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COURT OF APPEALS

Serial: **247575**

IN THE SUPREME COURT OF MISSISSIPPI

No. 2023-CA-00584-SCT

ANN SAUNDERS, SABREEN SHARRIEF, AND DOROTHY TRIPLETT — ***Appellants***

v.

STATE OF MISSISSIPPI; STATE OF MISSISSIPPI, EX REL. TATE REEVES, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF MISSISSIPPI; STATE OF MISSISSIPPI, EX REL. LYNN FITCH, IN HER OFFICIAL CAPACITY AS ATTORNEY GENERAL 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***

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ORDER

A Motion for Recusal of Chief Justice Michael K. Randolph (Chief Justice), with attachments, was filed by Ann Saunders, Sabreen Sharrief, and Dorothy Triplett (Appellants) on May 29, 2023. That motion was followed by supplements filed on June 19, 2023, and June 22, 2023. The latter supplement attached a 187-page transcript. The Chief Justice has given thorough consideration to the motion, supplements, and attachments; reviewed the relevant legal authorities with the utmost care; and consulted with colleagues on this Court. A motion for recusal "must be scrutinized with care, and judges should not recuse themselves solely

because a party claims an appearance of partiality." ***In re Aguinda v. Texaco, Inc.***, 241 F.3d 194, 201 (2d Cir. 2001).

PROCEDURAL HISTORY

On Friday, April 21, 2023, in the United States District Court for the Southern District of Mississippi, Northern Division, the National Association for the Advancement of Colored People (NAACP), et al., filed suit charging that the recently enacted House Bill No. 1020 (H.B. 1020), *inter alia*, violates their federal constitutional rights (***NAACP v. Reeves***, Civil Action No.: 3:23-CV-272-HTW-LGI).[1]

On April 24, 2023, Appellants filed a civil action in the Chancery Court of Hinds County, First Judicial District, charging that Mississippi Code Section 9-1-105(2) (Rev. 2020) and H.B. 1020 violate the Mississippi Constitution. (C.P. 20-39).

Plaintiffs in both the federal and state actions chose to sue Michael K. Randolph, in his official capacity as Chief Justice of the Mississippi Supreme Court. The Chief Justice promptly filed a motion to dismiss on multiple grounds, including judicial immunity, in each suit. (C.P. 148-51).

At the initial hearing in the case *sub judice*, the chancellor urged Appellants to dismiss the Chief Justice, as he was not a necessary party. (C.P. 699-700, 702, 704, 717-18). The chancellor counseled "that the lawsuit should be styled against the [Attorney General's] office only, and possibly the Governor. It's not necessary to sue the Chief . . . ." (C.P. 699). Additionally, the proper party, the State of Mississippi ex rel. Attorney General Lynn Fitch

[1] Because the complaint was filed after hours on April 21, 2023, it was not entered on PACER until April 24, 2023.

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(the State), moved pursuant to Mississippi Code Section 7-5-1 (Rev. 2019) and Mississippi Rule of Civil Procedure 24 "for leave to intervene . . . to argue the constitutionality of" Section 9-1-105(2) and H.B. 1020.[2] (C.P. 138, 705). Appellants sought leave to amend their Complaint to add two parties and cure a filing deficiency. (C.P. 172-95, 759). Appellants again elected to sue the Chief Justice in their amended complaint. (C.P. 159-60, 172-73, 176).

Following a hearing on the motion to dismiss, the chancellor dismissed all claims against the Chief Justice "*with prejudice*" on May 11, 2023. (C.P. 589-95 (emphasis added)). Seeking finality, the Chief Justice filed a Rule 54(b) Motion for Certification that day. (C.P. 598-602). Before the Rule 54(b) motion was heard, the chancellor entered a Final Order granting the State's Motion to Dismiss and denying all relief sought by Appellants on May 15, 2023. (C.P. 680-82).

On May 16, 2023, Appellants filed their Notice of Appeal. (C.P. 683). On May 19, 2023, Appellants filed an Emergency Motion for Expedited Consideration. The Chief Justice filed "no objection" to Appellants' request for an expedited review of the trial court's dismissal of the Chief Justice that same day. The appeal was retained in this Court, and an expedited briefing schedule was set.

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[2] The chancellor entered an Agreed Order granting the State's motion for leave to intervene on May 2, 2023. (C.P. 159-60).

On May 29, 2023, Appellants first filed a Motion for Recusal with an attached affidavit from one of their attorneys, Robert McDuff,[3] and with a transcript of a YouTube video of an October 10, 2022 legislative hearing.

On June 1, 2023, the federal court found that "Chief Justice Randolph must be dismissed from" the federal suit and "**ORDERED and ADJUDGED** that Defendant Michael K. Randolph, in his official capacity as the Chief Justice of the Mississippi Supreme Court, be dismissed from [the federal] litigation because of Judicial Immunity." ***NAACP v. Reeves***, No. 3:23-CV-272-HTW-LGI, 2023 WL 3767059, at *13 (S.D. Miss. June 1, 2023). On the same day, members of the "team" filed a separate suit in federal court (***JXN Undivided Coalition v. Tindell***, Civil Action No. 3:23-CV-351-TSL-RPM) charging that Senate Bill 2343 violates the protest rights of plaintiffs, which are not an issue in the case *sub judice*. On June 7, 2023, the ***NAACP*** plaintiffs filed a Motion to Clarify the June 1, 2023 Order. That same day, the plaintiffs in ***JXN Undivided Coalition*** filed a Motion to Consolidate the two actions. On June 14, 2023, the federal court heard the Motion to Clarify and Motion to Consolidate. Members of the "team" argued for consolidation of ***JXN***

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[3] McDuff, an attorney for the Mississippi Center for Justice, is one of the many well-educated, well-spoken, and well-respected members of a "team" of attorneys from numerous well-recognized organizations collaborating in the representation of Appellants in the case *sub judice* and plaintiffs in the federal proceedings. At the June 14, 2023 federal-court hearing, plaintiffs' counsel collectively referred to themselves as the "team." (Supp. T. 4, 37, 148).

Undivided Coalition with ***NAACP*** based on "potential"[4] claims to be added later. (Supp. T. at 18-22; *see also* Supp. T. at 12-13, 130-32, 141, 148).

On June 19, 2023, Appellants filed a Supplement to the Motion for Recusal, referencing comments made by the Chief Justice at the June 14 federal-court hearing. Appellants also gave notice of their intention to file the transcript of that hearing when it became available. On June 22, 2023, Appellants filed a Second Supplement to the Motion for Recusal, along with the 187-page transcript from the hearing.

DISCUSSION

The Oath of Office, taken by all Mississippi state judges, reads in its entirety:

> I, __________, solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that *I will faithfully and impartially discharge and perform all the duties incumbent upon me* as _________ according to the best of my ability and understanding, agreeably to the Constitution of the United States and the Constitution and laws of the State of Mississippi. So help me God.

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Miss. Const. art. 6, § 155 (emphasis added). "[T]he law presumes that the judge is qualified and unbiased." ***Washington Mut. Fin. Grp., LLC v. Blackmon***, 925 So. 2d 780, 785 (Miss. 2004).

Disqualification of judges begins with the Mississippi Constitution, article 6, Section 165; Mississippi Code Section 9-1-11 (Rev. 2019); Mississippi Rule of Appellate Procedure 48C; the Code of Judicial Conduct, Canon 3E; and relevant legal precedent.

[4] Despite conceding that ***JXN Undivided Coalition*** and ***NAACP*** involved separate parties, separate defendants, separate issues of fact, separate issues of law, and separate statutes, the "team[,]" nevertheless, sought to consolidate the two cases. (Supp. T. 19-20, 27, 34-37).

I. Mississippi Constitution and Mississippi Code Section 9-1-11

The Mississippi Constitution provides that

> No judge of any court shall preside on the trial of any cause, where the parties or either of them, shall be connected with him by affinity or consanguinity, or where he may be interested in the same, except by the consent of the judge and of the parties.

Miss. Const. art. 6, § 165. Mississippi Code Section 9-1-11 largely tracks the language of the Constitution and adds an additional basis for disqualification based on the judge's having served as counsel in the case.[5] Miss. Code Ann. § 9-1-11. "[T]he *interest* which disqualifies a judge under the constitution *must be a pecuniary or property interest, or one affecting his individual rights*." ***McLendon v. State***, 187 Miss. 247, 191 So. 821, 823 (1939) (emphasis added) (citing ***Ferguson v. Brown***, 75 Miss. 214, 21 So. 603, 606 (1897)).

Neither Appellants, nor their counsel, have asserted a claim that the Chief Justice has a "pecuniary or property interest, or one affecting his individual rights." ***Id.*** (citing ***Ferguson***, 21 So. at 606). Appellants have kept the Chief Justice named as a party, even after admitting that it would be acceptable if the Chief Justice was merely a "nominal party."[6] (C.P. 496).

The record in all proceedings are replete with the Chief Justice's unwavering disavowal of any interest in the constitutionality, *vel non*, of the challenged statutes. From the outset, the Chief Justice has painstakingly taken a stand of neutrality and has avoided formulating an opinion, pro or con, on the Appellants' or the State's positions.

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[5] That additional basis is not at issue here.

[6] At the June 14, 2023 federal-court hearing, counsel for the ***NAACP*** plaintiffs likewise argued that the Chief Justice should remain as a "nominal party" in the federal proceedings. (Supp. T. 71-72).

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Assuredly, the Chief Justice has advocated for years that the Courts of Mississippi be provided with appropriations necessary to allow every court in the state of Mississippi to fulfill its constitutional duties. The Chief Justice's interests lie in fulfilling constitutional mandates to keep courts open, administer justice (civil or criminal) without delay, and protect the rights of the accused and the victims. Miss. Const. art. 3, §§ 24, 25, 26, 26A. The Chief Justice has advocated eliminating the statewide case backlog in every judicial district exacerbated by the havoc wrought by COVID-19, whether those cases be in the circuit, chancery, county, or youth courts. The Chief Justice has also advocated reducing the number of children in state custody when families are available to provide them permanent homes. The Chief Justice has advocated that the rule of law must be honored and upheld.

The constitutionality of specific statutes, such as those at issue, does not become of interest to the Chief Justice until a case raising a challenge is appealed to the Mississippi Supreme Court. Then, and only then, does the Chief Justice dutifully undertake that determination. *See* ***Planters' Bank v. Black***, 19 Miss. 43, 50-51 (1848) ("The province of the legislature is to enact laws, that of the court is to expound or interpret them.").

The appointment powers provided in the challenged provisions are not the Chief Justice's "cause." Miss. Const. art. 6, § 165; Miss. Code Ann. § 9-1-11. These statutes were enacted by the Legislature and signed by the Governor. This dispute is between Appellants and the State of Mississippi. Thus, the Mississippi Constitution and the Mississippi Code fail to provide any basis for disqualification and a requisite recusal from consideration of the constitutional challenges to the subject statutes.

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II. Mississippi Rules of Appellate Procedure

Mississippi Rule of Appellate Procedure 48C(a)(i) reads:

> Any party may move for the recusal of a justice of the Supreme Court or a judge of the Court of Appeals if it appears that the justice or judge's *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. *A motion seeking recusal shall be filed with an affidavit of the party or, if the party is represented, by the party's attorney setting forth the factual basis underlying the asserted grounds for recusal* and declaring that the motion is filed in good faith and that the affiant truly believes the facts underlying the grounds stated to be true.

M.R.A.P. 48C(a)(i) (emphasis added).

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There is a baseline presumption that judges are "qualified and unbiased." ***Dodson v. Singing River Hosp. Sys.***, 839 So. 2d 530, 533 (Miss. 2003) (citing ***Farmer v. State***, 770 So. 2d 953, 956 (Miss. 2000)). "[T]he standard for recusal is a reasonable person knowing all the circumstances."[7] ***Id.*** "[R]ecusal is required when the evidence[,]" ***id.***, rather than "mere conjecture or speculation[,]" ***Blackmon***, 925 So. 2d at 785, operates to "produc[e] a reasonable doubt as to the judge's impartiality." ***Dodson***, 839 So. 2d at 533.

The representations and innuendos conjectured in Appellants' motion, peppered with minimal facts, lack a solid foundation. The motion is largely speculative, baseless, and (at times) inaccurate (*e.g.*, that the Chief Justice is a party "with respect *to the merits*"), expounding on selective, out-of-context statements (*e.g.*, that the Chief Justice has expressed "strong opinions" before a legislative subcommittee, the federal court, and the chancery

[7] Stated otherwise, it is an objective reasonable "*person*, not a lawyer or judge," standard. ***Dodson***, 839 So. 2d at 534 (citing ***Collins v. Joshi***, 611 So. 2d 898, 903 (Miss. 1992) (Banks, J., concurring)). All circumstances should not be viewed solely through the lens of a lawyer zealously advocating recusal to further the client's cause.

court). (Motion at 1-2, 4, 7-10 (emphasis added)). While Appellants repeatedly emphasize the term "might" in Rule 48C(a)(i), they fail to acknowledge the presumption that all judges (including the Chief Justice) are "qualified and unbiased[,]" and they expend no effort to reveal the events surrounding the Chief Justice's statements despite the controlling standard contemplating "a reasonable person *knowing all the circumstances*[.]" ***Blackmon***, 925 So. 2d at 784-85 (quoting Miss. Code of Jud. Conduct Canon 3E(1)); M.R.A.P. 48C(a) (emphasis added).

All that was offered by Appellants are an affidavit from counsel, a partial transcript of a YouTube video of an October 10, 2022 legislative hearing,[8] and the transcript of the June 14 federal-court hearing.

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The affidavit selects nine fragmented snippets of the Chief Justice's statements to a legislative subcommittee. It is devoid of a "factual basis" that would lead a reasonable person knowing all of the circumstances to believe that the Chief Justice had formulated any decision regarding the constitutionality of the subject statutes. M.R.A.P. 48C(a)(i).

The October 10, 2022 hearing was held before H.B. 1020 was introduced; more than six months before H.B. 1020 was signed into law; and only eighteen days after entry of four orders made pursuant to Section 9-1-105(2), which Appellants contest. It reveals the following to the reasonable person interested in all of the circumstances:

- that the Chief Justice praised the Courts of Mississippi as the most efficient branch of government in Mississippi;

[8] The testimony was transcribed from a YouTube video.

- that the Judiciary spent only funds appropriated and returned those unspent;

- that the taxpayers of this state benefitted immensely from successful intervention courts;

- that expenditure of funds received by Mississippi from the Coronavirus Aid, Relief, and Economic Security (CARES) Act[9] and the American Rescue Plan Act (ARPA)[10] to address the statewide backlog of cases attributable to COVID-19[11] had resulted in the closure of more than 10,000 cases in circuit and chancery courts throughout the state and more than 120,000 cases in Hinds County County Court alone, utilizing special appointment judges working with the elected circuit, chancery, county, and youth court judges of Hinds County; and

- that the Chief Justice requested additional funds to continue addressing the statewide backlog, which includes Hinds County.

The context in which these statements were made is essential to assessing all of the circumstances (*e.g.*, COVID-19, CARES Act, ARPA, statewide case backlogs).

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[9] 15 U.S.C. §§ 9001-9141.

[10] 42 U.S.C. §§ 802-805.

[11] As provided in the Order Appointing Special Judge entered August 4, 2020, at that time, the Seventh Circuit Court District ("the most populous single Circuit Court District") had "the largest number of positive coronavirus test results and the largest number of deaths in the State of Mississippi . . . ." Order Appointing Special Judge, ***In re: Judicial Appointment Related to Coronavirus (COVID-19): Special Judge for the Circuit Court of Hinds County, Mississippi***, No. 2020-AP-00821 (Aug. 4, 2020).

Similarly, the Order Appointing Special Judge entered September 22, 2022, made appointments "to alleviate the strain on Hinds County courts caused or exacerbated by the COVID-19 pandemic, in the interest of public safety and to timely provide access to justice to victims and accused alike in these unique times." Order Appointing Special Judge, ***In re: Judicial Appointment Related to Coronavirus (COVID-19): Hon. Betty W. Sanders Appointed as Special Judge for the County Court of Hinds County, Mississippi***, No. 2022-AP-00970 (Sept. 22, 2022).

The 187-page transcript from the June 14, 2023 hearing in federal court fails to reflect the Chief Justice's taking any position, pro or con, on the constitutionality of the subject statutes. Certainly, the Chief Justice expressed concern over efforts to continue to entangle him in lawsuits while the constitutionality of the subject statutes are before the Mississippi Supreme Court. (Supp. T. 117-20, 126-27).

In sum, it is the Chief Justice's firm conviction that the "evidence" offered by Appellants fails to establish the requisite factual basis for a reasonable person to question the Chief Justice's impartiality regarding the constitutionality of H.B. 1020 or Section 9-1-105(2), a thirty-year-old statute.

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III. Code of Judicial Conduct

Finally, there is the Code of Judicial Conduct. "[T]he purpose of the Code would be subverted if the Code were invoked by lawyers for mere *tactical advantage* in a proceeding." Miss. Code of Jud. Conduct Preamble (emphasis added). The Code then elaborates that recusal is appropriate in instances in which:

> (a) the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
>
> (b) the judge served as lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;
>
> (c) the judge knows that the judge, individually or as a fiduciary, or the judge's spouse or member of the judge's family residing in the judge's household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(d) the judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) is acting as a lawyer in the proceeding;

(iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) is to the judge's knowledge likely to be a material witness in the proceeding. . . .

Miss. Code of Jud. Conduct Canon 3E(1).

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Appellants do not claim a basis for disqualification or recusal under subsections (a) through (c), nor do those provisions apply.

Regarding subsection (d), Appellants point to the Chief Justice's being "a named defendant in the litigation and an Appellee in this Court." (Motion at 5). That was their decision, not mine. Despite any legal precedent, they sued the Chief Justice without citing a single successful case in the history of this state in which the Chief Justice was sued in order to resolve the constitutionality of a statute. Jurists in the state and federal court suits rightly concluded that the Chief Justice was not a necessary or proper party and dismissed the Chief Justice from those lawsuits. Appellants fail to offer any precedent from a similar case (*i.e.*, a challenge to the constitutionality of a statute) to support their argument that the Chief Justice should recuse solely because they chose to sue him.

Under these circumstances, the Chief Justice harbors grave concerns about recusing just because Appellants named him as a party (despite having no interest in the outcome or

being otherwise disqualified) as to do so would only reward attempts to create a basis for recusal by litigants (*i.e.*, naming the judge as a party and then seeking his recusal). *See* ***Blackmon***, 925 So. 2d at 785 ("[T]here must be an equilibrium between th[e] need for impartiality and the need to prevent the frivolous and unnecessary disqualification of those elected to perform judicial duties[;]" the "recusal process must not degenerate into a technique for a lawyer to utilize in constructing a forum favorable to the positions which may favor the litigants represented by the lawyer."). In ***Blackmon***, this Court stated that

> Courts generally have been wary of requiring recusal where the alleged animosity or discord is the result of affirmative, hostile actions by the attorney. To do so without caution would create situations in which the judges would serve at the will of the lawyers—a circumstance generally thought to be intolerable.

Blackmon, 925 So. 2d at 792 (citations omitted). A plausible case can be made that such concerns are more than hypothetical here because the Chief Justice was named as a defendant "for suspect tactical and strategic reasons" despite having no interest whatsoever. ***Blackmon***, 925 So. 2d at 793 (quoting ***In re Kan. Pub. Emps. Ret. Sys.***, 85 F.3d 1353, 1360 (8th Cir. 1996)).

"The recusal mechanism must be guarded carefully to check its use as a weapon to be wielded in a campaign to maneuver onto more favorable fields of battle." ***Blackmon***, 925 So. 2d at 796-97; *see also* ***In re Aguinda***, 241 F.3d at 201 (recusal standards "must be applied in an adversarial context in which counsel will seek to steer cases to judges deemed favorable to their cause—in the lexicon of the profession, 'judge-shopping.' As a result, the grounds asserted in a recusal motion must be scrutinized with care, and judges should not

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recuse themselves solely because a party claims an appearance of partiality."). And "where the standards governing disqualification have not been met, disqualification is not optional; rather, it is prohibited. As we have stated, '[a] judge is as much obliged not to recuse himself when it is not called for as he is obliged to when it is.'" ***In re Aguinda***, 241 F.3d at 201 (alteration in original) (quoting ***In re Drexel Burnham Lambert Inc. v. Drexel Burnham Lambert Inc.***, 861 F.2d 1307, 1312 (2d Cir. 1988)).

On the issue of the constitutionality of Section 9-1-105(2) and H.B. 1020, Appellants fail to meet their burden of overcoming the presumption of impartiality because the grounds for recusal advanced in their motion are "untenable." ***Turner v. State***, 573 So. 2d 657, 676 (Miss. 1990). From the commencement of these proceedings, the Chief Justice painstakingly has taken a position of neutrality on the constitutionality of the challenged statutes and avoided taking any merit-based positions, pro or con. When all circumstances are considered, Appellants have failed to overcome the presumption of impartiality or to provide any factual basis for disqualification or recusal under the Code of Judicial Conduct with respect to the constitutional challenges to the subject statutes.

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<u>Sua Sponte Recusal</u>

The only issue on which the Chief Justice, in his official capacity, has a substantive position is whether a Chief Justice should have ever been named as a defendant. Throughout, the Chief Justice unequivocally has maintained that he is not a proper party to these proceedings. The chancellor ruled that the Chief Justice is immune from suit.

The Chief Justice has consistently been (and remains) neutral and without any interest regarding the constitutionality of the statutes challenged in this appeal. But absent recusal, the Chief Justice's participation risks prolonging the "circus"[12] and allowing a sideshow to overshadow the center-ring attraction (*i.e.*, the concrete issue of constitutionality, *vel non*, of the subject statutes). (Supp. T. at 120).

I considered seeking a final decision on judicial immunity separate from, and prior to, any consideration of the other issues on appeal. But doing so would surely delay a timely resolution of the constitutional issues presented and contravene the constitutional mandate that "justice shall be administered without . . . delay." Miss. Const. art. 3, § 24. Absent a separate ruling, I am a party to this appeal. Moreover, a just and independent judiciary is a paramount consideration. The institution of the Mississippi Supreme Court must be shielded from unnecessary criticisms that would surely result if I delayed the proceedings. Accordingly, I, *sua sponte*, recuse from consideration of all issues in this appeal.

In so holding, I emphasize that this decision is related to the specific circumstances presented in this unique and most irregular proceeding. "The recusal mechanism must be guarded carefully to check its use as a weapon to be wielded in a campaign to maneuver onto more favorable fields of battle." ***Blackmon***, 925 So. 2d at 796-97. This Order should not be construed, in any way, as judicial approval of the tactical manipulation of naming judges to

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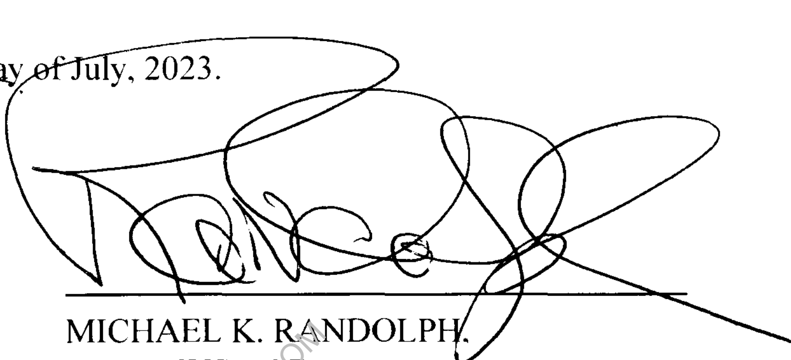
[12] This was a term used by the Chief Justice at the June 14 federal-court hearing in reference to the continued efforts by the "team" to entangle him in potentially years-long litigation without legal justification. (Supp. T. 126-27, 141, 155).

a lawsuit and then seeking their recusal by litigants. Just suing a judge does not mandate his recusal.

IT IS THEREFORE ORDERED that the Chief Justice, *sua sponte*, recuses from participation in this appeal.

SO ORDERED, this the 3 day of July, 2023.



MICHAEL K. RANDOLPH,
CHIEF JUSTICE

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