

No. 413P21

TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

REBECCA HARPER, et. al.,

Plaintiffs,

vs.

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

Defendants,

From Wake County
(includes Plaintiff-Intervenors
Common Cause on Certificate of Service)

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

Plaintiffs,

vs.

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

Defendants.

**LEGISLATIVE DEFENDANTS' MOTION FOR
RECUSAL OF JUSTICE SAMUEL J. ERVIN, IV**

Pursuant to Rule 37 of the North Carolina Rules of Appellate Procedure,
Legislative Defendants Representative Destin Hall, in his official capacity as Chair
of the House Standing Committee on Redistricting; Senator Warren Daniel, in his

official capacity as Co-Chair of the Senate Standing Committee on Redistricting and Elections; Senator Ralph Hise, in his official capacity as Co-Chair of the Senate Standing Committee on Redistricting and Elections; Senator Paul Newton, in his official capacity as Co-Chair of the Senate Standing Committee on Redistricting and Elections; Representative Timothy K. Moore, in his official capacity as Speaker of the North Carolina House of Representatives; and Senator Philip E. Berger, in his official capacity as President Pro Tempore of the North Carolina Senate, (the “Legislative Defendant-Respondents”) respectfully file this Motion for Recusal of Justice Samuel J. Irvin, IV.

INTRODUCTION

These consolidated cases question the constitutionality of our state legislative district boundaries and the boundaries for the North Carolina congressional districts. On 4 November 2021, the General Assembly enacted S.L. 2021-175 (H.976 (House)), S.L. 2021-173 (S. 739 (Senate)), and S.L. 2021-174 (S. 740 (Congressional)) (collectively the “Enacted Plans”). However, in order to facilitate time for litigation and, if necessary, the drawing and enactment of new plans, Plaintiffs advocated for delays in the primary election. The Executive Director of the State Board of Elections has advocated that administering primary elections for elected positions specifically impacted by district maps separate from a primary for statewide elected offices would be cost prohibitive and depress voter turnout. (Affidavit of Karen Brinson Bell, Appendix pp. 484-493 to *Harper* Plaintiffs’ Petition for Discretionary Review).

Accordingly, the Director advocated that, if any primary election should be moved, all primary elections should be moved in tandem. (*Id.* 491-92).

Justice Samuel J. Ervin IV is the only sitting justice on this Court who is currently up for reelection in November 2022 and, therefore, the only sitting justice on this Court who may face a primary if another Democratic candidate files for his seat. Decisions that he makes on redistricting may impact voter turnout or other factors of the general election. Decisions Justice Ervin makes directly about the election process could impact his own electability and creates a situation where his own impartiality may reasonably be questioned. Justice Ervin's perfectly natural desire to continue public service as a Justice on the North Carolina Supreme Court is an interest that could be substantially affected by the outcome of this proceeding. Accordingly, Justice Ervin should follow the examples of other jurists and recuse himself from consideration of these matters.

ARGUMENT

In order to support recusal, a litigant must show "that 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). Here, Legislative Defendants move only under the last part of the inquiry: that there is an *interest* on the part of the judge that makes him unable to rule impartially. Because Justice Ervin is the only sitting justice on this Court up for election this year, he has a unique personal interest in the laws governing this election cycle, including those setting up the legislative and congressional districts.

Justice Ervin's current term ends at the end of 2022, making him the only Justice on the Court¹ facing election in the 2022 cycle, which began with filing for a March primary when filing opened in December. When previous justices have found their own race on the ballot and faced the constitutionality of election laws applicable to their election cycle, they have recused themselves. For instance, in *Faires v. State Bd. of Elections*, 368 N.C. 825, 784 S.E.2d 463, 464 (2016), this Court was called upon to examine the constitutionality of retention elections for this Court. One of the justices, Justice Robert H. Edmunds Jr., was up for election in that cycle and he, without motion from any party, "took no part in the consideration or decision of this case." *Id.*; see also *Pender County v. Bartlett*, 361 N.C. 491, 649 S.E.2d 634 (2007) (redistricting case coming before the court for motions and oral argument in 2006, when Justice Robin E. Hudson was up for reelection; Justice Hudson is noted as not participating in the decision of the Court).

More specific to this election cycle, Superior Court Judge Paul C. Ridgeway recused from hearing any election law cases in this 2022 cycle. In his letter to the Chief Justice, Judge Ridgeway noted that his "obligation under the North Carolina Code of Judicial Conduct is to carefully consider whether, as a candidate, [his] impartiality as a judge could reasonably be questioned when ruling on matters directly impacting the administration of the 2022 primary and general elections." (See Exhibit 1, Letter from Judge Ridgeway to the Chief Justice). Judge Ridgeway

¹ Justice Hudson's term also ends in 2022, but she has noted she will not be seeking another term.

believed concerns over his impartiality could be a distraction and, thus, recused from hearing these cases in 2022. Judge Ridgeway also noted that his “predecessor senior resident superior court judge in Wake County, in 2011, reached this same conclusion as he stood for re-election to retain his seat in 2012, and he likewise recused himself from participating in redistricting challenges filed in 2011.

Judge Ridgeway, and his predecessor, Judge Donald W. Stephens, came to the conclusion that their natural personal and financial interests in retaining their seats as superior court judges during the election cycle they were called upon to review laws pertaining to created sufficient questions regarding impartiality. There is no pending case or controversy regarding judicial districts; therefore, Judge Ridgeway could have determined that the cases at issue—seeking redistricting for legislative and congressional races—would not directly implicate him. But Judge Ridgeway determined the opposite. That was his decision. Justice Ervin should recuse himself for the same reasons.

Following the appeals from the three-judge superior court’s determination to deny preliminary injunctive relief to Plaintiffs, this Court interceded before the Court of Appeals and entered its 8 December 2021 Order that: (a) stayed the candidate filing period for any 2022 race; (b) moved all primaries to 17 May 2022; (c) authorized the trial court to shorten a resumed filing period, if necessary; (d) directed the trial court to hold an exceedingly truncated merits hearing and enter its order by 11 January 2021; (e) shortened the thirty-day appeal window to two business days; (f) retained jurisdiction of the appeal (preemptively bypassing the Court of Appeals); and (g)

alluded to a hastened briefing schedule before this Court post-appeal. While the Order does not suggest it was entered for a unanimous court, it also does not suggest that any Justice recused themselves or otherwise did not participate in the process. Therefore, it is more than reasonable to conclude—opposite the position of Judge Ridgeway—Justice Ervin participated in a decision that halts candidates from filing for office against him, moves his opponents’ primary election back two months, and authorizes a truncated filing period for any more opponents when, and only when, this Court enters its final order on the proceedings.

At the time this Court entered its Order, “[c]andidate filing had begun on Monday at the N.C. State Fairgrounds for state- and federal-level contests and at all 100 county boards of elections for local contests.”² (*See* NC State Board of Elections Press Release (8 December 2021) (link in footnote). As of the evening of 8 December 2021, more than 1,400 candidates had filed statewide. *Id.* Justice Ervin was one of those candidates, having filed on 6 December 2021.³ (*See* NC State Board of Elections 2022 Candidate Filing List) (link in footnote). So too were his Republican opponents, who are vying for a Republican primary. *Id.* Justice Ervin’s Facebook page notes that he met several Democratic-party candidates on the first day of filing.⁴

² <https://www.ncsbe.gov/news/press-releases/2021/12/08/supreme-court-suspends-all-candidate-filing-moves-2022-primary-may-17>

³

https://s3.amazonaws.com/dl.ncsbe.gov/Elections/2022/Candidate%20Filing/2022_Primary_Election_Candidate_PDFs/2022_primary_candidate_list_by_contest_federal_and_state.pdf

⁴ *See* <https://www.facebook.com/ervinforjustice>

As of the time Justice Ervin was himself filing for office, motions were pending in this Court to seek restrictions on candidate filing. This decision affects both political parties. Two Republican candidates now locked in a primary election will be forced to spend money and resources campaigning against one another—and not Justice Ervin—for at least two months longer than they anticipated. For the Democrats, no one can formally launch a campaign against Justice Ervin until this Court reopens candidate filing. And it is probable that not everyone who was going to file for a statewide office did so before 8 December because, for instance, there are two Court of Appeals seats where no Democratic-party candidate has yet filed to run.⁵ Only the Justices participating in any review of the trial court decision know when that period will be and for how long filing will be reopened.

Decisions like the 8 December 2021 Order entered by this Court are designed to affect the election process: here, to halt the election process while this Court allows an abbreviated amount of time to have the parties present a case to the trial court and then to this Court. Voting for or against changes in the election cycle, however, reasonably raises questions of impartiality when there is a personal interest in one the justices becoming reelected. *See, e.g. State v. Fie*, 320 N.C. 626, 628, 359 S.E.2d 774, 776 (1987) (identifying a standard of perception in the mind of a reasonable person). A reasonable person would conclude that Justice Ervin has a personal interest in how these election matters progress as the Court deals with aspects of the election laws governing the very election in which Justice Ervin is participating.

⁵ See website link to candidate list, n.3, *supra*.

As other justices and judges have concluded, participating in judicial review of the election laws while a jurist campaigning for election under those very laws, creates a circumstance under Canon 3(C)(1)(d)(iii) where the judge is known “to have an interest that could be substantially affected by the outcome of the proceeding,” and should recuse themselves.

CONCLUSION

Justice Ervin should recuse himself from these cases.

Respectfully submitted, this the 6th day of January, 2022.

**NELSON MULLINS RILEY &
SCARBOROUGH LLP**

Electronically Submitted

Phillip J. Strach

NC Bar No. 29456

4140 Parklake Avenue, Suite 200

Raleigh, NC 27612

Telephone: (919) 329-3800

Facsimile: (919) 329-3799

phil.strach@nelsonmullins.com

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.

Thomas A. Farr (NC Bar No. 10871)

tom.farr@nelsonmullins.com

John Branch (NC Bar No. 32598)

John.branch@nelsonmullins.com

Alyssa M. Riggins (NC Bar No. 52366)

Alyssa.riggins@nelsonmullins.com

4140 Parklane Avenue, Suite 200

Raleigh, NC 27612

Telephone: (919) 329-3800

BAKER & HOSTETLER LLP

Katherine L. McKnight (VA Bar. No. 81482)*
kmcknight@bakerlaw.com
E. Mark Braden (DC Bar No. 419915)*
mbraden@bakerlaw.com
Washington Square, Suite 1100
1050 Connecticut Avenue, N.W.
Washington, DC 20036-5403
Telephone: 202.861.1500

Counsel for Legislative Defendants

**Appellate Pro Hac Vice Applications
Forthcoming*

CERTIFICATE OF SERVICE

It is hereby certified that on this the 6th day of January, 2022, the foregoing was served on the individuals below by email:

Burton Craige
Narendra K. Ghosh
Paul E. Smith
Patterson Harkavy LLP
100 Europa Drive, Suite 420
Chapel Hill, NC 27517
bcraige@pathlaw.com
nghosh@pathlaw.com
psmith@pathlaw.com
Counsel for Plaintiffs Rebecca Harper, et al.

Abha Khanna
Elias Law Group LLP
1700 Seventh Avenue, Suite 2100
Seattle, WA 98101
AKhanna@elias.law
Counsel for Plaintiffs Rebecca Harper, et al.

Elisabeth S. Theodore
R. Stanton Jones
Samuel F. Callahan
Arnold and Porter
Kaye Scholer LLP
601 Massachusetts Avenue NW
Washington, DC 20001-3743
elisabeth.theodore@arnoldporter.com

Aria C. Branch
Lalitha D. Madduri
Jacob D. Shelly
Graham W. White
Elias Law Group LLP
10 G Street NE, Suite 600
Washington, DC 20002
ABranch@elias.law
LMadduri@elias.law
JShelly@elias.law
GWhite@elias.law
Counsel for Plaintiffs Rebecca Harper, et al.

Terence Steed
Special Deputy Attorney General
N.C. Department of Justice
Post Office Box 629
Raleigh, NC 27602-0629
tsteed@ncdoj.gov
*Counsel for the North Carolina State Board
of Elections; Damon Circosta, Stella*

Counsel for Plaintiffs Rebecca Harper, et al.

David J. Bradford
Jenner & Block LLP
353 North Clark Street
Chicago, IL 60654
dbradford@jenner.com

Counsel for Plaintiffs North Carolina League of Conservation Voters, et al.

Sam Hirsch
Jessica Ring Amunson
Kali Bracey
Zachary C. Schauf
Karthik P. Reddy
Urja Mittal
Jenner & Block LLP
1099 New York Avenue, NW, Suite 900
Washington, DC 20001
shirsch@jenner.com
zschauf@jenner.com

Counsel for Plaintiffs North Carolina League of Conservation Voters, et al.

Allison J. Riggs
Hilary H. Klein
Mitchell Brown
Katelin Kaiser
Southern Coalition For Social Justice
1415 W. Highway 54, Suite 101
Durham, NC 27707
allison@southerncoalition.org
hilaryhklein@scsj.org
mitchellbrown@scsj.org
katelin@scsj.org
Counsel for Intervenor Common Cause

Anderson, Jeff Carmon III, Stacy Eggers IV, and Tommy Tucker, in their official capacities with the State Board of Elections

Stephen D. Feldman
Robinson, Bradshaw & Hinson, P.A.
434 Fayetteville Street, Suite 1600
Raleigh, NC 27601
sfeldman@robinsonbradshaw.com

Counsel for Plaintiffs North Carolina League of Conservation Voters, et al.

Adam K. Doerr
Robinson, Bradshaw & Hinson, P.A.
101 North Tryon Street, Suite 1900
Charlotte, NC 28246
adoerr@robinsonbradshaw.com

Erik R. Zimmerman
Robinson, Bradshaw & Hinson, P.A.
1450 Raleigh Road, Suite 100
Chapel Hill, NC 27517
ezimmerman@robinsonbradshaw.com

Counsel for Plaintiffs North Carolina League of Conservation Voters, et al.

J. Tom Boer
Olivia T. Molodanof
Hogan Lovells US LLP
3 Embarcadero Center, Suite 1500
San Francisco, CA 94111
tom.boer@hoganlovells.com
olivia.molodanof@hoganlovells.com
Counsel for Intervenor Common Cause

s/ Phillip J. Strach

Phillip J. Strach (NC Bar No. 29456)
phillip.strach@nelsonmullins.com

Exhibit 1

(Letter from Judge Paul Ridgeway to Chief Justice Paul Newby)



State of North Carolina
General Court of Justice
10th Judicial District

PAUL C. RIDGEWAY
SENIOR RESIDENT SUPERIOR COURT JUDGE

WAKE COUNTY COURTHOUSE
POST OFFICE BOX 351
RALEIGH, NC 27602

TELEPHONE: (919) 792-4950
FAX: (919) 792-4951
PAUL.RIDGEWAY@NCCOURTS.ORG

November 12, 2021

Chief Justice Paul Newby
North Carolina Supreme Court
2 East Morgan Street
Raleigh, North Carolina 27601

Re: *Pending Redistricting Challenges*

Dear Chief Justice Newby:

I write to update you on several pending matters in Wake County Superior Court pertaining to the recent redistricting of North Carolina's legislative and congressional districts. Because these matters implicate your three-judge panel appointment and assignment authority under North Carolina Gen. Stat. 1-267.1, I feel it important that you be aware of these developments.

The North Carolina General Assembly ratified the 2021 Redistricting Plans for House districts (SL 2021-175), Senate districts (SL 2021-173) and Congressional districts (SL 2021-174) on November 4, 2021.

There are presently pending in Wake County Superior Court two actions that relate to these plans: *NC NAACP v. Berger* (21 CVS 14476) and *Harper v. Lewis* (19 CVS 12667).

NC NAACP v. Berger was filed on October 29, 2021 prior to the enactment of the 2021 Redistricting Plans. The Plaintiffs seek a declaratory judgment and injunctive relief, including pushing back the initial election deadlines and March primaries by two months. The action challenges the process used by the General Assembly to adopt congressional and state legislative districts. The Plaintiffs, citing N.C. Gen. Stat. 1-81.1, assert that a three-judge panel is not required for this action because, at the time the litigation was filed, it did not challenge an "act" of the General Assembly.

On November 9, 2021, the Legislative Defendants in *NC NAACP v. Berger* filed a “motion to transfer” seeking to initiate the process set out in N.C. Gen. Stat. 1-267.1 to transfer this matter to a three-judge panel appointed by the Chief Justice. Legislative Defendants seek to have this motion heard expeditiously. Legislative Defendants have also filed a motion to dismiss Plaintiff’s complaint.

In *Harper v. Lewis*, on November 5, 2021, Plaintiffs filed a motion for leave to file a supplemental complaint pursuant to Rule 15(d) in litigation brought in 2019 challenging the 2016 congressional districts. The supplemental complaint, among other things, seeks to have the 2021 congressional districts declared unconstitutional and to enjoin the defendants from moving forward with the 2022 primary and general elections for Congress using the 2021 plan. The Plaintiffs assert that the three-judge panel originally appointed in 2019 has the authority to grant the motion for leave to file the supplemental complaint, and further assert that two members of the three-judge panel could take such action, presumably recognizing that one member of the panel, the Honorable Alma Hinton, has retired from the bench.

On November 10, 2021, the Legislative Defendants in *Harper v. Lewis* filed a “motion to transfer” seeking to initiate the process set out in N.C. Gen. Stat. 1-267.1 to transfer this matter to a new three-judge panel appointed by the Chief Justice. Legislative Defendants seek to have this motion heard expeditiously.

In addition to these two matters, our office, by correspondence from counsel dated November 5, 2021, has been made aware of the anticipated filing of another action “challenging the General Assembly’s redistricting maps” that will, among other things, request the assignment by the Chief Justice to a three-judge panel pursuant to N.C. Gen. Stat. 1-267.1. As of the time of this writing, we have not received any indication that this action has been commenced.

As you are aware, N.C. Gen. Stat. 1-267.1 requires that an action challenging the validity of an act of the General Assembly that apportions or redistricts State legislative or congressional districts be heard by a three-judge panel of the Superior Court of Wake County organized by the Chief Justice. The senior resident superior court judge of Wake County shall be the presiding judge, and the Chief Justice shall appoint to the three-judge panel one resident superior court judge from the First through Third Judicial Divisions and one resident superior court judge from the Fourth through Fifth Judicial Divisions. The statute further provides that should the senior resident judge of Wake County be disqualified or otherwise unable to serve on the three-judge panel, the Chief Justice shall appoint another resident superior court judge of Wake County as the presiding judge.

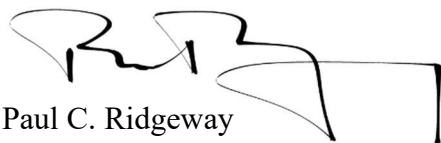
After a great deal of deliberation, as the current senior resident superior court judge in Wake County, I have concluded that I should not serve as a judge in matters concerning redistricting during the 2022 election cycle. I will be a candidate to retain my judicial position during the 2022 election cycle. My obligation under the North Carolina Code of

Judicial Conduct is to carefully consider whether, as a candidate, my impartiality as a judge could reasonably be questioned when ruling on matters directly impacting the administration of the 2022 primary and general elections. I have concluded that even the slightest concern about my impartiality in this regard would be an unnecessary distraction from this important litigation, and I therefore have concluded that I should recuse myself from the matters described above, as well as any further redistricting challenges brought in 2021 or 2022. I note that my predecessor senior resident superior court judge in Wake County, in 2011, reached this same conclusion as he stood for re-election to retain his seat in 2012, and he likewise recused himself from participating in redistricting challenges filed in 2011.

I therefore respectfully request that you exercise your authority under N.C. Gen. Stat. 1-267.1 to appoint another resident superior court judge of Wake County as the presiding judge of any and all panels needed to preside over redistricting challenges brought in 2021 or 2022, and that you likewise relieve me of my role as presiding judge of the three-judge panel in *Harper v. Lewis* and appoint a replacement Wake County judge to serve in my stead. Should the appointment of new three-judge panel(s) be required under N.C. Gen. Stat. 1-267.1 after the 2022 election cycle has concluded, assuming I retain my seat, I stand ready to serve at your request.

It has been a privilege to serve you, and your predecessor Chief Justices, as the presiding judge on redistricting panels since 2011, and I trust that you understand that it is with great reluctance, but with a compelling sense of duty to the integrity of our Courts, that I have reached this decision.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Paul C. Ridgeway', with a stylized, elongated flourish extending to the right.

Paul C. Ridgeway

Cc: Counsel of record