

SUPREME COURT OF NORTH CAROLINA

COMMUNITY SUCCESS
INITIATIVE, et al.,

Plaintiffs,

v.

TIMOTHY K. MOORE, IN HIS
OFFICIAL CAPACITY OF
SPEAKER OF THE NORTH
CAROLINA HOUSE OF
REPRESENTATIVES, et al.,

Defendants.

From Wake County
No. P21-340

**PLAINTIFFS' MOTION FOR PROMPT DISQUALIFICATION
OF JUSTICE BERGER, JR., OR, IN THE ALTERNATIVE, FOR
DEFERRED CONSIDERATION OF DISQUALIFICATION
FOLLOWING THE COURT'S RESOLUTION OF PLAINTIFFS'
PETITION FOR SUPERSEDEAS AND A TEMPORARY STAY**

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF
NORTH CAROLINA:

Plaintiffs respectfully submit this motion for prompt disqualification of Justice Philip Berger, Jr., pursuant to Canon 3C(1)(d)(i) of the North Carolina Code of Judicial Conduct, or, in the alternative, for deferred consideration of disqualification following the Court's resolution of Plaintiffs' emergency petition for supersedeas and a temporary stay. In support of this motion, Plaintiffs state as follows:

1. Canon 3C(1)(d)(i) of the North Carolina Code of Judicial Conduct governs disqualification of judges based on the appearance of impartiality, including when a judge has a close enough familial relationship with a party to a case. This Canon provides, in relevant part:

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 ... [t]he 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]s a party to the proceeding, or an officer, director, or trustee of a party.

2. Notably, disqualification is required in the situations set out in Canon C even if a judge is in fact capable of impartially presiding over the case before them. *See Fie v. State*, 320 N.C. 626, 628-29 (1987).

3. Here, Justice Berger, Jr.'s father, Senator Philip Berger Sr., is a named defendant in this case—"a party to the proceeding." The plain text of Canon 3C(1)(d)(i) thus unequivocally mandates disqualification. The parent-child relationship is a familial relationship of the first degree.

4. Indeed, Canon 3C(1)(d)(i) would require disqualification in situations where the appearance of impartiality was far more attenuated than here. For instance, disqualification would be required if the *spouse* of a judge's *spouse's niece or nephew* were a *director* of a *corporation* named as a party in a case. The appearance of impartiality is at its apex when, as here, the judge's own father is a named defendant.

5. It does not matter that Senator Berger is named as a defendant in his official capacity as Senate President *Pro Tempore*. On its face, Canon 3C(1)(d)(i) makes no distinction between a judge's family member named as a party in their personal, official, or any other capacity. It states without exception that disqualification is required if the judge's family member "[i]s a party to the proceeding." The text of Canon 3C(1)(d)(i) reinforces this conclusion by mandating disqualification even where the judge's family member is not themselves a party to the case, but rather is "an officer, director, or trustee of a party."

If disqualification is required where a judge's family member is merely an officer or director of a corporation named as a party, *a fortiori* it is required where the judge's own father is named as a defendant in an official capacity. After all, a judge's family member who sits on a corporation's board of directors has no personal interest in the litigation and the disqualification of the judge is solely due to the family member's official role. Furthermore, despite being named in his official capacity, Senator Berger is personally engaged in the defense of this case, wielding direct control over the litigation strategy, including as to this appeal.¹

6. In an abundance of caution, to avoid any later claim of waiver, Plaintiffs are raising this mandatory basis for disqualification now and seeking prompt disqualification of Justice Berger, Jr., at this time.

7. However, as all parties have agreed, time is of the essence in resolving Plaintiffs' emergency petition for supersedeas and a temporary stay. This case involves the voting rights of over 56,000 North Carolinians, and the State Board warned last week that a stay of the trial

¹ *See, e.g.,* Senator Berger Press Shop, *Appeals Court Grants Legislators' Request to Block Lower Court Ruling in Felon Voter Case*, (Sept. 3, 2021), <https://tinyurl.com/d5t3pf73>.

court's expanded injunction would threaten its basic ability to conduct elections in which early voting starts in just 10 days. Although all litigants in North Carolina courts are entitled to enforcement of the Code of Judicial Conduct provisions ensuring both the reality and appearance of impartiality, Plaintiffs' foremost interest is in the Court's prompt resolution of their emergency request for supersedeas and a temporary stay, even if it requires the full Court's participation at this time.

8. Accordingly, if time does not permit consideration of disqualification now, and to avoid any delay that would further jeopardize the State Board's ability to conduct the upcoming elections in orderly fashion, Plaintiffs request, in the alternative, that consideration of this motion under Canon 3C(1)(d)(i) be deferred until after the Court resolves Plaintiffs' petition for supersedeas and a temporary stay.

CONCLUSION

For the reasons stated herein, Plaintiffs respectfully request that Justice Berger, Jr. be disqualified promptly from participating in this case, or, in the alternative, that consideration of disqualification be deferred until after resolution of Plaintiffs' emergency petition for supersedeas and a temporary stay.

Respectfully submitted this the 6th day of September 2021.

FORWARD JUSTICE

Electronically Submitted

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N.C. R. App. P. 33(b) Certification:
I certify that the attorneys listed
below have authorized me to list their
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that Plaintiffs' Motion For Prompt Disqualification Of Justice Berger, Jr., Or, In The Alternative, For Deferred Consideration Of Disqualification Following The Court's Resolution Of Plaintiffs' Petition For Supersedeas And A Temporary Stay was served on the parties to this action via email and was addressed to the following counsel:

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This the 6th day of September 2021.

Electronically Submitted
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