IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-12003-U

KELVIN LEON JONES,
BONNIE RAYSOR,
DIANE SHERRILL,
Individually and on behalf of others similarly situated,
JEFF GRUVER,
EMORY MARQUIS MITCHELL,
MARQ, et al.,

Plaintiffs - Appellees,

ROSEMARY MCCOY,
SHEILA SINGLETON,

Plaintiffs - Appellees - Cross - Appellants,

versus

GOVERNOR OF FLORIDA,
FLORIDA SECRETARY OF STATE,

Defendants - Appellants - Cross Appellees,

On Appeal from the United States
District Court for the Northern District of Florida

BEFORE: LUCK and LAGOA, Circuit Judges:

Appellees have moved to disqualify us from this case because, as Justices on

the Florida Supreme Court, we heard oral argument in Advisory Opinion to the Governor re: Implementation of Amendment 4, the Voting Restoration Amendment, 288 So. 3d 1070 (Fla. 2020).[1] Appellees contend that, having heard oral argument in Advisory Opinion to the Governor, we must disqualify ourselves: (1) under Canon 3(C)(1)(e) of the Code of Conduct for United States Judges because, they argue, we participated in the present "proceeding" in our "previous judicial position[s]"; and (2) under 28 U.S.C. section 455(a) because, they argue, our impartiality might reasonably be questioned based on our questioning during oral argument in the Advisory Opinion to the Governor proceeding and our answers to the Senate Judiciary Committee during our confirmation. As discussed below, these two cases involve different kinds of proceedings (advisory opinion vs. Article III case-and-controversy), in different courts (state supreme court vs. federal court), with different issues (interpreting state constitution vs. federal constitutional questions), and different players ("interested persons" vs. parties). And nothing in this case asks us to review the correctness of the Florida Supreme Court's decision in Advisory Opinion to the Governor. For the following reasons, the motion is denied.

[1] Neither of us was a member of the Florida Supreme Court when it issued Advisory Opinion to the Governor.

Canon 3(C)(1)(e)

Canon 3(C)(1)(e) provides that "[a] judge shall qualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances in which . . . the judge has served in governmental employment and in that capacity participated as a judge (in a previous judicial position), counsel, advisor, or material witness concerning the proceeding." Code of Conduct for United States Judges Canon 3(C)(1)(e) (2019). "[P]roceeding" is defined to include "pretrial, trial, appellate review, or other stages of litigation." Id. Canon 3(C)(3)(d). Appellees argue that two separate cases—the Advisory Opinion to the Governor proceeding and this case—are stages of the same case and part of the same "proceeding." But they are not.

Canon 3(C)(1)(3)'s text and the case law interpreting "proceeding" are clear that the term refers to the single case before the judge and not a separate, even if related, proceeding or case. The canons, for obvious reasons, are aimed at discouraging judges from being involved in the decision of cases in which they've already participated. Because we've never participated in the present proceeding or case as a judge, counsel, advisor, or witness, Canon 3(C)(1)(3) does not compel our disqualification.

As to the text of Canon 3(C), "other stages of litigation" of a proceeding, as used in the Code, must be read as similar in nature to "pretrial, trial," and "appellate review." "[W]here, as here, a more general term follows more specific terms in a list, the general term is usually understood to embrace only objects similar in nature to those objects enumerated by the preceding specific words." Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1625 (2018) (internal quotation marks omitted); see also Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 114–15 (2001) ("Where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." (quotation and alteration omitted)).

"Pretrial, trial," and "appellate review" are major phases in a single lawsuit. The common feature is that all three are steps in the same litigation. In that light, "other stages of litigation," as the general term, must also be read as stages of the same proceeding that are similar to pretrial, trial, and appellate review. Black's Law Dictionary—which defines "proceeding" as the "regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and entry of judgment"—lists some helpful examples of "other stages":

> [T]he term 'proceeding' may include – (1) the institution of the action; (2) the appearance of the defendant; (3) all ancillary and provisional

> steps, such as arrest, attachment of property, garnishment, injunction, writ of ne exeat; (4) the pleadings; (5) the taking of testimony before trial; (6) all motions made in the action; (7) the trial; (8) the judgment; (9) the execution; (10) proceedings supplementary to execution, in code practice; (11) the taking of the appeal or writ of error; (12) the remitter, or sending back of the record to the lower court from the appellate or reviewing court; (13) the enforcement of the judgment, or a new trial, as may be directed by the court of last resort.

Black's Law Dictionary 1457 (11th ed. 2019) (emphasis added). The "other stages of litigation"—in addition to pretrial, trial, and appellate review—could include preliminary injunctions and attachments of property, post-judgment litigation, enforcement of the judgment, and proceedings supplementary. Importantly, these other stages are different steps in a single case.

Canon 3(C)(1)(e) also describes the proceeding in which the judge must have participated (in his or her previous job) as "a proceeding" and "the proceeding." The articles "a" and "the" are important because they refer to a single and definite case—the one before the judge—and not other separate and different proceedings. See Nielsen v. Preap, 139 S. Ct. 954, 965 (2019) ("Because words are to be given the meaning that proper grammar and usage would assign them, the rules of grammar govern statutory interpretation unless they contradict legislative intent or purpose. Here grammar and usage establish that 'the' is a function word indicating that a following noun or noun equivalent is definite or has been previously specified by context." (alterations adopted; citations and internal quotation marks omitted));

Rumsfeld v. Padilla, 542 U.S. 426, 434 (2004) ("The consistent use of the definite article in reference to the custodian indicates that there is generally only one proper respondent to a given prisoner's habeas petition."); Evanto v. Fed. Nat. Mortg. Ass'n, 814 F.3d 1295, 1298 (11th Cir. 2016) ("We presume that the statute uses the term 'the disclosure statement' consistently, especially because sections 1638 and 1641 connote one particular document by using a definite article ('the') and a singular noun ('disclosure statement')." (citations omitted)).

The other circuit courts have also read "proceeding" to mean the single case before the judge and not separate, related cases. Section 455, the "federal disqualification statute," United States v, Sciarra, 851 F.2d 621, 634 (3d Cir. 1988), defines "proceeding" exactly as Canon 3(C)(3)(d) does to include "pretrial, trial, appellate review, and other stages of litigation." 28 U.S.C. § 455(d)(1). The identical language was intentionally used; Congress enacted section 455 "[b]ased largely on Canon 3C of the ABA Code of Judicial Conduct." Sciarra, 851 F.2d at 634.

The Seventh Circuit discussed the meaning of "proceeding" in United States v. Lara-Unzueta, 735 F.3d 954 (7th Cir. 2013). There, the defendant was convicted of one count of illegal reentry. Id. at 955. On appeal, the defendant argued that the district judge should have disqualified himself because he was district counsel

for the Immigration and Naturalization Service when the defendant was originally removed from the United States. Id. at 957–58. Section 455(b)(3) requires that a judge disqualify himself "[w]here he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding." Id. at 958–59 (quoting 28 U.S.C. § 455(b)(3)) (emphasis added). The Seventh Circuit rejected the disqualification argument, and affirmed the defendant's conviction, because the district judge had not served as counsel or advisor concerning the proceeding:

> The proceeding means the current proceeding. This interpretation is dictated by the text of the statute. On July 21, 2011, Lara was indicted for the crime that is the subject of this direct appeal. On the day of Lara's indictment, Judge Der-Yeghiayan had been a sitting United States District Judge for over eight years. Judge Der-Yeghiayan was not involved in the investigation, preparation of the indictment, presentment of the indictment, or prosecution of the 8 U.S.C. § 1326(a) conviction that is the subject of the proceeding—this criminal case. The present appeal of Lara's criminal proceeding presided over by Judge Der-Yeghiayan in 2012 is not the same as Lara's deportation proceeding from 1997-98.

Id. at 959.[2]

[2] Appellees argue that even if the Advisory Opinion to the Governor proceeding and this case are not the same "proceeding," Canon 3(C)(1)(e) requires disqualification in cases "concerning the proceeding," which they claim is broader. The Seventh Circuit rejected the same argument in Lara-Unzueta:

> At oral argument, counsel for Lara indicated that he "read the 'concerning' language differently." By "differently" counsel suggested that "concerning" expands the scope of "the proceeding" to include Lara's first deportation

The First Circuit has also read "proceeding" to mean the current case before the judge. In In re Vazquez-Bolet, 464 F.3d 54 (1st Cir. 2006), the defendant moved to disqualify the district judge because his wife represented an unindicted co-conspirator. Id. at 56–57. On behalf of the unindicted co-conspirator, she had negotiated an immunity deal and her client testified before the grand jury and was a potential prosecution witness. Id. She also had represented another unrelated client whom the government considered calling as a "404(b) witness." Id. On behalf of this second, unrelated client, the judge's wife publicly accused the defendant in the case her husband was presiding over of intimidating her client and privately threatened to notify the government that the defendant had violated the conditions of his bond. Id.

> proceeding in 1997-1998. He argued that if Judge Der-Yeghiayan rules on a dispositive motion that relies on a deportation order entered when the judge simply had supervisory responsibility over the INS office prosecuting that first deportation, then now-Judge Der-Yeghiayan has a role "concerning the proceeding," subjecting him to disqualification. Not so. "Concerning" does not expand the scope of this disqualification statute. "Concerning" appears twice in 28 U.S.C. § 455(b)(3). Both references confine the proceeding to this proceeding. The particular case in controversy is this proceeding—an appeal from an indictment returned on July 21, 2011, for which Lara was convicted on August 6, 2012, and sentenced on January 3, 2013. Other than presiding over Lara's trial, conviction, and sentence, Judge Der-Yeghiayan had nothing more to do with "the proceeding" that is the subject of this appeal.

Lara-Unzueta, 735 F.3d at 959 (emphasis added)

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The district judge denied a disqualification motion and the First Circuit denied the ensuing mandamus petition because "[t]he charge that [the judge's wife] '[i]s acting as a lawyer in the proceeding' under § 455(b)(5)(ii) does not provide a basis for mandamus relief." Id. at 58. The First Circuit explained that the judge's wife's representation of her clients "occurred over ten months before this criminal case was initiated (the original indictment was returned on April 8, 2004)." Id. (emphasis added). "Even though the word 'proceeding' is defined to include 'pretrial, trial, appellate review, or other stages of litigation,' 28 U.S.C. § 455(d)(1), [the district judge] was not clearly mistaken in confining his attention here 'to the litigation encompassed by this indictment.'" Id. (emphasis added); see also United States v. Sarno, 41 F. App'x 603, 609 (4th Cir. 2002) (affirming denial of disqualification motion because, although the judge's son had some involvement in the case early on, he "was never retained nor appeared as a lawyer of record in this case" (emphasis added)); Rural Tel. Fin. Coop. v. Prosser, No. Civ. 2004-132, 2005 WL 3077607, at *5 (D.V.I. Nov. 16, 2005) (denying disqualification motion where the judge's spouse appeared on behalf of one of the parties in front of the Public Service Commission because "the September 10, 2004 PSC hearing was not a proceeding as defined in section 455(d)(1). . . . Although the examples in section 455(d)(1) do not appear to be exclusive, the list seems to only include stages of litigation. The September 10,

2004, PSC hearing was not a part of the Virginia litigation, nor could it be. In fact, any regulatory issue addressed at the PSC hearing remains separate and distinct from the default and guarantee proceedings before this Court. The proceeding to which section 455(d) refers to is the one before this Court (either the default or guarantee action)." (emphasis added)).

Like section 455(d)(1), "the proceeding" in Canon 3(C)(1)(e) is the single proceeding currently before the judge. If the judge participated in the same proceeding or case in his or her prior job, disqualification is required. But if the judge participated in a different case, even if it's related, disqualification is not required.[3]

Even if "the proceeding" could mean more than the case currently before the judge, it would not include the Advisory Opinion to the Governor proceeding. That

[3] To be sure, disqualification is required in federal habeas cases where, as state trial or appellate judges, a judge heard the underlying trial, direct appeal, or state post-conviction motion, although the basis for disqualification is not that they involve the same "proceeding." A federal habeas appeal and the underlying state trial and appellate proceedings are more than simply "related." Not only are the parties, the issues, and the record substantially the same, unlike the situation here. But even more significantly, a federal habeas court, in effect, reviews the state courts' findings and conclusions on the same federal constitutional issues. Thus, where a federal habeas appeal would require one of us to review the correctness of our own previous decision in an underlying state court matter, disqualification is required under 28 U.S.C. § 455(a), even though the federal habeas appeal and the underlying state court matter are not the same "proceeding." See, e.g., Rice v. McKenzie, 581 F.2d 1114 (4th Cir. 1978) (district court judge could not sit on federal habeas case to review state supreme court's adjudication of the same claims rendered while he was a member of that state supreme court). In this case, we are not asked to determine the correctness of the Florida Supreme Court's decision in the Advisory Opinion to the Governor proceeding, and therefore concerns like those that arise in a federal habeas case do not exist.

proceeding and this case are not the same or even similar types of cases, and do not have the same or even similar issues.

Procedurally, Advisory Opinion to the Governor is a unique type of proceeding under Florida law, with no federal equivalent. The Florida Constitution allows the governor to "request in writing the opinion of the justices of the supreme court as to the interpretation of any portion of this constitution upon any question affecting the governor's executive powers and duties." Fla. Const. Art. IV, § 1(c). The request is an original proceeding. There is no trial or intermediate appeal. No facts are developed for the record—there is no record. The opinion of the state supreme court, as the name suggests, is advisory only.

This case, by contrast, is not an advisory proceeding. Federal courts don't issue advisory opinions. See Golden v. Zwickler, 394 U.S. 103, 108 (1969) ("The federal courts established pursuant to Article III of the Constitution do not render advisory opinions." (alteration adopted; internal quotation marks omitted)). This case began not with a member of the executive branch sending the court a letter asking for advice, but, as court cases traditionally do, with the plaintiffs suing the defendants. The plaintiffs and defendants exchanged discovery, had motion practice, and developed a record at trial; the district court held a trial, made findings of fact and conclusions of law that bind the class, and entered a judgment; and the

losing parties appealed. None of that happened in the Advisory Opinion to the Governor proceeding—nor, as explained above, could it have.

This case has parties—not just interested persons, but parties. There are plaintiffs and defendants; appellants and appellees. The Advisory Opinion to the Governor proceeding had no parties—no plaintiffs, no defendants, no appellants, and no appellees. The Florida Constitution permits "interested persons to be heard on the questions presented" when the governor requests an advisory opinion. Fla. Const. Art. IV, § 1(c); Fla. R. App. P. 9.500(b)(2) ("[T]he court shall permit, subject to its rules of procedure, interested persons to be heard on the questions presented through briefs, oral argument, or both."). And the Florida Supreme Court did hear from a wide range of "interested persons," including the Florida Association of Criminal Defense Lawyers, the Florida House of Representatives, the Florida Senate, and one South Florida appellate attorney, Adam Richardson, who wanted to be heard on the question. Advisory Opinion to the Governor, 288 So. 3d at 1071. None of these "interested persons" are parties in this case. Not a single one. While the Florida Supreme Court's advisory opinion is publicly available, it is addressed only to the governor, not to any of the "interested persons" who provided that court with input on the issue.

Finally, the Advisory Opinion to the Governor proceeding and this case were filed in, and to be decided by, different judicial systems. Our system of federalism rests upon the guarantee that our federal and state governments retain their separate sovereign identities, and the state court systems are no more part of the federal court system than the state legislatures are part of Congress. The suggestion that the Advisory Opinion to the Governor proceeding and this case are the same "proceeding" misapprehends this basic premise of our national constitutional structure.[4]

In addition to the procedural distinctions between the two proceedings, the issues in the Advisory Opinion to the Governor proceeding were different from the issues in this case. The narrow—and only—issue in the Advisory Opinion to the Governor proceeding was "whether the phrase 'all terms of sentence' [in Amendment 4] encompasse[d] legal financial obligations (LFOs)—fines, restitution, costs, and fees—ordered by the sentencing court." Id. at 1072. The governor, in his request for an advisory opinion, specifically said that he did "not ask [the] Court to address any issues regarding . . . the United States Constitution." Id. at 1074. The Florida Supreme Court took the Governor at his word, noting that "[d]uring oral

[4] Indeed, it is relatively common for separate, related cases to be pending simultaneously in the federal and state court systems, or to be pending simultaneously in different state court systems. Even though those cases often involve the same parties and issues, they are not the same "proceeding" for purposes of Canon 3(C).

argument, counsel for the Governor made clear that the Governor requests advice solely as to the narrow question of whether the phrase 'all terms of sentence' includes LFOs ordered by the sentencing court. We answer only that question." Id. at 1074–75 (emphasis added). That's all that the proceeding involved and all the Florida Supreme Court decided. Its advisory opinion said not one word about any federal constitutional issue.[5]

In the present case, by contrast, the meaning of "completion of all terms of sentence" is not an issue. Before the Governor requested an advisory opinion from

[5] Appellees argue that the constitutional avoidance canon of statutory construction was involved before the Florida Supreme Court, and because it was, the Fourteenth and Twenty-Fourth Amendment issues in this case were considered in the Advisory Opinion to the Governor proceeding. The fundamental flaw in that argument is that canon applies only if there are "competing plausible interpretations of statutory text." The threshold requirement is that the language being interpreted is ambiguous. See Iancu v. Brunetti, 139 S. Ct. 2294, 2301 (2019) ("This Court, of course, may interpret ambiguous statutory language to "avoid serious constitutional doubts. But that canon of construction applies only when ambiguity exists." (citation and internal quotation marks omitted; emphasis added)); F.C.C. v. Fox Tel. Stations, Inc., 556 U.S. 502, 516 (2009) ("The so-called canon of constitutional avoidance is an interpretive tool, counseling that ambiguous statutory language be construed to avoid serious constitutional doubts." (emphasis added)).

The Florida Supreme Court in its advisory opinion did not even mention the constitutional avoidance canon for the obvious reason, as its opinion makes clear, that it was not involved or applied. It was not involved or applied because the court unanimously found that the meaning of the phrase "all terms of sentence" was plain, it was clear, there was no ambiguity. See Advisory Opinion to the Governor, 288 So. 3d at 1081 ("We conclude that 'all terms of sentence' plainly encompasses not only durational terms but also obligations and therefore includes all LFOs imposed in conjunction with an adjudication of guilt. As explained next, we reject as overly technical the arguments advanced by certain Non-State Parties that Amendment 4 encompasses only some LFOs." (emphasis added)).

Because it found there was no basis for doubt about what that language meant, and because the Governor's request expressly excluded any question about any federal constitutional issue, the Florida Supreme Court did not consider or discuss, directly or indirectly, explicitly or implicitly, the federal constitutional issues involved in the present case. It had no occasion to do so.

the Florida Supreme Court, Appellees themselves alleged in their complaint that Senate Bill 7066 defined the phrase "to include not only any term of imprisonment, probation, community control or supervision (collectively, 'carceral supervision'), but also the full payment of any LFOs, including restitution, fines and fees 'ordered by the court as part of the sentence or that are ordered by the court as a condition of any form of supervision,' even if those obligations have been converted to civil liens." (DE 84 at 16–17.) Thus, this case takes as a given that Florida requires full payment of LFOs before restoration of voting rights and, assuming that, asks whether this requirement violates the Fourteenth and Twenty-Fourth Amendments.

Section 455(a) and the Senate Judiciary Committee Questionnaires

Appellees also contend that we're disqualified under 28 U.S.C. section 455(a) because of our questioning during oral argument in the Advisory Opinion to the Governor proceeding and our written answers to questions from the Senate Judiciary Committee. Section 455(a) requires that a judge "disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a).

"[T]he standard for determining whether a judge should disqualify himself under [section] 455 is an objective one, whether a reasonable person knowing all the facts would conclude that the judge's impartiality might reasonably be questioned."

United States v. Greenough, 782 F.2d 1556, 1558 (11th Cir. 1986); see also United States v. Scrushy, 721 F.3d 1288, 1303 (11th Cir. 2013) (motion to recuse under section 455(a) is "whether an objective, disinterested lay observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt about the judge's impartiality"); United States v. Carlton, 534 F.3d 97, 100 (2d Cir. 2008) ("In determining whether Section 455(a) requires recusal, the appropriate standard is objective reasonableness—whether 'an objective, disinterested observer fully informed of the underlying facts [would] entertain significant doubts that justice would be done absent recusal.'" (citations omitted)). Moreover, section 455(a)'s recusal requirement is "commonly limited to those circumstances in which the alleged partiality 'stem[s] from an extrajudicial source.'" Carlton, 534 F.3d at 100 (quoting Liteky v. United States, 510 U.S. 540, 544 (1994)).

Carlton is instructive on the application of that objective standard. In that case, the defendant had been on a five-year term of supervised release resulting from a previous bank robbery conviction. The government sought revocation of supervised release, alleging that the defendant committed another bank robbery while on supervised release. The district court held a revocation hearing and, after concluding that the government had proved by a preponderance of the evidence that the defendant had committed the second robbery, revoked the defendant's term of

supervised release and imposed a 30-month term of imprisonment for the previous bank robbery conviction. Later, the defendant was indicted on three counts relating to the second bank robbery, and the case was assigned to the same district court judge who had held the revocation hearing and determined that the defendant had committed the second bank robbery. The defendant moved to recuse under section 455(a), and the district court denied that motion. The case proceeded to trial and then appeal, including appeal of the denial of the recusal motion. The Second Circuit concluded that section 455(a) did not require recusal, holding that "[h]aving heard evidence and made a determination of defendant's guilt in a revocation hearing, a judge may properly preside over the subsequent criminal trial for the same offense." Id.

The Second Circuit in Carlton relied on Liteky in reaching its conclusion. In Liteky, the Supreme Court did not adopt a bright line rule that section 455(a) only applied to extrajudicial conduct, but stated that "it would be better to speak of the existence of a significant (and often determinative) 'extrajudicial source' factor, than of an 'extrajudicial source' doctrine, in recusal jurisprudence." 510 U.S. at 554–55. The Supreme Court then described judicial conduct that would not require recusal under section 455(a). "First, judicial rulings alone almost never constitute a valid basis for a bias or partiality motion. In and of themselves (i.e., apart from

surrounding comments or accompanying opinion), they cannot possibly show reliance upon an extrajudicial source, and can only in the rarest circumstances evidence the degree of favoritism or antagonism required . . . when no extrajudicial source is involved." Id. at 555. The Supreme Court continued: "Second, opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge." Id.

The Supreme Court then turned to Berger v. United States, 255 U.S. 22 (1921) as an example of judicial remarks that would constitute "high degree of favoritism or antagonism that would make fair judgment impossible." Berger involved a World War I espionage case against German-American defendants. During the trial, the district court allegedly said: "'One must have a very judicial mind, indeed, not [to be] prejudiced against the German Americans' because their 'hearts are reeking with disloyalty.'" Liteky, 510 U.S. at 555 (quoting Berger, 255 U.S. at 28). Thus, to the extent that Appellees argue that our questions at oral argument in Advisory

Opinion to the Governor in and of themselves form a basis for disqualification under section 455(a), having reviewed the questions cited in Appellees' brief and using the objective standard required by section 455(a), those questions fail to meet the standard for recusal.

Turning to the substance of our written statements to the Senate Judiciary Committee, in our written answers to the Committee, we explained how we would resolve potential disqualification issues. Judge Luck wrote:

> The impartiality of judges, and the appearance of impartiality, are important for ensuring public confidence in our federal courts. If confirmed, I would carefully evaluate every case to determine whether recusal is warranted. In making these determinations, I will consult 28 U.S.C. § 455 and the Code of Conduct for United States Judges, as well as other applicable rules or guidance. I will also, as necessary and appropriate, consult with colleagues and ethics officials within the court system. I anticipate that there will be matters from which I will need to recuse myself, most notably cases on which I served as a lawyer, or as a trial or appellate judge. In every case, I will carefully consider whether recusal is necessary.

Similarly, Judge Lagoa wrote:

> The impartiality of judges, and the appearance of impartiality, are key to ensuring public confidence in our courts. A judge must recuse herself where her impartiality "might reasonably be questioned." 28 U.S.C. § 455(a); Canon 3(C)(1), Code of Judicial Conduct for United States Judges. If confirmed, I would conscientiously review and follow the standards for judicial recusal set forth in 28 U.S.C. § 455(a) and the Code of Conduct for United States Judges, as well as any other applicable rules or guidance. As necessary and appropriate, I would also consult with colleagues and ethics officials within the federal court system.

> In terms of specific examples of the types of cases I would recuse from if confirmed, I would recuse from cases in which my husband or his law firm appeared, as well as cases involving either the Supreme Court of Florida or the Florida Third District Court of Appeals while I was a member of either court. In addition, and as described in my responses to the Committee's Questionnaire, I currently conduct a review of each case assigned to me and apply the standards for judicial recusal under the Florida standard to determine whether I should recuse myself from a particular case. During my over 13 years on the bench, I have occasionally recused myself from cases based on that case-by-case review, for example where I knew a party or witness involved. If confirmed to the Eleventh Circuit, I would continue to conduct a review of each case assigned to me and apply the standards for judicial recusal in determining whether to recuse myself.

This is exactly what we have done. We've reviewed the Code of Conduct for United States Judges and 28 U.S.C. section 455. We have also consulted with experienced colleagues. We have carefully considered whether disqualification is legally required, and because we did not serve as lawyers or trial or appellate judges in this case, we've concluded that it is not.

Appellees point out that Judge Luck also wrote that "[i]f confirmed, I will recuse myself from any case where I ever played any role." Similarly, they point out that Judge Lagoa wrote that "I would recuse myself from any case in which I participated as a justice on the Supreme Court of Florida" and that if confirmed, "I would recuse from cases . . . involving either the Supreme Court of Florida or the Florida Third District Court of Appeals while I was a member of either Court." In

keeping with our pledge to the Committee, we have recused in those types of cases and we will continue to do so.[6]

Our statements to the Committee expressly use the word "case" to refer to a case pending before this Court. Appellees argue that, because as Justices on the Florida Supreme Court we heard oral argument in the Advisory Opinion to the Governor proceeding, we "played a role" or "participated" in this case. Thus, according to Appellees, if we do not recuse ourselves from this case we are not honoring our pledges and our impartiality might reasonably be questioned under section 455(a). Appellees' reading, however, suffers from the same mistaken

[6] For example, both Judge Luck and Judge Lagoa disqualified themselves from Calhoun v. Sec'y, Dep't of Corrs., Case No. 19-12331 and Dailey v. Sec'y, Dep't of Corrs., Case No. 19-15147, two federal habeas appeals. Additionally, Judge Luck has disqualified himself in Wilson v. Sec'y, Fla. Dep't of Corrs., Case No. 20-11089, and Judge Lagoa has disqualified herself in Rodriguez v. Att'y Gen., et. al, Case No. 18-12699, Sanchez v. Sec'y, Dep't of Corrs., Case No. 19-12086, and Robinson v. Florida, Case No. 20-10982, all of which are other federal habeas appeals. While these federal habeas appeals were not the same "proceedings" as the respective underlying state court cases, they required this Court to review the federal constitutional issues decided by the state trial and appellate courts, including the appellate court decision in which Judge Luck and Judge Lagoa served as a member of the panel and rendered a decision. This Court, in effect, would be reviewing the correctness of the decision of those state courts. In this case, by contrast, this Court will not be deciding the correctness of anything that the Florida Supreme Court decided or expressed a view about in Advisory Opinion to the Governor, because it only addressed and decided state law issues and federal courts are required to accept as state law anything that a state supreme court decides is state law. See Wilson v. Corcoran, 562 U.S. 1, 5 (2010) ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." (alteration in original)); Waddington v. Sarausad, 555 U.S. 179, 192 (2009) ("[W]e have repeatedly held that it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." (internal quotation marks omitted)).

Finally, as pledged to the Committee, Judge Lagoa has recused herself from cases where her husband's law firm appeared as counsel. See, e.g., Schuh v. American Express Bank, et al., Case No. 18-12753.

premise that we've already discussed in connection with Canon 3(C). That is, Appellees' argument assumes that the Advisory Opinion to the Governor proceeding is the same proceeding or case as this case and that as a result we previously played a role, were involved, or participated in this case. We didn't.

As we've already explained, this case and the Advisory Opinion to the Governor proceeding are not the same case. We did play a role, we were involved in, and we did participate in the Advisory Opinion to the Governor proceeding. We sat during oral argument and we asked questions to the lawyers appearing before that court. But Advisory Opinion to the Governor was a separate proceeding involving different persons, different issues, and different courts. Moreover, this case does not ask this Court to sit in review of or otherwise opine on the correctness of Advisory Opinion to the Governor—or any other decision by the Florida Supreme Court for that matter. We were never judges, lawyers, or litigants in this case, and did not have anything to do with this case, until after we became judges on this Court and Appellants filed their motion for rehearing en banc in the first appeal (the appeal from the preliminary injunction).

Appellees have not pointed to either judicial or extrajudicial statements that meet the legal standard requiring recusal under section 455(a). An objective, disinterested lay person, knowing that we asked questions in a different proceeding

(advisory vs. case-and-controversy), in a different court (Florida Supreme Court vs. federal court), with different issues (interpreting the state constitution vs. federal constitutional questions), and with different participants ("interested persons" vs. parties), would not reasonably entertain a significant doubt about our impartiality in this case.[7]

Conclusion

"There are twin, and sometimes competing, policies that bear" on the disqualification decision. Greenough, 782 F.2d at 1558.

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[7] Of note, Eleventh Circuit Rule 26.1-1 requires parties to file a Certificate of Interested Persons and Corporate Disclosure Statement at the outset of a case. The purpose of this filing is to alert judges to possible recusal issues. See, e.g., United States v. Dilullo, No. 2:07CV-0321-KJD-PAL, 2007 WL 3124544, at *2 (D. Nev. Oct. 23, 2007) (stating that the certificate "is necessary to enable the judges who have been assigned to this case to evaluate possible recusal"). To that end, Rule 26.1-2(a) requires the party to list all "persons . . . who have an interest in the outcome of the particular case or appeal" in their Certificate. The Certificate is filed by appellants and appellees early in the life of an appeal, Rule 26.1-1(a), and well before any party knows which member of this Court will be assigned to the panel or sitting en banc in their case.

This case has come before this Court twice, once after the district court granted the preliminary injunction and now after the trial. Each time en banc consideration by this Court has been requested. To the extent Appellees believed that we already had played a role in this case, each Certificate of Interested Persons was their opportunity to alert us of their belief. Indeed, it is common practice for attorneys in federal habeas appeals to list all of the state trial and appellate judges involved in the underlying state court trial and post-conviction proceedings. For example, the Certificates of Interested Persons filed in the federal habeas appeals discussed in footnote 6 did just that—they listed all of the state trial and appellate judges in the underlying state court proceedings, including Judge Luck and Judge Lagoa, who sat as members of the appellate panels that rendered decisions in the underlying state court actions. Significantly, Appellees did not list us—or any of the Florida Supreme Court Justices who participated in the Advisory Opinion to the Governor proceeding—on any of their Certificates. While the Certificate is not itself dispositive, as judges retain their own responsibility to review cases for potential disqualification issues, it confirms our conclusion that an objective, disinterested person knowing all of the facts and circumstances would not reasonably question our impartiality in this case.

> The first is that courts must not only be, but must seem to be, free of bias or prejudice. . . . A second policy is that a judge, having been assigned to a case, should not recuse himself on unsupported, irrational, or highly tenuous speculation. If this occurred the price of maintaining the purity of the appearance of justice would be the power of litigants or third parties to exercise a veto over the assignment of judges.
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> > Because there exists this second policy, our inquiry cannot stop with the questions: have a number of people thought or said that a judge should not preside over a given case? has the judge's failure to recuse himself been a subject of unfavorable comment in the media? or, would the judge have avoided controversy and the need for appellate review had he stepped aside?

Id. (quoting In re United States, 666 F.2d 690, 694 (1st Cir. 1981)). Or, as our Court has explained, "there is as much obligation for a judge not to recuse when there is no occasion for him to do so as there is for him to do so when there is." In re Moody, 755 F.3d 891, 895 (11th Cir. 2014) (internal quotation marks omitted). Having reviewed Appellees' motion, the Code of Conduct for United States Judges, section 455, the case law interpreting these provisions, Appellants' response, and Appellees' reply, we conclude that there is no occasion for us to recuse and we deny the disqualification motion.[8]

[8] Appellants argue that the motion to recuse should be denied on untimeliness grounds because Appellees delayed in filing it. Although there is no explicit timeliness requirement in section 455, the general rule is that if a party knows of circumstances that could lead a reasonable person to question the judge's impartiality, but does not make a motion for disqualification within a reasonable time after discovering these facts, that party may forfeit any available relief under section 455.

There is substantial authority supporting the Appellants' position that the motion could be

denied because it was not promptly filed. See, e.g., Summers v. Singletary, 119 F.3d 917, 921 (11th Cir. 1997); Phillips v. Amoco Oil Co., 799 F.2d 1464, 1472 (11th Cir. 1986) ("Counsel, knowing the facts claimed to support a [section] 455(a) recusal for appearance of partiality may not lie in wait . . . ."); United States v. Sykes, 7 F.3d 1331, 1339 (7th Cir. 1993) (denying a section 144 motion to recuse, in part, because filing the motion "[t]wo months after the allegedly prejudicial statement is certainly not 'at the earliest possible moment' after discovery of the prejudice"); see also Richard E. Flamm, Recusal and Disqualification of Judges: For Cause Motions, Peremptory Challenges and Appeals 189 (2018) ("Title 28 U.S.C. § 455 has often been interpreted in such a way as to require that a motion to disqualify a judge must be made in a timely fashion."); id. at 192 ("Most of the courts that have had an opportunity to consider the matter have ruled that a [section] 144 challenge [seeking recusal] that is not made in a timely fashion is subject to being rejected on that basis"); id. at 191 ("Courts have often refused to entertain objections [to a judge sitting] that have been lodged in an insufficiently prompt manner. Judges have been particularly reluctant to entertain [section] 144 motions that are not filed until after a substantive motion in the case has been made.").

Here, the motion was not filed until July 15, 2020, which was 140 days after the petition for rehearing en banc was filed on February 26, 2020 in the appeal from the grant of the preliminary injunction, and 34 days after the petition for hearing en banc was filed in this case seeking review of the grant of the permanent injunction. *See* Pet. Reh'g En Banc, Jones v. Governor of Fla., 950 F.3d 795 (11th Cir. 2020) (No. 19-14551); Pet. Initial Hr'g En Banc, Jones v. Governor of Fla., No. 20-12003 (11th Cir. June 11, 2020).

Nonetheless, it is not necessary to decide whether the motion to disqualify should be denied as untimely because it is denied for the reasons we have already explained.