No. 413P21 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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REBECCA HARPER, et al.,

Plaintiffs,

v.

REPRESENTATIVE DESTIN HALL, in his official capacity as Chair of the House Standing Committee on Redistricting, et al.,

Defendants.

NORTH CAROLINA LEAGUE OF CONSERVATION VOTERS, INC., et al.,

Plaintiffs,

v.

REPRESENTATIVE DESTIN HALL, in his official capacity as Chair of the House Standing Committee on Redistricting, et al.,

Defendants.

From Wake County

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HARPER PLAINTIFFS' OPPOSITION TO LEGISLATIVE DEFENDANTS' MOTION FOR RECUSAL OF JUSTICE SAMUEL J. ERVIN, IV

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Legislative Defendants assert that Justice Ervin has as an "interest" in this litigation that makes him unable to rule impartially. Legislative Defendants are incorrect, but their arguments also fail on two independent, threshold grounds. First, Legislative Defendants have forfeited the ability to seek recusal by failing to do so before the Court ruled on Plaintiffs' preliminary injunction motion, despite having knowledge of the purported basis for recusal from the very outset of proceedings in this Court. Second, the crux of their recusal argument, which relates to the timing of the 2022 candidate filing period and primary elections, is moot because the filing period and primaries have already been postponed. And even if Legislative Defendants could properly assert their arguments now, there is no support for their overbroad conception of Canon 3, which would effectively require a Justice to recuse from all election-related cases in his or her election year. The motion should be denied.

BACKGROUND

These consolidated cases assert constitutional challenges to North Carolina's 2021 districting plans for Congress, the state Senate, and the state House. No judicial districts or judicial elections are at issue. On December 3, 2021, a three-judge panel denied Plaintiffs' motions for preliminary injunctions. Both sets of Plaintiffs immediately appealed and, on December 6, Plaintiffs in *Harper v. Hall* petitioned for discretionary review prior to determination by the court of appeals. That same day, the *Harper* Plaintiffs moved to disqualify Justice Philip Berger, Jr. The *Harper* Plaintiffs explained that they sought prompt disqualification at the outset of appellate proceedings in part "to

avoid any later claim of waiver." Mot. at 4. No other motions for disqualification were filed.

On December 8, this Court granted a preliminary injunction, temporarily stayed the candidate filing period for all 2022 elections, and ordered that all primary elections be delayed until May 17, 2022. Order at 3-4. No dissents or recusals were noted. The three-judge panel then held a trial in all of the consolidated cases from January 3 through 6. On January 6, Legislative Defendants for the first time moved in this Court for recusal of Justice Ervin, contending that this case implicates candidate filing deadlines and primary dates that will apply to Justice Ervin's reelection campaign this year. The three-judge panel then issued its final decision in favor of Legislative Defendants on January 11, which the Plaintiffs appealed.

ARGUMENT

I. Legislative Defendants Have Waived the Ability to Seek Recusal

"One must raise a motion to recuse at the earliest moment after acquiring knowledge of the facts which give rise to the motion to recuse." *State v. Pakulski*, 106 N.C. App. 444, 450, 417 S.E.2d 515, 519 (1992). Courts hold that the failure to do so precludes a later motion for recusal. *Id.*; *see Sutton v. Est. of Shackley*, 259 N.C. App. 734, 813 S.E.2d 480 (2018). In *Pakulski*, for example, the defendant became aware in March 1988 of a judge's statement suggesting bias, but did not move for recusal until May 1989. 106 N.C. at 450. The court of appeals held that the defendant's delay in seeking recusal waived his right to seek recusal. The same was true in *Sutton*, where the party believed the judge was biased yet "allowed [the judge] to render a ruling on her

motion to dismiss earlier proceedings … in October 2015, and only filed for his recusal before further proceedings in February 2016." 259 N.C. App. at 734.

As these decisions recognize, requiring prompt motions for disqualification prevents gamesmanship and promotes public trust in the judiciary. Without a strict waiver rule, a defendant could "choose to wait and seek a trial judge's recusal until after the trial judge rules unfavorably to the defendant on some other grounds." *Pakulski*, 106 N.C. App. at 450; *see also, e.g.*, *United States v. Owens*, 902 F.2d 1154, 1156 (4th Cir. 1990) (cited in *Pakulski*) ("[a] defendant cannot take his chances with a judge and then, if he thinks that the sentence is too severe, secure a disqualification and a hearing before another judge").

Under this well-established rule, Legislative Defendants have forfeited their ability to seek recusal. Over a month ago, on December 6, *Harper* Plaintiffs sought this Court's immediate discretionary review of the denial of a preliminary injunction. Recognizing the potential for waiver of their ability to seek recusal, *Harper* Plaintiffs at the same time sought prompt recusal of Justice Berger. Legislative Defendants could have filed a motion seeking the recusal of Justice Ervin. But they did not, despite indisputably knowing of the purported basis for recusal, namely the fact that this case could affect the timing of this year's primary elections. Indeed, the *Harper* Plaintiffs' December 6 petition for discretionary review in this Court explicitly and repeatedly stated that it is "likely" that "the Court will need to delay the primary election to 17 May 2022—the date currently scheduled for second primaries, *see* N.C.G.S. § 163-111(e)." *Harper* Pls.' Pet. for Discretionary Review at 27; *see also id.* at 30 (same). Legislative Defendants filed a

51-page brief opposing discretionary review, and even specifically addressed whether the Court should move the primary dates, asserting that if "the existing election calendar [were] suspended—with candidate qualification now in-progress for the 2022 primary elections"—it "would have the effect of rendering the [redistricting] plans unconstitutional." Legislative Defs.' Combined Response in Opp. at 35 (Dec. 8, 2021).

This Court then granted Plaintiffs' motion for a preliminary injunction. Legislative Defendants may not have liked the outcome of that ruling, but this sort of gamesmanship—seeking recusal only after securing an unfavorable ruling—is exactly what the waiver rule forbids.

Legislative Defendants have "pointed to no change in circumstances after [this Court's December 8 order] to justify [their] delayed recusal motion." *Sutton*, 259 N.C. App. at 734. If anything (and as explained below) the purported grounds for recusal have become substantially more attenuated, because Legislative Defendants' primary argument for recusal was mooted by this Court's December 8 order. Having "take[n] [their] chances" in allowing Justice Ervin to rule on the Plaintiffs' December 6 petition, they cannot now belatedly seek his disqualification. *Owens*, 902 F.2d at 1156. This is reason enough to deny the motion. *See, e.g.*, *Sutton*, 259 N.C. App. at 734.

II. Legislative Defendants' Arguments for Recusal Are Moot

Even if Legislative Defendants had not waived the ability to seek recusal, their arguments are moot in light of this Court's December 8 preliminary injunction order. Legislative Defendants' primary argument for recusal is that this case has the potential "to affect the election process" that will "govern[] the very election in which Justice

Ervin is participating." Mot. 7. But their motion focuses almost exclusively on the effects of this Court's December 8 order, which they claim imposes "restrictions on candidate filing" that "affect[] both political parties." *Id.*; *see id.* at 5-7. In Legislative Defendants' view, "[d]ecisions like the 8 December 2021 Order entered by this Court"—*i.e.*, those involving "changes in the election cycle"—"reasonably raise[e] questions of impartiality when there is a personal interest in one of the justices becoming reelected." *Id.*

Even assuming that such generalized concerns about "the election cycle" warranted recusal—and, as explained below, they do not—these concerns simply are no longer at issue. This Court's December 8 order that Legislative Defendants complain about was issued over a month ago. The candidate filing period was already stayed, and the primaries were already delayed from March until May. And Legislative Defendants do not explain how either the merits of this appeal or any of the requested relief implicates "the election cycle" in any way that directly affects Justice Ervin's election. Indeed, their motion all but admits that any alleged harm has already been done—they criticize Justice Ervin for having already "*participated* in a decision that halts candidates from filing." Mot. at 7 (emphasis added). Legislative Defendants' arguments for recusal are moot and their motion should be denied on that basis as well.

III. There Is No Basis for Recusal

Even if Legislative Defendants could properly assert these arguments at this stage of the proceedings, their arguments are incorrect. As Legislative Defendants explain, recusal is warranted only if "there exists such a personal bias, prejudice or interest on the

part of the judge that he would be unable to rule impartially." *State v. Fie*, 320 N.C. 626, 627, 359 S.E.2d 774, 775 (1987). That standard is not remotely met with respect to Justice Ervin. As Legislative Defendants admit, "[t]here is no pending case or controversy regarding judicial districts." Mot. at 5. This case does not challenge any procedures whatsoever that are used to elect judges, let alone Justices of this Court. It instead challenges districts used to elect state legislators—like Justice Berger's father—and members of Congress. *See Harper* Pls.' Mot. for Prompt Disqualification of Justice Berger (Jan. 11, 2021). The mere fact that Justice Ervin is running for reelection as a Justice in 2022 does not plausibly give him an "interest" in the outcome of this case within the meaning of Canon 3C.

Legislative Defendants cite no authority supporting their theory, which seems to be that a Justice cannot hear any election-related case in a year that he or she is up for election. They admit that their primary authority, *Faires v. State Bd. of Elections*, 368 N.C. 825, 784 S.E.2d 463, 464 (2016), involved "the constitutionality of retention elections *for this Court*." *Id.* at 464 (emphasis added); *see* Mot. 4. And Legislative Defendants are simply wrong to cite *Pender County v. Bartlett*, 361 N.C. 491, 649 S.E.2d 634 (2007), as supporting judicial recusal anytime a Justice is "up for reelection" (Mot. 4). The only Justice who recused there, Justice Robin E. Hudson, first joined the Court in January 2007—*after* "motions and oral argument" were held—and was not up for reelection until 2014, seven years after the decision.[1]

[1] *See* N.C. Judicial Branch, *Robin Hudson*, https://www.nccourts.gov/judicial-directory/robin-hudson.

Indeed, this Court's precedent undermines Legislative Defendants' position. For example, this Court heard and decided *Dickson v. Rucho*, 367 N.C. 542, 766 S.E.2d 238 (2014), which likewise involved a challenge to gerrymandered state legislative districts, during a year in which Justice Hudson was up for reelection, and yet she did not recuse. In short, the Justices of this Court have not adopted Legislative Defendants' overbroad interpretation of Canon 3C. That theory, if adopted, would frequently impede this Court's ability to decide an entire category of significant constitutional cases involving elections and voting rights.

CONCLUSION

Legislative Defendants' motion for recusal of Justice Ervin should be denied.

Respectfully submitted this 11th day of January, 2022.

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

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CERTIFICATE OF SERVICE

Pursuant to North Carolina Rule of Appellate Procedure 26, I hereby certify that I have this day served a copy of the foregoing by email, addressed to the following counsel:

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This the 11th day of January, 2022.

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