IN THE DISTRICT COURT FOR OKLAHOMA COUNTY
STATE OF OKLAHOMA

OKPLAC, INC., d/b/a Oklahoma Parent Legislative Action Committee, et al.,	)	
Plaintiffs,	)	
v.	)	Case No. CV-2023-1857
STATEWIDE VIRTUAL CHARTER SCHOOL BOARD, et al.,	)	
Defendants.	)	

DEFENDANTS' CONSOLIDATED OPPOSITION TO PLAINTIFFS' MOTION TO DISQUALIFY JUDGE

Michael H. McGinley*
Steven A. Engel*
M. Scott Proctor, OBA No. 33590
DECHERT LLP

John A. Meiser*
NOTRE DAME LAW SCHOOL RELIGIOUS LIBERTY CLINIC

Michael R. Perri, OBA No. 11954
Socorro Adams Dooley, OBA No. 32716
PERRI DUNN, PLLC

Attorneys For Defendant St. Isidore of Seville Catholic Virtual School

Bryan Cleveland, OBA No. 33860
OKLAHOMA STATE DEPARTMENT OF EDUCATION OFFICE OF LEGAL SERVICES

Hiram Sasser, OBA No. 19559
FIRST LIBERTY

Anthony J. Ferate, OBA No. 21171
SPENCER FANE

Attorneys for Defendants Oklahoma State Department of Education and State Superintendent of Public Instruction, Ryan Walters, in his official capacity

Philip A. Sechler*
DC Bar No. 426358
J. Caleb Dalton**
VA Bar No. 83790
Mark Lippelmann**
AZ Bar No. 036553
ALLIANCE DEFENDING FREEDOM

Cheryl Plaxico, OBA No. 4499
PLAXICO LAW FIRM, PLLC

Attorneys for Statewide Virtual Charter School Board and its members in their official capacity, Robert Franklin, William Pearson, Nellie Tayloe Sanders, Brian Bobek, and Scott Strawn

**Admitted Pro Hac Vice*
***Pro Hac Vice Application Forthcoming*

Full counsel contact information on signature page

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INTRODUCTION

For reasons all their own, Plaintiffs have decided that they do not want the Assigned Judge, the Honorable C. Brent Dishman, presiding over this case. They are thus pulling out all the stops, arguing that disqualification is required because of (1) a concluded case from another jurisdiction in which the Assigned Judge was *not a party* and (2) a family relation of the Assigned Judge whom Plaintiff OKPLAC chose to elevate to its board *after learning* the Assigned Judge was on the case. Because these situations—one attenuated, the other contrived—do not raise a reasonable question about "the judge's impartiality," Okla. Code Jud. Conduct R. 2.11(A), neither requires disqualification. It is therefore the Assigned Judge's responsibility to "hear and decide" this case, *id.*, R. 2.7, and Plaintiffs' Motion to Disqualify should be denied.

ADDITIONAL FACTS

College of the Ozarks (the "College") is a Christian liberal arts college located in Point Lookout, Missouri. Mot., Ex. 1, Tr. of Proceedings in front of J. Dishman (Oct. 13, 2023) at 8. In 2022, the Board of Trustees (the "Board") on which the Assigned Judge serves had 19 members. *Nonprofit Explorer: College of the Ozarks*, ProPublica, https://projects.propublica.org/nonprofits/organizations/440556862 (last visited Dec. 19, 2023).

Alliance Defending Freedom ("ADF"), one of seven law firms representing one or more of the defendants in this case, represented the College in *School of the Ozarks, Inc. v. Biden*, No. 6:21-03089-CV-RK (W. D. Mo.), from March 2021 through June 2023. Declaration of Matthew S. Bowman (Dec. 18, 2023) ("Bowman Decl.") ¶ 6 (attached as Ex. A). The case involved a federal directive and executive order applying the federal Fair Housing Act to college dormitories. A federal court in Missouri dismissed the case for lack of standing, 2021 WL 2301938 (W. D. Mo. June 4, 2021), a decision that was affirmed by the U.S. Court of Appeals for the Eight Circuit, 41 F.4th 992 (8th Cir. 2023). ADF's representation of the College ended when the Supreme Court denied certiorari in June 2023, prior to Plaintiffs initiating this action. Bowman Decl. ¶ 9.

Neither the Board nor any of its members was a party to the *School of the Ozarks* case.

During its representation of the College, one or two ADF attorneys met with the Board on three occasions to provide limited comments on the status of the case. *Id.* ¶ 5. These updates (two of which were by video conference) were 10 to 15 minutes long and made up a small part of the Board's much longer agenda for its biannual meetings. *Id.* ¶ 6. ADF took no direction on litigating the case from the Board or any of its members. *Id.* ¶ 7.

On September 20, 2023, Defendants filed their motions to dismiss Plaintiffs' Petition in this action. On October 9, nearly a month later and a day after plaintiff OKPLAC elected Jennifer Dishman to its Board of Directors, Plaintiffs first requested the disqualification of the Assigned Judge. On October 13, the Court held a status conference to disclose that Judge Dishman was related by marriage to Ms. Dishman and that he served on the Board of Trustees of the College of the Ozarks, which had been represented by ADF in the *School of the Ozarks* case. Mot., Ex. 1, at 6–8. Following this hearing, Plaintiffs broadened their request for disqualification. On December 1, 2023, Plaintiffs filed a Motion to Disqualify pursuant to District Court Rule 15(a), claiming that the disclosures require disqualification.

ARGUMENT AND AUTHORITIES

"A judge shall hear and decide matters assigned to the judge, except when disqualification is required." Okla. Code Jud. Conduct R. 2.7. Disqualification is required when "the judge's impartiality might reasonably be questioned." *Id.*, R. 2.11(A). Because "[t]he common law contains a presumption that a judge is not biased," a party seeking disqualification "must point to some fact to substantiate a claim that the appearance of a fair trial is not present, or that the judge's impartiality might reasonably be questioned." *Miller Dollarhide, P.C. v. Tal*, 2007 OK 58, ¶ 18, 163 P.2d 548, 554 (quoting *Pierce v. Pierce*, 2001 OK 97, ¶¶ 19 & 21, 39 P.3d 791, 799). Without such a showing, the judge must "hear and decide" the case, as "[u]nwarranted disqualification may bring public disfavor to the court and to the judge personally." Okla. Code Jud. Conduct R. 2.7, Comment [1]. A judge should "not use disqualification to avoid cases that present difficult, controversial or unpopular issues," *id.*, and "should try to avoid recusal consistent with the judge's

obligation to the Court system." Jud. Ethics Op. 2007-3, ¶ 6, 162 P.3d 986, 986 (Okla. Jud. Eth. 2007).

Here, Plaintiffs fail to point to facts to substantiate their claim that the Assigned Judge's impartiality might reasonably be questioned. Their Motion to Disqualify should therefore be denied.

I. THE *SCHOOL OF THE OZARKS* CASE DOES NOT REQUIRE DISQUALIFICATION.

ADF's representation of the College in the *School of the Ozarks* case does not require or support disqualification. ADF did not represent the Assigned Judge personally or in any official capacity. ADF represented only the College, and that representation ended before this matter was filed. The College is not a party to this matter. Although ADF met with the Board on which the Assigned Judge sits, those meetings were few in number, brief in duration, and limited in scope. Each of these facts is significant, and together they show that this case is not one "in which the judge's impartiality might reasonably be questioned" under Rule 2.11(A).

First, it is significant that ADF did not represent the Assigned Judge in any personal or official capacity. Relationships that are "too attenuated" do not support recusal. *Long v. City of Piedmont*, 2015 OK CIV APP 85, ¶ 8-9, 359 P.3d 189, 192 (affirming denial of motion to disqualify where alleged "business partner" relationship and "affiliation" between trial judges who served together were "too attenuated to support recusal"). Failure to show some "famil[ial], social, political, financial, or other interests or relationships" that might reasonably bring into question the Court's judgment, Okla. Code Jud. Conduct R. 2.4(B), defeats any contention that a judge is "in the bag." *Long*, 359 P.3d at 192. Although the representation of a judge in an ongoing *personal* matter by an attorney appearing before the judge can be one such relationship, Jud. Ethics Op. 1999-3, ¶ 6, 86 P.3d 663, 664 (Okla. Jud. Eth. 1999), the "mere prior association" presented here does not "form a reasonable basis for questioning a judge's impartiality." *See Maier v. Orr*, 758 F.2d 1578, 1583 (Fed. Cir. 1985) (holding that judge's former military service and pension did not constitute grounds for recusal in suit against the Air Force). "To hold otherwise would mean that

Judges would have to recuse themselves in every case in which a litigant could point to the single fact of a prior association with a party or his attorney and would set a precedent that would certainly prove troublesome, to say the least, to every member of the . . . Judiciary." *Bumpers v. Uniroyal Tire Co., Division of Uniroyal Inc.*, 385 F. Supp. 711, 714 (E.D. Pa. 1974).

Even Plaintiffs state the rule as requiring disqualification "[w]hen counsel appearing before the court is currently representing or recently represented *the assigned judge*." Mot. 9 (emphasis added). Indeed, the cases they cite concern disqualification where counsel appearing before the judge represented the judge *personally*. *See Ballard v. Campbell*, 127 So. 3d 693 (Fla. Dist. Ct. App. 2013) (recusal required when counsel represented judge in dissolution of marriage); *Smith v. Sikorsky Aircraft*, 420 F. Supp. 661 (C.D. Cal. 1976) (reassignment made when counsel had represented judge in private suit and in mandamus proceeding); *In re Howes*, 880 N.W.2d 184 (Iowa 2016) (disqualification required when counsel represented judge in divorce proceedings); *Carbana v. Cruz*, 595 F. Supp. 585 (D.P.R. 1984) (recusal announced where lawyer had represented judge in disbarment proceeding); *Catsimatidas v. Innovative Travel Grp., Inc.*, No. 84 CIV. 5697 (SWK), 1988 WL 3420 (S.D.N.Y. Jan. 13, 1988) (recusal announced where counsel had represented judge in property sale). It is notable that although Plaintiffs present cases from across the country over a period of more than 40 years, none supports disqualification in a situation like this—where counsel appearing before it merely had represented an entity with which the judge is affiliated.[1]

Second, it is equally significant that ADF's representation of the College has concluded. The Oklahoma Judicial Ethics Advisory Panel endorsed the principle that the "mere fact that a

[1] The authorities on affiliated entities that Plaintiffs cite are likewise inapposite. *See* Okla. Code Jud. Conduct R. 2.11(A)(2)(a) (requiring disqualification when judge is officer or director "of a party"); Mass. Jud. Branch Comm. Jud. Eth. Op. No. 91-3, 1991 WL 11760277, at *1 (Dec. 30, 1991) (judge who serves on advisory committee of hospital must recuse himself from any cases where hospital is "a party"); *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 850 (1988) (judge's membership on university board created appearance of impropriety where university's real estate sale worth several million dollars "turned, in large part, on [party] prevailing in the litigation" pending before judge).

judicial officer was formerly represented by a law firm presently appearing before a [sic] him would not, per se, require disqualification based on appearance of impropriety." Op. 1999-3, ¶ 8 (quoting *McKeague v. Talbert*, 3 Haw. App. 646, 658 P.2d 898 (1983) (overruled on other grounds)). The appearance arising from the fact of past representation "will ordinarily be much less disturbing" than the appearance arising from concurrent representation. *Reilly ex rel. Reilly v. Se. Pa. Transp. Auth.*, 479 A.2d 973, 979 (Pa. Super. 1984). "In appraising the significance of past representation . . . the fact that it *is* past must be recognized." *Id.*

Plaintiffs' emphasis on the language in Judicial Ethics Opinion 1999-3 that a judge "should probably" recuse when his representation by the attorney is "somewhat current," Mot. 9, is a red herring. That opinion concerns the question of disqualification when an attorney had represented the judge individually in a "*personal* legal matter." Op. 1999-3, ¶ 6 (emphasis added). Because ADF has not represented the Assigned Judge in any capacity, that language is inapplicable. On the contrary, the one case cited favorably in the Panel's opinion, *McKeague*, cuts directly against Plaintiffs' position. There, the court held disqualification was *not required* where counsel appearing before the court had represented a corporation of which the judge was a minority stockholder. The court reasoned that "the corporation was not before court, the corporate action was completed, and the law firm no longer represented the corporation." 658 P.2d at 654–55. Each of those circumstances is present here: the College is not before the Court, the College's case has concluded, and ADF no longer represents the College. Indeed, much like the court in *McKeague,* the Oklahoma Judicial Ethics Advisory Panel expressly rejected "a policy requiring Judges to disqualify themselves simply because of prior professional relationships with attorneys" due to the burden that would place upon the judiciary. Op. 1999-3, ¶ 11.[2]

Third, the circumstances underlying ADF's representation of the College demonstrate the

[2] The Oklahoma Code of Judicial Conduct permits a judge to "serv[e] as an officer, director, trustee, or nonlegal advisor" of an educational or religious non-profit entity, with the only caveat being a judge should not serve when "it is likely" *the entity itself* will ordinarily be "engaged" in proceedings before the judge or court of which the judge is a member. Okla. Code Jud. Conduct R. 3.7(A)(6).

attenuated nature of the Assigned Judge's prior experience with ADF. One or two ADF attorneys met with the Board three times over the course of thirteen months to provide limited comments on the status of the *School of the Ozarks* case. Bowman Decl. ¶ 6. These updates were only 10 to 15 minutes long and made up a small part of the Board's much longer agenda for their biannual meetings. *Id.* ¶ 7. And when ADF provided these updates, it took no instruction from the Board. *Id.* ¶ 8; *see Harris v. Bd. of Supervisors of La. State Univ. & Agric. & Mech. Coll. ex rel. LSU Health Sci. Ctr. Shreveport*, 409 F. App'x 725, 727–28 (5th Cir. 2010) (affirming denial of motion to recuse in action against university because university was managed by board of supervisors, not law center board of which district judge was a member). Under these circumstances, the Assigned Judge's service on the College's Board cannot be said to "create a doubt regarding [the Assigned Judge]'s bias or impartiality." *Bryan v. State*, 1997 OK CR 15, ¶ 28, 935 P.2d 338, 355, as corrected (Mar. 24, 1997).

Finally, Plaintiffs offer no basis for their argument that "if the Assigned Judge remains on the case, he will need to issue a decision on legal questions whose resolution could also substantially affect the College in an unresolved legal controversy." Mot. 11. Far from being unresolved, the *School of the Ozarks* case is over.[3] And no decisions by this Court could have *any* effect on that case, as the questions presented there (federal Fair Housing Act applied to college dorms) are different from those presented here and this Court's rulings would have no precedential value to the federal courts that handled the *School of the Ozarks* case. Because Plaintiffs fail to offer any plausible explanation as to how the College would benefit from any of the Assigned Judge's rulings in this action, they have failed to show how the "circumstances and conditions surrounding [this] litigation" would "preclude reasonable [observers] from feeling that a fair and impartial trial can be had before [the Assigned Judge]." *Sadberry v. Wilson*, 1968 OK 61, ¶¶ 12–

[3] Plaintiffs' conjecture that ADF "could" represent the College in the future, Mot. 10, is too speculative to raise any question about the Court's impartiality. "A judge should not recuse himself on unsupported, irrational, or highly tenuous speculation." *Hinman v. Rogers*, 831 F.2d 937, 939 (10th Cir. 1987) (citing *United States v. Greenough*, 782 F.2d 1556, 1558 (11th Cir.1986)).

18, 441 P.2d 381, 384.

II. THE ASSIGNED JUDGE'S SISTER-IN-LAW'S ROLE WITH OKPLAC DOES NOT REQUIRE DISQUALIFICATION

Jennifer Dishman's relationship with OKPLAC does not require or support disqualification either. A judge is presumed to be impartial, *Pope v. Fed. Exp. Corp.*, 974 F.2d 982, 985 (8th Cir. 1992), and the party moving for recusal has the "substantial burden" of showing otherwise, *Hinman*, 831 F.2d at 939; *see State ex rel. Vahlberg v. Crismore*, 1949 OK CR, 90 Okla Crim. 244, 246, 213 P.2d 293, 295; *see also Holloway v. Hopper*, 1993 OK 56, ¶¶ 5–7, 852 P.2d 711, 713 (looking to federal case law for guidance). Plaintiffs have failed to meet this heavy burden.

A. Plaintiffs' Past Arguments Betray Their Effort to Engineer Recusal.

To start, this Court should not ignore the evidence that Plaintiffs have sought from the start to use Ms. Dishman's relationship with OKPLAC to engineer the Assigned Judge's recusal. Any such effort is improper. Many courts have observed that "[i]n the real world, recusal motions are sometimes driven more by litigation strategies than by ethical concerns," *In re Kan. Pub. Emps. Ret. Sys.*, 85 F.3d 1353, 1360 (8th Cir. 1996) (quotations omitted), which means they "are the frequent instruments of misuse," *Alvarado Morales v. Digit. Equip. Corp.*, 699 F. Supp. 16, 19 (D.P.R. 1988) (cleaned up). Recognizing this risk, courts have made plain that parties "cannot be allowed to create the basis for recusal by their own deliberate actions." *United States v. Owens*, 902 F.2d 1154, 1156 (4th Cir. 1990); *see also, e.g., In re Ball*, 2006 WL 2038641, at *6 (Bankr. D. Ariz. Apr. 5, 2006) ("A litigant cannot manufacture a conflict of interest as a source of recusal bias"). If a motion for recusal is "essentially a judge shopping attempt," denial is "proper[]." *United States v. Williams*, 624 F.3d 889, 894 (8th Cir. 2010) (quotations omitted); *cf., e.g., Sears v. Citizens Exch. Bank of Pearson*, 166 Ga. Ct. App. 840, 842, 305 S.E.2d 609, 611 (1983) ("judge shopping" is "a practice that courts abhor").

Here, the declaration of Plaintiffs' attorney states that Plaintiffs first filed their *in camera* letter requesting recusal on October 9, the day after Ms. Dishman was elected to the OKPLAC Board of Directors. *See* Mot., Ex. 8, Decl. of Kenneth D. Upton, Jr. (Nov. 29, 2023) ("Upton

Decl.") ¶ 3. The declaration says that the October 9 letter merely "explained that [Judge Dishman's] sister-in-law Jennifer Dishman is a member of the Steering Committee of plaintiff OKPLAC, Inc." *Id.* That description is woefully incomplete.[4] As the Court is aware, the October 9 letter *also* informed the Court that Ms. Dishman had just been elected to the OKPLAC Board of Directors and then quoted the section of the Oklahoma Code of Judicial Conduct that provides that the Court should recuse if a third-degree relative is a "director." Rule 2.11(A)(2)(a). The letter makes plain that Plaintiffs believed Ms. Dishman's recent elevation to the OKPLAC Board of Directors would force the Assigned Judge to recuse.

Plaintiffs are now in full retreat from that argument. *See* Mot. 7 n.1, 16 n.2; Upton Decl. ¶ 3. They have reason to be. The underlying events leading to Ms. Dishman's appointment to the OKPLAC Board of Directors demonstrate that Plaintiffs' recusal request is nothing more than an impermissible effort to manipulate the court system. According to Plaintiffs, they learned of Ms. Dishman's relationship with the Assigned Judge as early as September 20—the day that Defendants filed their motions to dismiss. *See* Mot. 7 n.1. At that point, they were aware that electing Ms. Dishman to the OKPLAC Board of Directors could implicate Rule 2.11(A). Yet they forged ahead with Ms. Dishman's nomination and election to the OKPLAC Board of Directors on October 8. *Id.* Then, one day later, on October 9, Plaintiffs sent a letter to the Court raising the issue and purporting to decline to waive disqualification. Upton Decl. ¶ 3. Their actions and their letter lead to only one conclusion: They want to force the Assigned Judge to recuse, and have taken steps to achieve that end.[5]

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[4] Defendants do not here submit non-docketed materials from *in camera* proceedings. However, Defendants note that Plaintiffs have submitted papers purporting to explain what those *in camera* materials said. *See, e.g.*, Upton Decl. ¶ 3. Where appropriate, Defendants generally describe what Plaintiffs left out of their description. The Court has access to the *in camera* materials to confirm Defendants' reading of them.

[5] Plaintiffs deny that Ms. Dishman was elected to the OKPLAC Board of Directors in order to engineer recusal. *See* Mot. 7 n.1. But they do not deny that they went ahead with Ms. Dishman's election even after learning of her relation to the Assigned Judge.

The Oklahoma Code of Judicial Conduct does not require this Court to countenance Plaintiffs' effort to judge shop by orchestrating a supposed conflict. On the contrary, the Code contains "rules of reason that should be applied consistent with" the law and "with due regard for all relevant circumstances." Okla. Code Jud. Conduct, Scope ¶ [5]. They "should not be interpreted to impinge upon the essential independence of judges in making judicial decisions." *Id.* And they are not "intended to be the basis for litigants . . . to obtain tactical advantages in proceedings before a court." *Id.* ¶ [7]. Thus, Plaintiffs' "attempt to create recusal by affirmative actions counsels *against* recusal, 'les[t] we encourage tactics designed to force recusal.'" *United States v. Williams*, 2010 WL 3120189, at *4 (E.D. Ky. Aug. 5, 2010) (quoting *United States v. Bertoli*, 40 F.3d 1384, 1414 (3d Cir. 1994)) (cleaned up). This Court should reject Plaintiffs' effort to judge shop.

B. Plaintiffs' Argument Fails on the Merits.

Plaintiffs' late-breaking effort to refocus their motion on Ms. Dishman's membership on the OKPLAC Steering Committee in any event fails. Rule 2.11(A) notes that a "judge shall disqualify himself" if the judge learns that the spouse of "a person within the third degree of relationship" to him is "a party to the proceeding, or an officer, director, general partner, managing member, or trustee of a party." Plaintiffs' motion explains that until October 8—the day before their first *in camera* letter—Ms. Dishman held no such position within OKPLAC. *See* Mot. 7 n.1. None of Plaintiffs' efforts to conflate Ms. Dishman's previous position on OKPLAC's Steering Committee with her position on OKPLAC's Board of Directors, *see* Mot. 12–13, changes the fact that she was not an "officer, director, general partner, managing member, or trustee" until Plaintiffs decided to make her one.[6]

Even if this Court were inclined to interpret Rule 2.11(A) to include other corporate actors besides directors, Plaintiffs still fail to justify disqualification. They manifestly fail to show that a

[6] If anything, by listing specific roles, the Rule's text implies that other roles not listed do *not* require disqualification. *Cf. Patterson v. Beall*, 2000 OK 92, ¶ 24, 19 P.3d 839, 845 (explaining the maxim "expressio unius est exclusiio alterius," which means that "the mention of one thing in a statute impliedly excludes another thing").

member of a "Steering Committee" is sufficiently similar to a "director" to fall within Rule 2.11(A)'s ambit. As Ms. Dishman's and Ms. Bradley's declarations make plain, OKPLAC Steering Committee members perform separate and distinct functions from the Board of Directors. *See* Mot. to Disqualify, Ex. 6, Decl. of Misty Bradley (Nov. 30, 2023) ("Bradley Decl.") ¶ 7; *id.* Ex. 7, Decl. of Jennifer Dishman (Nov. 30, 2023) ("Dishman Decl.") ¶ 9. It is the OKPLAC Board of Directors that runs "the day-to-day functions" pursuant to OKPLAC's bylaws. Dishman Decl. ¶ 6. In contrast, members of OKPLAC's massive 48-person Steering Committee merely represent local chapters and occupy an occasional role distinct and apart from the role played by directors. *Id.* ¶ 7. It meets only a handful of times a year. *Id.* By contrast, Plaintiffs' own declarations make clear that membership on OKPLAC's Board of Directors is significantly more demanding—and indeed the work of the Board is so "challenging" and "tiring" that OKPLAC has difficulty finding qualified individuals "willing to make that commitment" for even a single two-year term. Bradley Decl. ¶ 16. Ms. Dishman's many years of membership on the apparently much less demanding Steering Committee is plainly not the same—and that position is insufficient to support disqualification under Rule 2.11.

If anything, Plaintiffs' shifting strategy belies their claim that the Steering Committee somehow has "more power" than the OKPLAC Board of Directors. *See* Mot. 15. If Plaintiffs honestly thought this, they would have raised the issue and filed a motion to disqualify *immediately* upon learning of Ms. Dishman's relationship to the Assigned Judge. Instead, they sat on their hands for nearly three weeks—and acted the *day after* Ms. Dishman was elected to the OKPLAC Board of Directors to seek recusal. The fact that they have disavowed any argument focused on that late-breaking Board membership amplifies the point, and reinforces that this motion is inappropriate and untimely. *See supra* and *infra.*

Plaintiffs rely on two cases, neither of which helps them. Start with *Santos v. Chappell*, 318 N.Y.S.2d 570 (Sup. Ct. 1971)—a New York trial court case addressing an arcane issue of New York corporate law that (according to Lexis and Westlaw) has been cited in just two other cases. Plaintiffs cite this case for its conclusion that a particular organization's "Board of Governors"

acted as its de facto Board of Directors. Mot. 14. But, regardless whether that was true for the particular entity in that case, this of course does nothing to suggest that the entity OKPLAC formed as its "Board of Directors" is not, in fact, its board of directors. Indeed, the "Board of Governors" in *Santos* exercised a host of budgetary and organizational powers, could "review and approv[e]" "[a]ll actions" of the relevant board of directors, and had a long history of exercising those powers. *See Santos*, 318 N.Y.S.2d at 573–76. It was different in kind from OKPLAC's Steering Committee, which (according to Plaintiffs) meets occasionally to decide "high-level OKPLAC policy matters" and hears "report[s]" on "spending of OKPLAC funds." Dishman Decl. ¶ 9.

Then consider *First Covenant Trust v. Willis*, 2023 WL 2200599 (Tenn. Ct. App. Feb. 24, 2023). This case merely notes that "[i]t is not the title of the employee that matters, but rather whether that employee has 'skin in the game.'" Mot. 14. But the court found *against* disqualification in *Willis*, as the judge's spouse—a part-time "senior manager" of a related organization—"simply [did] not fall within the category of 'an officer, director, general partner, managing member, or trustee.'" 2023 WL 2200599, at *3. Indeed, the *Willis* court emphasized that "[a] judge should not decide to recuse unless a recusal is *truly called for* under the circumstances." *Id.* (citation omitted) (emphasis added). As in *Willis*, no "objective, knowledgeable member of the public" would find a third-degree relative's extracurricular administrative involvement in an advocacy organization, which only meets a handful of times a year, as "a reasonable basis for doubting the judge's impartiality." *See id.* (citation omitted). If anything, *Willis* counsels *against* disqualification here.

In summary, Ms. Dishman is not "an officer, director, general partner, managing member, or trustee" of OKPLAC by dint of her membership on OKPLAC's Steering Committee, R. 2.11(A)(2)(a). Plaintiffs' motion thus fails on the merits and should be dismissed.

C. Plaintiffs Waived Their Argument for Disqualification.

Plaintiffs have no right to demand disqualification. But even if they had such a right, they long ago waived it. First, Plaintiffs' initial attempt to engineer recusal by placing Ms. Dishman on

the OKPLAC Board of Directors *during litigation* constitutes waiver of any right to move for recusal. Oklahoma Code of Judicial Conduct Rule 2.11(C) specifically contemplates waiver, and the Oklahoma courts have held that the "right to disqualify the judge is a personal privilege that may be waived." *Pierce*, 39 P.3d at 800. When a party creates the circumstances giving rise to a recusal request, "the principle of waiver bars him from complaining" when his request is denied. *Sullivan v. Conway*, 157 F.3d 1092, 1096 (7th Cir. 1998). Plaintiffs did just that by pushing forward Ms. Dishman's appointment to their Board with full knowledge of her relationship with the Assigned Judge.

Second, Plaintiffs unjustifiably delayed seeking disqualification, thus waiving their right to it. Courts require parties to seek recusal or disqualification "in a timely fashion," before the court begins reviewing motions or invests significant time and effort into the case. *United States. v. Kimball*, 73 F.3d 269, 273 (10th Cir. 1995); *see also, e.g.*, *Burke v. Regalado*, 935 F.3d 960, 1053 (10th Cir. 2019); *In re United States*, 441 F.3d 44, 65 (1st Cir. 2006) ("[A] party must raise the recusal issue at the earliest moment after acquiring knowledge of the relevant facts.") (cleaned up). Plaintiffs failed to do that here. By their own admission, Plaintiffs learned about Ms. Dishman's involvement with OKPLAC on September 20, 2023, the day that Defendants filed their Motions to Dismiss. Mot. 7 n.1. At that point, they were aware of the facts that they now allege implicate Rule 2.11(A). Yet they failed to seek disqualification on that basis, and instead delayed for nearly three weeks as OKPLAC placed Ms. Dishman on its Board. Only then did Plaintiffs send an *in camera* letter to the Court raising the Ms. Dishman's relationship to OKPLAC and declining to waive disqualification. *See* Mot. 7 & n.1. Plaintiffs offer no reason why they failed to seek recusal based on Ms. Dishman's Steering Committee membership earlier than October 9th. And once the Court completed its *in camera* review, Plaintiffs waited yet longer to file their Motion to Disqualify. At the October 13 proceedings, the Court cautioned that the case should not be "delayed unnecessarily" and expressed skepticism towards Plaintiffs' actions in requesting recusal "with full knowledge of the identity of the judge in the case and the immense amount of work and numerous filings that have already been made." *See* Mot., Ex. 1, at 7, 12. Even so, it took Plaintiffs

until December 1—nearly a month after the Court concluded that it need not recuse—to file their motion. Since October 9, the case has progressed further, with both counsel and Court investing additional time and resources, including filing substantial briefing on the merits of Plaintiffs' claims. Plaintiffs have failed to act in a timely manner and have thus waived any right to demand recusal.

* * *

The Oklahoma County District Court assigned this case using the same fair and impartial method it uses to assign every case. But Plaintiffs would prefer that it be assigned elsewhere. So Plaintiffs appear to have engineered circumstances that they hope might disqualify the Assigned Judge and give them another spin of the wheel that might land them before a jurist more to their liking. Indeed, Plaintiffs have expressed their intent to press for a new judge by appealing to the Chief Judge of this Court and then seeking mandamus from the Oklahoma Supreme Court. A. Luchenitser Ltr. to Court (Dec. 6, 2023) at 1. But Ms. Dishman's membership on OKPLAC's Steering Committee plainly does not merit recusal, a fact that Plaintiffs themselves seem well aware of given their efforts to elect her to the Board of Directors before seeking any disqualification on these grounds. Allowing Plaintiffs' dilatory and pernicious tactics to succeed would only disrupt the case assignment process and undermine confidence in this Court. The Court must refuse to countenance such gamesmanship.

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion to Disqualify Judge should be denied.

Dated: December 19, 2023

Respectfully submitted,

Anthony J. Ferate, OBA No. 21171
SPENCER FANE LLP
9400 North Broadway Extension,
Suite 600
Oklahoma City, Oklahoma 73114-7423
T: (405) 844-9900
ajferate@spencerfane.com

Bryan Cleveland, OBA No. 33860
OKLAHOMA STATE DEPARTMENT
OF EDUCATION
Oliver Hodge Building
2500 North Lincoln Boulevard
Oklahoma City, Oklahoma 73105
T: (405) 521-3301
bryan.cleveland@sde.ok.gov

Hiram Sasser, OBA No. 19559
FIRST LIBERTY INSTITUTE
2001 West Plano Parkway, Suite 1600
Plano, TX 75075
T: (972) 941-4444
hsasser@firstliberty.org

Attorneys for Defendants Oklahoma State Department of Education and State Superintendent of Public Instruction, Ryan Walters, in his official capacity

Cheryl Plaxico, OBA No. 4499
PLAXICO LAW FIRM, PLLC
923 N. Robinson Ave., 5th Floor
Oklahoma City, OK 73102
T: (405) 400-9609
cplaxico@plaxico.law

Philip A. Sechler (DC Bar No. 426358)*
J. Caleb Dalton (VA Bar No. 83790)**
ALLIANCE DEFENDING FREEDOM
44180 Riverside Parkway
Lansdowne, VA 20176
T: (571) 707-4655
psechler@adflegal.org
cdalton@adflegal.org

Mark Lippelmann (AZ Bar No. 036553)**
ALLIANCE DEFENDING FREEDOM
15100 N. 90th St.
Scottsdale, AZ 85260
T: (480) 444-0020
mlippelmann@adflegal.org

Attorneys for Statewide Virtual Charter School Board and its members in their official capacity, Robert Franklin, William Pearson, Nellie Tayloe Sanders, Brian Bobek, and Scott Strawn

Michael H. McGinley*
Steven A. Engel*
M. Scott Proctor, OBA No. 33590
DECHERT LLP
1900 K Street, NW
Washington, DC 20006
T: (202) 261-3308
michael.mcginley@dechert.com
steven.engel@dechert.com
scott.proctor@dechert.com

John A. Meiser*
NOTRE DAME LAW SCHOOL RELIGIOUS LIBERTY CLINIC
1338 Biolchini Hall of Law
Notre Dame, IN 46556
T: (574) 631-3880
jmeiser@nd.edu

Michael R. Perri, OBA No. 11954
Socorro Adams Dooley, OBA No. 32716
PERRI DUNN, PLLC
100 N. Broadway, Suite 3280
Oklahoma City, OK 73102
T: (405) 724-8543
mrperri@perridunn.com
sadooley@perridunn.com

Attorneys For Defendant St. Isidore of Seville Catholic Virtual School

**Admitted Pro Hac Vice*
***Pro Hac Vice Application Forthcoming*

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of December, 2023, I caused a true and correct copy of the above and foregoing Defendants' Consolidated Opposition to Motion to Disqualify Judge to be served by electronic mail pursuant to the Stipulation Concerning Electronic Service entered on September 7th, 2023 upon:

Alex J. Luchenitser (luchenitser@au.org)
Kenneth D. Upton, Jr. (upton@au.org)
Kalli A. Joslin (joslin@au.org)
Daniel Mach (dmach@aclu.org)
Heather L. Weaver (hweaver@aclu.org)
Robert Kim (RKim@edlawcenter.org)
Jessica Levin (JLevin@edlawcenter.org)
Wendy Lecker (WLecker@edlawcenter.org)
Patrick Elliott (pelliott@ffrf.org)
Karen Heineman (kheineman@ffrf.org)
Benjamin H. Odom (odomb@odomsparks.com)
John H. Sparks (sparksj@odomsparks.com)
Michael W. Ridgeway (ridgewaym@odomsparks.com)
Lisa M. Millington (millingtonl@odomsparks.com)
Alyssa Kirkham (kirkhama@odomsparks.com)
Cody Serna (sernac@odomsparks.com)
J. Douglas Mann (douglassmann66@icloud.com)
Sarah M. Taitz (taitz@au.org)
Jennifer A. Samuels (samuels@au.org)

Respectfully submitted,

Cheryl Plaxico

EXHIBIT A

IN THE DISTRICT COURT FOR OKLAHOMA COUNTY
STATE OF OKLAHOMA

OKPLAC, INC., d/b/a Oklahoma Parent Legislative Action Committee, et al.,	)	
Plaintiffs,	)	
v.	)	Case No. CV-2023-1857
STATEWIDE VIRTUAL CHARTER SCHOOL BOARD, et al.,	)	
Defendants.	)	

DECLARATION OF MATTHEW S. BOWMAN

I, Matthew S. Bowman, do hereby declare and state as follows:

1. I am Senior Counsel and Director of Regulatory Practice of Alliance Defending Freedom ("ADF") in Washington, D.C. I have personal knowledge of the facts set forth below.

2. ADF represented the College of the Ozarks (the "College") in the case of *School of the Ozarks v. Biden,* No. 6:21-03089-CV-RK (W. D. Mo.) from March 2021 through June 2023. I was one of the ADF attorneys involved in that representation.

3. The case involved a federal directive and executive order applying the federal Fair Housing Act to college dormitories.

4. Neither the Board of Trustees of the College nor any of its members was a party to the case or a client of ADF.

5. Over the course of ADF's representation of the College, one or two ADF attorneys met with the Board on three occasions to provide limited comments on the status of the case. Those meetings occurred on April 25, 2022, October 25, 2022, and April 24, 2023. Two of these meetings were by videoconference, and one was in person.

6. These updates were 10 to 15 minutes long, and we understood they made up a small part of the Board's much longer agenda for its biannual meetings.

7. ADF took no instruction from the Board in its litigation for the College.

8. A Missouri federal court dismissed the case for lack of standing, 2021 WL 2301938 (W. D. Mo. June 4, 2021), and the U.S. Court of Appeals for the Eight Circuit affirmed that decision, 41 F.4th 992 (8th Cir. 2023).

9. When the Supreme Court denied certiorari, ADF's representation of the College terminated.

I, Matthew S. Bowman, state under penalty of perjury under the laws of Oklahoma that the foregoing is true and correct.

Executed this 18th day of December, 2023, in Washington, D.C.

Matthew S. Bowman