IN RE DISQUALIFICATION OF JENKINS.

THE STATE EX REL. DOE *v.* FOREST HILLS LOCAL SCHOOL DISTRICT BOARD OF EDUCATION ET AL.

[Cite as *In re Disqualification of Jenkins*, 165 Ohio St.3d 1294, 2021-Ohio-4355.]

Judges—Affidavits of disqualification—R.C. 2701.03—Affiant failed to present sufficient evidence that judge has formed a biased opinion of affiant or affiant's client or has formed a fixed anticipatory judgment in underlying case—Allegations based on hearsay are generally insufficient to establish bias or prejudice—Disqualification denied.

(No. 21-AP-114—Decided September 22, 2021.)

ON AFFIDAVIT OF DISQUALIFICATION in Hamilton County Court of Common Pleas, General Division, Case No. A-21-02899.

O'CONNOR, C.J.

{¶ 1} Curt C. Hartman, counsel for the relator, has filed an affidavit pursuant to R.C. 2701.03 and Article IV, Section 5(C) of the Ohio Constitution seeking to disqualify Judge Christian A. Jenkins from the above-referenced case.

{¶ 2} On August 18, 2021, Mr. Hartman filed a complaint on behalf of an anonymous relator alleging that a local school board had held a special meeting in violation of the notice requirements of the Open Meetings Act, R.C. 121.22. The relator seeks to invalidate the formal action taken by the school board during the meeting—which was the adoption of a mask mandate for elementary school children in the school district. The relator's complaint also requested "a temporary restraining order/preliminary injunction" preventing the school board from enforcing the mask mandate. On August 19, 2021, Judge Jenkins held a conference

with counsel for both sides. Later that day, the judge issued an entry denying the relator's request for a temporary restraining order and concluding that an evidentiary hearing was necessary.

{¶ 3} Mr. Hartman thereafter filed this affidavit of disqualification. He alleges that Judge Jenkins's comments during the August 19 conference and in his decision—as well as other conduct outside of this litigation—demonstrate bias against Mr. Hartman and his client or have created the appearance of bias. Judge Jenkins submitted a response to the affidavit and requests that it be denied.

{¶ 4} In disqualification requests, "[t]he term 'bias or prejudice' 'implies a hostile feeling or spirit of ill-will or undue friendship or favoritism toward one of the litigants or his attorney, with the formation of a fixed anticipatory judgment on the part of the judge, as contradistinguished from an open state of mind which will be governed by the law and the facts.' " *In re Disqualification of O'Neill,* 100 Ohio St.3d 1232, 2002-Ohio-7479, 798 N.E.2d 17, ¶ 14, quoting *State ex rel. Pratt v. Weygandt,* 164 Ohio St. 463, 132 N.E.2d 191 (1956), paragraph four of the syllabus. "The proper test for determining whether a judge's participation in a case presents an appearance of impropriety is * * * an objective one. A judge should step aside or be removed if a reasonable and objective observer would harbor serious doubts about the judge's impartiality." *In re Disqualification of Lewis,* 117 Ohio St.3d 1227, 2004-Ohio-7359, 884 N.E.2d 1082, ¶ 8.

{¶ 5} For the reasons explained below, Mr. Hartman has not established that Judge Jenkins has hostile feelings toward him or the relator or has formed a fixed anticipatory judgment on any issue in the underlying case. Nor has Mr. Hartman set forth a compelling argument for disqualifying Judge Jenkins to avoid an appearance of partiality.

Judge Jenkins's comments at the August 19 conference

{¶ 6} During the August 19 conference, Judge Jenkins asked Mr. Hartman about the propriety of ordering a remedy—i.e., invalidating the school board's

mask mandate—that the judge believed would endanger lives. Mr. Hartman responded that the judge had "no basis and facts to say it will endanger lives." Judge Jenkins responded:

> I have every basis and fact to say it would. You and I both do.
>
> Only someone who buries their head in the sand, ignores science, ignores evidence, ignores every governmental level from the top to the bottom, to our governor just the other day saying the kids in school should wear masks.

Mr. Hartman thereafter requested Judge Jenkins's recusal, arguing, at least in part, that because the judge had a reputation as a strong advocate in favor of imposing a mask mandate on individuals entering the courthouse, Judge Jenkins might not be open to the relief requested by relator in the underlying lawsuit. Judge Jenkins refused to recuse himself and stated that he was "obligated to follow the law." The judge further noted:

> The Court is not a zealous advocate for masking. I do not enjoy wearing the mask. It irritates me. It irritates my face. But I do want to take care of the larger and the greater good. And that is what masking does, at least that is the science, as best we know it, at this moment. And that is as unequivocally an open and shut case as there ever, ever has been at this moment. Anyone who says otherwise is lying.

{¶ 7} In his affidavit of disqualification, Mr. Hartman alleges that Judge Jenkins made the above-quoted comments in a confrontational and aggressive tone

and that the comments demonstrate he has prejudged the underlying merits based on his personal and established beliefs about the effectiveness of face masks. Mr. Hartman also asserts that an objective observer would reasonably question the judge's ability to impartially decide this case based on his "numerous derogatory comments" about people—such as the relator or Mr. Hartman—who disagree with the judge's views on the importance of masking.

{¶ 8} For his part, Judge Jenkins states that he made the comments in the context of deciding whether to grant relator's request for a temporary restraining order. One of the factors he had to consider, the judge claims, was whether any third parties would be unjustifiably harmed if he granted the injunction. According to the judge, it is "basic public knowledge" that masking prevents the spread of COVID-19 and that invalidating the school board's mask requirement would endanger lives. To support his position, the judge cited guidance issued by the Centers for Disease Control and Prevention and the Ohio Department of Health. Regardless, the judge recognized that the issue before him is the school board's compliance with the Open Meetings Act, and he believes he has acted judiciously by setting the matter for an evidentiary hearing.

{¶ 9} The issue of mask mandates, especially in schools, is highly charged. When judges find it necessary to wade into hotly debated policy issues, they should refrain from using words that might appear insensitive to one side and lead by example with dignity and the appropriate judicial decorum. But in general, a judge will not be disqualified merely for voicing disapproval with a party's legal argument or interrogating counsel in a confrontational tone. "Emotions can run high in the courtroom, and occasional flares of temper are to be expected in the heat of argument." *United States v. Snyder*, 235 F.3d 42, 48 (1st Cir.2000).

{¶ 10} Judge Jenkins's comments here do not prove that he has prejudged any issue in the underlying case. The judge made the comments during an attorney-only conference while hearing a request for a temporary restraining order. *See, e.g.*,

In re Disqualification of Fregiato, 163 Ohio St.3d 1256, 2021-Ohio-1265, 169 N.E.3d 695, ¶ 8 ("a judge's undignified comment—especially during an attorney-only conference outside the courtroom—does not necessarily reflect judicial bias or preclude the judge from fairly and impartially deciding future legal issues in a case"). The judge believed that the impact of the requested remedy was an appropriate factor to consider. In his response to the affidavit, Judge Jenkins affirmed that the issue before him is the school board's compliance with the Open Meetings Act; the matter is now pending for an evidentiary hearing. "A judge is presumed to follow the law and not to be biased, and the appearance of bias or prejudice must be compelling to overcome these presumptions." *In re Disqualification of George,*100 Ohio St.3d 1241, 2003-Ohio-5489, 798 N.E.2d 23, ¶ 5. Those presumptions have not been overcome here. Judge Jenkins's comments on masking do not mean that he will be unable to impartially interpret and apply the Open Meetings Act.

Judge Jenkins's August 19 decision

{¶ 11} In his August 19 decision, Judge Jenkins concluded that an evidentiary hearing was necessary and denied the relator's request for a temporary restraining order. The judge's entry also stated the following:

> Finally, the Court notes a line of decisions recognizing that Ohio's sunshine laws have from time to time been "perverted" to achieve unjust and inequitable results such that Ohio courts sitting in equity may properly decline to find a violation where the result would be repugnant to the purposes of the statute. *See Jones v. Brookfield Township Trustees,* 11th Dist. Trumbull No. 92-T-4692, 1995 WL 411842, **5-6 (June 30, 1995). In this regard, the Court cannot ignore that the remedy requested by relator in this case, if granted, could potentially lead to an increase in unnecessary and

> avoidable exposure of school children and their families to a highly contagious and dangerous pathogen. The Court takes judicial notice that Hamilton County, Ohio is currently at a high level of risk for COVID-10 transmission, with only 55 percent of the eligible population being fully vaccinated. This Court will not entertain a judgment with such potential without a full and adequate factual record.

(Footnote omitted.)

{¶ 12} Mr. Hartman argues that this language in the judge's decision shows that the judge considers the relator's complaint as an effort to "pervert" the Open Meetings Act and is further evidence of his personal views invading the adjudicatory process.

{¶ 13} The decision, however, merely noted an alleged "line of decisions" recognizing that Ohio's sunshine laws have been "perverted" to achieve inequitable results. Judge Jenkins did not conclude that the relator's complaint fell within that line of cases. The parties will have the opportunity to argue about the purpose and application of the Open Meetings Act at the appropriate time. But an affidavit of disqualification "is not a vehicle to contest matters of substantive or procedural law." *In re Disqualification of Solovan*, 100 Ohio St.3d 1214, 2003-Ohio-5484, 798 N.E.2d 3, ¶ 4. And just as a judge's issuance of a temporary restraining order does not mean that the judge will be unable to impartially weigh the evidence and render a fair decision at the preliminary-injunction hearing, *see In re Disqualification of Wallace*, 165 Ohio St.3d 1254, 2021-Ohio-2732, 179 N.E.3d 128, ¶ 5, Judge Jenkins's decision denying the request for a temporary restraining order does not mean he will be unable to impartially consider all arguments raised at the evidentiary hearing.

Judge Jenkins's conduct outside of this litigation

{¶ 14} Mr. Hartman also alleges that Judge Jenkins engaged in conduct outside of this litigation demonstrating his "strong personal commitment" to the imposition of mask mandates and suggesting that he would be unable to set aside his personal views to fairly apply the law. Specifically, Mr. Hartman alleges that in October 2020, Judge Jenkins became hostile with and berated Mr. Hartman for not wearing a mask outside. Mr. Hartman also claims that he has been made aware that Judge Jenkins conducted his own personal survey in an effort to persuade other judges to adopt a mask mandate at the county courthouse.

{¶ 15} In response, Judge Jenkins denies that he became aggressive with or berated Mr. Hartman in October 2020. According to Judge Jenkins, he merely offered Mr. Hartman a mask while Mr. Hartman was mingling with voters outside the board of elections. Judge Jenkins also stated that Mr. Hartman's other allegations are based on hearsay and denied conducting a survey in the manner described by Mr. Hartman.

{¶ 16} Allegations based on hearsay are generally insufficient to establish bias or prejudice. *In re Disqualification of Flanagan*, 127 Ohio St.3d 1236, 2009-Ohio-7199, 937 N.E.2d 1023, ¶ 4. And given the other conflicting accounts in the record, Mr. Hartman has failed to set forth sufficiently compelling evidence to overcome the presumption that Judge Jenkins is fair and impartial based on conduct occurring outside of this litigation. *See*, *e.g.*, *In re Disqualification of Harwood*, 137 Ohio St.3d 1221, 2013-Ohio-5256, 999 N.E.2d 681, ¶ 6-7 (affiant failed to set forth compelling evidence to overcome presumption of impartiality when judge had denied affiant's allegations and affiant had failed to sufficiently substantiate her allegations). Even if there were some truth to Mr. Hartman's allegations, no inference of bias arises merely because Judge Jenkins advocated for the administrative adoption of a masking requirement at the county courthouse.

Conclusion

{¶ 17} A judge's views on matters of public policy ordinarily are not legitimate grounds for disqualification, even if the views are strongly held. *See* Flamm, *Judicial Disqualification*, Section 10.7, at 271-272 (2d Ed.2007). "That a judge has a general opinion about a legal or social matter relating to a pending case does not automatically render a judge biased or prejudiced within the meaning of the judicial canons." *Cleveland Bar Assn. v. Cleary*, 93 Ohio St.3d 191, 201, 754 N.E.2d 235 (2001). But as a federal court of appeals explained, "when a judge proves unable to put aside his personal convictions in order to carry out the law, when his hostility toward a litigant's position has become so pervasive that he cannot reasonably hope to provide a fair hearing, then recusal is of course warranted." *Snyder*, 235 F.3d at 48. Based on this record, Mr. Hartman has not proved that those conditions exist here.

{¶ 18} The affidavit of disqualification is denied. The case may proceed before Judge Jenkins.
