining to disqualify Judge Pryor, this Court noted that the earlier case in which Judge Pryor was counsel "involved different parties and a different set of material facts than [were] present in this case" and was a "previous unrelated matter." *Id.* at 1227 n.13. Here, the cases involve the same parties, the same counsel, raised many of the same issues, and the State has identified it as a related matter. This case easily meets the standard requiring that judges "err on the side of recusal." *Murray v. Scott*, 253 F.3d 1308, 1313 (11th Cir. 2001).

II. Appellees' Motion Was Timely.

Appellees' motion was timely because it was filed shortly after the relevant fact—the judges' intent to participate in this case—became known. Disqualification motions must be filed "within a reasonable time after the grounds for the motion are ascertained." *Summers v. Singletary*, 119 F.3d 917, 921 (11th Cir. 1997). The State contends that Appellees were required to file their motion before there was any indication that Judges Luck and Lagoa would participate in this case, and that

Appellees have engaged in gamesmanship by not doing so. The State's argument is without merit.

The first time it became known that Judges Luck and Lagoa would participate in this case was July 1, 2020, when the Court issued its order identifying which judges had participated or recused from the decision to hear the case *en banc* and to grant a stay. Appellees filed their disqualification shortly thereafter, before the parties' *en banc* briefs were due and well in advance of the August 18, 2020 oral argument. Appellees acted within a reasonable time after learning that the judges intended to participate in this case. Appellants' arguments to the contrary must be rejected.

First, the State contends that Appellees should have sought disqualification of Judges Luck and Lagoa when the State initially sought *en banc* review on February 26. But Appellees had no indication then that Judges Luck and Lagoa planned to participate in the decision whether to grant the State's petition. Indeed, they did not. This Court denied the petition because "no judge in regular active service on the Court . . . requested that the Court be polled on rehearing en banc." Order, *Jones v. DeSantis*, No. 19-14551 (11th Cir. Mar. 31, 2020). Appellees thus had no basis to know which, if any, particular active judges had considered or recused, because there was no action by any judge whatsoever.

A party is not required to file disqualification motions whenever it is *possible* a judge might be assigned to hear their case. If that were the law, then parties would be obligated to file disqualification motions the moment their appeal is docketed, just to protect their rights to seek disqualification in the event a particular judge is assigned—or decides to participate—in hearing their case. Moreover, ordinarily judges first make their own determinations of whether to recuse from hearing cases, and the State cites no case holding that parties must preempt that decision-making process and file a motion before the judge has determined whether to recuse. If the State were correct, then this Court would become inundated with disqualification motions prior to the participating judges being identified. Such a rule would not only waste the parties' and the Court's resources, but would also disrespect the decision-making process of the judges themselves, whose independent recusal determinations will likely obviate the need for most disqualification motions.

Second, the State's contention that Appellees should have filed their motion immediately upon the State's request for initial hearing *en banc* on June 2, 2020, *see* Opp. at 8, fails for the same reasons. Once again, Appellees had no way to know that Judges Luck and Lagoa would participate in the decision of whether to hear the case *en banc* and to grant a stay, contrary to their recusal commitments to the Senate Judiciary Committee and the public. Surely parties are entitled to rely upon a judge's public statements regarding recusal without filing a preemptive motion before even

learning whether the judge intends to participate or to recuse. Indeed, the Court indicated *en banc* hearing was unlikely (as initial *en banc* hearing always is), both by denying the previous request and by setting this appeal for argument before a panel.

Third, it is irrelevant that the Appellees filed their motion after the stay was granted. The case law on timeliness generally deals with district and magistrate judges, whose participation is obviously known to the litigants when substantive motions are pending. Here, Appellees had no way to know whether or not Judges Luck and Lagoa would participate or recuse until they announced their intent to participate, and they did so in the same Order in which the stay was granted.

Rather than timeliness, the State's chief complaint appears to be that "it would cause extraordinary prejudice to the State for Judges Luck and Lagoa to recuse themselves" from this matter after having participated in the decision to take the case *en banc* and issue a stay of the district court's decision. Opp. at 11. But the actual prejudice alleged is unstated and no cognizable prejudice exists. Disqualification will not cause any delay to the proceedings. The remaining judges will be able to proceed forthrightly, just as they have done without Judges Rosenbaum and Brasher. As such, the State suffers no *legal* prejudice should Judges Luck and Lagoa abide by their prior representations and their statutory and ethical obligations and recuse. Rather, the State appears to contend that it will be prejudiced

based on the presumption Judges Luck and Lagoa voted in their favor regarding *en banc* hearing and the stay—a fact that is not publicly known from this Court's Order. The State's assertion that it will be prejudiced absent the participation of its desired judges only further demonstrates that disqualification is necessary. *See* 28 U.S.C. § 455(a).

Likewise, the State's contention that this Court should *invert* the standard governing disqualification in this case is foreclosed by Circuit precedent and undermined by the only case the State cites. The State contends that "any uncertainty must be resolved *against* disqualification, especially when this Court is sitting en banc and recused judges cannot be replaced through random assignment." Opp. at 11 (emphasis in original). This Court (and every other Circuit) has held otherwise. *See, e.g.*, *Murray*, 253 F.3d at 1313 (holding that "in close cases, [judges must] err on the side of recusal"). For support, the State cites Justice Scalia's decision not to recuse in *Cheney v. United States District Court for the District of Columbia*, 541 U.S. 913 (2004) (Scalia, J., in chambers). But Justice Scalia reasoned that the Supreme Court was differently situated than the Court of Appeals, and that the imperative to "resolve any doubts in favor of recusal . . . might be sound advice if I

were sitting on a Court of Appeals." *Id.* at 915 (internal quotation marks omitted). Here it exceeds "sound advice"—it is binding Circuit precedent.[3]

CONCLUSION

For the foregoing reasons, the motion to disqualify should be granted.

July 24, 2020

Respectfully submitted,

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[3] The State contends that "it is the settled practice for the subject of a disqualification motion to rule on it individually." Opp. at 11 n.2. To the contrary, in *Evans*, 387 F.3d at 1220 n.*, Judges Carnes and Pryor recused themselves from consideration of the motion to disqualify Judge Pryor, and the remaining judges sitting *en banc* decided the issue.

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CERTIFICATE OF COMPLIANCE

I certify that this Motion complies with the type-volume limitations of Fed. R. App. P. 27 because it contains 2,572 words.

This Response complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this Response has been prepared in a proportionally spaced typeface using Microsoft Word for Office in 14-point Times New Roman font.

Date: July 24, 2020

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system on July 24, 2020. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Date: July 24, 2020

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