

SUPREME COURT OF NORTH CAROLINA

NORTH CAROLINA STATE)	
CONFERENCE OF THE NATIONAL)	
ASSOCIATION FOR THE)	
ADVANCEMENT OF COLORED)	
PEOPLE,)	
)	
Plaintiff-Appellant,)	Wake County
)	
v.)	
)	
TIM MOORE, in his official capacity,)	
PHIL BERGER, in his official capacity,)	
)	
Defendant-Appellees)	

ORDER

Pursuant to an administrative order entered by this Court on December 23, 2021, and having considered precedent established by this Court, the North Carolina Code of Judicial Conduct, and the arguments of the parties, plaintiff's motion to disqualify the undersigned is denied.

This Court has repeatedly held that “[a] suit against a public official in his official capacity is a suit against the State.” *White v. Trew*, 366 N.C. 360, 363, 736 S.E.2d 166, 168 (2013). *See also Mullis v. Sechrest*, 347 N.C. 548, 554, 495 S.E.2d 721, 725 (1998) (“official-capacity suits are merely another way of pleading an action against the governmental entity.”); *Meyer v. Walls*, 347 N.C. 97, 111, 489 S.E.2d 880,

888 (1997) (official capacity “is a legal term of art with a narrow meaning—the suit is in effect one against the entity.”) (Citation omitted); *Harwood v. Johnson*, 326 N.C. 231, 238, 388 S.E.2d 439, 443 (1990) (“A suit against defendants in their official capacities, as public officials or a public employee of the Parole Commission acting pursuant to its direction, is a suit against the State.”); and *Est. of Long by & through Long v. Fowler*, 378 N.C. 138, 861 S.E.2d 686 (2021) (“a suit against a State employee in that employee’s official capacity is a suit against the State[.]”). Stated a different way by the Supreme Court of the United States, “a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official’s office.” *Will v. Michigan Dep’t of State Police*, 491 U.S. 58, 71 (1989).

With this straightforward precedent, a reasonable person would understand that a suit against a government official in his or her official capacity is not a suit against the individual. See *Matter of Mason*, 916 F.2d 384, 386 (7th Cir. 1990) (“Judges must imagine how a reasonable, well-informed observer of the judicial system would react.” The question is “how things appear to the well-informed, thoughtful observer rather than to a hypersensitive or unduly suspicious person.”) See also *United States v. Jordan*, 49 F.3d 152, 156 (5th Cir. 1995) (“we ask how things appear to the well-informed, thoughtful and objective observer, rather than the hypersensitive, cynical, and suspicious person.”).

There can be no question that this is a suit against the State. Plaintiff’s motion seeks to disqualify the undersigned from performing constitutionally prescribed

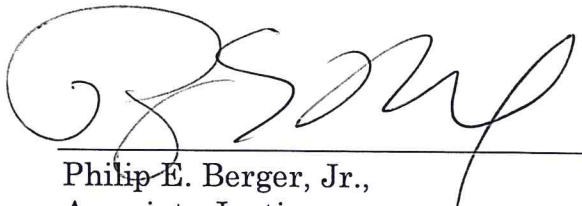
duties because my father is named in this action in his official capacity. Indeed, my father's name appears in the caption only as a matter of procedure.

It is the public policy of the State of North Carolina that in any action in any North Carolina State court in which the validity or constitutionality of an act of the General Assembly or a provision of the North Carolina Constitution is challenged, the General Assembly, jointly through the Speaker of the House of Representatives and the President Pro Tempore of the Senate, constitutes the legislative branch[.]

N.C.G.S. § 1-72.2. Moreover, Rule 19(d) of the Rules of Civil Procedure requires that the President Pro Tempore of the Senate “must be joined as [a] defendant[] in any civil action challenging the validity of a North Carolina statute or provision of the North Carolina Constitution under State or federal law.” N.C.G.S. § 1A-1, 19 (2019).

More than 2.7 million North Carolinians, knowing or at least having information available to them concerning my father's service in the Legislature, elected me to consider and resolve significant constitutional questions like the one at issue here. The ultimate question, and indeed the touchstone of all recusal issues, is “whether the justice can be fair and impartial?” Because this case is a suit against the State, and because I can and will be fair and impartial carrying out my duties in this case, plaintiff's motion is denied.

This the 7th day of January, 2022.



Philip E. Berger, Jr.,
Associate Justice

WITNESS my hand and the seal of the Supreme Court of North Carolina,
this the 7th day of January, 2022.



AMY L. FUNDERBURK
Clerk of the Supreme Court


Assistant Clerk

Copy to:

North Carolina Court of Appeals

Ms. Kimberley G. Hunter, Attorney at Law, For NC NAACP - (By Email)

Mr. David L. Neal, Attorney at Law, For NC NAACP - (By Email)

Mr. Irving Joyner, Attorney at Law, For NC NAACP - (By Email)

Mr. Daryl V. Atkinson, Attorney at Law, For NC NAACP - (By Email)

Mr. Martin M. Warf, Attorney at Law, For Moore, Tim, et al. - (By Email)

Mr. Noah H. Huffstetler, III, Attorney at Law, For Moore, Tim, et al. - (By Email)

Mr. Colin Shive, Attorney at Law, For N.C. Professors of Constitutional Law - (By Email)

Mr. Robert F. Orr, Attorney at Law, For N.C. Professors of Constitutional Law - (By Email)

Mr. John J. Korzen, Attorney at Law, For Democracy North Carolina - (By Email)

Mr. Douglas B. Abrams, Attorney at Law, For N.C. Advocates for Justice - (By Email)

Mr. Noah B. Abrams, Attorney at Law, For N.C. Advocates for Justice - (By Email)

Mr. Matthew E. Lee, Attorney at Law, For N.C. Advocates for Justice - (By Email)

Mr. Robert Harrington, Attorney at Law, For North Carolina Legislative Black Caucus - (By Email)

Mr. Adam K. Doerr, Attorney at Law, For North Carolina Legislative Black Caucus - (By Email)

Mr. Erik R. Zimmerman, Attorney at Law, For North Carolina Legislative Black Caucus - (By Email)

Mr. Travis S. Hinman, Attorney at Law, For North Carolina Legislative Black Caucus - (By Email)

Ms. Jaclyn A. Maffetore, Attorney at Law, For American Civil Liberties Union of North Carolina -
(By Email)

Ms. Leah J. Kang, Attorney at Law, For American Civil Liberties Union of North Carolina - (By
Email)

Ms. Kristi L. Graunke, Attorney at Law, For American Civil Liberties Union of North Carolina - (By
Email)

Mr. Daniel F.E. Smith, Attorney at Law, For Governor Roy Cooper - (By Email)

Mr. Jim W. Phillips, Jr., Attorney at Law, For Governor Roy Cooper - (By Email)

Mr. Eric M. David, Attorney at Law, For Governor Roy Cooper - (By Email)

Ms. Kasi W. Robinson, Attorney at Law, For Governor Roy Cooper - (By Email)

Ms. Kathleen F. Roblez, Attorney at Law, For NC NAACP - (By Email)

Mr. R. Daniel Gibson, Attorney at Law, For John V. Orth - (By Email)

Prof. John V. Orth, For John V. Orth - (By Email)

Mr. Pressly M. Millen, Attorney at Law, For Former Chairs JSC - (By Email)

Ms. Mary Ellen Murphy, Attorney at Law, For NC Professors of Professional Responsibility - (By
Email)

Mr. Colin A. Shive, Attorney at Law, For NC Professors of Constitutional Law - (By Email)

Ms. Jeanette K. Doran, Attorney at Law, For NC Institute for Constitutional Law, et al. - (By Email)

Mr. Christopher J. Heaney, Attorney at Law, For Scholars of Judicial Ethics and Professional
Responsibility - (By Email)

Ms. Lindsey W. Dieselman, Attorney at Law, For Brennan Center for Justice at NYU School of Law -
(By Email)

Mr. John R. Wallace, Attorney at Law, For NC Legislative Black Caucus - (By Email)
Ms. Lauren T. Noyes, Attorney at Law, For NC Legislative Black Caucus - (By Email)
Ms. Caitlin Swain, Attorney at Law, For NC NAACP - (By Email)
Mr. Aaron R. Marcu, Attorney at Law, Pro Hac Vice, For Legislative Black Caucus
Ms. Shannon K. McGovern, Attorney at Law, Pro Hac Vice, For Legislative Black Caucus
Mr. Michael Schietzelt, Attorney at Law, For Hon. Edmunds, Hon. Jackson, Hon. Martin - (By Email)
West Publishing - (By Email)
Lexis-Nexis - (By Email)