No. 413PA21 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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REBECCA HARPER; AMY CLARE OSEROFF; DONALD RUMPH; JOHN ANTHONY BALLA; RICHARD R. CREWS; LILY NICOLE QUICK; GETTYS COHEN, JR.; SHAWN RUSH; JACKSON THOMAS DUNN, JR.; MARK S. PETERS; KATHLEEN BARNES; VIRGINIA WALTERS BRIEN; and DAVID DWIGHT BROWN

v.

REPRESENTATIVE DESTIN HALL, in his official capacity as Chair of the House Standing Committee on Redistricting; SENATOR WARREN DANIEL, in his official capacity as Co-Chair of the Senate Standing Committee on Redistricting and Elections; SENATOR RALPH HISE, in his official capacity as Co-Chair of the Senate Standing Committee on Redistricting and Elections; SENATOR PAUL NEWTON, in his official capacity as Co-Chair of the Senate Standing Committee on Redistricting and Elections; SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES, TIMOTHY K. MOORE; PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE, PHILIP E. BERGER; THE NORTH CAROLINA STATE BOARD OF ELECTIONS; and DAMON CIRCOSTA, in his official capacity

NORTH CAROLINA LEAGUE OF CONSERVATION VOTERS, INC.; HENRY M. MICHAUX, JR.; DANDRIELLE LEWIS; TIMOTHY CHARTIER; TALIA FERNÓS; KATHERINE NEWHALL; R. JASON PARSLEY; EDNA SCOTT; ROBERTA SCOTT; YVETTE ROBERTS; JEREANN KING JOHNSON; REVEREND REGINALD WELLS;

Wake County

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

* * * * * * * * * * * * * * * *

ORDER

A Motion for Recusal of Justice Anita S. Earls was filed herein by defendants Representative Destin Hall, Senator Warren Daniel, Senator Ralph Hise, Senator Paul Newton, Representative Timothy K. Moore, and Senator Philip E. Berger. Pursuant to this Court's administrative order dated 23 December 2021 addressing the procedure to be followed in these circumstances, the motion was assigned to me for final determination.

Because the motion is without basis in fact or law and raises many of the same issues as those raised in a similar motion filed in 2019 by many of the same defendants, *see* Legislative Defendants' Mot. To Recuse Justice Earls, *Common Cause v. Lewis*, 373 N.C. 258, No. 417P19 (Nov. 6, 2019) that previously was denied by the Court, *see* Order Denying Legislative Defendants' Mot. to Recuse Justice Earls, *Common Cause v. Lewis*, 373 N.C. 258 (Nov. 15, 2019), 2019 N.C. LEXIS 1143, it is appropriate for me to rule on this motion at this time.

With regard to both the prior motion and this one, "[b]ecause these motions for disqualification touch me personally, I resolved, when they were filed, to give defendants' arguments the fullest possible consideration." *Pennsylvania v. Int'l Union of Operating Eng'rs*, 388 F. Supp. 155, 160 (E.D. Pa. 1974) (Judge Higginbotham denying motions to disqualify himself because of his public statements concerning social injustice and civil rights). For the reasons that follow, the motion is denied.

Two sources of law govern when a Justice of this Court should voluntarily recuse herself from participation in the deliberation and decision of a pending case: (1) the North Carolina Code of Judicial Conduct and (2) the due process clause of the Fourteenth Amendment, as interpreted by the United States Supreme Court in cases such as *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009) and *Williams v. Pennsylvania*, 579 U.S. 1 (2016). Turning first to the North Carolina Code of Judicial Conduct, the provision of the Code relevant to the defendants' motion in this case is Canon 3(c)(1), which states:

> C. Disqualification.
>
> (1) 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:
>
> > (a) The judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceedings;
> >
> > (b) The 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, or the judge or such lawyer has been a material witness concerning it;
> >
> > (c) The judge knows that he/she, individually or as a fiduciary, or the judge's spouse or minor child residing in the judge's household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;
> >
> > (d) The 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) Is a party to the proceeding, or an officer, director, or trustee of a party;
> >
> > (ii) Is acting as a lawyer in the proceeding;
> >
> > (iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;
> >
> > (iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

There is both a subjective and an objective component to a Justice's ethical obligation under Canon 3(c). Subjectively, a Justice must be satisfied that she can be fair and impartial and that she can rule on the case based on the facts and the law. I have subjectively determined that I can and will be fair and impartial in carrying out my duties in this case.

The balance of this motion is addressed to the objective component, as defendants "assert that there is a financial interest and personal bias on the part of the justice that makes her unable to rule impartially." Of the four concerns that defendants contend demonstrate my financial interest and personal bias, three are the same as those raised in the recusal motion in *Common Cause v. Lewis,* namely that my 2018 campaign for election to the Court was financially supported by the North Carolina Democratic Party, that I have a personal bias against defendants because in my prior career I represented clients who were adverse parties to the State, and that in various speeches or public statements before becoming a Justice I made statements expressing views about redistricting. The motion raising these

concerns in the *Common Cause v. Lewis* litigation in 2019 was denied by the Court in conference. There is no reason why these concerns would have greater force in this litigation over an entirely new redistricting plan that was drawn years after I joined the Court, particularly given the passage of even more time.

I have no financial interest whatsoever in the outcome of this case and no member of my family or any person within the third degree of relationship to me or my spouse has any interest, financial or otherwise, in the outcome. Thus, subsections 3(C)(1)(c) and 3(C)(1)(d) of the Code are not implicated here.

With regard to subsection 3(C)(1)(a), personal prejudice against defendants cannot be inferred from my prior role as counsel in voting rights litigation. It is well established that my past career as an attorney who litigated civil rights matters occurring more than four years ago is not disqualifying.[1] In general, in this context, "[b]ias or prejudice does not refer to any views a judge may entertain toward the subject matter involved in the case." *State v. Kennedy*, 110 N.C. App. 302, 305 (1993). Every Justice comes to the Court having had a prior career in some substantive area of law. As Justice Scalia observed in a case squarely addressing the meaning of impartiality in the judicial context:

> A judge's lack of predisposition regarding the relevant legal issues in a case has never been thought a necessary component of equal justice, and with good reason. For one thing, it is virtually impossible to find a judge who does not have preconceptions about the law. As then-Justice Rehnquist observed of our own Court: "Since most Justices come to this bench no earlier than their middle years, it

[1] In December 2017, I resigned from my job, and withdrew from practicing law and representing clients, in order to campaign for election to this Court.

> would be unusual if they had not by that time formulated at least some tentative notions that would influence them in their interpretation of the sweeping clauses of the Constitution and their interaction with one another. It would be not merely unusual, but extraordinary, if they had not at least given opinions as to constitutional issues in their previous legal careers." Indeed, even if it were possible to select judges who did not have preconceived views on legal issues, it would hardly be desirable to do so. "Proof that a Justice's mind at the time he joined the Court was a complete tabula rasa in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias."

Republican Party v. White, 536 U.S. 765, 777–78 (2002) (quoting *Laird v. Tatum*, 409 U.S. 824, 835 (1972) (memorandum opinion)).

No one suggests that a former prosecutor now serving as a Justice must be disqualified from criminal cases because of a bias against criminal defendants. For similar reasons, multiple courts have repudiated the argument that a judge should be disqualified based on prior work as a civil rights lawyer. *United States v. Alabama,* 828 F.2d 1532, 1543 (11th Cir. 1987) ("Nor can we countenance defendants' claim that [a judge] is prejudiced and no longer impartial by virtue of his background as a civil rights lawyer."), *cert. denied*, 487 U.S. 1210 (1988); *United States v. Black*, 490 F. Supp. 2d 630, 661 (E.D.N.C. 2007) ("[F]ormer civil rights attorneys are not necessarily barred from presiding as a judge in civil rights cases."); *United States v. Fiat*, 512 F. Supp. 247, 251–52 (D.D.C. 1981) (collecting cases rejecting arguments that a judge should recuse from discrimination cases based on prior advocacy for civil rights and racial justice causes); *see also MacDraw, Inc. v. CIT Grp. Equip. Fin., Inc.*, 157 F.3d 956, 963 (2d Cir. 1998) ("[I]t is intolerable for a litigant, without any factual

basis, to suggest that a judge cannot be impartial because of his or her race and political background.").

Nor does my prior work with non-partisan civil rights organizations require my recusal. As Federal District Court Judge Nancy Gertner explained regarding her work with the Lawyers' Committee for Civil Rights:

> Former association with such an organization alone cannot and should not be seen as undermining one's neutrality as a judge. The Supreme Court has said as much on several occasions when they were applying to themselves the same standards of recusal mandated for district court judges. The fact that a judge actively advocated a legal, constitutional or political policy or opinion before being a judge is not a bar to adjudicating a case that implicates that opinion or policy.

Wessmann by Wessmann v. Bos. Sch. Comm., 979 F. Supp. 915, 916–17 (D. Mass. 1997) (citations omitted). There is simply no factual or legal basis for the assertion that I cannot be fair and impartial in this matter now because of my prior career as a civil rights attorney or because of statements I made before joining the Court.

The one new assertion not raised in the *Common Cause v. Lewis* motion is defendants' contention that my prior professional association with one of the many attorneys of record in this matter is a disqualifying factor. Advancing what they acknowledge is a "broad reading of Cannon [sic] 3(C)(1)(b)," they assert, without citation, that other judges read the canon so broadly as to counsel recusal under circumstances such as these. In fact, the precedent in North Carolina is precisely the opposite. Under Judicial Standards Commission's Formal Advisory Opinion 2009-

02,[2] disqualification is not required based on this type of prior association. In that Opinion, the Commission advised that "the best practice is for judges to follow a 'Six Month Rule' whereby newly installed judges, for a minimum of 6 months after taking judicial office, refrain from presiding over any adjudicatory proceeding wherein an attorney associated with the judge's prior employer provides legal representation to a party in the proceeding." *Id.* Although the Opinion notes that "specific circumstances may necessitate a deviation from the 'Six Month Rule,' " it is unclear whether the referenced deviation contemplates a shorter or longer period of time. Nevertheless, it has now been years since I worked with that former colleague, and my previous professional association therefore is not disqualifying.

Applying the more general constitutional due process standards in these circumstances also leads to an obvious answer. The contributions to my campaign identified by defendants are far less significant in both absolute and relative terms than the spending in *Caperton v. A.T. Massey Coal Company* that the United States Supreme Court recognized as implicating a due process concern. 556 U.S. at 885. In that case, unlike here, the Justice whose impartiality was being challenged was up for election, and a party to the proceeding before the court spent "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 873. Here, the entities contributing to my 2018 campaign are not parties to this lawsuit,

[2] https://www.nccourts.gov/assets/inline-files/09-02.pdf?ZUcwTcUAKlVHRO9m57DRJbWI4mgEWpXV

and my campaign received 92 other contributions close to or at the statutory limit of $5,200 for that election. Moreover, in North Carolina, it is common for political parties to contribute to judicial campaigns. The in-kind contributions to my campaign from the North Carolina Democratic Party were only roughly 13% of my overall total committee spending, a small fraction of the contributions deemed problematic in *Caperton*.

There is relevant North Carolina precedent on this point as well. In 2012, this Court summarily denied a motion to recuse then-Associate Justice Newby in an appeal involving North Carolina's legislative redistricting plans. *See* Order Denying Plaintiffs' Mot. for Recusal of Justice Paul Newby, *Dickson v. Rucho*, 366 N.C. 425 (2012) (Dec. 17, 2012), 2012 N.C. LEXIS 1015. The plaintiffs in *Dickson* sought recusal in light of campaign expenditures supporting then-Associate Justice Newby made by the Republican State Leadership Conference (RSLC), a political committee focused on electing Republicans in state elections. The RSLC's own documents stated that they retained the consultant who drew the redistricting maps at issue in that litigation. *See* Pl.-Appellants' Mot. for Recusal of Justice Paul Newby at 9, *Dickson v. Rucho*, 366 N.C. 425 (2012), No. 201PA12-1 (Nov. 21, 2012). Campaign finance disclosure reports showed that the RSLC spent hundreds of thousands of dollars in support of then-Associate Justice Newby's candidacy in the final months of the campaign. *Id.* at 27–29. It also donated $1.17 million to a political action committee that supported then-Associate Justice Newby's campaign, which amounted to well over half the money spent on advertising in support of his candidacy. *Id.* Independent

expenditures supporting then-Associate Justice Newby were more than three times greater than the total expenditures of both candidates' campaigns in what was a closely contested election while the appeal was pending before this Court. *Id.* at 28. If the spending at issue in *Dickson* was insufficient to warrant recusal, then so too are the contributions identified by defendants here—which are far less substantial both in absolute terms and relative to total spending in the race, and which occurred years before the redistricting maps at issue were even drawn.

This Court's prior recusal decisions are relevant to any recusal inquiry. *See Cheney v. U.S. Dist. Court for Dist. of Columbia*, 541 U.S. 913, 924–26 (2004). There is ample precedent demonstrating that none of the reasons advanced by defendants require my disqualification. Therefore, the motion is denied.

This the 31st day of January 2022.

Anita Earls
Anita Earls
Associate Justice

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 31 day of January 2022.

AMY FUNDERBURK
Clerk, Supreme Court of North Carolina

M.C. Hackney
~~Assistant Clerk~~, Supreme Court of North Carolina

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