No. 201PA12-2 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA
****

MARGARET DICKSON, *et al.*, *Plaintiffs,*	)	**From Wake County**
v.	)	11 CVS 16896
	)	11 CVS 16940
ROBERT RUCHO, *et al.*, *Defendants.*	)	*(Consolidated)*
NORTH CAROLINA STATE CONFERENCE OF BRANCHES OF THE NAACP, *et al.*, *Plaintiffs,*	)	
v.	)	
THE STATE OF NORTH CAROLINA, *et al.*, *Defendants.*	)	

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PLAINTIFF-APPELLANTS' MOTION FOR RECUSAL OF JUSTICE PAUL NEWBY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE(S)**

STATUTES

OTHER AUTHORITIES

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PLAINTIFF-APPELLANTS' MOTION FOR RECUSAL OF JUSTICE PAUL NEWBY

****

NOW COME the *Dickson* Plaintiffs and the *NAACP* Plaintiffs in the above-captioned matter and move Justice Newby to recuse himself from participating in this case, or, in the alternative, to refer this Motion to the Court for consideration, and for the Court to hold that Justice Newby should be recused from this case.

In support whereof, Plaintiffs show the Court as follows:

INTRODUCTION

These consolidated cases are before the Court for a second time. In a prior appeal by Defendants from an interlocutory discovery order, the Court, in a divided decision, reversed the trial court and held that N.C. Gen. Stat. § 120-133 does not waive the attorney-client privilege between Defendants and their privately retained redistricting counsel. *Dickson v. Rucho*, 366 N.C. 332, 737 S.E.2d 362 (2013).

These cases are now before the Court on the Plaintiffs' appeal from the trial court's final orders with regard to the merits of Plaintiffs' claims that the legislative and congressional redistricting maps enacted by the General Assembly in 2011 violate the North Carolina and United States Constitutions. The Record on Appeal was mailed by the Court on 5 September 2013, and Plaintiffs' first brief on the merits is being filed contemporaneously with this Motion on 11 October 2013.

During the prior interlocutory appeal, on 21 November 2012, Plaintiffs moved for the recusal of Justice Paul Newby, in part on the ground that the largest contributor in support of Justice Newby's 2012 re-election to the Court, the Republican State Leadership Committee (the "RSLC"), had a significant stake in the outcome of that appeal, due to the fact that the RSLC's agent, Dr. Thomas Hofeller, was the principal architect of the redistricting maps challenged in this

litigation. On 17 December 2012, Plaintiffs' motion was denied without a written opinion. *Dickson v. Rucho*, ___ N.C. ___, 735 S.E.2d 193 (2012).

In comparison with the prior interlocutory appeal, the legal principles and policy concerns requiring Justice Newby's recusal in this appeal weigh even more heavily. The relationship between the RSLC's expenditures and the RSLC's interest in the outcome of this litigation is direct and concrete. The RSLC, through its agent, Dr. Hofeller, drew the plans at issue in this case; the RSLC publicly endorsed and embraced the plans; and then, within days of the election, as it appeared that Justice Newby was going to lose his seat on the Court, the RSLC spent hundreds of thousands of dollars in support of Justice Newby's re-election. Thus, unless Justice Newby recuses himself, he will rule on the validity of redistricting plans that were drawn, endorsed, and embraced by the principal funder of a committee supporting his campaign for re-election.

To be clear, Plaintiffs' motion is not based on the mere fact that there were independent expenditures or contributions made in support of Justice Newby's re-election by those who supported his candidacy and who believed that he would favor these redistricting plans when they came before the Court. Rather, it is the fact that the RSLC played a significant role in the drafting of the redistricting plans challenged in this appeal and then weighed in with contributions in support of

Justice Newby's re-election in an amount and at a time that "had a significant and disproportionate influence in placing [Justice Newby] on the case … ." *Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868, 884, 129 S. Ct. 2252, 2264 (2009) (emphasis added). As this Court observed in *Ponder v. Davis*, 233 N.C. 699, 65 S.E.2d 356 (1951):

> It is not enough for a judge to be just in his judgments; he should strive to make the parties and the community feel that he is just; he owes this to himself, to the law and to the position he holds. […] "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[.]"

Ponder, 233 N.C. at 706, 65 S.E.2d at 360 (internal citation omitted).

This Motion is made on three grounds:

1) that Justice Newby's recusal is required as a matter of law by the United States Supreme Court's decision in *Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868, 129 S. Ct. 2252 (holding that recusal was required by the Fourteenth Amendment Due Process Clause);

2) that Justice Newby's recusal is required as a matter of law by this Court's decision in *Ponder v. Davis*, 223 N.C. 699, 65 S.E.2d 356; and

3) that Justice Newby's recusal is required by Canon 3C of the North Carolina Code of Judicial Conduct.

Underlying these legal principles is a significant public policy concern that has been addressed by two former Chief Justices of the North Carolina Supreme Court—former Chief Justice James Exum and former Chief Justice I. Beverly Lake, Jr.—who stated as follows in their *amicus curiae* brief to the United States Supreme Court in *Caperton*:

> Substantial financial support of a judicial candidate—whether contributions to the judge's campaign committee or independent expenditures—can influence a judge's future decisions, both consciously and unconsciously. *Amici* believe that the only way to preserve a litigant's due process right to adjudication before an impartial judge is to require that a judge recuse from a case not only when the judge consciously perceives the judge's own partiality, but also when there exists a reasonable appearance of partiality or impropriety.

Brief *Amicus Curiae* of 27 Former Chief Justices and Justices in Support of Petitioners (copy attached as Exhibit 1).[1]

In this Motion, Plaintiffs will first demonstrate that as election day approached with Justice Newby behind in the polls, the RSLC—an organization with a direct stake in the preservation of the legislative and congressional districts at issue in this appeal, and the organization whose agent drew the plans—sought contributions and itself expended at least $1,165,000 to support Justice Newby's re-election. Those contributions had a significant and disproportionate influence

[1] The Exhibits to this Motion are being filed with the Court on a DVD.

on Justice Newby's victory. These circumstances also created a widespread and persisting perception that Justice Newby is likely to be predisposed to uphold the constitutionality of the legislative and congressional districts challenged in this litigation and the corresponding appeal.

Plaintiffs will then demonstrate that under these circumstances and pursuant to the principles set forth in *Ponder v. Davis* and *Caperton v. A. T. Massey Coal Co.*, as well as in Canon 3C(1) of the North Carolina Code of Judicial Conduct, Justice Newby should be recused from participation in this case.

STANDARD OF REVIEW

Due process requires an objective inquiry into whether the Republican State Leadership Committee's influence on the election under all the circumstances "would offer a possible temptation to the average judge to lead him not to hold the balance nice, clear and true." *Caperton*, 556 U.S. at 885, 129 S. Ct. at 2264 (quoting *Tumey v. Ohio*, 273 U.S. 510, 532, 47 S. Ct. 437 (1948)).

If a judge finds sufficient force in a recusal motion in order to proceed to find facts, he should either disqualify himself or refer the matter to another judge before whom evidence may be presented to show why the referring judge should not be recused. *North Carolina Nat'l Bank v. Gillespie*, 291 N.C. 303, 311, 230 S.E.2d 375, 379 (1976) (citing *Ponder*).

RELEVANT FACTS

I. THE MAJOR FUNDER OF JUSTICE NEWBY'S ELECTION HAS A DIRECT STAKE IN THE REDISTRICTING PLANS CHALLENGED IN THIS LITIGATION

The Republican State Leadership Committee is a Section 527 organization headquartered in Washington, D.C.[2] According to its website, the RSLC is "the only national organization whose mission is to elect down ballot, state-level Republican office holders." (Exhibit 2 at 2). The RSLC also provides assistance to Republican legislators in the enactment of redistricting plans favorable to Republicans, as it has done with respect to the plans at issue here. In an e-mail dated August 15, 2011 (just three weeks after the plans challenged in these lawsuits were first enacted), the President of the RSLC described the "solid results" that its "veteran team" had "delivered" for the RSLC in North Carolina. He wrote:

> The RSLC has been designated as the lead Republican Redistricting organization, with a focus on helping the eighteen states that have won or lost Congressional representatives as a result of population shifts. *We have retained the veteran team of seasoned redistricting experts, including Tom Hoefeller* [sic], *Dale Oldham, Mike Wild and others who collectively have over a century's worth of redistricting experience*. They will be working closely with the RNC [Republican National

[2] *See About the RSLC*, Republican State Leadership Committee, *at* http://rslc.com/about/ (last accessed Nov. 19, 2012) (copy attached as Exhibit 2). The term "Section 527" organization refers to registration with the Internal Revenue Service ("IRS") pursuant to 26 U.S.C. § 527.

> Committee], NRCC [National Republican Congressional Committee] and State Republican Legislative Caucuses to ensure lines that are fair, legal and maximize our opportunities for success.
>
> *The team has been crisscrossing the county [sic] and already has delivered solid results in a number of states, most recently in North Carolina*. They will remain engaged in a number of states and play an indispensable role in helping draw fair and legal lines that will allow us to run and win elections in 2012 and throughout the rest of the decade.

Exhibit 393 to Deposition of Dale Oldham (copy attached as Exhibit 3) (emphasis added).[3]

In his e-mail, the RSLC's President identified Thomas Hofeller and Dale Oldham as two members of the RSLC's "veteran team" in North Carolina. Senator Rucho and Representative Lewis attested to the importance of the role Dr. Hofeller and Mr. Oldham played here. They described Hofeller as the "chief architect" of the three redistricting plans challenged in these lawsuits. (Hofeller Dep. p 30) (copy attached as Exhibit 4); (Rucho Dep. pp 26, 31) (copy attached as Exhibit 5). Hofeller was assisted in his role as "chief architect" by Mr. Oldham. (Dale Oldham Dep. pp 14, 16) (copy attached as Exhibit 6). Indeed, Dr. Hofeller made his first trip to Raleigh in the year 2011 in early February, even before final state

[3] As a technical matter, an entity controlled by the RSLC, the State Government Leadership Foundation, entered into a contract for Dr. Hofeller's consulting services with a limited liability company named Geographic Strategies, LLC, in which Dr. Hofeller and Dale Oldham were members. *See, e.g.*, Hofeller Dep. pp. 12-13 (Exhibit 4).

Census data had been released, the first of 10 trips that year.[4] Both Hofeller and Oldham provided deposition testimony for the Defendants in this case. Moreover, Hofeller was one of only two witnesses that the Defendants called to testify at trial.

Following the enactment of the plans drafted by Hofeller and Oldham for the Defendants, the RSLC spent significant amounts of money in support of the election of Justice Newby and in opposition to his opponent, Judge Samuel J. Ervin IV. Below, Plaintiffs briefly trace the major contributions made by RSLC to benefit Justice Newby, the reasons for those contributions, and the relationship between such contributions and the results of the election.

On 4 June 2012, a poll conducted by the Civitas Institute ("Civitas") showed Judge Ervin leading Justice Newby among potential voters:

7.2%	Newby
70.6%	Undecided
17.8%	Ervin
4.5%	Don't Know/Refused

(Copy of Civitas poll attached as Exhibit 7). Two months later, on 23 August 2012, another poll conducted by Civitas showed Judge Ervin leading Justice Newby among potential voters by even larger margins:

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[4] *See* Olga Pierce, Justin Elliott and Theodoric Meyer, *How Dark Money Helped Republicans Hold the House and Hurt Voters*, Pro Publica, Dec. 21, 2012, *at* http://www.propublica.org/article/how-dark-money-helped-republicans-hold-the-house-and-hurt-voters (last accessed October 11, 2013) (copy attached as Exhibit 43A) (citing Hofeller Deposition Exhibit 431) (copy attached as Exhibit 43B)).

6.1%	Newby
69%	Undecided
22%	Ervin
2.8%	Don't Know/Refused

(Copy of Civitas poll attached as Exhibit 8).

Judge Ervin's lead continued through early October. According to a poll released on 1 October 2012 by Public Policy Polling ("PPP"):

> The most important state race this year besides Governor may actually be for the Supreme Court. In that nonpartisan race the de facto Democratic candidate, Sam Ervin IV, leads the Republican incumbent Paul Newby by a 31-23 margin. The 46% of voters undecided is not terribly surprising in a race where voters can't just go on party labels. Ervin is winning 44% of Democrats while only 37% of Republicans are currently committed to Newby.

(Copy of PPP poll attached as Exhibit 9). A PPP poll released two weeks later stated: "In the North Carolina Supreme Court race Sam Ervin IV continues to lead with 32% to 24% for incumbent Paul Newby. But the main story in the nonpartisan race is the undecideds—44% of voters are undecided without having party cues to rely on." (Copy of PPP poll attached as Exhibit 10).

Throughout October and the first week of November, the Republican State Leadership Committee contributed a total of $1,165,000 to a super PAC named Justice for All NC ("Justice for All"), which in turn provided money to a second super PAC known as the NC Judicial Coalition (the "Judicial Coalition"). The

Judicial Coalition made the following expenditures between 11 October 2012 and 5 November 2012 on television advertisements[5] totaling $1,944,919—all in support of Justice Newby:

10/11/2012	$345,000
10/15/2012	$140,000
10/16/2012	$100,000
10/18/2012	$110,000
10/22/2012	$500,000
10/23/2012	$ 77,000
10/25/2012	$ 13,000
10/26/2012	$331,059
10/29/2012	$203,570
11/01/2012	$ 9,700
11/02/2012	$ 25,000
11/05/2012	$ 50,000

(Copy of expenditure reports attached as Exhibits 11A and 11B).[6]

This unprecedented scale of advertising to influence the outcome of a North Carolina judicial election would not have been possible without the money from the Republican State Leadership Committee. In fact, the $1,165,000 that the RSLC contributed to Justice for All amounted to 79% of the $1,480,000 that

[5] A copy of at least one television commercial funded by the North Carolina Judicial Coalition, the so-called "Banjo" commercial, is attached as Exhibit 28.

[6] The RSLC was not the only contributor. During approximately the same period of time (from 13 August 2012 to 19 October 2012), Civitas spent a total of $74,500 on radio and newspaper advertisements relating to Newby's election (Exhibit 11C), and in late October 2012, Americans for Prosperity paid at least $225,000 to send out direct mail to "educate citizens" about Justice Newby (Exhibit 11D). *See generally State for Sale*, The New Yorker, October 20, 2011 (copy attached as Exhibit 12).

Justice for All ultimately gave to the Judicial Coalition in support of Justice Newby's re-election. In turn, the $1,480,000 from Justice for All amounted to 76% of the $1,944,919 total that the Judicial Coalition spent on advertising in support of Justice Newby.

On 31 October 2012, a poll released by Public Policy Polling stated: "[i]n the critical Supreme Court contest Sam Ervin IV leads Paul Newby 39-35, but with 26% of voters undecided in the nonpartisan race it could still end up going either way." (Copy of PPP poll attached as Exhibit 13). Similarly, a Civitas poll released in late October or early November was described by the Raleigh *News & Observer* as follows:

> The closely watched and highly funded race for the N.C. Supreme Court has tightened, according to a new poll.
>
> Sam Ervin IV, a judge on the N.C. Court of Appeals, leads N.C. Supreme Court Justice Paul Newby by a 38-32 percent margin, according to a poll commissioned the Civitas Institute, a Raleigh-based conservative advocacy group.
>
> Although officially nonpartisan, Republicans have rallied to Newby to make sure the court stays in Republican hands—an issue that has implications for redistricting challenges and other issues.

Under the Dome, *Civitas Poll Shows Tightening Supreme Court Race*, The News & Observer, Nov. 1, 2011 (copy attached as Exhibit 14).

Justice Newby won re-election on 6 November 2012, and he spoke at a victory rally hosted by the North Carolina Republican Party at the North Raleigh Hilton. (Exhibit 15, p 3). Representative Tillis and Senator Berger, both of whom are parties to this litigation, spoke from the same dais, *see id*. at 5-7, and Representative Tillis told the crowd: "We are now in control of the Governor's mansion, the General Assembly, and have a conservative supreme court." *See* Exhibit 16 at 0:56 seconds to 1:06 (video of Rep. Tillis's remarks).

On 7 November 2012, the Civitas Institute posted the following on its web site:

> The Republican Party was also glad to see incumbent State Supreme Court Justice Paul Newby retain his seat on the bench. He fended off Democrat Sam Ervin IV. *That seat could be a deciding vote in not only redistricting* but in other cases down the road. The chances are good Democrats and liberals will challenge changes a Republican General Assembly will want to make on such issues as school choice, immigration and tax reform.

(Copy attached as Exhibit 17) (emphasis added).

II. THE REPUBLICAN STATE LEADERSHIP COMMITTEE'S CONTRIBUTIONS IN SUPPORT OF JUSTICE NEWBY'S RE-ELECTION AND ITS RELATIONSHIP TO THIS CASE HAVE BEEN THE SUBJECT OF MUCH PRESS COVERAGE FROM 2012 TO THE PRESENT

Prior to the election, supporters of Justice Newby drew attention to his candidacy by emphasizing his role in this redistricting case. On 8 August 2012, for example, *The Winston-Salem Journal* published an editorial that stated in part:

> [S]tarting several weeks ago with a blog written by Carter Wrenn, a former aid to the late Sen. Jesse Helms, attention paid to the race between Associate Justice Paul Newby and court of Appeals Judge Sam Ervin IV has grown considerably. The reason: The court's partisan political balance will tip to the side of the winner, and that has big implications for the constitutionality of the redistricting plans the Republican legislature passed this year.

New Court Will Take Up Redistricting, The Winston-Salem Journal, Aug. 8, 2012 at A15 (copy attached as Exhibit 18). The blog post by Mr. Wrenn, referenced in the editorial above, was even more specific:

> The way Republicans see it, sooner or later, the Democrats' lawsuit to throw out their new State House and Senate districts is going to end up in the State Supreme Court and, if that happens next year, either Paul Newby (Republican) or Sam Ervin (Democrat) will cast the deciding vote. So, if Newby wins, Republicans in the House and Senate keep their districts and, the way they see it, control of the legislature for the next decade.

Carter Wrenn, *The Second Most-Watched Race …,* July 12, 2012 (copy attached as Exhibit 19).

Reports on the outside spending in the election for this Supreme Court seat were covered widely in the media, including newspapers outside of North Carolina. Most of the stories mentioned the pending redistricting case. *See*, *e.g.*, Gary D. Robertson, *Big Money Could Arrive for NC Supreme Court Race*, Associated Press State & Local Wire July 29, 2012 (copy attached as Exhibit 20) ("The outcome of a single race could swing the legal temperament of the entire court. The winner likely will have to rule on challenged redistricting maps approved by the new Republican-Controlled Legislature."), Gary D. Robertson, *NC Outside Group Begins Running TV Ad for Newby*, Erie Times-News, October 19, 2012 (copy attached as Exhibit 21) (" … justices are expected to consider redistricting litigation that challenges new maps for congressional and General Assembly Districts."); *see also* Editorial, *North Carolina, Meet Citizens United*, New York Times, June 5, 2012 (copy attached as Exhibit 22) ("The North Carolina Judicial Coalition is a new tax-exempt organization, known as a super PAC, supported by wealthy conservative Republicans who are determined to make this year's race for a seat on the North Carolina Supreme Court ideological and expensive. … Justice John Paul Stevens predicted that such spending would

overwhelm state court races, which would be especially harmful since judges must not only be independent but be seen to be independent as well. North Carolina is proving him right. … The North Carolina Judicial Coalition was set up to re-elect state Justice Paul Newby … .").

As election day neared, newspaper reports on the contest continued to mention the significance of the upcoming redistricting case and the funding in support of Justice Newby from entities with an interest in the outcome of the case. *See, e.g.*, *FYI—Newby-Ervin Race has Far-Reaching Implications*, The Winston-Salem Journal, Sept. 13, 2012, at A4 (copy attached as Exhibit 23) ("That matters because the court likely will hear legal challenges to redistricting maps drawn by Republicans in the General Assembly that favor the GOP …"); Scott Mooneyham, *Do Party Affiliations Matter?*, The Stanley News and Press, Oct. 3, 2012 (copy attached as Exhibit 24) (expressing the opinion that "the money pouring into the [Supreme Court] race is and will continue to look partisan," pointing out the funding backing Newby from the N.C. Judicial Coalition, and stating that "there is a little case before the Supreme Court that does have a partisan bent, and it has the attention of traditional donors. It's the case that will determine whether legislative districts that provide advantage to Republicans will stand."); Doug Clark, *Partisan Judicial Endorsement*, The Greensboro News and Record, Oct. 8, 2012 (copy

attached as Exhibit 25) (asserting that *The News & Observer's* endorsement of Judge Sam J. Ervin, IV "seems to boil down to" the belief that Justice Newby would be less likely to overturn the Republican legislature's redistricting plans); *see also For the Court*, The News & Observer, Oct. 7, 2012 (copy attached as Exhibit 26 (citing redistricting as the reason why "Republicans are going all out for Newby, to the extent of setting up a super PAC to support their man with spending above and beyond the public financing that Newby (and Ervin) elected to receive"); Rob Christensen, *GOP Candidates Rally Backers, Urge Focus on State Judicial Race*, The News & Observer, Oct. 27, 2012 (copy attached as Exhibit 27) ("If Newby loses his state Supreme Court race … Republicans fear their redistricting plan could be overturned.").

In addition, the public reports of the influence of big money donors paying for advertisements supporting Justice Newby explicitly linked the financial support to a ruling in this redistricting case, in diverse media outlets. They also showed the dominant role of RSLC as the largest dominant donor. For example, on 30 October 2012, a political blog reported:

> According to its third quarter report filed with the state board of elections on Oct. 29, Justice for All NC had received more than $1 million in contributions through Oct. 20, with another $338,000 posted after that date. *The bulk of that money—$860,000—came from the Republican State Leadership Committee* in Washington

> D.C., a group with a *keen interest in the outcome of the redistricting case likely to land in the state Supreme Court over the next year or two*. That's an interest shared by several state conservatives who've donated to the RSLC – in September alone, Art Pope's Variety Stores donated $150,000, western Carolina businessman Phil Drake, $50,000, and Bob Luddy (who also donated $25,000 to the Judicial Coalition) $50,000.

Sharon McClosky, *More Dollars Rolling In for Newby*, NC Policy Watch, Oct. 30, 2012 (emphasis added) (copy attached as Exhibit 29). The next day, on 31 October 2012, writing in *The Charlotte Observer*, John Frank and Jim Morrill reported:

> In the Supreme Court race, Republicans launched an independent expenditure committee named Justice for All. It has been dormant since registering with the state in May, but now its third-quarter report and a subsequent filing show a sudden flurry of activity adding up to $1.3 million in receipts.
>
> A huge portion—$860,000—came from the Republican State Leadership Committee, based in Washington. *The organization has a vested interest in keeping the GOP-drawn congressional and legislative districts intact, an issue that will end up before the state Supreme Court, which currently tilts conservative 4-3*.

John Frank and Jim Morrill, *McCrory Leads Dalton 6-1 in Governor's Race Fundraising*, The Charlotte Observer, Oct. 31, 2012 (emphasis added) (copy attached as Exhibit 30).

On 1 November 2012, *The News & Observer* reported that:

> The Washington, D.C.-based Republican State Leadership Committee has chipped in another $275,000 to help re-elect state Supreme Court Justice Paul Newby over appellate Judge Sam Ervin IV. That brings the outside group's contribution to the cause to $1.1 million. *The RSLC has an interest in retaining North Carolina's newly redrawn legislative and congressional districts, which will help keep Republicans in office in this state and in Congress*. The redistricting will eventually end up before the state Supreme Court, which currently tilts 4-3 conservative.

Under the Dome, The News & Observer, Nov. 1, 2012 (emphasis added) (Exhibit 14).

Following the election, reports and editorials again made the link between the Court's consideration of this case and Justice Newby's re-election. These appeared in North Carolina newspapers large and small. *See, e.g.*, Steve Ford, *Treasure of Votes from GOP Maps*, The News & Observer, Nov. 10, 2012 (copy attached as Exhibit 31) (discussing the impact of the newly-drawn maps and the redistricting challenges pending before this Court and expressing the opinion that "[Newby's] claims of impartiality meant zilch to his supporters—who must figure that for the price they paid, they're entitled to the ruling they want."); John Hood, *North Carolina Votes for Change*, The (Elkin) Tribune, Nov. 11, 2012 (copy attached as Exhibit 32) ("While most of the media attention in the Paul Newby-

Jimmy Ervin race focused on the potential effects on state redistricting litigation, the policy implications of the Supreme Court race were far broader than that.").

Another typical editorial is this one from the Southern Pines Pilot:

> So why would out-of-state forces care who won a normally obscure post on one of 50 state supreme courts—and not even the chief justice's position at that? The answer: *Republican forces, knowing Newby to be one of their own, thought it worth a lot of money to boost his chances of helping preserve a GOP-sympathetic majority on the court when it hears a case challenging the legality of the heavily partisan set of congressional districts drawn up by the Republican-dominated General Assembly*.
>
> This all stinks. Judges are supposed to be chosen on their merits, not on the promise or probability that they will vote a certain way on future cases.

Courts, Politics are a Bad Mix, The Pilot, Nov. 14, 2012 (emphasis added) (copy attached as Exhibit 33); *see also* WRAL *On the Record*, Nov. 17, 2012 (copy attached as Exhibit 34A and 34B) (statements of reporter Mark Binker at 18:45 minutes questioning the impartiality of Justice Newby in light of the campaign spending in support of his candidacy by entities with an interest in the redistricting litigation).

In 2013, actions by the General Assembly with respect to public financing of judicial elections again highlighted the role of private funds for Justice Newby. In a June 14, 2013 editorial (copy attached as Exhibit 35), the *News and Observer*

editorial board discussed the impact of special interest spending in the 2012 Supreme Court race:

> The 2012 state Supreme Court race between incumbent Justice Paul Newby and appeals Judge Sam Ervin IV displayed that vulnerability. The $2.6 million independent groups spent in the race overwhelmingly went to Newby. He narrowly won after outspending Ervin nearly 10 to 1, but public financing helped Ervin to stay competitive against special interest money.
>
> *A Democratic challenge to the Republican redrawing of legislative and congressional district maps may make it to the state Supreme Court. In that event, Newby could be the deciding vote on an officially nonpartisan court that is nonetheless considered 4-to-3 Republican to Democrat*. Thus special interest money spent in Newby's race could lock in a statewide political design that tilts right largely due to Pope's decisive role in legislative races.

Id. (emphasis added);[7] *see also* Scott Mooneyham, *A Guiding Hand from Washington*, Salisbury Post, Aug. 19, 2013 (copy attached as Exhibit 39) (describing the influence of outside spending in North Carolina and noting that

[7] The appearance that Justice Newby could be predisposed to uphold the constitutionality of the challenged districts was heightened by Justice Newby's subsequent remarks. On 1 July 2012, during a speech at the Resurrection Church in Charlotte, Justice Newby told the congregation: "There are seven of us on the Supreme Court, and my Court is 4-3. Unfortunately, I'm the only one that's up this time, and if I lose, it'll be 3 to 4." *See* Exhibit 36A at 44:35 to 44:50 minutes (video of Justice Newby's remarks). Justice Newby also appeared at high-profile Republican electioneering events, including the grand opening of the Nash County Republican Party's new headquarters on 28 August 2012, *see* Exhibit 37 at 7:25 to 30:00 minutes (video of Justice Newby's remarks). Following the election, Justice Newby spoke at the Conservative Leadership Conference held in Raleigh in March of 2013. Defendants Phil Berger and Thom Tillis also spoke at the conference. *See* Conference Schedule and List of Speakers (copy attached as Exhibits 38A through 38D).

"when you have helped decide who is in power somewhere, you feel entitled to tell people there what they should do").

Questions concerning the influence of the spending in the election were also raised in newspapers in other parts of the country and in the national media. *See* Emery P. Dalesio, *NC Chooses McCrory, Newby and Extends GOP Lead in State House in Big Day for Republicans*, The Republic (Columbus, Indiana) Nov. 7, 2012 (copy attached as Exhibit 40) (commenting that "[t]he race was officially nonpartisan but had plenty of political ramifications. Four of the seven current justices are Republican by voter registration. The court is expected to consider legal challenges to redistricting in the near future. Outside groups raised at least $2 million to back Newby's re-election."). On 12 November 2012, *USA Today* ran an editorial with this comment:

> North Carolina Supreme Court Justice Paul Newby was re-elected with the aid of $2.5 million in independent spending. Newby and his opponent participated in the state's acclaimed public financing program for judicial races, but this system was overwhelmed by cash from corporate interests such as the Koch brothers' Americans for Prosperity and the RJ Reynolds Tobacco Company. Newby authored a recent ruling in favor of RJ Reynolds in a dispute with farmers. *Money from Washington, D.C.-based organizations poured into groups running ads on Newby's behalf. A national Republican group chipped in to help keep a conservative majority on the court, which is expected to vote on the Republican state legislature's redistricting maps*.

Billy Corriher, *Money Undermines Judges' Impartiality*, USA Today, Nov. 12, 2012 (emphasis added) (copy attached as Exhibit 41); *see also* PBS Frontline article (Nov. 19, 2012) (copy attached as Exhibit 42). These articles demonstrate a widespread public perception, in multiple media outlets throughout the state and elsewhere in the country from many reporters and commentators, that there are reasonable grounds to question Justice Newby's impartiality in this case.

ARGUMENT

I. JUSTICE NEWBY'S RECUSAL IS REQUIRED AS A MATTER OF LAW BY *CAPERTON v. A. T. MASSEY COAL*

In 2009, the United States Supreme Court in *Caperton* examined the impact of the funding of judicial campaigns on the right of citizens and litigants to a fair and impartial judiciary. Building on the same principles articulated by this Court in *Ponder*, the U.S. Supreme Court held that where large contributions to judicial campaigns by persons or entities that have "pending or imminent" cases before the court and that have a "significant and disproportionate influence on the electoral outcome," the risk that the donor's "influence engendered actual bias is sufficiently substantial that it must be forbidden if the guarantee of due process is to be adequately implemented." *Id.* at 884, 129 S. Ct. at 1222.

Plaintiffs are not challenging Justice Newby's participation in this appeal merely because he associated with Republicans. Rather, Plaintiffs are seeking

recusal because of the substantial support and the impact of the support given to Justice Newby by the RSLC, which weighed in during the waning days of the campaign to protect its handiwork. Indeed, the RSLC's expenditures in support of Justice Newby's re-election is precisely the type of support that the United States Supreme Court found to be too much in *Caperton*. In that case, the Supreme Court held that the Fourteenth Amendment Due Process Clause of the United States Constitution requires the recusal of a judge when, under the "extreme facts" of the case, the probability of actual bias "rises to an unconstitutional level." *Caperton*, 556 U.S. at 887, 129 S. Ct. at 2266.

In *Caperton*, a West Virginia jury awarded a $50 million verdict against Massey Coal Company. *Id.* at 872, 129 S. Ct. at 2257. "After the verdict but before the appeal, West Virginia held its 2004 judicial elections. Knowing the Supreme Court of Appeals of West Virginia would consider the appeal in the case, [Don Blankenship, who was the chairman, chief executive officer, and president of Massey Coal] decided to support an attorney" named Brent Benjamin, who sought to replace an incumbent justice on the West Virginia Supreme Court named Warren McGraw. *Id.* at 873, 129 S. Ct. at 2257.

In addition to contributing the $1,000 statutory maximum to Benjamin's campaign committee, Blankenship donated almost $2.5 million to "And For The

Sake Of The Kids," a political organization formed under 26 U.S.C. § 527. *Id.* The Section 527 organization opposed Justice McGraw and supported Mr. Benjamin, and Blankenship's donations accounted for more than two-thirds of the total funds it raised. *Id.* In addition, Blankenship spent just over $500,000 on independent expenditures—for direct mailings and letters soliciting donations as well as for television and newspaper advertisements to support Benjamin. *Id.* The coal-mining company made these contributions while "[k]nowing the State Supreme Court of Appeals would consider [an] appeal after Mr. Benjamin was elected," in which the coal company had been liable for a judgment in excess of $50 million. *Id.*

The United States Supreme Court held that the Due Process Clause of the United States Constitution required Justice Benjamin to recuse himself from hearing the appeal involving the coal-mining company. *Id.* at 889-90, 129 S. Ct. at 2265-66. The Court stated as follows:

> [T]here is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case *had a significant and disproportionate influence in placing the judge on the case* by raising funds or directing the judge's election campaign when the case was pending or imminent. The inquiry centers on the contribution's relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the

> election, and the apparent effect such contribution had on the outcome of the election.

Id. at 884, 129 S. Ct. at 2264 (emphasis added). In *Caperton*, Blankenship contributed some $3 million to unseat the incumbent and replace him with Benjamin. *Id.* His contributions exceeded the total amount spent by all other Benjamin supporters and exceeded by 300 percent the amount spent by Benjamin's campaign committee. *Id.* Blankenship spent $1 million more than the total amount spent by the campaign committees of both candidates combined. *Id.*

With respect to the "apparent effect that such contribution[s] had on the outcome," the U.S. Supreme Court stated as follows:

> In an election decided by fewer than 50,000 votes (382,036 to 334,301) [approximately 6.7 percentage points], Blankenship's campaign contributions—in comparison to the total amount contributed to the campaign, as well as the total amount spent in the election—had a significant and disproportionate influence on the electoral outcome. And the risk that Blankenship's influence engendered actual bias is sufficiently substantial that it "must be forbidden if the guarantee of due process is to be adequately implemented."

Id. at 883-84, 129 S. Ct. at 1222.

The Court in *Caperton* referred to three other factors that informed its decision, stating that "[t]he temporal relationship between the campaign

contributions, the justice's election, and the pendency of the case is also critical." *Id.* at 886, 129 S. Ct. at 2264. The Court stated:

> It was reasonably foreseeable, when the campaign contributions were made, that the pending case would be before the newly elected justice. The $50 million adverse jury verdict had been entered before the election, and the Supreme Court of Appeals was the next step once the state trial court dealt with post-trial motions. So it became at once apparent that, absent recusal, Justice Benjamin would review a judgment that cost his biggest donor's company $50 million. Although there is no allegation of a quid pro quo agreement, the fact remains that Blankenship's extraordinary contributions were made at a time when he had a vested stake in the outcome.

Id.

The facts in this case are substantially similar to, and in fact more extreme, than those in *Caperton*. RSLC expenditures for Justice Newby were made in October 2012, less than one month before the election and while these redistricting plans was under judicial review. The RSLC contributed a total of $1,165,000 to Justice for All (a super PAC), which then provided money to the Judicial Coalition (another super PAC). The Judicial Coalition made expenditures totaling $1,944,919, all in support of Justice Newby. The $1,165,000 that the RSLC contributed to Justice for All amounted to 79% of the $1,480,000 that Justice for All ultimately gave to the Judicial Coalition in support of Justice Newby's re-

election. In turn, the $1,480,000 from Justice for All amounted to 76% of the $1,944,919 total that the Judicial Coalition spent on advertising in support of Justice Newby.

In comparison, the official campaign committees for Judge Ervin and Justice Newby were limited to spending $240,000 in public money, plus an additional $82,300 that each candidate raised in order to qualify for public financing (for a total of $322,300 for each campaign). Thus, the amount of money that the Judicial Coalition spent on Justice Newby was approximately 300 percent of the amount spent by *both* campaigns, and the Judicial Coalition's expenditures in support of Justice Newby exceeded the amount spent by both campaigns by $1.3 million.

The following table summarizes the principal factors considered by the U.S. Supreme Court in *Caperton*, as compared to this case:

Factor	***Caperton***	**This Case**
The contribution's relative size in comparison to the total amount contributed to the campaign.	Independent expenditures constituted about 300% of total campaign expenditures and exceeded total expenditures by $1 million.	Independent expenditures for Justice Newby were greater than 390% of total campaign expenditures and exceeded total campaign expenditures by more than $1.3 million.
The total amount spent in the election.	Justice Benjamin (won): About $3 million in total independent expenditures.	Justice Newby (won): About $2.5 million in independent expenditures.
	Justice McGraw (lost): Unspecified.	Judge Ervin (lost): About $300k in independent expenditures.
	For their own campaigns, Justice Benjamin and Justice McGraw each spent between $500k and $1 million.	For their own campaigns, Justice Newby and Judge Ervin could each spend about $240,000 in public money and $82,300 in private contributions.
The apparent effect of the contribution on the outcome.	The margin of victory was 6.6 percent of votes cast, and the expenditures "had a significant and disproportionate influence on the outcome."	The margin of victory was 3.8 percent of votes cast. The polls showed Ervin well ahead of Newby prior to the independent expenditures.
The temporal relationship between the campaign contributions, the justice's election, and the pendency of the case.	"It was reasonably foreseeable that the pending case would be before the newly elected justice. There is no allegation of a quid pro quo agreement, but the extraordinary contributions were made at a time when [the contributor] had a vested stake in the outcome."	The vast majority of independent expenditures were made in the month preceding the election, by the Republican State Leadership Committee, while an interlocutory appeal in the redistricting litigation was under consideration by the North Carolina Supreme Court.

As shown by this table, all of the *Caperton* factors weigh in favor of recusal even more heavily in this case than they did in *Caperton*, and the Court should therefore find that recusal is required.

It is also important to emphasize that in *Caperton*, two former Chief Justices of the North Carolina Supreme Court joined an *amici curiae* brief in which they took the position that recusal was not only proper, but required as a matter of law. Along with 25 other former chief justices and justices from state supreme court courts around the country, former Chief Justice James Exum and former Chief Justice I. Beverly Lake, Jr. wrote as follows:

> *Amici* uniformly believe that the participation of Justice Benjamin in this case created an appearance of impropriety. All *amici* participating in this brief would have recused if they had benefited from the level and proportion of independent expenditures by the CEO of a party to a case pending before the court.

Brief *Amici Curiae* of 27 Former Chief Justices and Justices in Support of Petitioners (Exhibit 1).

Justice Newby or the Court should reach the same conclusion in this case and hold that due process requires the recusal of Justice Newby from this appeal.

II. JUSTICE NEWBY'S RECUSAL IS REQUIRED AS A MATTER OF LAW BY THIS COURT'S DECISION IN *PONDER V. DAVIS* AND SUBSEQUENT CASES

As recently as 2010, this Court reiterated the well-established principle that "[p]ublic confidence in the courts requires that cases be tried by unprejudiced and unbiased judges." *In re Inquiry Concerning a Judge*, 364 N.C. 114, 122, 691 S.E.2d 685, 691 (2010) (*citing In re Martin*, 295 N.C. 291, 306, 245 S.E.2d 766,

775 (1978)). Impartiality and public confidence in the judicial process in redistricting cases have been of particular concern to the legislature, as evidenced by the legislative decision to require that a three-judge panel (one from Wake County and a Judge from the East and a Judge from the West) be appointed to hear such cases and that no member of the panel be a former member of the General Assembly. *See Stephenson v. Bartlett*, 358 N.C. 219, 229-30, 595 S.E.2d 112, 119-20 (2004) (holding that N.C. Gen. Stat. § 1-267.1's prohibition on a former member of the General Assembly sitting as a member of a three-judge panel in a redistricting case "reduces the appearance of improprieties" and is justified as "sensible insurance against any appearance of conflict of interest.")

This case is most like the circumstances in *Ponder v. Davis*, 233 N.C. 699, 65 S.E.2d 356, where this Court held in an election dispute between two candidates that if the presiding judge took an active part in the campaign for one of the litigants, "we think it must be conceded the resident judge was disqualified to hear the case, and he should have granted the petition for an order of recusation." *Id*. at 706, 65 S.E.2d at 361 (citations omitted). The Court in *Ponder* first examined N.C. Gen. Stat. § 5-9, the provision which, at the time, set out the procedure for a trial court to follow in civil contempt matters. The Court concluded that the case "comes within the spirit of the act requiring removal, if not within the letter, for the

gravamen of the petition and affidavit of bias is, that the presiding judge took a partisan interest in the election contest, out of which the present controversy arose." *Id.* at 703, 65 S.E.2d at 358. Going beyond the statute, however, the Court found additional support for the recusal petition in the fundamental rights of due process and the maintenance of respect for the judgments of the court. "Every litigant … is entitled to nothing less than the cold neutrality of an impartial judge." *Id*. at 703, 65 S.E.2d at 359. The Court held that an impartial judge in all cases is a "prime requisite" of due process. *Id*. at 704, 65 S.E.2d at 358.

It is also noteworthy that the evidence supporting the recusal motion in *Ponder* included averments that "the great majority of the people … regardless of the decision of the Court in the present case, would feel that political considerations were the determining factor." *Id*. at 699, 65 S.E.2d at 356. Even more important than the rights of the litigants is that the Court's judgments are respected by the public. The Court declared that:

> "The law is not so much concerned with the respective rights of judge, litigant, or attorney in any particular cause, as it is, as a matter of public policy, that the courts shall maintain the confidence of the people." *U'Ren v. Bagley*, 118 Or. 77. As stated in *People ex rel. Roe v. Suffolk Common Pleas*, 18 Wend. 550: "Next in importance to the duty of rendering a righteous judgment is that of doing it in such a manner as will beget no suspicion of the fairness and integrity of the judge." Or as a former member of this Court, Allen, J., was wont to

> say: It is not enough for a judge to be just in his judgments; he should strive to make the parties and the community feel that he is just; he owes this to himself, to the law and to the position he holds. It is a great thing to have power, but it is an awful thing to have to use it in contempt proceedings, for in such hearings the wisdom and patience of the judge are often put to their severest test. "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" – Wolfe, J., in *Haslam v. Morrison*, 113 Utah 14.

Id. at 705-706, 65 S.E.2d at 360 (certain parallel citations omitted). There is the highest public policy concern referred to in *Ponder* that the "courts shall maintain the confidence of the people" when the courts are measuring statutes creating election districts against the North Carolina and United States Constitutions. There should be "no suspicion as of the fairness and integrity of the judge[s]."

The *Ponder* court found further support for its position in a similar case from Kentucky, in which a trial judge made speeches for the candidate opposed by the defendant and that state's highest Court held that the trial judge erred in refusing to recuse himself. *See Kentucky Journal Publishing Co. v. Gaines*, 119 Ky. 747, 110 S.W. 268 (1908).

This Court cited *Ponder* and *Kentucky Journal Publishing Co.* with approval in 1976 in *North Carolina National Bank v. Gillespie*, 291 N.C. 303, 311, 230 S.E.2d 375, 380 (1976) and *State v. Rhodes*, 290 N.C. 16, 27, 224 S.E.2d 631, 638

(1976); and it also relied on the *Ponder* rationale again in 1984 in *State ex rel. Edmisten v. Tucker*, 312 N.C. 326, 341-42, 323 S.E.2d 294, 305 (1984). In *State ex rel. Edmisten*, the Court repeated the principle that a judge has a duty to excuse himself from hearing a matter "whenever his impartiality can be reasonably questioned." *Id.* In 1987, citing *Ponder*, this Court emphasized that even though recusal in criminal statutes is governed by state statute, "a judge may be disqualified for reasons other than those stated in the statute." *State v. Fie*, 320 N.C. 626, 628, 359 S.E.2d 774, 775 (1987) (holding that a judge should recuse himself whenever the judge's "objectivity may reasonably be questioned").[8]

Ponder has not been subsequently overruled or modified, and the fundamental principles it embraces are as important now as they have always been to our system of justice. *Stare decisis* requires that here, as in *Ponder*, where circumstances surrounding the recent election campaign have led to public questioning of the impartiality of the Court's ruling in a specific case pending before it, Justice Newby should recuse himself from further proceedings in this matter.

[8] In *Stephenson v. Bartlett*, 357 N.C. 301, 582 S.E.2d 247 (2003), Justices Martin and Orr did not participate in the consideration or decision of the case.

III. JUSTICE NEWBY'S CONTINUED PARTICIPATION IN THIS CASE IS ALSO CONTRARY TO CANON 3C(1) OF THE N. C. CODE OF JUDICIAL CONDUCT

Canon 3C(1) of the North Carolina Code of Judicial Conduct states that a judge should recuse himself when "the judge's impartiality may reasonably be questioned." This Court has held that this provision means a judge should recuse himself when "a reasonable man knowing all the circumstances would have doubts about the judge's ability to rule … in an impartial manner." *McClendon v. Clinard*, 38 N.C. App. 353, 356, 247 S.E.2d 783, 785 (1978) (holding that it was error for the trial judge not to recuse himself where his statements to a newspaper indicated he had prejudged the merits of the matter before him). The facts and circumstances recited above, including the connections between the litigants in this case, the map drawers, and the funders of campaign advertisements in support of Justice Newby's candidacy, as well as the evidence of general and widespread public perception, demonstrate that Justice Newby's impartiality may reasonably be questioned.

While in some instances, recusal may be based on evidence of a personal bias, prejudice, or interest on the part of the judge, *see Lange v. Lange*, 357 N.C. 645, 588 S.E.2d 877 (2003), in other cases there may be no evidence that the judge is actually prejudiced against one party or unable to preside fairly over the matter,

but the appearance that the judge has prejudged the matter is sufficient to require recusal. *See In re Inquiry Concerning a Judge (Braswell)*, 358 N.C. 721, 600 S.E.2d 849 (2004) (holding that it was a violation of Canon 3C(1) for a judge to refuse to recuse himself in a case where one of the litigants had an unrelated lawsuit pending against the judge); *State v. Fie*, 320 N.C. 626, 628, 359 S.E.2d 774, 776 (1987) (recusal required where there was no evidence of actual bias but because the judge initially referred the matter to the district attorney for prosecution "a perception could be created in the mind of a reasonable person that [the judge] thought the defendants were guilty…"); *State v. Pemberton*, ___ N.C. App. ___, 729 S.E.2d 128 (N.C. App. 2012), *rev. denied* 2012 N.C. LEXIS 865 (N.C. Oct. 4, 2012) ("We are aware that in some instances a motion for recusal may be supported by substantial evidence that a judge's impartiality could reasonably be questioned.").

Facts and circumstances surrounding the final month of the campaign and in many instances matters over which Judge Newby had no control have created a situation in which his continued participation in this case would contravene Canon 3C(1) of the North Carolina Code of Judicial Conduct. Public perception of the "pivotal role" that RSLC played in drafting the redistricting plans challenged in

these cases and in the re-election of Justice Newby objectively requires Justice Newby's recusal in this appeal.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully move Justice Newby to recuse himself from participating in this case, or, in the alternative, to refer this Motion to the Court for consideration, and for the Court to hold that Justice Newby should be recused from this case.

This the 11th day of October, 2013.

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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.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that this day a copy of the foregoing MOTION has been duly served by e-mail and by depositing a copy thereof in an envelope bearing sufficient postage in the United States mail, addressed to the following persons at the following addresses, which are the last addresses known to me:

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