IN THE SUPREME COURT OF MISSISSIPPI

NO. 2023-TS-00584

ANN SAUNDERS; SABREEN SHARRIEF; and DOROTHY TRIPLETT,

Appellants

v.

STATE OF MISSISSIPPI; STATE OF MISSISSIPPI *ex rel.* TATE REEVES, in his capacity as Governor of the State of Mississippi; STATE OF MISSISSIPPI *ex rel.* LYNN FITCH, in her capacity as Attorney General of the State of Mississippi; HONORABLE MICHAEL K. RANDOLPH, in his official capacity as Chief Justice of the Mississippi Supreme Court; ZACK WALLACE, in his official capacity as Circuit Clerk of the Circuit Court of Hinds County, Mississippi; and GREG SNOWDEN, in his official capacity as Director of the Administrative Office of Courts,

Appellees.

MOTION FOR RECUSAL OF CHIEF JUSTICE MICHAEL K. RANDOLPH

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MOTION FOR RECUSAL OF CHIEF JUSTICE MICHAEL K. RANDOLPH

INTRODUCTION

Plaintiffs-Appellants respectfully move to recuse Chief Justice Michael K. Randolph from consideration of the present appeal. On April 25, 2023, Plaintiffs filed their complaint in the Hinds County Chancery Court against Chief Justice Randolph as well as Zack Wallace, Circuit Clerk of the Circuit Court of Hinds County, Mississippi, and Greg Snowden, Director of the Administrative Office of Courts. R.20-62. (The State of Mississippi was subsequently added as the result of an amended complaint). Plaintiffs-Appellants alleged that portions of the recently enacted House Bill 1020 as well as judicial appointments made pursuant to Section 9-1-105(2) of the Mississippi Code violate, among other things, the Mississippi Constitution's provision that circuit judges must be elected. Those enactments specifically gave the Chief Justice the authority to appoint judges, including judges to the Hinds County Circuit Court, and also to appoint a judge to a newly created court of the Capital Complex Improvement District (CCID). On May 15, 2023, the Hinds County Chancery Court dismissed the complaint in its entirety. R.655-79. On May 16, Plaintiffs-Appellants filed their Notice of Appeal, R.683.

In this appeal, Plaintiffs-Appellants specifically seek review of the Chancery Court's determination that Chief Justice Randolph enjoys judicial immunity against injunctive relief with respect to the claims asserted in this lawsuit as well as the Chancery Court's decision on the merits regarding the validity of the Chief Justice's appointment authority under HB 1020 and his prior appointments of judges under Miss. Code § 9-1-105(2).[1] Chief Justice Randolph is a party to the appeal with respect to the merits and the issue of judicial immunity.

[1] Plaintiffs-Appellants do not challenge any rulings, decisions, or judgements of judges previously appointed under 9-1-105(2), nor do they believe those rulings, decisions, or judgements could be called into

Moreover, the Chief Justice expressed strong opinions as a litigant in the lower court regarding his immunity to injunction for potentially unconstitutional appointments of judges that he has made and will make, strong opinions in the lower court regarding the benefits of the appointments of circuit judges that he has made and will make, and strong opinions before a legislative committee regarding his appointment of circuit court judges in the past and in the future and the benefits of those appointments. Indeed, the Chief Justice specifically committed to a legislative committee a few months before the passage of HB 1020 that he would eliminate the backlog of cases in Hinds County within two years so long as the money could be appropriated and he could continue to appoint circuit court judges in Hinds County. These statements, whether considered individually or collectively, demonstrate that the Chief Justice's "impartiality *might* be questioned by a reasonable person knowing all the circumstances." M.R.A.P. 48C(a) (emphasis added). Under these circumstances, Rule 48C as well as Canon 3(E) (1) of the Code of Judicial Conduct and other provisions and settled precedent, make clear that recusal is required.[2]

ARGUMENT

I. APPLICABLE LAW

Two separate principles, independently and collectively, are at issue in this case. The first is expressed in Section 165 of the Mississippi Constitution, which provides, in part, that "[n]o

question. Under the "de facto officer doctrine," actions performed by officials in possession of office, including judicial office, do not lose their validity simply because it is later discovered that they undertook their role without proper legal authority. *Powers v. State*, 36 So. 6, 8 (Miss. 1904); *see also Bird v. State*, 122 So. 539, 540 (Miss. 1929) ("It is well settled in this state that the acts of a de facto judge are valid, regardless of whether he was properly appointed or qualified or not"); *Nelson v. State*, 626 So. 2d 121, 125 (Miss. 1993) ("These precedents compel the conclusion that [appellant's] prayer for reversal based upon the failure to comply with the statute regarding the appointment of Judge Evans must fail.").

[2] Under M.R.A.P. 48C, the justice whose recusal is sought decides the motion in the first instance subject to review by the full Court upon a timely motion for rehearing if the justice declines to recuse.

judge of any court shall preside on the trial of any cause . . . where he may be interested in the same." Miss. Const. art. 6, § 165. This prohibition applies to justices of the Supreme Court as well as to lower court judges. *Cf. Turner v. State*, 573 So. 2d 657, 676 (Miss. 1990) (applying § 165 in recusal motion directed to associate justice of the Supreme Court in an appeal); *see also* Miss. R. App. P. 48C(a) (setting for the procedures applicable to motion for recusal of Supreme Court justice). Similarly, Miss. Code § 9-1-11 states that "[t]he judge of a court shall not preside on the trial of any cause . . . where he may be interested in the same."

This is a manifestation of the "the ancient first principle of justice that no man may serve as a judge in his own cause." *Bell v. City of Bay St. Louis*, 467 So.2d 657, 662 (Miss. 1985) (citing *Dr. Bonham's Case*, 8 Co. Rep. 114a, 118a, 77 Eng. Rep. 646, 652 (C.P.1610) and *In re Murchison*, 349 U.S. 133, 136 (1955)); *see also* The Federalist No. 10 (J. Madison) ("No man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment.") Indeed, this Court has explained the centrality of this principle to tenets of due process in clear terms: "We doubt a more powerful principle may be found in our law." *Collins v. Dixie Transp., Inc.*, 543 So. 2d 160, 166 (Miss. 1989). Thus, a judge who is directly involved in a case—whether as a party, a witness, or otherwise—must recuse. *Id.* at 166 ("The principle's power extends beyond the case of the judge-litigant to that of the judge-witness . . . ."); *Brent v. State*, 929 So. 2d 952, 955 (Miss. Ct. App. 2005) (judge prohibited from hearing appeal of his own order). As explained in this motion, the legislature has given the Chief Justice the very authority that is being challenged in this case under the Mississippi Constitution, which led to him being named as a party and which was followed by his active participation with respect to one of the issues in the proceedings below that is now before this Court.

The second principle, which is at least equally and perhaps more important, stems from the appearance of impartiality. Thus, a justice of the Supreme Court must recuse whenever "it appears that the justice['s] impartiality *might* be questioned by a reasonable person knowing all the circumstances." Miss. R. App. Pro. 48C(a) (emphasis added). Canon 3(E)(1) of the Code of Judicial Conduct similarly states that "Judges should disqualify themselves in proceedings in which their impartiality *might* be questioned by a reasonable person knowing all the circumstances or for other grounds provided in the Code of Judicial Conduct or otherwise as provided by law." (Emphasis added).

The standard is an objective one. *Rutland v. Pridgen*, 493 So. 2d 952, 954 (Miss. 1986). It turns on the potential appearance of partiality, not the actual, subjective bias of the judge. *Id.; see Collins*, 543 So. 2d at 166 ("Judicial ethics reinforced by statute exact more than virtuous behavior; they command impeccable appearance. Purity of heart is not enough.") (quoting *Hall v. Small Business Administration,* 695 F.2d 175, 176 (5th Cir.1983)); *In re Moffett*, 556 So. 2d 723, 725 (Miss. 1990) (holding that recusal does not require a demonstration that the judge "would give favor or disfavor" to one party).[3]

"Every litigant is entitled to nothing less than the cold neutrality of an impartial judge, who must possess the disinterestedness of a total stranger to the interest of the parties involved in the litigation, whether that interest is revealed by an inspection of the record or developed by evidence

[3] *Rutland* specifically involved an earlier version of Canon 3C, which similar to the present version, required disqualification of a judge "in a proceeding in which his impartiality might reasonably be questioned." 493 So.2d at 954. But in the course of their discussion of various standards regarding recusal, *Rutland* and *Moffett* also mentioned the "appearance of impropriety." *Id.*; 556 So.2d at 725. While an appearance of impropriety would certainly justify recusal, the test under the current Canon 3(E)(1) and M.R.A.P. 48C is whether the judge's "*impartiality might* be questioned by a reasonable person knowing all the circumstances." (Emphasis added). Thus, even if an action by a judge is completely proper and appears completely proper, the action would require recusal if a reasonable person might question the judge's impartiality in a particular case because of it.

aliunde the record." *Jenkins v. Forrest County General Hospital*, 542 So.2d 1180, 1181–82 (Miss.1988). *See, also Nicholson on Behalf of Gollott v. State*, 672 So. 2d 744, 755 (Miss. 1996) (recusal required where the judge or justice has expressed "preconceived opinions regarding a case so that he could not fulfill the role of a judge in deciding it").

The remainder of this motion first addresses the Chief Justice's position as a litigant in this case and then examines various extrajudicial statements that he has made demonstrating that a reasonable person might question his impartiality in this matter.

II. CHIEF JUSTICE RANDOLPH SHOULD BE RECUSED BECAUSE HE IS A NAMED DEFENDANT IN THE LITIGATION AND AN APPELLEE IN THIS COURT.

In their complaint, Plaintiffs-Appellants named Chief Justice Randolph as a defendant because he is the state officer charged in H.B. 1020 with carrying out the unconstitutional appointments to the Hinds County Circuit Court and the CCID Court, and in the past has exercised the unconstitutional appointment authority conferred upon him by Miss. Code § 9-1-105(2). Complaint, R.29-30, ¶¶ 39-43; R. 31-32, ¶¶ 53-54; R.40-62, Exhs. A-D. The Chancery Court granted Chief Justice Randolph's motion to dismiss on the ground of judicial immunity, a decision the Plaintiffs-Appellants have appealed. Order Granting Motion to Dismiss, R.594-95; Judgement, R.680-82; Notice of Appeal, R.683. Plaintiffs-Appellants have also appealed the Chancery Court's dismissal of their complaint on the merits. Notice of Appeal, R.683.

Thus, there was a basis to name Chief Justice Randolph as a defendant, he remains a party in this litigation, and he is an appellee in this Court. Indeed, Chief Justice Randolph has acknowledged his status as a party to this appeal by filing a response to Plaintiffs-Appellants' motion to expedite. *See* Response to Emergency Motion for Expedited Consideration by Michael K. Randolph, *Saunders v. State of Mississippi*, No 2023-TS-00584 (Miss. May 19, 2023). Because

Chief Justice Randolph cannot serve as both a party and a judge in this matter, Plaintiffs-Appellants respectfully request that he be recused from participation in the appeal. *See Bell*, 467 So.2d at 662 ("[N]o man may serve as a judge in his own cause.").

III. CHIEF JUSTICE RANDOLPH SHOULD BE RECUSED BECAUSE HE MADE EXTRAJUDICIAL STATEMENTS ON THE MERITS OF THE CASE.

Chief Justice Randolph has made a number of extrajudicial statements about judicial immunity and appointments of circuit judges that relate to the issues in this litigation and that might cause a reasonable person to question his impartiality.

In the court below, Chief Justice Randolph moved to dismiss the complaint against him on the ground of judicial immunity. Motion to Dismiss on Behalf of Defendant, Hon. Michael K. Randolph, R.148-51. In the motion, he argued in favor of sweeping, nearly absolute, judicial immunity—asserting in effect that he is immune even from a suit for prospective relief enjoining future unconstitutional conduct pursuant to statutes that give him the authority to make judicial appointments. R.149-50. Given the Chief Justice's position on judicial immunity and the fact that the issue is dispositive of his own exposure to an injunction in this litigation, his "impartiality *might* be questioned by a reasonable person knowing all the circumstances." M.R.A.P. 48C(a), Canon 3(E)(1) (emphasis added).

In addition, the complaint challenges the constitutionality of appointments Chief Justice Randolph has already made under Section 9-1-105(2), which were embodied in a series of orders attached to the complaint, each bearing the Chief Justice's signature. *See* Complaint, R.40-62, Exhs. A-D. The propriety of those appointments, and the legality of the orders effectuating them, will remain central to the issues this Court will be called upon to determine, regardless of whether the Chief Justice is ultimately dismissed as a party on judicial immunity grounds. Were Chief

Justice Randolph to participate in consideration of this case, he would in effect be hearing a challenge to his own prior orders. "Not only *might* a reasonable person harbor doubts about the impartiality of the judge in this situation, . . . any reasonable person *should* have such doubts." *Brent*, 929 So. 2d at 955 (reversing judge's failure to recuse from reviewing propriety of search warrant he himself had issued as a county court judge prior to elevation to circuit court) (emphasis in original).

Moreover, in the proceedings below, Chief Justice Randolph has already expressed views supporting the importance of those orders. In his motion to certify the judgment of dismissal, Chief Justice Randolph asserted that "appointments made under § 9-1-105(2) are utilized on a regular basis for the promotion of the efficient administration of justice." R.599. In other words, the Chief Justice, writing as a party in this litigation and not in his judicial capacity, has expressed his view that Section 9-1-105(2) is wise policy and is well established. Chief Justice Randolph made similar statements in that same document concerning the impact of H.B. 1020 for the sound administration of justice in Jackson and in the CCID. *Id.* ("H.B. 1020 is likewise of great consequence in the creation and workings of the Capital Complex Improvement District.").

Prior to this litigation, Chief Justice Randolph has advocated strongly for the use of judicial appointments to address the caseload in Hinds County. For example, he testified before the House Judiciary B Committee on October 10, 2022, less than two months before the commencement of the 2023 legislative session and less than six months before HB 1020 was passed by the legislature. In that hearing, Chief Justice Randolph explained how he had previously appointed judges to the Hinds County Circuit Court and discussed his plan to do so in the future. *See* Mississippi House of Representatives, Hearing of the House Judiciary B Committee (Oct.10, 2022), at 2:48, *available at* https://www.youtube.com/watch?v=qc6fTrAwW4E. He testified that beginning in the spring of

2020, he met with the District Attorney, various judges, some public defenders, and some legislators. *Id*. at 2:55-2:57, Transcript 7-9.[4] He started developing a plan to use federal funds to speed up resolution of cases in Hinds County using appointed judges. Tr. 8-16; *Id.* at 2:56-2:57, Tr. 8-9 ("I asked the district attorney … when do you expect you can start trying additional cases when I start appointing judges"). He explained that he developed and vetted a list of judges he wished to appoint. *Id.* at 3:03, Tr. 13-14 ("[B]efore I talked to anybody … I identified about 12 judges and I [asked] our legal department [to tell me] what these people's records are on appeal. I want to know if these judges get reversed all the time, because I don't want to bring judges in that are going to have bad trials."). He described implementing a program using $5 million to pay for an initial group of four appointed judges along with court rooms and support staff. *Id.* at 3:04, Tr. 14 ("[A]fter vetting the judges now, as it turned out, the first appointment group was four"). He further testified to his opinion that the program had been successful, *Id.* at 3:06, Tr. 15-16 ("[T]he original money we had, the 5 million, we had closed about 8,000 cases"), and he discussed other aspects of the process. *Id*. at 3:07-3:08, Tr. 17 ("[W]e appointed judges for 200 cases…. that's our test. Four judges, 50 cases. You get your own docket, you got your own courtroom, you got your own court administrator, you got your own bailiff.").

The Chief Justice also spoke about the future prospects for addressing the caseload with more funding and the continuing appointment of circuit court judges, and made a specific commitment: "[I]f you give us the amount of money we ask for, you give me two years and you won't have a backlog . . . . We have a good number of good judges throughout the state that can come in and help us." *Id.* at 3:07, Tr. 16. He also said: "[R]ight now I have appointed judges and

[4] Plaintiffs have procured a transcript by a court reporter of the Chief Justice's testimony before the Committee as recorded in the you tube video just cited. The transcript is attached as an exhibit to this motion.

I have a whole 'nother list of more judges to appoint should I need more because we're now just figuring out what are we doing." *Id.* at 2:54, Tr. 5-6.

The constitutionality of the appointments that Chief Justice Randolph discussed at the October 10 Judiciary B hearing—both past and proposed—is directly challenged in this litigation. Given his personal and professional investment in these appointments, and particularly his personal commitment to eliminate the backlog in two years if more money is appropriated and he can continue to appoint judges, Chief Justice Randolph does not "possess the disinterestedness of a total stranger to the interest of the parties involved in the litigation." *Jenkins*, 542 So.2d at 1181–82. *See also United States v. State of Ala.*, 828 F.2d 1532, 1544 (1987) ("Judge Clemon's involvement in the issues before this court went beyond the mere making of public statements, however. During his tenure in the state legislature, the trial judge actively participated in the very events and shaped the very facts that are at issue in this suit."). Although the Chief Justice was seeking to improve the administration of justice through measures he believes to be in the public interest, a reasonable person might question his impartiality when the constitutionality of those measures is at issue. Moreover, the fact that he pursued and promoted these appointments with no apparent hesitation about the possibility they might be unconstitutional, might further lead a reasonable person to conclude he has made up his mind on that subject.

In summary, the Chief Justice expressed strong opinions in the lower court regarding his immunity to injunction for potentially unconstitutional appointments of judges that he has made and will make, strong opinions in the lower court regarding the benefits of the appointments of circuit judges that he has made and will make, and strong opinions before a legislative committee regarding his appointments of circuit court judges in the past and in the future and the benefits of those appointments, including his personal commitment to eliminate the backlog in two years if

provided the funding and allowed to continue appointing judges. These statements, whether considered individually or collectively, demonstrate that the Chief Justice's "impartiality might be questioned by a reasonable person knowing all the circumstances." M.R.A.P. 48C(a), Canon 3(E)(1). Chief Justice Randolph should be recused from consideration of all aspects of this litigation, procedural and substantive, to ensure the unquestioned appearance of impartiality that is required under the law.

CONCLUSION

For all of the foregoing reasons, Plaintiffs-Appellants respectfully request that Chief Justice Michael K. Randolph be recused from participation in any aspect of this appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day electronically filed the foregoing motion with the Clerk of the Court using the MEC system, which sent notification of such filing to all counsel of record.

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This, the 29th day of May, 2023.

/s Robert B. McDuff
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