No. 261A18-3 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA
****

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

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DEFENDANT-APPELLEES' RESPONSE TO PLAINTIFF'S MOTION TO DISQUALIFY JUSTICE BARRINGER AND JUSTICE BERGER

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In this appeal, Plaintiff asks this Court to reverse the Court of Appeals and become the first court of review ever to find that a legislature lost its popular sovereignty and lacked the ability to pass legislation. The legislative acts at the center of the challenge are two proposed constitutional amendments that were later adopted in 2018 by the people of North Carolina.

An election cycle later, in 2020, the people of North Carolina elected Justice Tamara Barringer and Justice Philip Berger, Jr. to this Court of seven. These two justices were sworn in and began work in January 2021. Their background and familial relationships, which are the issues challenged here, were known by all before

they were elected and before Plaintiff filed its reply in February. Nearly six months later, now after the Court has calendared the matter for argument on a date certain, Plaintiff asks for those justices—and just those justices—to recuse themselves and shrink the Court from seven justices to five.

Plaintiff's Motion treats the issue of recusal here as all but decided. But Plaintiff's Motion does not "demonstrate objectively that grounds for disqualification actually exist." *Lange v. Lange*, 357 N.C. 645, 649, 588 S.E.2d 877, 880 (2003). As shown below, there are no facts – let alone any "substantial evidence" – or legal grounds to support the recusal of Justice Barringer or Justice Berger. *Id.* That conclusion is all the more true when considering that Plaintiff's concerns for impartiality, however unfounded, only go so far. Plaintiff's decision not to seek recusal of another justice with actual involvement in this case only undermines its position and calls into question Plaintiff's real goal in bringing this Motion, which is that a vote of five justices might be better for it than all seven.

Whether this Court denies this Motion or defers a decision on Plaintiff's Motion to the justices who are challenged, one thing is sure: grounds for disqualification do not exist.

A. The real "party" in this case is the State, not the named defendants individually or any former legislator.

Plaintiff states that the case for Justice Berger's recusal is "straightforward": since his father "is a named defendant," he must recuse. (Motion p.2) Plaintiff's theory may be "straightforward," but it is wrong all the same.

While the defendants in this case at one time included the State Board of Elections and its members, in their official capacities, Plaintiff's only remaining claims are against the Speaker of the North Carolina House of Representatives and the President Pro Tempore of the North Carolina Senate, *in their official capacities*. Philip Berger (or for that matter, Tim Moore) is not individually a party to this proceeding. As this Court knows, when a plaintiff names a government official in his or her official capacity, the suit is actually against the State—not the individual.[1] *White v. Trew*, 366 N.C. 360, 363, 736 S.E.2d 166, 168 (2013) ("A suit against a public official in his official capacity is a suit against the State."); *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989) ("[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. As such, it is no different from a suit against the State itself.").

North Carolina's statutes confirm as much. Rule 19(d) of the Rules of Civil Procedure does not require the joinder of any legislator in his or her individual capacity but instead states that "[t]he Speaker of the House of Representatives and the President Pro Tempore of the Senate, *as agents of the State* through the General Assembly, *must be joined* as defendants 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, Rule 19(d) (emphasis added); *see also* N.C.G.S. §

[1] By arguing that then-Senator Barringer was a party, Plaintiff is implicitly arguing that all the members of the General Assembly are (or were) defendants in this case. Casting such an improperly broad net would mean that the brief in this case from the North Carolina Legislative Black Caucus, as *amicus curiae*, should be stricken because it would be a "party's" brief.

120-32.6(b) ("Whenever the validity or constitutionality of an act of the General Assembly or a provision of the Constitution of North Carolina is the subject of an action in any State or federal court, the Speaker of the House of Representatives and the President Pro Tempore of the Senate, as agents of the State through the General Assembly, shall be necessary parties[.]").

The reality is that individual legislators are not real parties here. This reading is consistent with Plaintiff's pleading, which does not otherwise include the State of North Carolina as a defendant, but is brought against the Legislative Defendants in their official capacities, and is consistent with their requested relief, which is a request to void two constitutional amendments as to the entire State of North Carolina, not just two people.

If more were needed, case law shows that courts often make the distinction between official capacity suits and suits against an individual when considering recusal motions. When former Speaker of the House Jim Black asked U.S. District Court Judge James Dever III to recuse himself from his sentencing hearing because he had previously represented Republican legislators in redistricting litigation that had named the-then Speaker as a party, Judge Dever noted that the cases were against the defendants in their official capacities and not individual suits. *U.S. v. Black*, 490 F. Supp. 2d 630, 647 (2007). "Of course, when a state officer is named as a defendant in his official capacity, the party suing is not seeking relief against the defendant personally, but against the Government." *Id.* Judge Dever further

examined the challenged case to see if it even implicated the defendant named in his official capacity:

> Nowhere-except in the case caption in *Stephenson* I and *Stephenson* II-does the Supreme Court's 2002 or 2003 decision mention Black. Moreover, nowhere in the case was there ever any allegation, evidence, or issue of *criminal* wrongdoing by anyone. Rather, the litigation is the type of civil, official-capacity redistricting litigation that takes place in numerous states following the decennial census. The focus of such litigation (including in Stephenson) is whether a given redistricting statute (i.e., a statute creating the boundaries of legislative districts) meets the governing legal criteria. If the statute meets the legal criteria, then the court upholds it. If the statute does not, then the statute is invalidated. The focus in such litigation is not on the official-capacity defendants and was not on any of them in Stephenson I or Stephenson II.

Id. at 648; *see also In re Mason*, 916 F.2d 384, 387 (7th Cir. 1990) ("Any doubts about the judge's impartiality are especially weak because the complaint names Hudnut and Mowery in their official rather than personal capacities."). The same can be said of the litigation here. Philip Berger (and Timothy Moore) are referenced solely in the caption of the case and only in their official capacities as agents of the State.

Moreover, there are neither facts to be found, nor actions of any individual legislators that need to be construed or debated.[2] It is an undisputed fact that the challenged amendments (and others) were proposed to the people of North Carolina

[2] It is misleading for Plaintiff to allege that President Pro Tempore Berger has "decision-making power over the litigation." (Motion, 6.) This case is not in the trial court where facts still might need to be developed, witnesses chosen, or theories developed. To the contrary, these proposed constitutional amendments were passed by the General Assembly before this lawsuit began. The matter has proceeded through the trial court and the Court of Appeals, and briefing at this Court is complete. There are frankly no more decisions either party can make at this point.

through session laws enacted by three-fifths of each house of the General Assembly. Plaintiff's argument is purely a legal one: whether the General Assembly that existed was imbued with popular sovereignty or whether the legislators were usurpers. Plaintiff has not pled which senators or representatives were elected from unconstitutional districts (or districts that ultimately needed modification) or how many individuals otherwise appropriately elected in a particular legislative chamber are required to create a loss of popular sovereignty. Plaintiff argues that whatever that number is, proposing constitutional amendments to the people is too much. Thus, as in *Black*, "the focus in such litigation is not on the official-capacity defendants."

Justice Scalia brought this point to bear in his denial of the Sierra Club's motion to recuse on the grounds that he was friends with Vice President Cheney and that Cheney was a named party (in his official capacity) in the suit at issue:

> That is by no means a rarity. At the beginning of the current Term, there were before the Court (excluding habeas actions) no fewer than 83 cases in which high-level federal Executive officers were named in their official capacity—more than 1 in every 10 federal civil cases then pending. That an officer is named has traditionally made no difference to the proposition that friendship is not considered to affect impartiality in official-action suits. Regardless of whom they name, such suits, when the officer is the plaintiff, seek relief not for him personally but for the Government; and, when the officer is the defendant, seek relief not against him personally, but against the Government.

Cheney v. U.S. Dist. Court for Dist. of Columbia, 541 U.S. 913, 917 (2004).[3] Accordingly, when it is the State that is the party, grounds for disqualification of Justice Berger do not exist. And that distinction between an individual suit and one brought against the State through an official-capacity suit, though glossed over by Plaintiff, matters when considering the meaning of Canon 3(C). Because the law in North Carolina requires that the President Pro Tempore of the Senate and Speaker of the House of Representatives be identified, as agents of the State, in a civil action challenging the constitutionality of an act of the General Assembly, Plaintiff's overbroad argument regarding named parties, in theory, would subject Justice Berger to recusal in every such case for so long as Senator Berger serves as the President Pro Tempore of the Senate. The judicial code does not require such a reading.

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[3] Justice Scalia also discounted the need to guard against any reputational harm to the officially-named individual as well—something Plaintiff alleges here could be an influencing factor.

> I do not see how the Vice President's " 'reputation and ... integrity are on the line' " any more than the agency head's reputation and integrity are on the line in virtually all official-action suits, which accuse his agency of acting (to quote the Administrative Procedure Act) "arbitrar[ily], capricious[ly], [with] an abuse of discretion, or otherwise not in accordance with law."

Id. at 920. "[P]olitical consequences are not my concern, and the possibility of them does not convert an official suit into a private one." *Id*.

B. Justice Barringer's former role as a legislator does not disqualify her to hear cases involving legislative acts she was involved in passing.

As to Justice Barringer, participation in shaping the law as a legislator does not typically require recusal when that law comes before the former legislator as a judge. For example, in *Buell v. Mitchell*, 274 F.3d 337, 346 (6th Cir. 2001), on a habeas review of the incarcerated individual's state law case, the Sixth Circuit affirmed the denial of a recusal motion where the trial court judge was a former legislator who sponsored the death penalty law that was used to sentence the incarcerated person. The Court made clear: "[A] judge is not automatically disqualified from a case on the basis of having sponsored or voted upon a law in the state legislature that he is later called upon to review as a judge." *Id*.

In another example, former Chief Justice Rehnquist cited to several examples of the principle that a former legislator should not be disqualified as a judge in his denial of a request for recusal:

> - Mr. Justice Black while in the Senate was one of the principal authors of the Fair Labor Standards Act; indeed, it is cited in the 1970 edition of the United States Code as the 'Black-Connery Fair Labor Standards Act.' Not only did he introduce one of the early versions of the Act, but as Chairman of the Senate Labor and Education Committee he presided over lengthy hearings on the subject of the bill and presented the favorable report of that Committee to the Senate. Nonetheless, he sat in the case which upheld the constitutionality of that Act, and in later cases construing it . . .
>
> - Justice Frankfurter had not only publicly expressed his views, but had when a law professor played an important, perhaps dominant, part in the drafting of the Norris-LaGuardia Act. This Act was designed by its proponents to

> correct the abusive use by the federal courts of their injunctive powers in labor disputes. Yet in addition to sitting in one of the leading cases interpreting the scope of the Act, Justice Frankfurter wrote the Court's opinion.
>
> - Justice Jackson . . . participated in a case raising exactly the same issue which he had decided as Attorney General (in a way opposite to that in which the Court decided it).
>
> - Chief Justice Vinson, who had been active in drafting and preparing tax legislation while a member of the House of Representatives, never hesitated to sit in cases involving that legislation when he was Chief Justice.

Laird v. Tatum, 409 U.S. 824, 831-32 (1972); *see also Newburyport Redevelopment Auth. v. Commonwealth*, 401 N.E.2d 118, 144 (Mass Ct. App. 1980) (rejecting the contention that a judge should have recused himself since he was a member of the Massachusetts legislature when the bill that was subject of litigation was enacted); *Williams v. Mayor & Council of the City of Athens*, 177 S.E.2d 581, 581 (Ga. Ct. App. 1970) (trial judge not required to recuse himself where, while previously serving as city attorney, he drafted an ordinance banning possession and operation of a pinball machine in city limits and defendant appearing before him was charged with violation of that ordinance); *In the Matter of Thomas W. Sullivan*, 219 So. 2d 346, 353 (Ala. 1969) ("A judge is not disqualified to try a case because he had been a member of the legislature enacting a statute involved in litigation before him.").

In *Buell*, the Sixth Circuit noted that to take a more restrictive position against former-legislators-turned-judges would be inordinately difficult and ill-advised.

> Establishing a rule that a judge must recuse himself in cases involving legislation that had been enacted when a judge served as a legislator would force recusal in an inordinate amount of cases. In addition, it might prevent

> individuals who are or were legislators from serving as members of the judiciary and from bringing their unique perspectives to the bench.

Buell, 274 F.3d at 347.[4]

Plaintiff points to nothing beyond Justice Barringer having been a legislator to justify her recusal. In *Buell*, the Court determined that even sponsoring legislation and making public comments about it were not sufficient grounds to warrant recusal. 274 F.3d at 346. With even less evidence of Justice Barringer's involvement with the challenged amendments than in *Buell*, there is no reason for Justice Barringer to recuse herself from hearing this constitutional challenge.

C. As the Supreme Court has no substitutions available, a recusal should be closely scrutinized as potentially having an impact on the outcome of the case.

Unlike the trial court or even the Court of Appeals, which upon the need for a recusal could substitute one of the other twelve judges, the justices on this Supreme Court have no current replacements to fill in for them. This is the court of last resort. Chief Justice Rehnquist made this point in declining to recuse himself when his son was a lawyer advocating an antitrust case, and his son's law firm was arguing a similar antitrust case to the United States Supreme Court.

> [I]t is important to note the negative impact that the unnecessary disqualification of even one Justice may have upon our Court. Here-unlike the situation in a District Court or a Court of Appeals-there is no way to replace a recused Justice. Not only is the Court deprived of the participation of one of its nine Members, but the even

[4] Legislative Defendants assume that the Governor would agree with this position, as he recently appointed North Carolina House Minority Leader Darren Jackson as a judge on the North Carolina Court of Appeals.

> number of those remaining creates a risk of affirmance of a lower court decision by an equally divided court.

Microsoft Corp. v. United States, 530 U.S. 1301, 1303 (2000). "Even one unnecessary recusal impairs the functioning of the Court." *Cheney*, 541 U.S. at 916. According to Justice Scalia (and Chief Justice Rehnquist), if a single justice recuses himself, it would take five of the nine justices' votes "to *overturn* the judgment below, and it makes no difference whether the needed fifth vote is missing because it has been cast for the other side, or because it has not been cast at all," *id*. (emphasis added).

This Court has hundreds of instances where a single recusal has led to an equally divided court with the result that the opinion of the Court of Appeals is affirmed without precedential value, *see, e.g., State v. Prince*, 377 N.C. 198, 856 S.E.2d 96 (2021). A single recusal has also led to different opinions. *See, e.g., State v. Steen*, 376 N.C. 469, 492, 852 S.E.2d 14, 29 (2020) (Justice Davis recusing; Justices Newby and Morgan concurring in part and dissenting in part; Justice Earls concurring in result only and dissenting in part). But it takes a majority of the court (and not a tie) to *reverse* a decision of the lower court. Therefore, a single recusal, while potentially impacting the decision of the Court, does not necessarily reduce the number of justices that are required for action. Two recusals, however, alters the votes of the Court.

Stripped of its unfounded justifications for recusal, Plaintiff's Motion really boils down to this simple math equation. Because quorum for the court is four, *see* N.C.G.S. § 7A-10; *Lake v. State Health Plan for Tchrs. & State Emps.*, 376 N.C. 661, 664, 852 S.E.2d 888, 890 (2021), recusal by two justices sets up an easier path for

Plaintiff to its desired outcome by achieving reversal if three, not four, justices agree with Plaintiff's position. Far from a concern for the institutional role of this Court, this Motion is designed to achieve what Plaintiff perceives as a more desirable balance of the Court. Such motivation is certainly no justification for any justice to strain to recuse. *See Laird*, 409 U.S. at 838 ("The undesirability of such a disposition is obviously not a reason for refusing to disqualify oneself where in fact one deems himself disqualified, but I believe it is a reason for not 'bending over backwards' in order to deem one's self disqualified.").[5]

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[5] Because there are no substitute justices and recusal of two justices implicates the Court's decision-making power, cases like *Ponder v. Davis*, 233 N.C. 699, 65 S.E.2d 356 (1951) do not support Plaintiff's position. There, the Court expressed concern over a challenged trial court judge finding facts on contempt when there was a colorable claim the contempt itself was politically motivated. Similarly, *North Carolina Nat. Bank v. Gillespie*, 291 N.C. 303, 230 S.E.2d 375 (1976) concerned a challenge to a trial judge, and the concern expressed by this Court was that the trial judge should not have found facts himself in response to an unverified motion to recuse; rather, the better course of action was to transfer the matter to another trial judge so that the challenged jurist could present evidence. Of course, there is no ability to transfer this Motion to another court. *In re Nakell*, 104 N.C. App. 638, 411 S.E.2d 159 (1991) also involved a trial court judge, but there the Court of Appeals did not find error in the judge finding contempt after a request that that judge recuse himself. In *State v. Fie*, 320 N.C. 626, 359 S.E.2d 774 (1987), this Court examined the standard for review of whether a trial judge should recuse himself. While this Court did not believe the actions of the trial court judge—which was recommending to the district attorney that a grand jury be empaneled against the defendants who were now appearing before him—rose to the level of recusal demanded by N.C.G.S. § 15A-1223, the Court determined that in a criminal case, the better standard was that expressed by N.C.G.S. § 15A-15, which stated that "if the criminal contempt is based upon acts before a judge which so involve him that his objectivity may reasonably be questioned, the order must be returned before a different judge." *State v. Fie*, 320 N.C. 626, 628, 359 S.E.2d 774, 776 (1987). In short, this Court determined that "[t]he standard for a criminal trial should be as high as for a criminal contempt proceeding." Notably, this is not a criminal proceeding, and Justices Barringer and Berger are not trial court judges.

If Plaintiff's Motion were fixed in institutional concerns or fair readings of the judicial code, and not perceived vote counting, Plaintiff would have challenged another justice's hearing of this case as well. That they did not speaks volumes. As a lawyer in private practice, Justice Anita Earls represented the plaintiffs in the *Covington v. North Carolina* litigation that is at the root of this case. While asking the federal district court to order a special election following remand from the United States Supreme Court, Justice Earls argued that the members of the General Assembly were usurpers based on the determination that multiple districts were unconstitutionally drawn. (*See* Appendix to Defendant-Appellees' New Brief, pp. App. 6-9) Specifically, Justice Earls argued as follows:

> Where nearly two-thirds of all of the districts used to elect the legislature must be redrawn to comply with the state and federal constitutions, the integrity and authority of the legislature is called into question. On June 30, 2017, the United States Supreme Court issued its mandate in this case. Arguably, under *State v Lewis* and *Van Amringe v. Taylor* upon issuance of that mandate the members of the illegally constituted General Assembly lost the protection of the de facto doctrine and became usurpers unauthorized to act to protect the health and safety of all North Carolinians. It is entirely possible that any legislative actions they take without being elected from legal districts could be subject to challenge under state law. This risk is not merely speculative. One public interest law organization has already publicly indicated its position.

(*Id*. at 7-8) The public interest organization that Justice Earls referenced in her argument was the Southern Environmental Law Center—Plaintiff's counsel in this case. Further, Plaintiff, the NC NAACP, as an amicus, raised this same argument to the *Covington* court, and Justice Earls also relied upon it in her argument: "the North

Carolina NAACP has taken a similar position, arguing that this court 'has strong justification to enjoin the current General Assembly from further convening or enacting any more legislation.'" (*Id*. at 8) Although the Court in *Covington* passed on adjudicating such an argument (despite questioning its viability), noting that the argument was a matter of state law, *Covington v. North Carolina*, 270 F. Supp. 3d 881, 901 (M.D.N.C. 2017), Plaintiff sees this action as but a continuation of the federal action: "Judge James Wynn, writing for a federal court panel, explained the limit of power given to an unconstitutionally-formed North Carolina legislature poses just such an unsettled question, and placed it squarely on our state courts to answer." (Appellant's New Brief, p.4-5)

Pursuant to the same Canon 3(C) of the North Carolina Code of Judicial Conduct that Plaintiff cites in its attempt to disqualify Justice Barringer and Justice Berger, a judge should also disqualify herself "where: [t]he judge served as lawyer in the matter in controversy[.]" Plaintiff's Motion ignores facts like that Justice Earls, as counsel for *Covington*, made the same novel argument to the federal court that Plaintiff makes to this Court (although the argument was even broader at that time in the sense that the *Covington* plaintiffs were advocating that potentially any law could be void). And Plaintiff's Motion is eerily silent about the fact that, under its theory of when a justice should recuse himself or herself, another justice is poised to sit in judgment on the constitutionality of the very acts she argued were unconstitutional in *Covington*. Were these facts attributable to Justice Barringer, instead of to Justice Earls, it seems evident that Plaintiff would have identified them

as equally concerning in its mind. But Plaintiff raises none of these points in its Motion. Plaintiff focuses entirely on alleged grounds to disqualify Justice Berger and Justice Barringer from hearing this case.

* * *

There is a "presumption of honesty and integrity in those serving as adjudicators." *Withrow v. Larkin,* 421 U.S. 35, 47 (1975). All judges take an oath to uphold the Constitution and apply the law impartially, and all parties should trust that they will live up to this promise. *See Republican Party of Minn. v. White,* 536 U.S. 765, 796 (2002) (Kennedy, J., concurring) ("We should not, even by inadvertence, 'impute to judges a lack of firmness, wisdom, or honor'").

By both what is said and not said, and by the justices targeted, Plaintiff's Motion shows that Plaintiff is less concerned about impartiality and more concerned about outcome. Were it otherwise it certainly appears that Plaintiff would have brought a different Motion. This Court should not be picked apart by such gamesmanship.

CONCLUSION

Plaintiff's Motion for disqualification ignores the law that when an individual is named in his or her official capacity, the suit is against the State, not that individual. Plaintiff's Motion also fails to compel the result that a former legislator cannot sit in review of laws passed by the legislature of which he or she was a member. Accordingly, Plaintiff's arguments for recusal do not establish that grounds

for disqualification actually exist and that the justices under review cannot be impartial. Plaintiff's Motion should be denied.

Respectfully submitted, this the 2nd day of August, 2021.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: /s/ Electronically submitted
D. Martin Warf
N.C. State Bar No. 32982
Tel: (919) 329-3800
martin.warf@nelsonmullins.com
4140 Parklake Avenue, Suite 200
Raleigh, NC 27612

N.C. R. App. P. 33(b) Certification: I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

Noah H. Huffstetler, III
N.C. State Bar No. 7170
noah.huffstetler@nelsonmullins.com
4140 Parklake Avenue, Suite 200
Raleigh, NC 27612

Counsel for Defendant-Appellants 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

CERTIFICATE OF SERVICE

The undersigned attorneys hereby certify that they served a copy of the foregoing **Defendant-Appellees' Response to Plaintiff's Motion to Disqualify Justice Barringer and Justice Berger** upon the parties via e-mail to the attorneys named below:

Kimberley Hunter
David Neal
Southern Environmental Law Center
601 W. Rosemary Street, Suite 220
Chapel Hill, NC 27516-2356
khunter@selcnc.org
dneal@selcnc.org

Counsel for Plaintiff-Appellant NC NAACP

Daniel F. E. Smith
Jim W. Phillips, Jr.
Eric M. David
Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P.
Suite 2000 Renaissance Plaza
230 North Elm Street (27401)
Post Office Box 26000
Greensboro, NC 27420-6000
dsmith@brookspierce.com
jphillips@brookspierce.com
edavid@brookspierce.com

Counsel for Roy Cooper, Governor of the State of North Carolina

Robert E. Harrington
Adam K. Doerr
Erik R. Zimmerman
Travis S. Hinman
Robinson, Bradshaw & Hinson, P.A.
101 North Tryon Street, Suite 1900
Charlotte, NC 28246
rharrington@robinsonbradshaw.com
adoerr@robinsonbradshaw.com
ezimmerman@robinsonbradshaw.com
thinman@robinsonbradshaw.com

Counsel for North Carolina Legislative Black Caucus

Colin A. Shive
Robert F. Orr
150 Fayetteville Street, Suite 1800
Raleigh, NC 27601
cshive@tharringtonsmith.com
orr@rforrlaw.com

Counsel for North Carolina Professors of Constitutional Law

Jaclyn Maffetore
Leah J. Kang
Kristi L. Graunke
ACLU of North Carolina Legal Foundation
PO Box 28004
Raleigh, NC 27611-8004
jmaffetore@acluofnc.org
lkang@acluofnc.org
kgraunke@acluofnc.org

Counsel for ACLU of North Carolina

John J. Korzen
Wake Forest University School of Law
PO Box 7206
Winston Salem, NC 27109-7206
korzenjj@wfu.edu

Counsel for Democracy North Carolina

Douglas B. Abrams
Noah B. Abrahms
Abrams & Abrams
1526 Glenwood Avenue
Raleigh, NC 27608
dabrams@abramslawfirm.com
nabrams@abramslawfirm.com

Matthew E. Lee
Whitfield Bryson LLP
900 W. Morgan Street
Raleigh, NC 27603
matt@whitfieldbryson.com

Counsel for NCAJ

This the 2nd day of August, 2021.

/s/ Electronically submitted
D. Martin Warf
N.C. State Bar No. 32982
Tel: (919) 329-3800
martin.warf@nelsonmullins.com
4140 Parklake Avenue, Suite 200
Raleigh, NC 27612