

**BEFORE THE NORTH CAROLINA STATE ETHICS COMMISSION**

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 )  
*Complainant,* )

**SWORN COMPLAINT  
AGAINST PERSONS  
UNDER JURISDICTION OF  
COMMISSION**

vs. )  
 )  
Philip E. Berger, State Senator from District26 )  
and President Pro Tempore of the Senate )  
 )  
and )  
 )  
Timothy K. Moore, State Representative from )  
District 111 and Speaker of the House of Representatives )  
 )  
*Respondents.* )

**INTRODUCTION**

Complainant hereby alleges that beginning on February 7, 2017, Respondents Berger and Moore appear to have knowingly begun a scheme to evade and did evade NCGS §138A-31 (Use of Public Position for Personal Gain), NCGS §138A-37 (Conflict of Interest While Performing Official Duties), and NCGS §120.86.1 (Unethical Personnel-Related Actions).

Respondents are covered by the State Government Ethics Act (NCGS. 138A) and/or the Legislative Ethics Act (NCGS. 120, Art. 14).

This sworn complaint alleges that Respondents Berger and Moore used their offices and leadership positions to intimidate and interfere with judges considering constitutional challenges to laws enacted by the General Assembly. This sworn complaint further alleges that Respondents Berger and Moore stand to directly benefit from their intimidation and interference tactics by continuing and perpetuating their ability to hold leadership positions, which entitle them to higher compensation and political contributions than would exist if they did not hold such leadership positions.

**FACTS AND GROUNDS FOR COMPLAINT**

On February 7 of 2017 Respondents Berger and Moore released a statement in response to a judicial order enjoining enforcement of S.L. 2016-125, which among other things changed the makeup of the North Carolina State Ethics Commission and the North Carolina State Board of Elections. Their

statement said that the three Superior Court judges who issued the order would face “profound consequences”<sup>1</sup> if they continued to “legislate from the bench”. Respondents Berger and Moore did not specify what those consequences might be, but following that statement they have taken a number of steps to make changes to the state judiciary, some of which have had direct impact on the judges considering the constitutionality of laws voted on, enacted, and signed by Respondents Berger and Moore.

Specifically, the North Carolina General Assembly, led by Respondents Berger and Moore, have undertaken a judicial redistricting effort making major changes to the judicial districts represented by the judges involved in the case noted above and in other cases involving the constitutionality of laws enacted by the General Assembly.

In addition, members of the General Assembly are considering shortening the terms of all judges to two years.

In addition to the specific allegations detailed above, these intimidation and interference tactics also form a pattern not just impacting individual judges, but undermining the institution of our state’s judiciary as a whole.

Three specific judges involved in cases contesting the constitutionality of laws enacted by the General Assembly and that are the targets of Respondent Berger and Moore’s “profound consequences”<sup>2</sup> statement are Judge Logan Todd Burke, Judge W. Osmond Smith III, and Judge James Floyd Ammons, Jr.

Judge Logan Todd Burke is a registered Democrat and an African-American judge from Forsyth County. In any of the judicial redistricting proposals currently under consideration by the General Assembly Judge Burke would see the percentage of African Americans in the district that he lives drop by 20%. Additionally Judge Burke who is currently in a single member district would be “double bunked” with another incumbent judge under any scenario except “option A”, meaning he would have to run against another sitting judge in 2 of 3 new district proposals.<sup>3</sup>

Judge W. Osmond Smith III, a registered Democrat, is a Senior Resident Superior Court Judge from Caswell County. Judge Smith ruled (in *Common Cause v. Forest*) that a constitutional challenge to the manner in which an Extra Session of the General Assembly presided over by Respondents Berger and Moore was “called” - with little public notice - should be heard.<sup>4</sup> In all the current judicial redistricting proposals under consideration at the General Assembly, Judge Smith has been moved to a new district with his home county of Caswell now paired with Rockingham County. This makes the district more heavily Republican and puts Judge Smith in a new district with two other incumbent judges from the more populous county in the new district.<sup>5</sup>

Judge James Floyd Ammons, Jr. who is registered unaffiliated, was one of the three judges considering the constitutionality of Session Law 2016-126, which transferred some powers of the State Board of Education to the Superintendent of Public Instruction. Prior to the hearing on this case, outside experts described the case brought against the General Assembly as “one of the strongest claims brought against the legislature’s recent actions.” Judge Ammons heard this case just days after the release, via Twitter<sup>6</sup>, of the initial judicial redistricting proposal. Within two weeks of the judicial redistricting proposal being unveiled the 3-judges ruled against the plaintiffs.<sup>7</sup> Under the now current proposed judicial redistricting plans, Judge Ammons has found himself in a district with other incumbent judges.<sup>8</sup>

## Impact on the Judiciary Generally

Widespread news coverage of the actions of Respondents Berger and Moore as leaders of their respective legislative chambers have pointed to their actions to rework the judiciary as having a threatening effect on judges and the judiciary as an institution. The New York Times in an article from October 18 of 2017 entitled “In North Carolina, Republicans Stung by Court Rulings Aim to Change the Judges”<sup>9</sup> wrote that Republican efforts headed by Berger and Moore to remake the courts were motivated by a string of losses on constitutional challenges. According to the New York Times:

“Republicans with a firm grip on the North Carolina legislature — and, until January, the governor’s seat — enacted a conservative agenda in recent years, only to have a steady stream of laws affecting voting and legislative power rejected by the courts. Now lawmakers have seized on a solution: change the makeup of the courts.

Judges in state courts as of this year must identify their party affiliation on ballots, making North Carolina the first state in nearly a century to adopt partisan court elections. The General Assembly in Raleigh reduced the size of the state Court of Appeals, depriving Gov. Roy Cooper, a Democrat, of naming replacements for retiring Republicans.

And this month, lawmakers drew new boundaries for judicial districts statewide, which critics say are meant to increase the number of Republican judges on district and superior courts and would force many African-Americans on the bench into runoffs against other incumbents.”<sup>10</sup>

Locally, WFAE, the Charlotte based affiliate of NPR, had a panel covering the actions of the legislature under Berger and Moore’s to change the judiciary noted the sudden emphasis after the election of Gov. Roy Cooper and Justice Mike Morgan in 2016.<sup>11</sup>

Beyond the news coverage, legal have experts have also noted how the pattern of laws passed by Berger and Moore’s direction have impacted the institution of North Carolina’s courts. At a recent panel hosted by The Federalist Society’s Triangle Lawyers Chapter, law professor Chris Bonneau of the University of Pittsburgh was quoted saying, “North Carolina’s reputation for passing bills regarding judicial selection may be harming the public perception of the courts”. J. Nicholas Ellis, Eastern North Carolina President of the American Board of Trial Advocates wrote in a widely published op-ed that “recent attacks questioning the credibility of the court’s members also threaten to harm the fairness of jury trials, which these same judges oversee...”<sup>12</sup>

## Redistricting Cases

Three state court judges and all seven members of the North Carolina Supreme Court have been involved in hearing *Dickson vs. Rucho*, a case challenging the constitutionality (racial gerrymandering) of congressional and legislative redistricting maps enacted in 2011. Furthermore, constitutional challenges to these and subsequent congressional and legislative maps have been brought in Federal court (*Harris v. Cooper* and *Covington v. State of North Carolina*) on the same issues. Further, a Federal court also heard a challenge (partisan gerrymandering) of the state’s congressional redistricting map (*Common Cause v. Rucho*).

The maps challenged in *Dickson vs. Rucho* were upheld by the trial court and twice upheld by the North Carolina Supreme Court, only to TWICE be reversed and remanded by the Supreme Court of the United States.

The maps challenged in *Common Cause* were ruled unconstitutionally racially gerrymandered with the effect of maintaining a Republican partisan advantage. Since these rulings Berger and Moore have moved to make changes to state court judges that would consider these and all future legislative redistricting maps.

Complainant alleges that the actions taken by Respondents Berger and Moore relating specifically to legislative redistricting were taken to ensure and perpetuate a Republican majority in each chamber of the General Assembly and therefore to ensure and perpetuate their leadership role in each respective chamber.

## CONCLUSION

Over 15 times<sup>13</sup> judges at all levels of the judiciary from Superior Court to the Supreme Court of the United States have ruled that laws enacted since Respondents Berger and Moore became leaders of their respective chambers in the General Assembly are unconstitutional. Respondents cannot take revenge on appointed federal judges, but they can – and have/and are – taking revenge against state judges.

In February of 2017, following a rebuke from a panel of Judges, Respondents Berger and Moore threatened “profound consequences” for judges who took an action as simple as issuing a temporary stay of a legislative action pending further proceedings and information. Since that threat, Respondents Berger and Moore have engaged in a pattern of using their offices to intimidate and interfere individual judges that have ruled against their actions and to intimidate other judges who may yet be called upon to rule on their actions. Respondents have sought to make changes to the judiciary, often with little notice and little reasoning given for the changes in ways that national media, local media, and outside experts have said negatively impact the independence of the judiciary.

This complaint has provided three specific instances where individual judges considering the constitutionality of laws enacted with the encouragement, support, and votes of Respondents Berger and Moore now find themselves potentially redistricted into less favorable judicial districts than the districts they currently represent including disgracefully, Judge Burke, an African-American serving in a majority African-American judicial district and now potentially drawn into a district with 20% less African-Americans.

The actions by Respondents Berger and Moore are a violation of statutes relating to Conflict of Interest While Performing Official Duties and Unethical Personnel-Related Actions.

Respondents Berger and Moore have used their intimidation and interference tactics – threatening “profound consequences” – coupled with protracted consideration of judicial redistricting schemes (during the pendency of all of these cases) to thwart – at every turn – constitutional challenges to legislative and congressional redistricting plans that have been ruled unconstitutional by Federal and State courts over and over again. The threat of retaliatory action by the Respondents Berger and Moore have cast a pall and chilling effect on the judiciary. Respondents Berger and Moore stand to directly benefit from their intimidation and interference tactics by continuing and perpetuating their ability to hold leadership positions, which entitle them to higher compensation and political contributions than would exist if they did not hold such leadership positions.

Complainant asks for an investigation into whether Berger and Moore did knowingly begin a conspiracy to violate and did violate NCGS §138A-31 (Use of Public Position for Personal Gain), NCGS §138A-37 (Conflict of Interest While Performing Official Duties), and NCGS §120.86.1 (Unethical

Personnel-Related Actions) and asks that whatever remedial or corrective action allowed by law be taken by the Commission against Respondents.

### SWORN COMPLAINT

I hereby swear or affirm, under penalty of perjury and other penalties established by North Carolina law, that the information provided in this complaint is true, correct, complete, and of my own personal knowledge, or if not, I believe the information to be true based upon the information herein contained.

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date

STATE OF NORTH CAROLINA  
COUNTY OF \_\_\_\_\_

SWORN TO (or affirmed) and subscribed before me this day by: \_\_\_\_\_

Date: \_\_\_\_\_

\_\_\_\_\_  
Official Signature of Notary Public

\_\_\_\_\_  
Notary's Printed or Typed Name

My Commission Expires: \_\_\_\_\_

### OFFICIAL SEAL

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<sup>1</sup> “Senate Leader Phil Berger (R-Rockingham) and House Speaker Tim Moore (R-Cleveland) issued the following statement Tuesday: ‘In a gross misreading of the Constitution and a blatant overstep of their Constitutional authority, three Superior Court judges attempted to dictate to the legislature when it could or could not hold committee meetings and what it could or could not consider in those meetings. This unprecedented move would be like the legislature telling a judge what jurors to pick to decide a case. Judges are not legislators and if these three men want to make laws, they should hang up their robes and run for a legislative seat. Their decision to legislate from the bench will have profound consequences, and they should immediately reconvene their panel and reverse their order.’”

Joint statement by Senate Leader Phil Berger and Speaker Tim Moore:  
[http://www.philberger.org/legislative\\_leaders\\_to\\_activist\\_judges\\_if\\_you\\_want\\_to\\_make\\_laws\\_run\\_for\\_the\\_legislature](http://www.philberger.org/legislative_leaders_to_activist_judges_if_you_want_to_make_laws_run_for_the_legislature)

<sup>2</sup>[http://www.philberger.org/legislative\\_leaders\\_to\\_activist\\_judges\\_if\\_you\\_want\\_to\\_make\\_laws\\_run\\_for\\_the\\_legislature](http://www.philberger.org/legislative_leaders_to_activist_judges_if_you_want_to_make_laws_run_for_the_legislature)

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- <sup>3</sup> <http://pulse.ncpolicywatch.org/2018/02/16/judges-double-bunked-new-maps-heres-list/#sthash.2xF1C6M.4vPB2alq.dpbs>
- <sup>4</sup> <http://www.newsobserver.com/news/politics-government/politics-columns-blogs/under-the-dome/article162271618.html>
- <sup>5</sup> <http://pulse.ncpolicywatch.org/2018/02/16/judges-double-bunked-new-maps-heres-list/#sthash.2xF1C6M.4vPB2alq.dpbs>
- <sup>6</sup> <http://www.newsobserver.com/news/politics-government/state-politics/article158264799.html>
- <sup>7</sup> <https://www.carolinajournal.com/news-article/court-backs-johnson-over-state-board-in-education-governance-fight/>
- <sup>8</sup> <http://pulse.ncpolicywatch.org/2018/02/16/judges-double-bunked-new-maps-heres-list/#sthash.2xF1C6M.4vPB2alq.dpbs>
- <sup>9</sup> <https://www.nytimes.com/2017/10/18/us/north-carolina-republicans-gerrymander-judges-.html>
- <sup>10</sup> <https://www.nytimes.com/2017/10/18/us/north-carolina-republicans-gerrymander-judges-.html>
- <sup>11</sup> <http://wfae.org/post/charlotte-talks-nc-courts-become-focus-lawmakers-tweaks#stream/>
- <sup>12</sup> <http://www.newsobserver.com/opinion/op-ed/article131845284.html>
- <sup>13</sup> <http://wunc.org/post/how-often-do-laws-passed-nc-end-court>