IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
Case No. _____

ANITA S. EARLS, Plaintiff, v. NORTH CAROLINA JUDICIAL STANDARDS COMMISSION; THE HONORABLE CHRIS DILLON, in his official capacity as Chair of the North Carolina Judicial Standards Commission; THE HONORABLE JEFFERY K. CARPENTER, in his official capacity as Vice Chair of the North Carolina Judicial Standards Commission; and the following Members of the North Carolina Judicial Standards Commission, each in his or her official capacity: THE HONORABLE JEFFERY B. FOSTER; THE HONORABLE DAWN M. LAYTON; THE HONORABLE JAMES H. FAISON III; THE HONORABLE TERESA VINCENT; MICHAEL CROWELL; MICHAEL T. GRACE; ALLISON MULLINS; LONNIE M. PLAYER JR.; JOHN M. CHECK; TALECE Y. HUNTER; DONALD L. PORTER; and RONALD L. SMITH, Defendants.	)	**COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF**

Plaintiff Anita S. Earls ("Earls"), by her undersigned counsel and pursuant to 28 U.S.C. §§ 2201 *et seq.*, and the First and Fourteenth Amendments to the United States Constitution, alleges as follows:

SUMMARY OF THIS ACTION

1. This is an action for declaratory judgment and injunction by Plaintiff, Anita S. Earls, Associate Justice of the North Carolina Supreme Court, who is being investigated and will potentially be punished for exercising her First Amendment rights to speak on the subject of lack of diversity in our State's courts, a matter of substantial public concern.

2. Justice Earls has been subjected to a series of months-long intrusive investigations, initiated by one or more anonymous informers, concerning her comments regarding operation of the North Carolina judicial system. Those comments, including those concerning diversity in the North Carolina judicial system, are fully protected by the First Amendment of the United States Constitution as core political speech.

3. The North Carolina Code of Judicial Conduct ("Code") which provides ethical guidance to judges in this State expressly permits judges to speak concerning the legal system and the administration of justice. This case concerns an on-going campaign on the part of the North Carolina Judicial Standards Commission (the "Commission"), which administers the Code, to stifle the First Amendment free-speech rights of Justice Earls and expose her to punishment that ranges from a letter of caution that becomes part of a permanent file available to any entity conducting a background check to removal from the bench.

4. As more fully described below, over the course of this year, the Commission has initiated two investigations into public comments made by Justice Earls on the subject of the legal system and the administration of justice. Most recently, on

August 15, 2023, the Commission indicated its intent to investigate and potentially punish Justice Earls for an interview in a legal news publication in which she discussed the North Carolina Supreme Court's recent record on issues relating to diversity. The interview was prompted by a published study of the race and gender of advocates who argue before the Court. In that interview, Justice Earls discussed matters such as the decision by the North Carolina Supreme Court to disband the Commission on Fairness and Equity, the Court's lack of judicial clerks from racial minority groups, the implicit bias associated with the interrupting of female advocates (and even herself as an African-American female justice) during oral argument, and the discontinuance of racial equity and implicit bias training in the North Carolina courts.

5. The Commission has indicated that it believes that Justice Earls' comments on these issues of legitimate public concern potentially violate a provision of the Code which requires judges to conduct themselves "in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

6. It is Justice Earls' position that public confidence in the judiciary is compromised when the court system does not reflect the population it serves and is not promoted, as one court striking down a sanction levied against a judge who criticized the court system put it, "by casting a cloak of secrecy around the operations of the courts."[1]

7. More importantly, though, the First Amendment of the United States Constitution prohibits the Commission, as an arm of the State, from stifling or even chilling free speech, especially core political speech from an elected Justice of the North

[1] *Scott v Flowers*, 910 F.2d 201, 213 (5th Cir. 1990).

Carolina Supreme Court. The First Amendment allows Justice Earls to use her right to free speech to bring to light imperfections and unfairness in the judicial system. At the same time, the First Amendment prohibits the Commission from investigating and punishing her for doing so.

8. In this action, Justice Earls seeks a judicial declaration that any attempt to investigate her and potentially punish her for speaking out on matters of public concern violates the First Amendment. She seeks an injunction, preliminary and permanent, to stop the Commission from continuing to chill her right to speak on matters of public concern.

JURISDICTION AND VENUE

9. This Court has subject matter jurisdiction over this case under (i) 28 U.S.C. §§ 1341 & 1343, in that it seeks to secure equitable relief to redress the deprivation, under color of any state law or statute, of any right, privilege, or immunity secured by the Constitution or by any Act of Congress, specifically 42 U.S.C. 1983, (ii) under 28 U.S.C. § 2201(a) to secure declaratory relief, and (iii) under 28 U.S.C. § 2202 to secure preliminary and permanent injunctive relief.

10. Venue of this action is proper within this judicial district pursuant to 28 U.S.C. § 1391(b) because Justice Earls resides in this district.

PARTIES

11. Justice Earls is a citizen and resident of Durham, North Carolina. In 2018, she was elected to the position of Associate Justice of the North Carolina Supreme Court. In that election, Justice Earls received the votes of over 1.8 million North Carolinians,

nearly one-third more than the votes received by the next-highest vote getter, the incumbent who was running for re-election. Justice Earls duly received a certificate of election from the State Board of Elections, a commission from the Attorney General as provided by law, and was sworn into office in January 2019 for a term of eight years – through December 2026 – as established by Art. IV, § 16 of the North Carolina Constitution. She is currently a candidate for reelection, having filed a letter in November 2022 declaring her intention to seek reelection to her office of Associate Justice.

12. The Defendant Commission was established by Article 30 of Chapter 7A of the North Carolina General Statutes, §§ 7A-374.1, *et seq.*, "to provide for the investigation and resolution of inquiries concerning the. . .conduct of any judge or justice of the General Court of Justice," including the imposition of various forms of "discipline," short of impeachment. *Id*. Such discipline is founded on violation of the Code, *i.e.*, the North Carolina Code of Judicial Conduct. *See* N.C. Gen. Stat. § 7A-374.2. The Commission is a person within the meaning of 42 U.S.C. § 1983 and was acting under color of state law at all times relevant to this Complaint.

13. The Commission is composed of 16 members. Under the current law, six are judges appointed by the North Carolina Chief Justice, two each from the North Carolina Court of Appeals, the Superior Court bench, and the District Court bench. N.C. Gen. Stat. § 7A-375(a). Four are lawyers appointed by the North Carolina State Bar Council, and four are lay citizens, two appointed by the Governor and one each appointed

by the President Pro Tempore of the North Carolina Senate and the Speaker of the North Carolina House of Representatives. *Id*.

14. Defendant Judge Chris Dillon is sued in his official capacity as the Chair of the Commission. In his official capacity, it is his responsibility to oversee the administration of the Commission, including overseeing investigations and potential discipline by the Commission. Judge Dillon is a person within the meaning of 42 U.S.C. § 1983 and was acting under color of state law at all times relevant to this Complaint.

15. Defendant Jeffery K. Carpenter is sued in his official capacity as the Vice Chair of the Commission. In his official capacity, it is his responsibility to assist in overseeing the administration of the Commission, including overseeing investigations and potential discipline by the Commission. Judge Carpenter is a person within the meaning of 42 U.S.C. § 1983 and was acting under color of state law at all times relevant to this Complaint.

16. Defendant Judge Jeffery B. Foster is sued in his official capacity as a member of the Commission. In his official capacity, it is his responsibility to participate in the work of the Commission, including investigations and potential discipline by the Commission. Judge Foster is a person within the meaning of 42 U.S.C. § 1983 and was acting under color of state law at all times relevant to this Complaint.

17. Defendant Judge Dawn M. Layton is sued in her official capacity as a member of the Commission. In her official capacity, it is her responsibility to participate in the work of the Commission, including investigations and potential discipline by the

Commission. Judge Layton is a person within the meaning of 42 U.S.C. § 1983 and was acting under color of state law at all times relevant to this Complaint.

18. Defendant Judge James H. Faison is sued in his official capacity as a member of the Commission. In his official capacity, it is his responsibility to participate in the work of the Commission, including investigations and potential discipline by the Commission. Judge Faison is a person within the meaning of 42 U.S.C. § 1983 and was acting under color of state law at all times relevant to this Complaint.

19. Defendant Judge Teresa Vincent is sued in her official capacity as a member of the Commission. In her official capacity, it is her responsibility to participate in the work of the Commission, including investigations and potential discipline by the Commission. Judge Vincent is a person within the meaning of 42 U.S.C. § 1983 and was acting under color of state law at all times relevant to this Complaint.

20. Defendant Michael Crowell is sued in his official capacity as a member of the Commission. In his official capacity, it is his responsibility to participate in the work of the Commission, including investigations and potential discipline by the Commission. Mr. Crowell is a person within the meaning of 42 U.S.C. § 1983 and was acting under color of state law at all times relevant to this Complaint.

21. Defendant Michael T. Grace is sued in his official capacity as a member of the Commission. In his official capacity, it is his responsibility to participate in the work of the Commission, including investigations and potential discipline by the Commission. Mr. Grace is a person within the meaning of 42 U.S.C. § 1983 and was acting under color of state law at all times relevant to this Complaint.

22. Defendant Allison Mullins is sued in her official capacity as a member of the Commission. In her official capacity, it is her responsibility to participate in the work of the Commission, including investigations and potential discipline by the Commission. Ms. Mullins is a person within the meaning of 42 U.S.C. § 1983 and was acting under color of state law at all times relevant to this Complaint.

23. Defendant Lonnie M. Player, Jr. is sued in his official capacity as a member of the Commission. In his official capacity, it is his responsibility to participate in the work of the Commission, including investigations and potential discipline by the Commission. Mr. Player is a person within the meaning of 42 U.S.C. § 1983 and was acting under color of state law at all times relevant to this Complaint.

24. Defendant John M. Check is sued in his official capacity as a member of the Commission. In his official capacity, it is his responsibility to participate in the work of the Commission, including investigations and potential discipline by the Commission. Mr. Check is a person within the meaning of 42 U.S.C. § 1983 and was acting under color of state law at all times relevant to this Complaint.

25. Defendant Talece Y. Hunter is sued in her official capacity as a member of the Commission. In her official capacity, it is her responsibility to participate in the work of the Commission, including investigations and potential discipline by the Commission. Ms. Hunter is a person within the meaning of 42 U.S.C. § 1983 and was acting under color of state law at all times relevant to this Complaint.

26. Defendant Donald L. Porter is sued in his official capacity as a member of the Commission. In his official capacity, it is his responsibility to participate in the work

of the Commission, including investigations and potential discipline by the Commission. Mr. Porter is a person within the meaning of 42 U.S.C. § 1983 and was acting under color of state law at all times relevant to this Complaint.

27. Defendant Ronald L. Smith is sued in his official capacity as a member of the Commission. In his official capacity, it is his responsibility to participate in the work of the Commission, including investigations and potential discipline by the Commission. Mr. Smith is a person within the meaning of 42 U.S.C. § 1983 and was acting under color of state law at all times relevant to this Complaint.

THE OPERATION OF THE COMMISSION

28. The disciplinary measures available to the Commission to apply to North Carolina judges and justices range from a private "letter of caution," N.C. Gen. Stat § 7A-374.2(6), which the Commission is authorized to issue on its own authority, *id*., to a "public reprimand," *id*. at § 7A-374.2(7), "censure," *id*. at § 7A-374.2(1), "suspension," *id*. § 7A-374.2(9), or "removal," *id*. at § 7A-374.2(8), each of which ultimately requires a "finding by the Supreme Court." The penalty of removal includes not only removal of the judge from her current position, but also "disqualif[ication] from holding further judicial office." *Id*.

29. The Chair of the Commission, by statute one of the appointed Court of Appeals judges (and here Judge Dillon), N.C. Gen. Stat § 7A-375(a1), is authorized to employ – and currently does employ – an executive director, Commission counsel, investigator, and other support staff. *Id*. at § 7A-375(f).

30. The Commission is also empowered, subject to approval by the Supreme Court, to adopt and amend "its own rules of procedure for the performance of the duties and responsibilities" under Article 30. N.C. Gen. Stat § 7A-375(g).

31. By statute, "[a]ny citizen of the State may file a written complaint with the Commission concerning the. . .conduct of any justice or judge of the General Court of Justice, and thereupon the Commission shall make such investigation as it deems necessary." N.C. Gen. Stat § 7A-377(a). The Commission may also "make an investigation on its own motion." *Id*. The investigation is defined as "the gathering of information with respect to alleged misconduct or disability." N.C. Gen. Stat § 7A-374.2(4).

32. Under the Rules promulgated by the Commission, the Chair is charged with dividing the Commission into two panels, designated Panel A and Panel B. Rule 2(b)(1), Rules of the Judicial Standards Commission ("Rules"). The Chair serves as Chair of each Panel while the other Commission members are assigned equally according to their status – as judges, lawyers, or lay citizens – to one Panel or the other. Rule 2(b)(2). Each panel serves either as an "investigative panel" or a "hearing panel," in a given matter. Rule 2(b)(4).

33. Complaints, including the name of the person who lodges the Complaint, are kept confidential by the Commission. Rule 6. Rule 10(c)(1) specifically provides that the notice letter to the accused judge "shall not identify the name of the complainant" (unless necessary to determine whether the judge must be disqualified from continued

involvement in cases involving the complainant). Thus, the judge's accuser is generally anonymous.

34. If a written complaint is not summarily dismissed by the Executive Director and Commission Counsel on the grounds that it fails to disclose facts which, if true, indicate that a judge has engaged in conduct in violation of the Code, the complaint is "considered by an investigative panel" which, by an affirmative vote of at least five members "may dismiss the complaint or authorize an investigation pursuant to Rule 10." Rule 9(b).

35. Rule 10, titled "Investigations," provides for both a "preliminary investigation" for "the purpose of verifying the credibility of or ascertaining additional facts necessary to evaluate the allegations," Rule 10(b), and a "formal investigation" made "for the purpose of determining whether a judge has engaged in actual misconduct in violation of the Code." Rule 10(c).

36. The Commission Rules provide that an accused judge is "given a general description of the subject matter of the investigation," as well as a "reasonable opportunity to respond to the notice letter and provide relevant information to the Commission relating to the subject matter of the investigation." Rule 10(c).

37. Upon "the affirmative vote of at least 5 members," the investigative panel may authorize the initiation of a disciplinary proceeding. . .against the judge." Rule 12(a). That proceeding is instituted by a Statement of Charges, Rule 12(b), followed by an Answer, Rule 13, opportunities for discovery, Rule 16, and a hearing with witnesses. Rules 19 & 20. At the conclusion of the hearing, the hearing panel, by an affirmative

vote of at least five members, may recommend discipline, up to and including removal of the judge, to the North Carolina Supreme Court. Rule 21.

38. While the Commission "has the same power as a trial court. . .to punish for contempt, or for refusal to obey lawful orders or process issued" by it, N.C. Gen. Stat § 7A-377(d), the Commission, by statute, "is limited to reviewing judicial conduct, not matters of law." *Id*. at § 7A-377(a). For that reason, the Commission does not provide a forum for Justice Earls to raise her constitutional claims against its actions.

THE OPERATIVE PROVISIONS OF THE NORTH CAROLINA CODE OF JUDICIAL CONDUCT

39. As more fully described below, this action concerns statements made by Justice Earls in an interview with a legal publication.

40. On August 15, 2023, Justice Earls was provided with a Notice Letter (the "Notice") from the Commission stating that the Commission had reopened a formal investigation into her "based on an interview" given "to the media in which you appear to allege that your Supreme Court colleagues are acting out of racial, gender, and/or political bias in some of their decision making." (A true and complete copy of the Notice is attached to this Complaint as Exhibit A.)

41. The Code pursuant to which the Commission seeks to investigate Justice Earls was first promulgated by the North Carolina Supreme Court in 1973, 283 N.C. 771 (1973), and has been amended many times in the years since. *See* A Publication Record of the Code of Judicial Conduct at 15. The current version was adopted in 2006, 360 N.C. 676 (2006), and amended in 2015. 368 N.C. 1029 (2015).

42. As stated in its Preamble, "[a]n independent and honorable judiciary is indispensable to justice in our society, and to this end and in furtherance thereof, this Code of Judicial Conduct is hereby established." Code, Preamble. The Preamble further states that "[a] violation of this Code of Judicial Conduct may be deemed conduct prejudicial to the administration of justice that brings the judicial office into disrepute, or willful misconduct in office, or otherwise as grounds for disciplinary proceedings pursuant to Article 30 of Chapter 7A of the General Statutes of North Carolina." *Id*. The Code is comprised of seven Canons, each with multiple subparts.

43. Of the seven Canons, only one, Canon 7, explicitly deals with speech. That Canon states that a "judge may engage in political activity consistent with the judge's status as a public official," and is explicitly "designed to strike a balance between two important but competing considerations: (1) the need for an impartial and independent judiciary and (2) in light of the continued requirement that judicial candidates run in public elections as mandated by the Constitution and laws of North Carolina, the right of judicial candidates to engage in constitutionally protected political activity." Code, Canon 7.[2]

44. North Carolina's Canon 7 was significantly revised to provide for fewer restrictions on speech after the United States Supreme Court, in *Republican Party of Minn. v. White*, 536 U.S. 765, 788 (2002), struck down a similar code provision in

[2] Part of Canon 3 (not at issue here), specifically Canon 3(A)(6), also provides that a "judge should abstain from public comment about the merits of a pending proceeding in any state or federal court dealing with a case or controversy arising in North Carolina or addressing North Carolina law."

Minnesota prohibiting candidates for judicial elections (including judges) from announcing their views on disputed legal and political issues on the grounds that it violated the First Amendment.

45. The Notice to Justice Earls references two Code provisions, Canons 2(A) and 3(A)(1). (Notice at 1.) Neither of those two Code provisions under which the Commission seeks to investigate Justice Earls' speech explicitly references speech. The first, a part of Canon 2 – headed "[a] judge should avoid impropriety in all the judge's activities" – sets out a standard that a "judge should respect and comply with the law and should conduct himself/herself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

46. The Commission's Notice announcing the investigation also refers to Canon 3(A)(1) which, under the rubric "Adjudicative Responsibilities," states that a "judge should be unswayed by partisan interests, public clamor, or fear of criticism."

47. The Commission Notice letter makes no mention of a further Code provision – Canon 4(A) – which explicitly provides in pertinent part that a "judge may speak, write. . .or otherwise engage in activities concerning the economic, educational, legal, or governmental system, or the administration of justice."

JUSTICE EARLS' INTERVIEW COMMENTS CONCERNING DIVERSITY

48. The events at issue in this case arise out of a May 17, 2023 article by North Carolina Solicitor General Ryan Park and two co-authors published in the magazine of the North Carolina Bar Association, *North Carolina Lawyer*, titled "Diversity and the North Carolina Supreme Court: A Look at the Advocates."

49. In that article, Solicitor General Park using "a dataset painstakingly compiled over the last two years," concluded that "over ninety percent of oral advocates in the North Carolina Supreme Court identified as white and over seventy percent as male." Those statistics were contrasted with North Carolina's overall population which is only 70% white and less than half male. The analysis concluded that in the "rarefied space" of Supreme Court oral arguments, "opportunities remain scarce for attorneys from certain backgrounds," *i.e.*, female and non-white.

50. Following up on the issues raised in that article, on June 20, 2023, *Law360*, an on-line publication directed to the legal profession, published an interview with Justice Earls, the only non-white female serving on the North Carolina Supreme Court, which it titled "North Carolina Justice Anita Earls Opens Up About Diversity" (the "Interview"). (A true and complete copy of the Interview is attached to this Complaint as Exhibit B.)

51. In the preface of the Interview, *Law360* described Justice Earls as "a former civil rights attorney elected as a justice of the North Carolina Supreme Court" who "shared her perspective on being a Black female Democrat on a state Supreme Court that is largely white, male and, after last year's elections, Republican." (Interview at 1.)

52. In response to the question raised by the article, namely, "[w]hy are oral advocates that come before the North Carolina Supreme Court overwhelmingly male and white, despite a diverse state population and state bar membership," Justice Earls referred to several factors, including:

- That the current Supreme Court was "lacking" on "racial diversity" with "14 or 15 law clerks serving in our court and no African Americans. One Latina. (Interview, at 2.)

- "Implicit bias" as evidenced by a circumstance where Justice Earls felt "like my colleagues are unfairly cutting off a female advocate" and she was "unfairly, not allowed to answer the question, interrupted." (*Id.*) This, while "not uniform" and "not in every case," Justice Earls said, could have been a factor "in the politics of the particular case that's being argued." (*Id.*)

Justice Earls took pains to point out that she was "not suggesting that any of this is conscious, intentional, racial animus," but that "our court system, like any other court system, is made up of human beings and I believe the research that shows that we all have implicit biases."

53. Asked about efforts to "diversify the appellate bench," Justice Earls noted that an internal equity committee set up "to look at just the North Carolina Supreme Court and our hiring practices" was "disbanded at the beginning of this year." (Interview at 2.)

54. She also mentioned that the Supreme Court, as previously constituted, had "issued an order appointing a Commission on Fairness and Equity in the North Carolina judicial system," which "dealt with gender as well as race." (Interview at 2.) Although that Commission "was established by order of the court in October of 2020," in "January of 2023, the chief justice refused to reappoint members of that committee." (*Id.*) In her view, Justice Earls continued, the "new majority on the court didn't issue a new court order saying we're superseding the old order. …It's in line with the values of the current party in power in our court." (*Id.*, ellipsis in original.) She continued, "[t]he new members of our court very much see themselves as a conservative bloc. They talk about

themselves as 'the conservatives.' Their allegiance is to their ideology, not to the institution."

55. As an example of that point, the Interview contained an "illustration hung in the North Carolina Supreme Court" depicting the elected Republican appellate justices and judges as cartoon superheroes, called the "North Carolina Justice League." (Interview at 3.)

56. In response to a third question about the obstacles attributable to gender or race that Justice Earls had personally faced as an appellate advocate or judge, Justice Earls stated that she believed that she was "interrupted by more junior colleagues" and sometimes even advocates "who won't let me get my question out." (Interview at 4.) In seeing "ways in which I'm treated differently by my colleagues and during oral argument," Justice Earls stated it was sometimes "hard to separate out: Is this race or is this gender or is this because of my political views." (*Id*.) She went on to state that "[a]ny one of those three or the combination of all three might be the explanation." (*Id*.) She also stated that "[t]here were two times when one of my colleagues publicly tried to embarrass me. . .in the context of the case and the oral argument." (*Id*.)

57. A fourth question asked Justice Earls about implicit bias trainings offered to North Carolina judges, to which Justice Earls replied that a curriculum had been developed and offered, but that the newly elected Chief Justice had ended the program (Interview at 4), which she described as "part of the general antipathy towards seeing that racial issues matter in our justice." (*Id*.) In explaining her position, Justice Earls noted that the current Chief Justice had actually dissented to the earlier Supreme Court order

establishing the Commission on Fairness and Equity, based on his view that the timing of the order was political, and that it prejudged issues of racial discrimination, and improperly inserted the judiciary into the policymaking arena. (*Id*.)

58. In response to a question about increasing diversity on the bench, Justice Earls mentioned the financial difficulties associated with running for office and the removal of public financing in North Carolina. (Interview at 4-5.) Finally, in response to the question "[w]hat would you tell women and people of color hoping to join North Carolina's appellate bench or appellate bar," Justice Earls said "I think the message I would give is: It's twice as important that you do this. You can find resources to help you surmount the hurdles." (*Id*. at 5.)

59. It is for this speech – core political speech concerning important public policy questions regarding the justice system and administration of the courts – that the Commission seeks to investigate Justice Earls to determine whether she has violated the Code, and potentially sanction her for a violation.

60. According to the Commission's Notice, Justice Earls' comments "appear to allege that your Supreme Court colleagues are acting out of racial, gender, and/or political bias in some of their decision-making." Yet, as shown above, none of Justice Earls' statements related to a "decision" in case (or the "decision-making" in arriving at such a decision), but concern, at most, only "decisions" to interrupt advocates or fellow justices at oral argument.

61. The other "decisions" – *i.e.*, whether to hire minority law clerks and to continue the work of committees dedicated to equity or court-based implicit bias trainings

– also do not relate to decision-making in any particular case, but instead to the public-policy implications of different aspects of court administration.

62. In fact, nowhere in the interview does Justice Earls discuss a single case that has come before the Supreme Court or its decision in such a case. Given that clear context, the Commission's statement (Notice at 2), that "publicly alleging that another judge makes decisions based on a motivation not allowed under the Canons without some quantum of definitive proof runs contrary to a judge's duty to promote public confidence in the impartiality of the judiciary," is obtuse, if not nonsensical.

63. Even on that point, the Commission pays minimal obeisance to the constitutional primacy of free speech, noting that "there are circumstances where a judge may publicly criticize another judge's judicial philosophy and decision-making process (see *GOP v. White*)" (Notice at 1-2), referencing the decision in which the U.S. Supreme Court struck down speech restrictions on judges. The Notice, moreover, entirely fails to reference Canon 4(A) which, consistent with the First Amendment, permits judges to "speak" concerning the "legal, or governmental system, or the administration of justice." Instead, the Commission's Notice indicates that it would read that Canon entirely out of the Code in favor of squelching free speech.

64. Indeed, the entire tenor of the Notice, and, more importantly, its decision to initiate an investigation based on a judge's speech, bespeaks a callous disregard for the principles of the First Amendment. The Commission's actions in instituting the investigation indicate that it believes that "promot[ing] public confidence in the impartiality of the judiciary" (Notice at 2), is best accomplished by threatening judges

who speak out about what they view as imperfections or defects in the judicial system and who do so in a measured and nuanced manner. Nothing could be more inimical to the First Amendment.

THE COMMISSION'S NOTICE IS PART OF A CONTINUING EFFORT TO THWART JUSTICE EARLS' RIGHT TO FREE SPEECH

65. If this were the first effort of the Commission to thwart the free-speech rights of Justice Earls, it might charitably be viewed as an over-zealous aberration. The fact that it is part of a continuing effort to stifle Justice Earls, however, makes such a conclusion impossible.

66. Earlier this year, on March 20, 2023, the Commission issued a Notice to Justice Earls indicating that "a written complaint [had been] filed with the Commission" and that it was initiating a formal investigation – dubbed "Inquiry No. 23-081" – concerning comments made by Justice Earls regarding "matters being currently deliberated in conference by the Supreme Court" and discussed by her at "two public events," and subsequently in a media inquiry. (A true and complete of the March 20, 2023 letter initiating the investigation ("Notice No. 1") is attached to this Complaint as Exhibit C.)

67. As with the Commission's more recent Notice, Notice No. 1 did not accuse Justice Earls of discussing any specific case being considered in the Supreme Court's conference, but instead only three administrative matters: (1) the Court's decision to rescind its 2019 Rule adopting the universal citation format, (2) the Court's decision to adopt a rule permitting published opinions of the court of appeals to be deemed

"unpublished" by the Court (and thus without precedential effect), and (3) consideration of a possible legislative change that would eliminate the right of appeal to the Supreme Court based on a dissent in the Court of Appeals. Each of these three issues was the subject of substantial earlier public discussion by members of the Court and others. The first issue, in fact, was already decided and the subject of a published order before Justice Earls even publicly addressed it. In other words, the Commission was investigating Justice Earls for publicly reporting on an already-public order on a technical administrative issue, *i.e.*, changing the manner in which cases would be cited by the courts.

68. Those matters, moreover, were discussed in forums at which a Supreme Court Justice's right to speak could hardly be questioned, namely, the North Carolina General Assembly Courts Commission (a commission made up of legislators and judges of which Justice Earls was a member), and the North Carolina Bar Association Board of Governors (of which Justice Earls was a vice president).

69. Nevertheless, as a result of the institution of the investigation, Justice Earls was required to retain a lawyer, to submit to a lengthy and probing interview by Commission staff, and to devote a substantial amount of time to defending herself, taking away time from the role to which she had been elected, that of Associate Justice of the North Carolina Supreme Court.

70. Ultimately, Justice Earls' counsel submitted a substantial letter explaining why her conduct not only did not violate any of the Canons of the Code, but was actually consistent with Canon 4(A)'s endorsement of judges engaging in activities "concerning

the legal. . .or governmental system or the administration of justice." (A true and complete copy of Justice Earls' counsel's response Notice No 1 is attached to this Complaint as Exhibit D.)

71. The letter sent to the Commission on behalf of Justice Earls attempted to explain to the Commission the potential problems with seeking to investigate judges with regard to speech, stating:

> The Code of Judicial Conduct, like all governmental pronouncements, is subject to the First Amendment of the U.S. Constitution and its proscription against the abridgment of free speech. The U.S. Supreme Court, for example, in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), ruled that the "Minnesota Supreme Court's canon of judicial conduct prohibiting candidates for judicial election from announcing their views on disputed legal and political issues violates the First Amendment" and struck down that particular canon. *Id*. at 788.
>
> An attempt to impose discipline of any type in this circumstance could be an appropriate subject of a First Amendment as-applied challenge in federal court to the putative authority of the Commission to proscribe and/or punish speech by judges concerning administrative matters. The lack of any written authority, coupled with the necessary reliance on opaque court traditions whose existence is disclaimed by multiple retired Justices, counsels against proceeding in this matter.

(Exhibit D, at 9.)

72. In addition to the response letter, Justice Earls submitted statements supporting her position from four retired Supreme Court Justices and a member of the North Carolina General Assembly.

73. On May 16, 2023, counsel for the Commission reported to Justice Earls' counsel that a Commission Panel had met on May 12, 2023 and voted to dismiss the complaint against Justice Earls without any further action.

74. Later, on June 12, 2023, Justice Earls, through counsel, informed Commission Counsel that she was waiving her right to confidentiality regarding the investigation pursuant to Commission Rule 6(b)(2).[3]

75. Despite the dismissal, Commission Counsel informed Justice Earls' counsel that Justice Earls should be reminded "of the language in Canon 2(A), that a Judge should respect and comply with the law and should conduct himself/herself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

76. Justice Earls took that "reminder" as a caution to be certain that her public comments do not reveal any confidential matters, as that is what is required to comply with the law; and to carry out her duties to uphold the fair and equitable administration of justice, as that is what the Code contemplates will promote public confidence in the judiciary. She did not perceive this to be a warning that if she continued to speak out on issues of public concern, she would again be subject to investigation and discipline for exercising her First Amendment rights.

77. However, it now appears that the warning was also intended to stop her from speaking on issues of public concern more broadly. Even though the earlier investigation concerning Justice Earls was reported as "dismissed," and the fact that the Commission's Rules have no procedure for "reopening" a case in which a Panel votes to dismiss, the Notice announcing the Commission's new inquiry states that it represents a

[3] Justice Earls, on August 28, 2023, also waived confidentiality with respect to the new investigation.

"reopen[ing]" of the earlier-dismissed formal investigation, utilizing the same inquiry number, No. 23-081. The Commission's failure to adhere to its own Rules is a further example of the irregularities surrounding its continuing harassment of Justice Earls concerning her right to speak out.

78. The Commission's continuing efforts to investigate and potentially discipline Justice Earls are a blatant attempt to chill her First Amendment rights. The fact that the Commission is doing so under Canon 2(A) with its vague standard when applied to speech that somehow fails to "promote[] public confidence" in the judiciary, makes the actions of the Commission even more unconstitutional and discourages both Justice Earls and other judges and candidates from making statements critical of the judicial system. Some members of the public will lose confidence in the judiciary if issues of race and gender bias are not addressed, especially if those issues are not addressed because the Commission is using its powers to stifle the discussion.

79. The Commission's reference to a second Canon – Canon 3(A)(1) – which concerns only a judge's "adjudicative responsibilities," is entirely without basis. Justice Earls' comments, which do not relate to any adjudicative case, cannot fairly be portrayed as "swayed" by "partisan interests, public clamor, or fear of criticism" as described in that Canon. Rather, her statements addressed a matter raised by an article written by the North Carolina Solicitor General and of sufficient public concern to merit publication by the North Carolina State Bar Association, and a follow-up article by the legal periodical, *Law360*. Her statements are core political speech protected by the First Amendment.

80. The series of investigations into Justice Earls has, in fact, led to a chilling of her First Amendment rights. As a result of the actions of the Commission, Justice Earls turned down an invitation to write an article for a national publication, and decided not to discuss the issue of the racial and gender composition of state courts in response to a request to contribute an essay to the Yale Law Review forum about state courts because of concerns that it could lead to further investigation by the Commission. In addition, Justice Earls refrained from speaking publicly at a meeting of the Equal Access to Justice Commission concerning a proposal to extend a court rule that broadens the pool of advocates available to indigent litigants for fear that she could not speak without running the risk of discipline from the Commission. She also declined to provide her personal views on the merits of the proposal when directly asked to do so in a private conversation with a person with a professional stake in the issue. Justice Earls has further considered whether any statement she makes in the opinions she issues might likewise subject her to discipline.

81. The effects have not only chilled the free-speech rights of Justice Earls, but have also interrupted her ability to do her work as a Justice of the North Carolina Supreme Court and have understandably taken a substantial emotional toll as she has tried to negotiate the Commission's capricious line on what judges can and cannot say about important public issues affecting the justice system. Part of the capriciousness of the Commission is based on the fact that other judges appear able to comment publicly on similar issues without challenge. Any discipline from the Commission has the potential

to derail Justice Earls from seeking or being considered for any future professional opportunities, which causes her considerable stress and anxiety.

FIRST CAUSE OF ACTION
DECLARATORY JUDGMENT

82. Paragraphs 1 through 81 of the Complaint are realleged as if fully set forth herein and reincorporated by reference.

83. The First Amendment of the U.S. Constitution prohibits the "abridging the freedom of speech" of persons by the government and those acting under color of its laws. Justice Earls is entitled to a declaration that any attempt to investigate or discipline her under the Code for speech concerning matters of public concern, including, without limitation, the statements in the Interview, is unconstitutional as applied to her. Justice Earls is currently under the cloud of yet another burdensome and protracted investigation with the prospect of discipline, up to and including her removal from the North Carolina Supreme Court as described above. Justice Earls, both as a judge and a judicial candidate, also intends to continue to engage in the core political speech described above in a manner that potentially subjects her to further investigations by the Commission backed by the additional threat of other discipline under the Code.

84. As applied to Justice Earls, the actions of the Commission seek to wield the Code as a content-based restriction in order to regulate, as well as punish, core political speech. As such, it is both subject to strict scrutiny and presumptively unconstitutional.

85. The fact that virtually any speech critical of the judicial system could be construed to undermine "public confidence" in the judiciary, renders Canon 2(A) in this

context unconstitutionally vague. In fact, nothing will undermine public confidence in our courts more than serial burdensome disciplinary investigations into speech designed to inform the public about problems perceived in the judicial system by one of its elected Supreme Court Justices. The actions of the Commission in this circumstance necessarily serve only to chill free speech.

86. In short, the actions of the Commission in wielding the Code against Justice Earls accomplishes no compelling state interest, let alone does so in a "narrowly tailored" fashion as otherwise required by the Constitution. The fact that the Commission has forced Justice Earls to engage with these invasive and expensive investigations for months shows that the Commission is acting primarily to chill protected political speech and, in fact, has achieved that improper goal.

88. Justice Earls has no adequate remedy at law. The Commission should be enjoined from purporting to reopen its earlier-dismissed investigation and its investigation of Justice Earls' statements on matters of public concern, including statements in the Interview, should be declared unconstitutional, and any further investigation or enforcement proceeding under the Code against Justice Earls for her speech on matters of public concern should be preliminarily and permanently enjoined.

SECOND CAUSE OF ACTION
FIRST AMENDMENT & 42 U.S.C. § 1983

89. Paragraphs 1 through 88 of the Complaint are realleged as if fully set forth herein and reincorporated by reference.

90. The actions of the Commission as alleged above violate the freedom of speech clause of the First Amendment of the United Stated Constitution by purporting to regulate – through the investigative powers of the Commission and the sanctions against judges provided for in the Code – speech at the absolute core of the First Amendment, namely protected political speech, all in violation of 42 U.S.C. § 1983.

WHEREFORE, Plaintiff prays the Court that:

A. The Court declare pursuant to 28 U.S.C. § 2201(a) that the investigation and potential punishment of Plaintiff for her statements on matters of public concern, including, without limitation, the statements in the Interview, is unconstitutional;

B. The Court grant preliminary injunctive relief as well as a permanent injunction in favor of Plaintiff barring further investigation or punishment of her for statements on matters of public concern;

C. That Plaintiff be granted her attorneys' fees under 42 U.S.C. § 1988; and

D. The Court grant Plaintiff such further relief as it may deem appropriate.

This the 29th day of August, 2023.

By: /s/ Pressly M. Millen

Pressly M. Millen
State Bar No. 16178
Raymond M. Bennett
State Bar No. 36341
Samuel B. Hartzell
State Bar No. 49256

OF COUNSEL:

WOMBLE BOND DICKINSON (US) LLP
555 Fayetteville Street, Suite 1100

Raleigh, North Carolina 27601
(919) 755-2100

Attorneys for Plaintiff
Anita S. Earls

EXHIBIT A

State of North Carolina
Judicial Standards Commission

P. O. Box 1122
Raleigh, NC 27602
(919) 831-3630

JUDGE CHRIS DILLON, CHAIR
JUDGE JEFFERY CARPENTER, VICE-CHAIR
JOHN M. CHECK
MICHAEL CROWELL
JUDGE JAMES H. FAISON, III
JUDGE JEFFERY B. FOSTER
MICHAEL GRACE
TALECE Y. HUNTER
JUDGE DAWN M. LAYTON
ALLISON MULLINS
LONNIE M. PLAYER, JR.
DONALD L. PORTER
RONALD L. SMITH
JUDGE TERESA H. VINCENT

BRITTANY PINKHAM
EXECUTIVE DIRECTOR

PATRICIA A. FLOOD
COMMISSION COUNSEL

August 15, 2023

CONFIDENTIAL
SENT VIA EMAIL PURSUANT TO WAIVER OF PERSONAL SERVICE TO COUNSEL
Justice Anita Earls
Press.millen@wbd-us.com

Re: Inquiry No. 23-081

Dear Justice Earls:

I hope you are doing well. As I discussed with Mr. Millen, the Commission has reopened the formal investigation into allegations raised against you in 23-081. For your information and as required pursuant to Rule 10(c) of the Judicial Standards Commission, I would like to inform you of the following:

1. The original subject matter of the investigation involved allegations that you disclosed confidential information concerning matters being deliberated in conference by the Supreme Court at two public events and to a newspaper reporter which led to media coverage of the subject matter. At the conclusion of this investigation, the Commission voted to dismiss the complaint and provide you with a verbal reminder to be mindful of your public comments in light of the language of Canon 2A. This verbal warning was provided to your counsel and was later reiterated in written correspondence.

2. The Commission voted to reopen this investigation based on an interview you since gave to the media in which you appear to allege that your Supreme Court colleagues are acting out of racial, gender, and/or political bias in some of their decision-making. This conduct, if true, potentially violates Canon 2A of the Code of Judicial Conduct which requires a judge to conduct herself "at all times in a manner which promotes public confidence in the integrity and impartiality of the judiciary." Since Canon 3 requires judges to perform their duties "impartially and diligently . . . unswayed by partisan interests," consistent with the Commission's historical interpretation of Canon 2A, a judge should not publicly suggest that another judge before whom litigants are appearing is making decisions based on some improper basis, unless the criticizing judge *knows* this to be the case. While there are circumstances where a judge may publicly criticize another judge's judicial philosophy and

decision-making process (see *GOP v. White*), publicly alleging that another judge makes decisions based on a motivation not allowed under the Canons without some quantum of definitive proof runs contrary to a judge's duty to promote public confidence in the impartiality of the judiciary.

3. You are entitled to a reasonable opportunity to present any relevant information regarding this matter at any time during this investigation. This includes any documents, statements, or other information. The Commission Investigator will also contact you regarding a time to set up a formal interview to address the Commission's questions and concerns.

4. You may, but are not required to, retain counsel to represent you in this matter, but we ask that you have such counsel file a written notice of appearance with the Commission to ensure proper communication. Consistent with Formal Opinion No. 2011-02, which is available on the Commission's website, if you retain counsel in this matter, you should request an informal advisory opinion as to whether disqualification is required in cases in which such counsel appears before you.

5. This investigation is confidential in accordance with the provisions of N.C. Gen. Stat. § 7A-377 and Commission Rule 6, and information or documents provided to you in furtherance of the investigation may not be disclosed.

6. The Commission Investigator or I may be conducting interviews with your court colleagues, court staff, or attorneys as part of this investigation. A thorough, fair, and accurate investigation depends on their full cooperation and candor without fear of reprisal, actual or perceived. As such, I want to make you aware that pursuant to Commission Rule 10(e), any conduct on your part that may be reasonably perceived as retaliatory for cooperating with the Commission may constitute a separate violation of the Code.

If you have any questions about the Commission's procedures, the status of the investigation, or any other issue relevant to this matter, please do not hesitate to reach out to me. If you would like to review the Commission's Rules, the Code of Judicial Conduct, formal advisory opinions, ethics resources, or past disciplinary decisions, they are available on our website, www.ncjsc.gov.

Sincerely,

Patricia A. Flood
Commission Counsel

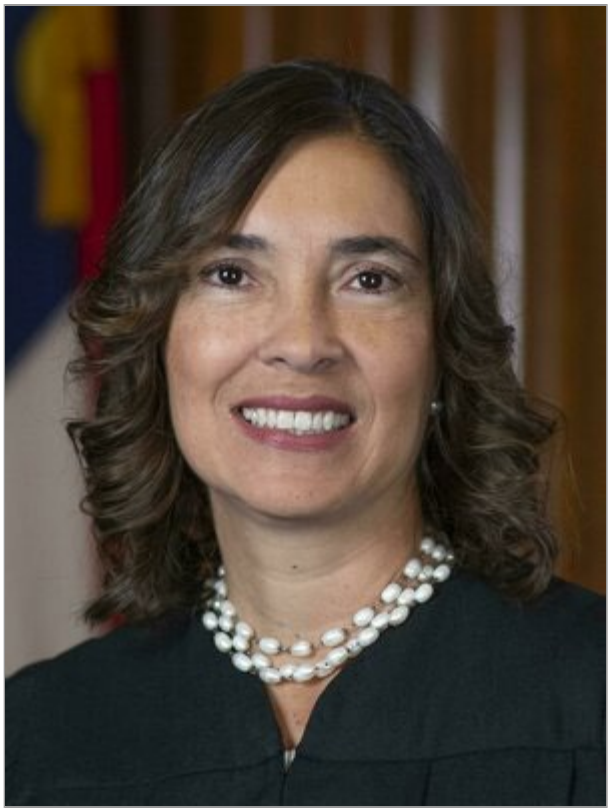
EXHIBIT B

Portfolio Media. Inc. | 111 West 19th Street, 5th floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

North Carolina Justice Anita Earls Opens Up About Diversity

By **Hannah Albarazi**

Law360 (June 20, 2023, 10:45 AM EDT) -- In an interview with Law360, North Carolina Supreme Court Justice Anita Earls discusses what's behind a glaring lack of diversity on the state's appellate bench and among advocates who argue before her court, and how the newest chief justice derailed initiatives addressing implicit bias and racial inequities in the state's justice system.



Justice Anita Earls

Justice Earls, a former civil rights attorney elected as a justice of the North Carolina Supreme Court in 2019, shared her perspective on being a Black female Democrat on a state Supreme Court that is largely white, male and, after last year's elections, Republican, when voters flipped the court's majority from 4-3 Democratic to 5-2 Republican.

In this conversation, Justice Earls shined a spotlight on the decision by North Carolina Chief Justice Paul Newby — who did not respond to Law360's request for comment — to discontinue efforts within the judiciary to address implicit bias and racial discrimination at a time when there remains a significant lack of diversity on the appellate bench and among those who argue before it.

A Law360 analysis found that North Carolina Supreme Court justices are 71% white males and that the state's Court of Appeals judges are 93% white and 60% male. A recent study by the state Solicitor General Ryan Y. Park likewise found that attorneys who argue before the state Supreme Court are 90% white and 70% male and do not reflect the state's diversity.

This interview has been edited for length and clarity.

Why are oral advocates that come before the North Carolina Supreme Court overwhelmingly male and white, despite a diverse state population and state bar membership?

Part of it is the current pool of who's eligible to argue in front of us and then who decides who gets to do the arguments. But then beyond that: What is the pipeline to arguing in front of us? If you look at who is hired to serve as clerks to the justices … we have plenty of female clerks, but on racial diversity we're lacking. … For the term that just started in January … there were 14 or 15 law clerks serving in our court and no African Americans. One Latina.

I think another part of this, in terms of the gender and race discrepancies that you see, I really do think implicit bias is at play.

There have been cases where I have felt very uncomfortable on the bench because I feel like my colleagues are unfairly cutting off a female advocate. We have so few people of color argue, but in one case there was a Black woman who argued in front of us and I felt like she was being attacked unfairly, not allowed to answer the question, interrupted. It's not uniform. It's not in every case. And so it could certainly factor in the politics of the particular case that's being argued.

So when that is the culture of our court — that is to say, when the culture is that male advocates and advocates who reflect the majority of the court, white advocates, when they get more respect, when they are treated better —I think it filters into people's calculations about who should argue and who's likely to get the best reception and who can be the most persuasive.

I'm not suggesting that any of this is conscious, intentional, racial animus. But I do think that our court system, like any other court system, is made up of human beings and I believe the research that shows that we all have implicit biases.

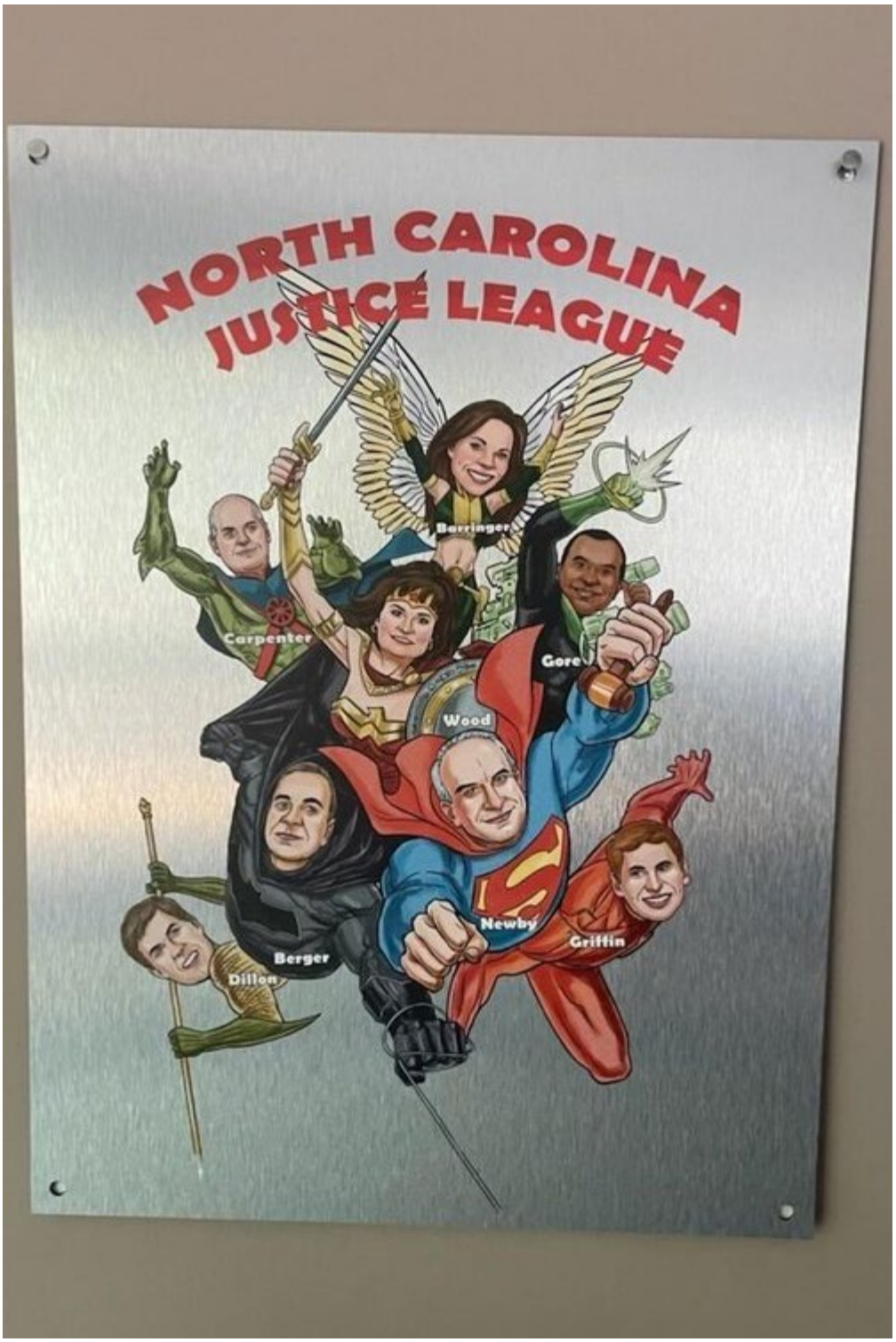
What efforts have been made to diversify the appellate bench, which is largely male and white?

Under the prior court, there was an equity committee looking at these issues. That committee was disbanded at the beginning of this year. That was an internal equity committee to look at just the North Carolina Supreme Court and our hiring practices. That's an issue, too.

The prior court had [also] issued an order appointing a Commission on Fairness and Equity in the North Carolina judicial system. It dealt with not only how we treat the public but how we operate internally. It dealt with gender as well as race. It was established by order of the court in October of 2020. And then in January of 2023, the chief justice refused to reappoint members of that committee.

There's been no attention to that because it's all been done very quietly. It's not like there was a big press conference …The new majority on the court didn't issue a new court order saying we're superseding the old order. … It's in line with the values of the current party in power in our court.

The new members of our court very much see themselves as a conservative bloc. They talk about themselves as "the conservatives." Their allegiance is to their ideology, not to the institution.



An illustration hung in the North Carolina Supreme Court depicts a slate of current elected Republican jurists as superheroes: Supreme Court Chief Justice Paul Newby and Justices Philip Berger Jr. and Tamara Barringer and Court of Appeals Judges Chris Dillon, Jeffery Carpenter, Fred Gore, Jefferson Griffin and April Wood. Click to enlarge. (Courtesy of Robyn Sanders)

Have you faced obstacles that you attribute to your gender or race on your journey to becoming an appellate advocate or Supreme Court judge?

Both. Yes.

I had to have very sharp elbows sometimes as I got further along in my career, to say, "Look, I have 25 years' experience. You're not going to shut me out of this litigation strategy decision." So, just to be in the position to ultimately be the person who gets to argue the case on appeal, there were

certainly challenges as a female litigator.

In terms of being on the court, interestingly, I didn't feel any barriers running for office. I didn't feel like voters had any preconceived notions that I couldn't be an appellate judge because I was a woman.

But I certainly think that now that I'm on the bench, I see ways in which I'm treated differently by my colleagues and during oral argument, and sometimes it's hard to separate out: Is this race or is this gender or is this because of my political views? Any one of those three or the combination of all three might be the explanation.

I've been interrupted by more junior colleagues and I've had to say, "Excuse me, I'm not finished with my question." And less often or less striking to me, but still occasionally happens is, advocates who won't let me get my question out. That just doesn't happen to my male colleagues.

There were two times when one of my colleagues publicly tried to embarrass me, and in the context of the case and the oral argument, that's just not only my perception. Other people in the courtroom at the time were shocked and surprised because that isn't how our court operates, at least in the past.

Are there implicit bias trainings offered to North Carolina's jurists?

Well, there were.

I am co-chair of the Governor's Task Force on Racial Equity and Criminal Justice, [created] following George Floyd's murder in 2020. One of our first recommendations was that all judicial system actors have implicit bias and racial equity training.

The [University of North Carolina] School of Government … developed a curriculum. Some trial court judges attended their implicit bias training, and then when the new chief justice came into office in January 2021, he ended that by renegotiating the contract with the School of Government. It's no longer being offered to judges.

I think that it's part of the general antipathy towards seeing that racial issues matter in our justice system.

The current Chief Justice Newby — at the time [Senior Associate] Justice Newby — wrote a dissent to the order creating the Commission on Fairness and Equity, in which he basically said … that he thought the timing of the order was political, that the text of the order improperly prejudged issues of racial discrimination, and that it improperly inserts the judiciary into the policymaking arena.

So it's a very political issue. And the current party [in power] doesn't think that there are any problems of racial discrimination in our justice system.

And so why would you have training on implicit racial bias if there is no such thing as racial discrimination or racial bias, right? That's their worldview.

What can be done to increase diversity on the bench?

It can be really challenging to figure out how you're going to run for office and keep a full-time job. Because for me, running for office was a full-time job, and I could only do it when I had the financial means to go without income for a year. It was only after 30 years of practicing law, with both my kids out of college, could I finally say, "I can go without an income for a year." So I think that's a barrier at the appellate level.

The fact that you have to campaign statewide to win the seat, you have to raise a lot of money. I had to raise $1.5 million. That was in 2018. That wouldn't be enough now. When we had public financing of statewide judicial appellate races, that was actually when you saw the bench diversify.

If you look at when did women start getting elected to our appellate courts in North Carolina. It was after public financing came in, and that has since ended. Elimination of that was part of the monster voter suppression bill in 2013.

What would you tell women and people of color hoping to join North Carolina's appellate bench or appellate bar?

It would break my heart to think that people are discouraged from doing appellate work because they don't want to face these hurdles.

I think the message I would give is: It's twice as important that you do this. You can find resources to help you surmount the hurdles.

--Editing by Jill Coffey.

EXHIBIT C

State of North Carolina
Judicial Standards Commission

P. O. Box 1122
Raleigh, NC 27602
(919) 831-3630

March 20, 2023

CERTIFIED MAIL
CONFIDENTIAL

Justice Anita Earls
North Carolina Supreme Court
2 E. Morgan Street
Raleigh, NC 27601

Re: Inquiry No. 23-081

Dear Justice Earls:

I hope you are doing well. As you discussed with our Executive Director this morning, the Commission has ordered a formal investigation into allegations raised against you in a written complaint filed with the Commission. For your information and as required pursuant to Rule 10(c) of the Judicial Standards Commission, I would also like to inform you of the following:

1. The subject matter of the investigation involves allegations that you disclosed confidential information concerning matters being currently deliberated in conference by the Supreme Court at two public events and to a newspaper reporter which led to media coverage of the subject matter. This conduct, if true, potentially violates the following provisions of the North Carolina Code of Judicial Conduct: (1) failing to conduct yourself in a manner that promotes public confidence in the integrity and impartiality of the judiciary (Canons 1 and 2A); (2) failing to be faithful to the law and unswayed by partisan interests, public clamor, or fear of criticism (Canon 3A(1)); and (3) failing to facilitate the performance of the administrative responsibilities of other judges and court officials (Canon 3B(1)).

2. You are entitled to a reasonable opportunity to present any relevant information regarding this matter at any time during this investigation. This includes any documents, statements, or other information. The Commission Investigator will also contact you regarding a time to set up a formal interview to address the Commission's questions and concerns.

3. You may, but are not required to, retain counsel to represent you in this matter, but we ask that you have such counsel file a written notice of appearance with the Commission to ensure proper communication. Consistent with Formal Opinion No. 2011-02, which is available on the Commission's website, if you retain counsel in this matter, you should request an informal advisory opinion as to whether disqualification is required in cases in which such counsel appears before you.

4. This investigation is confidential in accordance with the provisions of N.C. Gen. Stat. § 7A-377 and Commission Rule 6, and information or documents provided to you in furtherance of the investigation may not be disclosed.

5. The Commission Investigator or I may be conducting interviews with your court colleagues, court staff, or attorneys as part of this investigation. A thorough, fair, and accurate investigation depends on their full cooperation and candor without fear of reprisal, actual or perceived. As such, I want to make you aware that pursuant to Commission Rule 10(e), any conduct on your part that may be reasonably perceived as retaliatory for cooperating with the Commission may constitute a separate violation of the Code.

If you have any questions about the Commission's procedures, the status of the investigation, or any other issue relevant to this matter, please do not hesitate to reach out to me. If you would like to review the Commission's Rules, the Code of Judicial Conduct, formal advisory opinions, ethics resources, or past disciplinary decisions, they are available on our website, www.ncjsc.gov.

Sincerely,

Patricia A. Flood
Commission Counsel

EXHIBIT D

WOMBLE BOND DICKINSON

May 4, 2023

By Email and First-Class Mail
Patricia A. Flood, Esq., Commission Counsel
Judicial Standards Commission
P.O. Box 1122
Raleigh, NC 27602

Re: Inquiry No. 23-081

Womble Bond Dickinson (US) LLP

555 Fayetteville Street
Suite 1100
Raleigh, NC 27601

t: 919.755.2100
f: 919.755.2150

Press Millen
Partner
Direct Dial: 919-755-2135
Direct Fax: 919-755-6067
E-mail: Press.Millen@wbd-us.com

Ms. Flood:

I am writing concerning the above-referenced Inquiry on behalf of our client, North Carolina Supreme Court Associate Justice Anita Earls ("Justice Earls"). As I understood from our discussion at Justice Earls' interview, we have the opportunity to provide information pertinent to the Inquiry to be shared with the Panel conducting the Inquiry. We appreciate that opportunity and this letter and its attachments constitute additional supplemental information to that provided by Justice Earls at her interview.

We are attaching the following:

Annex A – Statement of former Chief Justice, Cheri L. Beasley, dated May 3, 2023;

Annex B – Statement of former Associate Justice Samuel James Ervin, IV, dated May 4, 2023;

Annex C – Statement of Justice Robin E. Hudson (Retired), dated May 3, 2023;

Annex D – Statement of Representative Marcia Morey, dated April 30, 2023; and

Annex E – Statement of Retired Associate Justice Robert F. Orr, dated April 27, 2023.

Initiation of the Inquiry

We understand from discussions with the Commission's Investigator that this inquiry was initiated by the Commission *sua sponte* as a result of an online article published on the website of WRAL-News with the headline "Leaked document shows big changes could be underway at

GOP-majority NC Supreme Court," first published on February 12, 2023.[1] As described by the Investigator, the initial concern was that a confidential court document had been "leaked" in a manner similar to the leaking at the U.S. Supreme Court last year of a draft of the majority opinion in *Dobbs v. Jackson Women's Health Organization*.

Notably, the article published by WRAL-News uses the word "leaked" solely in the headline.[2] In the body of the article there are simply references to "notes…taken from a North Carolina Bar Association Meeting last month," which were "obtained by WRAL News" and which "were taken by a meeting attendee." In other words, it appears that the decision to investigate Justice Earls may have been made based upon a misleading disparity between a headline and the more accurate and responsible account found in the body of the story.

This particularly lamentable phenomenon has been discussed in the academic literature. *See* Ecker, U. K. H., & Lewandowsky, S. (2014), "The effects of subtle misinformation in news headlines," *Journal of Experimental Psychology: Applied*, 20(4). That article described how misleading headlines "constrain further information processing, biasing readers towards a specific interpretation" of the body of the story. In less academic settings, the phenomenon is often referred to as "clickbait" which is defined by Merriam-Webster's on-line dictionary as "something (such as a headline) designed to make readers want to click on a hyperlink especially when the link leads to content of dubious value or interest."

Thus, given the fact that there is no purportedly "leaked" document from the Court (or from anywhere else for that matter) actually described in the article, it appears that this investigation may have arisen as a result of clickbait. In our view, the investigation should never have begun in the first place.

The Canons at Issue

As described in the original March 20, 2023 letter informing Justice Earls of the investigation, the four Canons at issue with respect to the investigation are Canons 1, 2(A), 3(A)(1), and 3(B)(1). None of those Canons purports to set forth any explicit requirement regarding confidentiality or to constrain a judge's speech concerning administrative responsibilities of the judge as discussed below.

Thus, at the outset, it is important to note the explicit dichotomy recognized in Canon 3 between "Adjudicative Responsibilities" (found in Canon 3(A)(1)-(7)), on the one hand, and "Administrative Responsibilities" (found in Canon 3(B)(1)-(4)), on the other.

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[1] It is unclear how that representation is consistent with the notice letter dated March 20, 2023 that was provided to Justice Earls which indicates that "the Commission has ordered a formal investigation into allegations raised against you in a written complaint filed with the Commission."

[2] Found at https://www.wral.com/story/leaked-document-shows-big-changes-could-be-underway-at-gop-majority-nc-supreme-court/20716857/).

Here the information disclosed – relating to two possible rule changes and a possible legislative change for consideration by the General Assembly – are in no way "adjudicative" and thus clearly fall within the category of performance of the Justice's administrative responsibilities as covered by Canon 3(B). As Justice Earls described, moreover, those issues can *only* have concerned administrative responsibilities because the Court's January 11, 2023 Retreat at which those items were discussed occurred at a time when there were no pending cases before the Court, two new members had just joined the Court, and the Court had heard no cases yet.

For that reason in our view, the provisions of Canon 3(A)(1) are simply inapplicable to the circumstances here.[3] With respect to the three other Canons mentioned in the March 20 letter – Canons 1, 2(A) and 3(B)(1) – as discussed more fully below, we do not believe that the circumstances here can fit within their proscriptions, no matter how broadly interpreted. Equally importantly, we are of the view that the conduct of Justice Earls was consistent with the requirements of other applicable Canons.

The Lack of a Written Confidentiality Rule

Pursuant to § 13 of Article IV of the North Carolina Constitution, the Supreme Court has exclusive authority to make rules for the appellate division, including itself. As Justice Earls indicated, she was not aware of any rule promulgated by the Court concerning confidentiality of the Conference. We have now confirmed that with four former Justices with tenures dating back to 1995 and continuing forward to the end of 2022. (*See* Orr Statement ¶ 4; Ervin Statement ¶ 6; Hudson Statement ¶ 8; Beasley Statement ¶ 5.)

Lacking any Rule or any specifically applicable Canon proscribing the statements made by Justice Earls, it is our view that there is simply no basis for any discipline in this circumstance. Any assertion of disciplinary authority pursuant to an opaque "unwritten rule" or some amorphous concept of the "traditions" of the Court would violate due process since the subject judge is given no fair notice of what conduct is prohibited. *See Chicago v. Morales*, 527 U.S. 41, 56 (1999).

[3] Even if those provisions were somehow found to be broadly applicable in spirit, they do not appear to have any relevance to these facts since we do not understand that there is any issue regarding Justice Earls' being less than "faithful to the law and unswayed by partisan interests, public clamor, or fear of criticism" (Canon 3(A)(1)), in the course of performing her adjudicative responsibilities. Similarly, the June 30, 2021 letter from Chief Justice Newby to Philip Feagan (which Justice Earls was not copied on and which she had not previously seen) and the excerpt from briefs submitted in federal court litigation that were provided with the March 20, 2023 notice letter are both irrelevant to the issues here because they clearly concern only adjudicative matters, that is, cases that come before the Court, as opposed to administrative responsibilities, including rulemaking.

The Standard Practice of the Justices has been to Discuss Rule Changes with Pertinent Stakeholders Prior to Adoption

Any resort to the "traditions" of the Court fares no better. The Statement of Retired Justice Orr – given without knowledge of the subject of this inquiry (Orr Statement ¶ 8) – makes it clear that during his time on the Court (from 1995 through 2004), he and other members of the Court would informally consult with other knowledgeable persons outside the Court "with regard to administrative matters relevant to the practice of law and the function of the judiciary of the State." (*Id*. ¶ 5.) The examples he gives of persons so consulted include "practitioners, retired or active Court of Appeals or trial judges, law professors and others." (*Id*.) Justice Orr stated his view that such consultations were appropriate in order that he be better informed in his decision making regarding those administrative matters. (*Id*.)

Retired Justice Ervin has provided a Statement to the same effect regarding the more recent practices of the Court. He identifies a number of specific examples of individual justices' consultations with stakeholders on issues such as the Uniform Bar Examination (Ervin Statement ¶ 9), the creation of a specialty in utilities law (*id*. at ¶ 10), and the adoption of the rule concerning the Universal Citation format (*id*. at ¶ 11) in which he and other Justices consulted with persons outside of the Court during the consideration of a rule change by the Court, but prior to its adoption. Justice Ervin even recalls that he had discussions with the staff of the Judicial Standards Commission indicating that his proposed discussions were permissible under the Code of Judicial Conduct. (*Id*. at ¶ 12.)[4]

Former Chief Justice Beasley has also provided a Statement indicating, among other things, that "it was a regular practice for members of the Court to consult with as many relevant stakeholders as possible regarding, for example, rule changes" and that these consultations were, in her view, "necessary for individual justices to understand the nature of given rule changes and the implications of those changes." (Beasley Statement ¶ 8.) She, too, provided a number of examples in which such consultations occurred with respect to specific rules proposals, including universal citation (*id*. at ¶ 10), adoption of a new general rule of practice concerning the ability of a trial court judge to assess a defendant's ability to pay before imposition or waiver of discretionary fines or fees (*id*. at ¶ 11), and the establishment of the Chief Justice's Commission on Fairness and Equity (*id*. at ¶ 12.) She stated that she even sought input from outside the Conference for exigent rules established during the Covid-19 pandemic as to which she had plenary authority to impose. (*See id*. at ¶ 13.)

In her view, "[t]raditionally and necessarily, it has fallen to each justice to determine what level of consultation each deems appropriate for the purposes of fulfilling their role in diligently discharging the justice's administrative responsibilities." (Beasley Statement ¶ 14.)

[4] Justice Ervin indicated in that regard his "understanding … that the staff of the Judicial Standards Commission felt that different standards applied to conversations involving matters that the Court was deciding in its adjudicative capacity and to matters that the Court was deciding in its administrative authority." (Ervin Statement ¶ 12.)

Most pertinently, perhaps, the long-standing practices of the Appellate Rules Committee of the North Carolina Bar Association best exemplify the open communications between Justices and practitioners concerning administrative matters thus demonstrating that Justice Earls' communications were well within the norms of past practice of Justices of the Court.

Justice Hudson, whose decades-long service on the Appellate Rules Committee (Hudson Statement ¶ 2), makes her a unique resource regarding its historical practice (*id*. at ¶ 3), states that in her experience "[d]iscussions concerning administrative matters" have "typically been frank, open, and cordial between Bench and Bar," and that "[s]uch administrative matters include rule changes considered by the Court, as well as wide-ranging issues affecting appellate practice more broadly." (*Id*. at ¶ 5.) Those discussion, in Justice Hudson's words, typically included serving Justices "express[ing] their own views regarding potential rule changes and related issues," including providing "assessments about how the Court as a whole might view a specific rule proposal." (*Id*. at ¶ 6.) Other practitioner-members of the Committee have confirmed the accuracy of this account to me.

In her view, "such discussions facilitate the administration of justice." (Hudson Statement ¶ 7.) She indicated, moreover, that she has "not understood that any confidentiality rules or practices of the Court prohibited members of the Court from engaging in such discussions with members of groups like the Appellate Rules Committee." (*Id*.) Rather, "[d]uring [her] time on the Court" – some 16 years in all and concluding only months ago (*id*. at 1) – it was her understanding that she and "other members of the Court could consult with knowledgeable persons outside the Court concerning administrative matters, including, for example, rule changes and related issues." (*Id*. at ¶ 9.)

Justice Ervin, in his Statement, also indicates that the Appellate Rules Committee played a particularly important role in the rule-making process receiving regular updates about rules under consideration by the Conference, some recommended by practitioners and others originating within the Court. (Ervin Statement ¶¶ 13-14.) As he put it, "[i]n those meetings, it was typical for members of the Committee and members of the judiciary to have frank and open discussions, including expressions of opinion by one or more members of the appellate courts concerning the level of interest in or advisability of potential rule changes." (*Id*. at ¶ 14.) He did not, moreover, "understand that confidentiality considerations precluded members of the appellate courts from participating in such discussions." (*Id*.)

In our view, there is no principled reason to distinguish between the Appellate Rules Committee, the North Carolina Bar Association Board of Governors, and the North Carolina General Assembly Courts Commission in terms of whether they are appropriate professional bodies to inform and consult regarding potential changes to the Rules of Appellate procedure and similar matters of judicial administration.

In summary, the retired Justices are in general agreement that members of the Court have recognized a distinction between confidentiality with respect to their adjudicative responsibilities and a different standard for administrative responsibilities. That distinction, explicitly recognized in the Code of Judicial Conduct, is borne out by the long-standing practices of the Justices reflected in specific examples occurring over many years up to and including 2022, most

especially at the Appellate Rules Committee. Any attempt to discipline Justice Earls based on her communications at the Bar Association's Board of Governors meeting or the meeting of the Courts Commission would be inconsistent with the long-standing practice of Justices of the Court and would be a wrongful application of the Code of Judicial Conduct.

The Matters in this Inquiry were Already the Subject of Open Discussion Prior to Justice Earls Raising the Issues

As has been explained to us, there are three rule changes publicly identified by Justice Earls at those two professional meetings that are the subject of this inquiry: (1) the Court's decision to rescind its 2019 Rule adopting the universal citation format, (2) the Court's decision to adopt a rule permitting published opinions of the court of appeals to be deemed "unpublished" by the Court (and thus without precedential effect), and (3) consideration of a possible legislative change that would eliminate the right of appeal to the Supreme Court based on a dissent in the Court of Appeals (pursuant to N.C. Gen. Stat. § 7A-30(2)). Justice Earls, as she described at her interview, discussed those issues at a meeting of the Board of Governors of the North Carolina Bar Association (of which she is a member) on January 19, 2023, and at a meeting of the North Carolina Courts Commission (of which she is a member) on January 27, 2023.

In the case of all three appellate rule changes, there had already been discussion outside of the Conference prior to the dates of the two meetings at which Justice Earls spoke.

First, the Court's Order rescinding the universal citation format – including the noted dissents of Justices Morgan and Earls – was actually published on January 13, 2023, nearly a week before the first meeting at which Justice Earls discussed the rule change. The Order was publicly announced with a press release stating the purported rational for the rule change.[5] To the extent that there was any confidentiality issue regarding that rule change, it necessarily evaporated upon publication of the new rule.

Second, with respect to the possible rule change concerning the unpublishing of Court of Appeals' opinions, it was represented *at the Conference itself* that the issue had already been discussed outside the Conference, namely, with one or more judges of the Court of Appeals who – it was represented – preferred that their decisions be unpublished rather than reversed. To the extent that the issue had already been discussed outside of the Conference, there can have been no putative breach of confidentiality. It simply cannot be the case that some members of the Court ethically can discuss a proposed rule change outside of conference while other members are prohibited from doing so.

[5] The press release states that "[t]he paragraph numbering has imposed significant administrative burdens on court staff responsible for preparing opinions for filing and physical publication." Available at https://www.nccourts.gov/news/tag/press-release/supreme-court-of-north-carolina-withdraws-order-implementing-universal-citation-system.

Third, the legislative change to eliminate of the right to appeal based on a dissent, has been the subject of much discussion outside the Conference for a long period of time.[6] For example, the Appellate Rules Committee – comprised, as described above, of both practitioners and judges, including current and former Supreme Court Justices – had been considering for some time the issue of the right to appeal based on a dissent in connection with attempts to harmonize Rules 16 and 28 of the Rules of Appellate Procedure.[7] In that connection, the Appellate Rules Committee sought to keep abreast of the Court's views regarding the statutory provision because, if the statutory right were to be repealed, there would be no need to continue to discuss clarification of the interaction between the two appellate rules.

Indeed, a discussion of a subset of the issue – on the subject of the right of appeal based on a dissent in cases concerning termination of parental rights – had come before the General Assembly as early as 2021. This circumstance is documented in the Statement in which Representative Morey describes the General Assembly's debate of Senate Bill 113 during which one Justice (not Justice Earls) conveyed to Representative Morey the positions on the provision at issue held by other Justices on the Court. (Morey Statement at 1.) Representative Morey describes that after later confirming that the particular Justices in question, in fact, were against ending the right to appeal based on a dissent in these cases, she sponsored an amendment to the pending bill which passed 77 to 39 on April 21, 2021. Senate Bill 113 was ultimately approved without the provision removing the right of appeal. (*Id.*)

If one Justice is able to convey the views of other Justices concerning legislation outside of the Conference in 2021, it cannot be a violation of some unwritten rule of confidentiality or in any other way improper for Justice Earls to do something similar in 2023, particularly with regard to substantially the same subject matter.

Justice Earls Conducted Herself in Accordance with the Code of Judicial Conduct and the Regular Practices of the Court

The specific activities of Justice Earls at issue here fit well within the actions deemed acceptable – and rightfully encouraged – under Canon 4's endorsement of judges engaging in activities "concerning the legal . . . or governmental system or the administration of justice," including:

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[6] Unlike a rule change which, as a matter of both constitutional and statutory law, can be effected by the Court unilaterally, a legislative change, by definition, requires action by a separate and co-equal branch of government. As a result, any determination to seek a legislative change, by definition, requires discussion outside of Conference, at a minimum with legislators. For that reason, any claim concerning the confidentiality of the legislative desires of one or more Justices, or the Court as a whole, is a logical *non sequitur*.

[7] Since at least January, 2020, there had been discussion in the Appellate Rules Committee concerning how Rule 16's definition of the scope of review when appeal is taken based on a dissent can be in tension with Rule 28(c)'s discussion of the contents of the Appellee's brief. Obviously that tension would disappear if parties no longer could take an appeal based on a dissent.

- "Speak[ing]" concerning "the legal . . . or governmental system or the administration of justice" (Canon 4(A));

- Appearing at a "public hearing before an executive or legislative body" (clearly applicable with respect to Justice Earls' role at the Courts Commission (Canon 4(B)); and

- "Serv[ing] as a member, officer, or director of an organization or governmental agency" (with respect to both the Bar Association Board of Governors and the Courts Commission) (Canon 4(C).)

Any attempt to impose discipline based on a judge's discussion of administrative matters at a meeting of the Board of Governors of the North Carolina Bar Association or the General Assembly's Courts Commission would squarely run afoul of the Code's endorsement of activities in which judges are explicitly permitted to participate in accordance with Canon 4. Any attempt to assert some vague construction of the largely generic provisions of Canons 1 and 2 against Justice Earls cannot prevail against the more specific provisions permitted under Canon 4. And, as noted below, such an attempt would potentially run afoul of the First Amendment rights of judges.

Importantly, this interpretation is consistent with the Statements made by the four former Justices as well as that of Representative Morey, herself a long-time member of the judiciary. Thus, former Chief Justice Beasley stated that consultations outside the Conference are "necessary for individual justices to understand the nature of given rule changes and the implications of those changes." (Beasley Statement ¶ 8.) Former Justice Ervin offered his opinion that "it is helpful for individual justices of the Supreme Court to be able to consult with persons outside the Court concerning proposed rule changes and the manner in which other administrative responsibilities should be carried in order to permit the members of the Court to properly perform their administrative responsibilities." (Ervin Statement ¶ 15.) Justice Orr stated that given the breadth of the rule-making authority of the Court, "it is useful to be able to discuss such matters with experts in the field." (Orr Statement ¶ 5.) Indeed, in his view, "as elected officials," Justices "have a right to discuss administrative matters being considered by the Court that would potentially impact practice before the Court or the practice of law generally." (*Id*. at ¶ 7.) Justice Hudson underscored, specifically with respect to the Appellate Rules Committee, that such "discussions are important for the purposes of informing members of the Court with respect to administrative issues under consideration, as well as to assist Committee members in providing constructive proposals and information to the Court." (Hudson Statement ¶ 10.)

Representative Morey indicated that "[a]s a member of the General Assembly," she "would consider any effort to apply judicial discipline in a manner that would impinge on the rights of any judge, including especially a Supreme Court Justice, to consult concerning court administration with members of the General Assembly to raise serious separation-of-powers issues, as well as substantial First Amendment concerns." (Morey Statement at 2.)

Other Prudential Considerations

The Code of Judicial Conduct, like all governmental pronouncements, is subject to the First Amendment of the U.S. Constitution and its proscription against the abridgment of free speech. The U.S. Supreme Court, for example, in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), ruled that the "Minnesota Supreme Court's canon of judicial conduct prohibiting candidates for judicial election from announcing their views on disputed legal and political issues violates the First Amendment" and struck down that particular canon. *Id*. at 788.

An attempt to impose discipline of any type in this circumstance could be an appropriate subject of a First Amendment as-applied challenge in federal court to the putative authority of the Commission to proscribe and/or punish speech by judges concerning administrative matters. The lack of any written authority, coupled with the necessary reliance on opaque court traditions whose existence is disclaimed by multiple retired Justices, counsels against proceeding in this matter.

Our research of ethics violations and discipline in state and federal courts has found no other instance where a judge or Justice was disciplined in any matter for speaking publicly about potential rule changes impacting the administration of justice. In this case, Justice Earls was diligently performing her duties under the Code of Judicial Conduct and should not be subject to any form of warning, censure, or discipline whatsoever.

* * * *

In the event that this matter proceeds to hearing, Justice Earls' current intention is to waive confidentiality of the hearing so that the matter can proceed in public. In addition, if we are required to proceed in that context, it is our intention to assert her full rights under the Commission's Rules with respect to both discovery and the subpoenaing of witnesses (including those who have already provided witness statements to us). Our inquiry will need to delve into the understanding of current and former Justices regarding the Court's rules, procedures, and practices regarding confidentiality, and could even require further inquiry into the actions of current and former Justices with respect to similar administrative responsibilities and their communications with various stakeholders outside the Court.

Thank you for your attention to this matter. Please let me know if you have any questions concerning the foregoing or any further questions for Justice Earls.

Sincerely,
WOMBLE BOND DICKINSON (US) LLP

Pressly M. Millen

cc: Justice Anita Earls