No. 425A21-3 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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HOKE COUNTY BOARD OF EDUCATION; et al., Plaintiffs

and

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, Plaintiff-Intervenor

and

RAFAEL PENN, et al., Plaintiff-Intervenors

v.

STATE OF NORTH CAROLINA and the STATE BOARD OF EDUCATION, Defendants

and

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, Realigned Defendant

and

PHILIP E. BERGER, in his official capacity as President Pro Tempore of the North Carolina Senate, and TIMOTHY K. MOORE, in his official capacity as Speaker of the North Carolina House of Representatives, Intervenor-Defendants

From N.C. Court of Appeals
22-86 23-788

From Wake
95CVS1158

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ORDER

Beyond question, an "unbiased, impartial decision-maker is essential to due process." *Crump v. Bd. of Educ. of the Hickory Admin. Sch. Unit*, 326 N.C. 603, 615 (1990) (citing *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970)). Though "bias" has "many connotations in general usage," it has a "few specific denotations in legal terminology." *Id.* In *Crump*, this Court explored how the law identifies "bias," explaining that:

> Bias has been defined as a predisposition to decide a cause or an issue in a certain way, which does not leave the mind perfectly open to conviction, or as a sort of emotion constituting untrustworthy partiality. Some sort of commitment is necessary for disqualification due to bias, even though it is less than an irrevocable one. Bias can refer to preconceptions about facts, policy or law; a person, group or object; or a personal interest in the outcome of some determination.

Id. (cleaned up).

Applying those concepts here is particularly unusual, as this Court has already decided the issues now before us. *See Hoke Cnty. Bd. of Educ. v. State*, 385 N.C. 380, 383 (2023) (Earls, J., dissenting) (explaining that this Court already "unequivocally rejected" the arguments Legislative-Intervenors seek to relitigate in this appeal). Four members of the current Court have already expressed their opinions about how this case should be decided. *See Hoke Cnty. Bd. of Educ. v. State* (*Leandro IV*), 382 N.C. 386, 469–71 (2022). Indeed,

> [t]he Legislative-Intervenors previously have raised the

> same jurisdictional arguments they now seek to raise in their bypass petition. There, as here, they disputed the trial court's authority to order a statewide remedy because, in their view, that court never found a statewide constitutional violation. We found those assertions untimely, distortive, and meritless.

Hoke Cnty. Bd. of Educ., 385 N.C. at 383–84 (cleaned up) (Earls, J., dissenting).

And the last time this case was before us, Legislative-Intervenors sought my recusal on the same grounds they do now. I addressed their arguments and denied their request. *See Hoke Cnty. Bd. of Educ. v. State*, 382 N.C. 694 (2022) (Earls, J.) (order examining Legislative-Intervenors' motion and explaining why recusal was not warranted under Canon 3(C)(1)(b) of the North Carolina Code of Judicial Conduct). Therefore, the facts, precedent, and reasoning which explained my decision to hear *Leandro IV* apply with equal force to rehearing the same issues here.

Legislative-Intervenors have nonetheless suggested again that I cannot hear this case. Their motion is based on the trial court's *sua sponte* action to invite participation by the Penn-Intervenors on remedial proceedings related to statewide claims eleven years after I withdrew from any representation of that party on an entirely different claim. In the interest of transparent and reasoned decision-making, I examine and now respond to Legislative-Intervenors' motion. To do so, I explain the legal standard for recusal, chart the relevant procedural history of this case, and assess the Legislative-Intervenors' arguments. After carefully considering Canon 3(C)(1)(b) and precedent applying it, I again conclude that recusal is unwarranted here because I never represented Penn-Intervenors "in the matter in controversy

currently pending before this Court." *Id.* at 695.

Almost twenty years ago, I was one of several attorneys to sign two complaints on behalf of Penn-Intervenors—a group of public-school students, their parents, and the Charlotte Branch of the NAACP. In essence, Penn-Intervenors sued the Charlotte-Mecklenburg School District (CMS) as part of the *Leandro* litigation. Specifically, they challenged how CMS assigned students to schools, arguing that the district divvied students up by wealth and created "many 'high poverty' and low-performing schools."

Because Penn-Intervenors are parties to the appeal before us, Legislative-Intervenors cite the 2005 complaints as grounds for my recusal. But though I joined my colleagues in signing Penn-Intervenors' complaints against an individual school district in 2005, that suit is not before us. Moreover, I did not personally participate in that case, appear in court for Penn-Intervenors, or make any important decisions about the litigation. In these circumstances, Canon 3(C)(1)(b) does not require recusal. And I am confident that my work with an organization that represented Penn-Intervenors in a distinct matter almost twenty years ago will not impair my ability to impartially decide this appeal.

That conclusion holds whether one takes the view, as the prior majority of the Court did, that this litigation properly involves statewide claims or whether one agrees with Legislative-Intervenors that this case only involves Hoke County. Legislative-Intervenors' request for my recusal is directly undercut by their

contention that this suit only implicates one county. Logically, they cannot be right that this is a statewide case for purposes of disqualifying me but only a Hoke County case for purposes of the Court's jurisdiction.

I. The Legal Standard for Recusal Under Canon 3(C)(1)(b)

North Carolina's Code of Judicial Conduct instructs judges to recuse themselves when they "served as [a] lawyer in the matter in controversy." N.C. Code of Jud. Conduct, Canon 3(C)(1)(b). Under that canon, a judge should withdraw from a case if "substantial evidence" shows that she is "unable to rule impartially" because of a "personal bias, prejudice or interest." *State v. Scott*, 343 N.C. 313, 325 (1996) (quoting *State v. Fie,* 320 N.C. 626, 627 (1987)). The "standard is whether grounds for disqualification actually exist." *Lange v. Lange*, 357 N.C. 645, 649 (2003) (cleaned up). To that end, this Court has instructed judges to base recusal decisions on concrete facts, not "inferred perception[s]." *Id.*

In applying Canon 3, our courts have found that a judge's mere connection to a litigant or issue does not mandate recusal. *See, e.g., State v. Pemberton*, 221 N.C. App. 671, 729 S.E.2d 128 (2012) (unpublished) (judge was not disqualified from a case even though he was the district attorney while his office investigated the defendant); *State v. Mitchell*, 220 N.C. App. 161, 723 S.E.2d 584 (2012) (unpublished) (slip op. at 8-9) (judge's "prior representation of a party adverse to defendant" four years earlier in an unrelated matter did not bar him from hearing her criminal case).

By contrast, a judge may not hear a case if he "initiated the criminal process

against" the defendant. *See Fie*, 320 N.C. at 628. In *Fie,* for instance, a judge wrote a district attorney "requesting that the grand jury be asked to consider" specific charges against two defendants. *Id.* at 626. The judge "based his letter on testimony he had heard" in a separate trial "over which he had presided." *Id.* The district attorney acted on the judge's suggestion, charged the defendants with several crimes, and secured indictments from a grand jury. *Id.* For their trial, the defendants were assigned to the very judge who solicited their charges. *Id.* But the judge did not recuse. *See id.*

We said that was error. *Id.* at 628. Because the judge "initiated the criminal process against" the defendants, he was directly and personally involved in their case. *Id.* His letter to the district attorney created the "reasonable perception" that the Judge believed the defendants "were guilty of the crimes with which they were charged." *See id.* at 628. Because of the judge's direct involvement with the defendants' criminal case and his demonstrated "preconception of the validity of the charges against" them, this Court held that recusal was proper. *Id.* at 628–29.

In applying Canon 3(C)(1)(b), I draw guidance from that precedent. Though a judge should recuse when she has served "as [a] lawyer in the matter in controversy," courts construing that canon have disclaimed recusal based on a judge's "remote connection" to a case or litigant. *Pemberton*, slip op. at 5 (quoting N.C. Code of Jud. Conduct, Canon 3(C)(1)(b)). Even when a judge once represented an adverse party, Canon 3(C)(1)(b) does not automatically bar her from later hearing a distinct matter. Instead, recusal turns on the nature of a judge's prior representation, the time

elapsed, and the parallels between the judge's past work and the matter now before her. *See* Leslie W. Abramson, *Appearance of Impropriety: Deciding When a Judge's Impartiality "Might Reasonably Be Questioned,"* 14 Geo. J. Legal Ethics 55, 83 (2000) (providing criteria for recusal decisions when a "judge is presiding over the case of a prior client").

II. Background and Procedural History

The legal framework in focus, I again explain the procedural history of this case and my connection to Penn-Intervenors.

A. Penn-Intervenors' 2005 Claim Against CMS

In 2005, I worked as an attorney at UNC's Center for Civil Rights. There, I joined my colleagues in signing two complaints on behalf of Penn-Intervenors against the school district where they lived. Those complaints sought a "limited intervention" in the *Leandro* litigation. Intervening Complaint, at 3, *Hoke Cnty. Bd. of Educ. v. Charlotte-Mecklenburg Bd. of Educ.*, No. 95CVS1158 (Wake Cnty. Super. Ct. Feb. 9, 2005). And Penn-Intervenors focused on a limited issue—their suit centered on changes to CMS's "student assignment patterns during the past five years." *Id.* at 3.

The trial court allowed Penn-Intervenors to intervene on just one claim: That CMS's policies had failed "to provide sufficient human, fiscal, and educational resources to its central city and high poverty schools." *See* Order re: Motion to Intervene, at 4, Hoke County Bd. of Educ., et al., v. State of North Carolina et al., No.

95 CVS 1158, Wake Co. Superior Ct., (Aug. 19, 2005).[1] To focus Penn-Intervenors' role in the litigation, the trial court severed their claim from the "pending matters that are on-going in the remedial phase of this case." *Id.* at 5. To that end, the court ordered that the suit against CMS "be pursued separately from the other claims pending in this action." *Id.* at 10. It also mandated that "pre-trial discovery and trial, if necessary, will go forward separately on the intervening claim." *Id*. And to underscore Penn-Intervenors' limited involvement, the court emphasized that the suit against CMS would not "interfere with the remedial process and proceedings of this case in other school systems throughout the State." *Id.*

I did not personally work on the case—before or after the trial court allowed the limited intervention against an individual school district. And when I left the Center for Civil Rights in 2007, I ended my already minimal ties to Penn-Intervenors' suit against CMS. In the seventeen years since, I have not rekindled those connections or worked on Penn-Intervenors' claim against their school district.

B. Penn-Intervenors' 2018 Participation in Statewide Remedial Proceedings

This case stems from separate statewide litigation that Penn-Intervenors joined in 2018. That year, the trial court in the *Leandro* suit decided that the State had not complied with this Court's decisions. It scheduled proceedings to craft a

[1] The trial court's 2005 Order re: Motion to Intervene is appended to my previous Order denying Legislative-Intervenor's Motion and Suggestion of Removal. *See Hoke Cnty. Bd. of Educ*, 382 N.C. at 695 n.2 & 700-08.

remedy for that statewide constitutional violation. And at its own behest, the court invited Penn-Intervenors to participate in the statewide suit. Penn-Intervenors accepted the court's invitation and joined the 7 March 2018 Consent Order Appointing Consultant.

Since then, Penn-Intervenors have remained involved in the statewide remedial proceedings. That litigation against the State produced the Comprehensive Remedial Plan we examined in *Leandro IV*. And in this case, we consider the trial court's 17 April 2023 order calculating the State's funding obligations under that remedial plan. In other words, this appeal stems from Penn-Intervenors' role in the statewide proceedings that started in 2018. The 2005 claim against CMS is not—and has never been—before us.

III. Discussion

Legislative-Intervenors make two arguments for recusal. First, they contend that "recusal is still warranted in this appeal" for the same reasons they raised in *Leandro IV*. There, as here, Legislative-Intervenors urged me to withdraw because I signed Penn-Intervenors' complaints almost two decades ago.

But here, as there, Legislative-Intervenors omit key "factual and legal context that is relevant to the application of Canon 3(C)(1)(b) under these circumstances." *Hoke Cnty. Bd. of Educ.*, 382 N.C. at 695. Most critically, the motion lumps Penn-Intervenors' 2005 suit against CMS into the 2018 litigation against the State. But as

explained above, those matters are distinct—factually, temporally, procedurally, and legally.

Those distinctions bear on Canon 3(C)(1)(b) and the need for recusal. My employer organization *only* represented Penn-Intervenors in their 2005 suit against CMS. That claim was "severed from the underlying case" and is not at issue in this appeal. *Id.* at 696. Instead, this case deals only with the litigation against the State. Penn-Intervenors joined the statewide proceedings in 2018—over a decade after I left the organization representing them against CMS. The statewide litigation produced the statewide remedial orders at issue in *Leandro IV* and before us now. Because my involvement with Penn-Intervenors ended long before they embarked on *this* appeal involving the State, I never represented Penn-Intervenors "in the matter in controversy" before this Court. *See* N.C. Code of Jud. Conduct, Canon 3(C)(1)(b).

I underscore, too, how little involvement I had in Penn-Intervenors' 2005 claim against CMS. I did not personally work on that suit. I do not remember "ever appearing in court" for Penn-Intervenors. *Hoke Cnty. Bd. of Educ.*, 382 N.C. at 696. I "did not receive any direct compensation for the pro bono representation." *Id.* at 698. And I did not participate in "any critical decisions on behalf of the parties that shaped the course of the litigation." *Id.* at 699 (cleaned up).

Second, Legislative-Intervenors urge me to disqualify because "this new appeal" raises issues that *Leandro IV* did not. In this case, we agreed to reconsider the trial court's subject matter jurisdiction to issue its 17 April 2023 order. In

disputing jurisdiction, the parties challenge Penn-Intervenors' standing to seek statewide relief. So according to Legislative-Intervenors, "Penn-Intervenors' pleadings"—including those I signed in 2005—"are now before this Court."

That is wrong. Penn-Intervenors' standing to seek *statewide* relief is a question raised by the *statewide* litigation. And again, Penn-Intervenors joined the suit against the State in 2018—eleven years after I ended any professional ties. In other words, this appeal, like *Leandro IV*, flows from a statewide action seeking statewide relief, not Penn-Intervenors' 2005 claim against the Charlotte-Mecklenburg Board of Education concerning the alleged failure of CMS to provide sufficient resources to its central city and high-poverty schools.

Since we decided *Leandro IV* less than two years ago, nothing about the parties or issues has changed to mandate my recusal in this case but not the earlier one involving the same issues. Here—as there—Penn-Intervenors' 2005 claim against CMS was a different suit based on different facts that raised different legal questions than this appeal. And so here—as there—Canon 3(C)(1)(b) does not require my recusal, as I have not represented Penn-Intervenors "in the matter in controversy" before us.

For these reasons, I conclude that recusal is not warranted. Consistent with the Code of Judicial Conduct and precedent applying it, I am confident in my ability to "rule impartially" and without "personal bias, prejudice or interest." *Scott*, 343 N.C. at 325 (quoting *Fie*, 320 N.C. at 627). Legislative-Intervenors' motion is denied.

Order of the Court

This the 31st day of January 2024.

/s/ Earls, J.
Associate Justice

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 31st day of January 2024.

Grant E. Buckner
Clerk of the Supreme Court

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