No. 20-12003

In the United States Court of Appeals for the Eleventh Circuit

KELVIN LEON JONES, ET AL.,

Plaintiffs–Appellees,

v.

RON DESANTIS, ET AL.,

Defendants–Appellants.

DEFENDANTS-APPELLANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS-APPELLEES' MOTION TO DISQUALIFY JUDGES ROBERT LUCK AND BARBARA LAGOA

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
NO. 4:19-CV-300-RH-MJ

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1, I certify that Defendants-Appellants' Amended Certificate of Interested Persons and Corporate Disclosure Statement filed on July 14, 2020 is to the best of my knowledge, complete and correct except for the following additional interested persons or entities:

1. Bangert, Ryan, *Counsel for Amicus Curiae*
2. Becker, Sue, *Counsel for Amicus Curiae*
3. Fitch, Lynn, Attorney General of Mississippi, *Counsel for Amicus Curiae*
4. Hawkins, Kyle, *Counsel for Amicus Curiae*
5. LaFond, Jason, *Counsel for Amicus Curiae*
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7. State of Mississippi, *Amicus Curiae*
8. The Public Interest Legal Foundation, *Amicus Curiae*
9. Thompson, William, *Counsel for Amicus Curiae*

Dated: July 22, 2020

s/Charles J. Cooper
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INTRODUCTION

Over the last 36 hours, two members of this Court have become the targets of extraordinary attacks by the Democratic members of the Senate Judiciary Committee intended to intimidate them into recusing themselves from this case. *See* Notice to Counsel re: Ex Parte Communications (11th Cir. July 22, 2020). Verbal assaults on the judiciary have become regrettably common in American politics, and they pose a growing threat to the rule of law. The Framers anticipated this type of attack on the courts: because of "the natural feebleness of the judiciary," it would be "in continual jeopardy of being overpowered, awed, or influenced by its co-ordinate branches." *The Federalist No.* 78 (Alexander Hamilton). That, Alexander Hamilton explained, is why Article III gives federal judges lifetime tenure. *Id.*

Ironically, while Movants and their Senate allies invoke statutes and ethical canons designed to promote public confidence in the judiciary, it is they who threaten the judiciary's independence by calling into question the integrity of two of this Court's Members without even a colorable basis for doing so. As the Chief Justice recently said in response to threatening statements made by a United States Senator about Justices Gorsuch and Kavanaugh, such statements "are not only inappropriate, they are dangerous." Office of Public Info., *Statement of Chief Justice John G. Roberts, Jr.*, Supreme Court of the U.S. (March 4, 2020), *available at*

https://bit.ly/2WNWuNn. No less than the Supreme Court, the Judges of this Court should "continue to do their job, without fear or favor, from whatever quarter." *Id.*

The motion to disqualify Judges Luck and Lagoa is frivolous, and it ought to be denied.

ARGUMENT

I. There is no basis for disqualification of Judges Luck and Lagoa.

Although the practice was once common, *see Laird v. Tatum*, 409 U.S. 824, 835–36 (1972) (Rehnquist, J., in chambers) (collecting examples), Congress long ago prohibited federal judges from sitting in review of their own decisions on appeal, *see* 28 U.S.C. § 47. The animating principle behind the prohibition is that a reasonable person might question a "judge's impartiality in judging his or her own past works." *Clemmons v. Wolfe*, 377 F.3d 322, 327–28 (3d Cir. 2004). Significantly, "this rule only applies to federal judges who had served as a judge beforehand, were subsequently appointed to the federal bench, *and are now being asked to review decisions made based on their previous judgeship*." *In re Smith*, 2019 WL 7037416, at *3 (N.D. Ohio Dec. 20, 2019) (emphasis added). This principle poses no obstacle to Judges Luck and Lagoa hearing the appeal in this case for at least three reasons.

First, unlike a habeas case in which a federal court is asked to decide whether state criminal proceedings violated the federal constitution, there is no sense in which this appeal calls upon the Court to review the Florida Supreme Court's

advisory opinion. The *only* questions that the Florida Supreme Court addressed, or was asked to address, were issues of *Florida* law, and "the Florida Supreme Court 'is unquestionably the ultimate expositor of [Florida] law.' " *J.R. v. Hansen*, 803 F.3d 1315, 1320 (11th Cir. 2015) (alteration in original) (quoting *Riley v. Kennedy*, 553 U.S. 406, 425 (2008)). Indeed, Governor DeSantis's request for an advisory opinion explicitly stated that he was not asking the Florida Supreme Court to address the federal constitutional issues involved in this case or the legislation implementing Amendment 4. Request for Advisory Op. from the Governor 4, Doc. 138-1 (Sept. 10, 2019) (attached as Exhibit A); *see also Advisory Op. to the Governor re: Implementation of Amendment 4*, 288 So. 3d 1070, 1074 (Fla. 2020). In our federal constitutional system, this Court *has no power to review* the Florida Supreme Court's resolution of these issues of state law. For that reason, the advisory opinion is nothing like a lower court decision subject to appellate review; instead, it more closely resembles the text of a statute that this Court is obliged to accept as a given for purposes of its decision. *Cf. Laird*, 409 U.S. at 831 (describing Justice Black's practice of hearing cases concerning the Fair Labor Standards Act, of which he was one of the principal authors).

Second, although Judges Luck and Lagoa participated in the oral argument over the advisory opinion, they were no longer members of the Florida Supreme Court by the time that court rendered its decision. Movants make much of questions

Judges Luck and Lagoa asked during the argument, but every seasoned litigator has had the experience of being asked seemingly sympathetic questions at oral argument only later to be disappointed by the court's decision. Judges ask questions during oral argument for a variety of reasons, and such questions do not come remotely close to implicating the concerns that arise when judges sit in review of their own prior rulings.

Third, even if this appeal and the Florida Supreme Court's advisory opinion proceeding concerned the same legal issues and even if Judges Luck and Lagoa had expressed views in a decision on the merits of those issues while serving on the Florida Supreme Court, there still would be no bar to Judges Luck and Lagoa participating because *this is a different case*. "Courts have uniformly rejected the notion that a judge's previous advocacy for a legal, constitutional, or policy position is a bar to adjudicating a case, even when that position is directly implicated in the case before the court." *Carter v. West Pub. Co.*, 1999 WL 994997, at *9 (11th Cir. Nov. 1, 1999) (Tjoflat, J., in chambers). The most authoritative exposition of this rule is *Laird v. Tatum*, 409 U.S. 824, 831 (1972) (Rehnquist, J., in chambers), in which Justice Rehnquist explained his rationale for declining to disqualify himself from a case that concerned legal issues he had addressed when testifying before a Senate Subcommittee on behalf of the Justice Department less than two years earlier. Despite having helped formulate and defend the Department of Justice's position on

those issues, Justice Rehnquist explained that he would not recuse because he did not play any role in the *Laird* litigation itself while working at the Department of Justice. *Id.* at 829. Justice Breyer took the same approach when explaining his rationale for hearing cases about the Federal Sentencing Guidelines, of which he was the principal author. *See United States v. Wright*, 873 F.2d 437, 445 (1st Cir. 1989) (Breyer, J., in chambers). Similarly, Justice Kavanaugh wrote the main dissent in *PHH Corp. v. CFPB*, 881 F.3d 75 (D.C. Cir. 2018) (en banc), only to later cast the deciding vote in a different case that presented the same issues at the Supreme Court in *Seila Law v. CFPB*, 2020 WL 3492641 (U.S. June 29, 2020).

This Court confronted a similar situation in *Evans v. Stephens*, 387 F.3d 1220, 1227 n.13 (11th Cir. 2004), in which a litigant suggested that Judge Pryor should be disqualified due to statements he had made about the merits of a different but similar case while serving as Alabama's Attorney General. Chief Judge Edmondson said that this argument was borderline "frivolous," explaining that "[m]ere representation and opinions about a previous unrelated matter . . . do not disqualify a judge." *Id.*; *see also United States v. Bray*, 546 F.2d 851, 857 (10th Cir. 1976) ("The mere fact that a judge has previously expressed himself on a particular point of law is not sufficient to show personal bias or prejudice."). Justice Kagan made the same point before she ascended to the bench: "Judges are not partial in deciding cases because they have strong opinions, or previously have expressed

strong opinions, on issues involved in those cases." Elena Kagan, *Confirmation Messes, Old and New*, 62 U. Chi. L. Rev. 919, 938 (1995). Thus, even if Judges Luck and Lagoa had made comments at oral argument while serving on the Florida Supreme Court that could somehow be construed as expressions of opinion about the merits of the issues in this case, they would not be required to recuse because this is a different case.[1]

Without citing any relevant precedent, Movants argue that Judges Luck and Lagoa must be disqualified based upon a tortured reading of 28 U.S.C. § 455(b)(3) and Judicial Canon 3(C)(1), both of which say that a judge must recuse if he or she previously served in governmental employment and in that capacity "participated . . . concerning the proceeding." Appellees' Mot. to Disqualify Judges Robert Luck, Barbara Lagoa, and Andrew Brasher 14–15 (11th Cir. July 15, 2020), ("Mot."). Movants emphasize a dictionary definition of the word "concerning," but they never acknowledge how courts have interpreted the phrase "the proceeding." There is a circuit split over whether judges may recuse themselves for purposes of some issues

[1] Movants note that the State's Civil Appeal Statement in the prior appeal identified the advisory opinion matter as concerning "substantially the same, similar, or [a] related . . . issue." Case No. 19-14551 Civil Appeal Statement 2 (11th Cir. Dec. 3, 2019) (alteration added). But in that same filing, the State also indicated that the advisory opinion matter before the Florida Supreme Court did *not* "arise[ ] from substantially the same case or controversy." *Id.* Regardless, in completing such forms parties "are encouraged to err on the side of caution," and such disclosures are "the beginning of the analysis, not the end." *See In re Bernard*, 31 F.3d 842, 845 (9th Cir. 1994) (Kozinski, J., in chambers).

but not others, but courts on both sides of the split agree that "*the* proceeding" refers to only a single "stage[ ] of litigation"—not the entire case. *See* 28 U.S.C. § 455(b)(3), (d)(1) (emphasis added); *compare Decker v. GE Healthcare Inc.*, 770 F.3d 378, 389 (6th Cir. 2014) (permitting issue-specific recusal and observing that "the reasons for questioning impartiality in one 'proceeding' of a case do not necessarily obtain to every 'proceeding' of that case"), *with United States v. Feldman*, 983 F.2d 144, 145 (9th Cir. 1992) (concluding that issue-specific recusals are prohibited and explaining that "when a judge determines that recusal is appropriate it is not within his discretion to recuse by subject matter or only as to certain issues and not others. Rather, recusal must be from a whole proceeding, an entire 'stage of litigation.' "). As the Seventh Circuit has explained, "*[t]he proceeding* means *the current proceeding*." *United States v. Lara-Unzueta*, 735 F.3d 954, 959 (7th Cir. 2013) (emphasis in original). This appeal plainly is not the same *proceeding* as the one that took place in the Florida Supreme Court, even if the two matters could somehow be said to be part of a single controversy. It follows that Section 455(b)(3) and Canon 3(C)(1) are wholly inapplicable.

Finally, Plaintiffs place great weight on statements that Judges Luck and Lagoa made about their recusal policies in connection with the confirmation process. But every one of the statements Plaintiffs identify was a pledge, consistent with 28 U.S.C. § 455 and the authorities cited above, to recuse from the *cases* in which they

had previously played some other role. This is the rule that should guide Judge Luck's disposition of the disqualification motion: "I will consult 28 U.S.C. § 455 and the Code of Conduct for United States Judges." Mot. Ex. C at 15–16. And this is the pledge that Judge Lagoa made to the Senate that is most relevant to the present matter: "I would conscientiously review and follow the standards for judicial recusal set forth in 28 U.S.C. § 455(a) and the Code of Conduct for United States Judges." Mot. Ex. A at 25. Judges Luck and Lagoa should follow the applicable legal and ethical standards for recusal and not be cowed by Movants and their political allies in the Senate.

II. The disqualification motion should be denied because it is untimely.

Even if the disqualification motion were not completely devoid of merit, it should still be denied because Movants waited to make the motion until *after* the en banc court ruled on the State's stay application. Movants offer no explanation for the timing of their motion, but they were apparently content to have Judges Luck and Lagoa participate in this case until July 1, when the Court granted en banc hearing and stayed the district court's injunction. The State first sought en banc review in this case on February 26, and it petitioned for initial en banc hearing in this appeal on June 2. Yet for months Movants remained silent on the question of recusal by Judges Luck and Lagoa. At last, after the en banc Court signaled through its stay order that the State is likely to succeed on the merits and Movants' prospects

for prevailing in this litigation were dim, Movants sprung the trap. But this Court has said that a party "may not lie in wait, knowing facts supporting [recusal], and raise [the] issue only after [the] court's ruling on [the] merits." *United States v. Kelly*, 888 F.2d 732, 746 (11th Cir. 1989). That is what Movants did, and it would cause extraordinary prejudice to the State for Judges Luck and Lagoa to recuse themselves now that the en banc Court has decided to stay the district court's injunction with their participation.

This Court has held that motions to disqualify under 28 U.S.C. § 455 are subject to a timeliness requirement, and such motions "must be filed within a reasonable time after the grounds for the motion are ascertained." *Summers v. Singletary*, 119 F.3d 917, 921 (11th Cir. 1997). Although there is no bright-line rule as to how quickly a motion to disqualify must be filed, where "the facts are known before a legal proceeding is held, waiting to file such a motion until the court has ruled against a party is untimely." *Id.* The entire basis for the motion is the participation by Judges Luck and Lagoa in an oral argument (but not the decision) of the Florida Supreme Court in an entirely separate matter *in which Movants themselves filed briefs and presented argument*. *See Advisory Op. to the Governor*, 288 So. 3d at 1071 (listing Movants as parties). Movants knew about the issues raised in their disqualification motion long before the State first requested en banc

review, and their failure to file their motion sooner is a patent abuse of the recusal statute of the sort that this Court "will not tolerate." *Kelly*, 888 F.2d at 747.

A chorus of judicial opinions echoes this Court's repeated admonitions against strategically delaying the filing of recusal motions. The Fifth Circuit has read Section 455 to prohibit "knowing concealment of an ethical issue for strategic purposes." *United States v. York*, 888 F.2d 1050, 1055 (5th Cir. 1989). The Second Circuit has said that litigants are prohibited from "holding back a recusal application as a fall-back position in the event of adverse rulings on pending matters." *LoCascio v. United States*, 473 F.3d 493, 497 (2d Cir. 2007) (emphasis omitted). And in the criminal context, the Fourth Circuit has said that 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." *United States v. Owens*, 902 F.2d 1154, 1156 (4th Cir. 1990) (quoting *Taylor v. United States*, 179 F.2d 640, 642 (9th Cir. 1950)). As these cases underscore, Movants' decision to wait to file their motion until after the en banc Court stayed the district court's injunction is by itself a sufficient basis for denying the motion.

Incredibly, without acknowledging how their strategic delay affects the equities of this situation, Movants argue that all doubts should be resolved in favor of recusal. Mot. 7. To the contrary, "where the standards governing disqualification have not been met, disqualification is not optional; rather, it is prohibited." *In re*

Aguinda, 241 F.3d 194, 201 (2d Cir. 2001). Indeed, at this late date any uncertainty must be resolved *against* disqualification, especially when this Court is sitting en banc and recused judges cannot be replaced through random reassignment. *See Cheney v. United States District Court*, 541 U.S. 913, 915 (2004) (Scalia, J., in chambers).

In 1973, Congress substantially revised Section 455 to conform the federal statutory recusal standard to the ABA's recently overhauled canons of judicial conduct. Explaining the revisions to the statute, the Senate Report said this:

> [I]n assessing the reasonableness of a challenge to his impartiality, each judge must be alert to avoid the possibility that those who would question his impartiality are in fact seeking to avoid the consequences of his expected adverse decision. . . . Nothing in this proposed legislation should be read to warrant the transformation of a litigant's fear that a judge may decide a question against him into a "reasonable fear" that the judge will not be impartial. Litigants ought not have to face a judge where there is a reasonable question of impartiality, but they are not entitled to judges of their own choice.

S. Rep. No. 93-419, at 5 (1973). The Senate Report offers sound advice that all judges should heed.[2]

[2] The disqualification motion is directed to the Court as a whole, but it is the settled practice for the subject of a disqualification motion to rule on it individually. *See, e.g.*, *Carter v. West Pub. Co.*, 1999 WL 994997 (11th Cir. Nov. 1, 1999) (Tjoflat, J., in chambers); *Baker & Hostetler LLP v. Dep't of Commerce*, 471 F.3d 1355 (D.C. Cir. 2006) (Kavanaugh, J., in chambers); *In re Bernard*, 31 F.3d at 845; *United States v. Wright*, 873 F.2d 437, 445 (1st Cir. 1989) (Breyer, J., in chambers).

CONCLUSION

"[M]otions to recuse should not be viewed as an additional arrow in the quiver of advocates in the face of anticipated adverse rulings," *In re Kansas Pub. Employees Retirement System*, 85 F.3d 1353, 1360 (8th Cir. 1996) (quotation and alteration omitted), and federal judges are required to hear the cases that come before them when there is no valid basis for recusal, *see In re Aguinda*, 241 F.3d at 201. The motion to disqualify Judges Luck and Lagoa is an abuse, and it ought to be denied.

Dated: July 22, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this motion complies with the type-volume limitations of FED. R. APP. P. 27(d)(2)(A) because this motion contains 3,014 words, excluding the parts of the motion exempted by FED. R. APP. P. 32(f).

This motion complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because this motion has been prepared in a proportionately spaced typeface using Microsoft Word for Office 365 in 14-point Times New Roman font.

Dated: July 22, 2020

s/ Charles J. Cooper
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system on July 22, 2020. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: July 22, 2020

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