

SUPREME COURT OF NORTH CAROLINA

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NORTH CAROLINA STATE )  
CONFERENCE OF THE NATIONAL )  
ASSOCIATION FOR THE )  
ADVANCEMENT OF COLORED )  
PEOPLE, )

Plaintiff-Appellant, )

v. )

TIM MOORE, in his official capacity, )  
PHILIP BERGER, in his official )  
capacity, )

Defendant-Appellees. )

From Wake County

No. COA19-384

\*\*\*\*\*

**MOTION TO DISQUALIFY  
JUSTICE BARRINGER AND JUSTICE BERGER**  
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**MOTION TO DISQUALIFY  
JUSTICE BARRINGER AND JUSTICE BERGER**

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TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Plaintiff-Appellant, North Carolina State Conference of the National Association for the Advancement of Colored People (“NC NAACP”), respectfully requests Justice Tamara Barringer and Justice Philip Berger, Jr. be disqualified from participating in this case. Disqualification is appropriate because Justice Barringer actively participated in the events at issue in this case and Justice Berger’s father is a named defendant in this action.

### **STATEMENT OF FACTS**

At issue before this Court is the General Assembly’s authority to place constitutional amendments to the North Carolina Constitution on the ballot at the time the General Assembly was formed by a widespread illegal racial gerrymander and did not possess the popular sovereignty required to propose changes to the State’s Constitution.

Justice Barringer was elected to serve in the General Assembly starting January 1, 2013 to represent North Carolina’s 17th district as a Senator. Justice Barringer served in this position until January 1, 2019 and was a member of the General Assembly when this case was filed in August 2018. Justice Barringer not only served as a member of the General Assembly at the time that it was sued in the present action, and thus was a prior party in this case, but she also voted in favor of the legislation that placed the constitutional amendments at issue in this case on the ballot. *See* N.C. Gen. Assembly, Sen. Tamara Barringer Vote History 2017-2018 Session, <https://www.ncleg.gov/Legislation/Votes/MemberVoteHistory/2017/S/368>

(last visited March 26, 2021) (voting on HB 1092 (photo ID amendment), SB 75 (income tax amendment)); *NAACP v. Moore*, No. 18-cv-9806, Complaint, Aug. 6, 2018 (Wake Cty. Super. Ct.).

Justice Berger's father, Philip Berger Sr. ("Senator Berger"), was elected to serve as President *Pro Tempore* of the North Carolina state Senate starting January 1, 2011. In this role, Senator Berger presided over the Senate as it voted to place Constitutional amendments on the ballot. Senator Berger also voted in favor of the legislation that proposed the constitutional amendments at issue in this case. N.C. Gen. Assembly, Sen. Phil Berger Vote History 2017-2018 Session, <https://www.ncleg.gov/Legislation/Votes/MemberVoteHistory/2017/S/64> (last visited March 26, 2021) (voting on HB 1092 (photo ID amendment), SB 75 (income tax amendment)). He is a named defendant in this case. He continues to preside as President *Pro Tempore* of the Senate today, and is thus a party with decision-making power in this litigation.

### STANDARD OF REVIEW

As this Court wrote in *Ponder v. Davis*,

The purity and integrity of the judicial process ought to be protected against any taint of suspicion to the end that the public and litigants may have the highest confidence in the integrity and fairness of the courts. . . . One of the fundamental rights of a litigant under our judicial system is that [they] shall be entitled to a hearing before a court to which no taint or prejudice is attached. . . . It is the duty of Courts to scrupulously guard this right and to refrain from attempting to exercise jurisdiction in any matter where [a judge's] qualification to do so is seriously brought in question.

233 N.C. 699, 706 (1951) (internal citations omitted).

N.C. Code of Judicial Conduct, Canon 3C(1) governs disqualification of a judge for impartiality which includes when the judge “has a personal bias or prejudice concerning a party” or when a relative within a third degree of relationship to the judge or the judge’s spouse is a party to the proceeding. Canon 3C(1)(a), (d)(i), (iii).

A judge should be disqualified if there is “sufficient force in the allegations contained in [the] motion to proceed to find facts.” *N. Carolina Nat. Bank v. Gillespie*, 291 N.C. 303, 311, 230 S.E.2d 375, 380 (1976)), *rev’d on other grounds*, 330 N.C. 93, 408 S.E.2d 729 (1991). The party moving for recusal has the burden of objectively demonstrating that there are actual grounds for disqualification. *In re Nakell*, 104 N.C.App. 638, 647, 411 S.E.2d 159, 164 (1991). But, once the movant presents evidence of “sufficient force” to require findings of fact, the judge whose recusal is requested should disqualify themselves. *See, e.g., N. Carolina Nat. Bank*, 291 N.C. at 311.

### **ARGUMENT**

“An impartial judge” is a “prime requisit[e] of due process,” *Ponder*, 233 N.C. at 704. The North Carolina judiciary long has stood as a safeguard to both North Carolina’s democratic system of government and the sacrosanct nature of our Constitution.

The question here is not whether Justice Barringer and Justice Berger can keep an open mind on the issues and parties involved in this case. The Judicial Code requires disqualification of judges in the situations set out in Canon C even if they



are in fact impartial and capable of presiding fairly over the matter before them. *See Fie v. State*, 320 N.C. 626, 628-29 (1987).

Justice Barringer was a member of the General Assembly when the challenged actions occurred, she voted on the legislation to propose the 2018 Constitutional Amendments and she was personally a defendant in this case from its filing on August 6, 2018 until January 1, 2019. In this situation, there can be no question that she played a central role in the events at issue in this case and must be disqualified under Canon 3(C)(1)(a). Justice Berger's father, who falls within a first degree relationship with his son, is a current Defendant in this case, a primary leader, decisionmaker and spokesperson for the actions at issue in the case and the litigation, leaving no doubt that he must be disqualified under Canon 3(C)(1)(d)(i).

**I. Justice Barringer should be disqualified because she served in the General Assembly when the challenged legislation was adopted, she voted on the challenged legislation, and she was a defendant.**

As a matter of “public policy,” “no judge should sit in [their] own case, or participate in a matter in which [they have] a personal interest, or [have] taken sides therein.” *Ponder*, 233 N.C. at 703; *see also In re Murchison*, 349 U.S. at 136.

In *Ponder*, the presiding judge previously took “an active part” in the election that was the subject of the proceeding and was therefore disqualified. 233 N.C. at 703.<sup>1</sup> Here, Justice Barringer's role in the underlying controversy is more direct than

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<sup>1</sup> In *Williams v. Pennsylvania*, the U.S. Supreme Court held that a judge was disqualified where “in an earlier role as a prosecutor, [the judge] had significant involvement in making a critical decision in this case.” 136 S. Ct. 1899, 1906 (2016). *Williams* was decided under the Due Process Clause of the U.S. Constitution, which has a higher standard for disqualification than most state judicial codes.

that of the judge in *Ponder*. Justice Barringer was a member of the General Assembly who voted to place the constitutional amendments at issue in this case on the ballot, thereby actively participating in the events “out of which the present controversy arose.” 233 N.C. at 703. Indeed, she was more than a participant, she was a decisionmaker in enacting the legislation that this case challenges and therefore, due to the matter at issue in this case, would be serving as judge of her own actions. Furthermore, she was still a member of the General Assembly when the present suit was filed, making her a former Defendant in this very action.<sup>2</sup> Justice Barringer has personal knowledge of the underlying controversy and legal action because she directly participated in it. The authority of the North Carolina legislature—and therefore the authority of Justice Barringer as Senator at the time the legislation proposing constitutional amendments was voted on—is the crux of this case. It is difficult to imagine a stronger case for disqualification than one in which the Judge previously participated in authorizing the action currently challenged, previously was a defendant in the case, and whose power as a legislator is the subject of the case.

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<sup>2</sup> Justice Barringer lost her re-election campaign to represent District 17 in the NC Senate in the November 2018 election, *See* “11/6/2018 Official General Election Results – Wake,” NC SBOE, [https://er.ncsbe.gov/index.html?election\\_dt=11/06/2018&county\\_id=92&office=NCS&contest=1140](https://er.ncsbe.gov/index.html?election_dt=11/06/2018&county_id=92&office=NCS&contest=1140); N.C. Gen. Assembly, Sen. Tamara Barringer Vote History 2017-2018 Session, <https://www.ncleg.gov/Legislation/Votes/MemberVoteHistory/2017/S/368> (last visited March 26, 2021).

**II. Justice Berger should be disqualified because his father is a defendant in this case and thus Justice Berger is within a third degree familial relationship with a defendant**

The need for recusal is straightforward and obvious when a judge's close family member is a party to the proceeding. The Judicial Code of Conduct directs disqualification of judges in these situations. Canon 3C(1)(d)(i) (requiring disqualification when "a person within the third degree of relationship" to the judge "[i]s a party to the proceeding . . ."). This Court recently demonstrated a strong commitment to this principle, announcing the disqualification of five of its seven justices because they had numerous relatives who "are or may be" members of a plaintiff class of 222,000 public employees in a class action dispute over health benefits. *See Lake v. State Health Plan for Tchrs. & State Emps.*, 852 S.E.2d 888 (N.C. 2021) (notifying the parties that pursuant to Canon 3C(1)(d)(i), five justices "are disqualified" and the Court will lack a quorum for the proceeding unless the parties agree each justice's basis for disqualification is immaterial or insubstantial or the Court invokes the Rule of Necessity).

The grounds for Justice Berger's recusal in the present case requires little explanation. Senator Berger was a leader in the decision to propose and support constitutional amendments in 2018. Senator Berger remains the President *pro tempore* of the Senate and is a named Defendant and spokesperson in this case with decision-making power over the litigation at issue here and a significant stake in the outcome. *See* Brendan O'Brien, "North Carolina Rules Voter ID, Tax Cap Unconstitutional" (Feb. 22, 2019), <https://www.reuters.com/article/us-north-carolina->

amendments/north-carolina-judge-rules-voter-id-tax-cap-amendments-unconstitutional-idUSKCN1QC03G (Berger called the lower court's decision to invalidate two of the constitutional amendments "absurd."). Accordingly, Justice Berger should be disqualified from participating in this proceeding where, by definition, he would be judging the actions of his father, and deciding on the contours of his father's power.

### CONCLUSION

For the reasons stated herein, NC NAACP requests Justice Berger and Justice Barringer be disqualified from participating in this proceeding.

Respectfully submitted this 23rd day of July 2021.

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**CERTIFICATE OF SERVICE**

The undersigned attorneys hereby certify that they served a copy of the foregoing Motion to Disqualify upon the parties via e-mail and by the filing system to the attorney for Defendants and Amici named below:

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