



NC Chamber

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NC Retail Merchants Association

June 28, 2022

VIA HAND DELIVERY

The Honorable Phil Berger  
President *Pro Tempore* of the NC Senate  
16 West Jones Street, Rm. 2007  
Raleigh, NC 27601

The Honorable Tim Moore  
Speaker of the NC House  
16 West Jones Street, Rm. 2304  
Raleigh, NC 27601

The Honorable Bill Rabon  
Chair, Senate Select Committee on Nominations  
16 West Jones Street, Rm. 2010  
Raleigh, NC 27601

The Honorable Destin Hall  
Chair, House Rules Committee  
16 West Jones Street, Rm. 2301  
Raleigh, NC 27601

*Re: Business Court Nomination*

Honorable Sirs,

The business community writes today with serious reservations about the nomination of Tenisha Jacobs to serve as a Special Superior Court Judge with a designation to the North Carolina Business Court. While we are grateful for Ms. Jacobs' years of service to the state, for reasons explained in more detail below, we nonetheless cannot support her nomination.

The undersigned business organizations have vocally supported many of the Governor's nominees. Just last year, we worked closely with your offices to help secure the unanimous confirmation of four of the Governor's nominees to the Business Court. During this session, we have supported the Governor's nominees to lead the Department of Health and Human Services and to serve as members of the North Carolina Board of Review and Industrial Commission. We regret, however, that we are unable to support this nominee. We have communicated our concerns to Governor Cooper and his staff numerous times, including well before the nomination was formally made.

Most of Ms. Jacob's career in public services has been devoted to representing the North Carolina Department of Revenue. She is currently the Department's General Counsel, and she previously served as head of the Revenue Section of the North Carolina Department of Justice. In both capacities, Ms. Jacobs represented the interests of the Department in disputes with taxpayers. Tax cases that are not resolved administratively or at the Office of Administrative Hearings are appealable to the Business Court. If confirmed as a Business Court judge, Ms. Jacobs would be in a position to decide cases in which her current employer and longtime client was a party.

In addition to this general concern about the appearance of partiality, the business community is particularly troubled by specific instances of the Department's overreaching conduct concurrent with Ms. Jacobs' terms of service. While she was head of the Revenue Section of the Department of Justice, the Department pursued a years' long attempt to subject an out-of-state trust to the state's income tax despite losing at the Business Court, the Court of Appeals, and the North Carolina Supreme Court. The Department nonetheless appealed to the United States Supreme Court, where the case finally ended with a unanimous decision against the Department.

During Ms. Jacob's period of service, hundreds of North Carolina businesses and individuals have experienced a tortured series of interactions with the Department regarding its treatment of solar tax credits authorized by the General Assembly over a decade ago. A Forbes article posted less than three months ago succinctly summarizes the collective sentiment of the business community regarding the

Department's actions in these cases: *"Regardless of whether one thinks solar tax credits are sound policy or not, revenue departments of states where lawmakers have enacted solar credits as part of their tax code should adhere to the letter of the law and not withhold credits that are due to solar investors, which is what is now happening and being challenged in court in North Carolina."*<sup>1</sup> The article cites similar criticism of the Department of Revenue by the Greensboro News and Record and the John Locke Foundation, no fan of solar tax credits more generally.

In another matter involving solar tax credits recently before the Office of Administrative Hearings, the Department quickly moved to dismiss a case against a North Carolina taxpayer after four years of hard fought (and expensive) litigation, late on the Friday before a Monday morning hearing before Administrative Law Judge Donald van der Vaart. While that result was no doubt a relief to the taxpayer, the Department offered no explanation for its action and does not appear to have offered to issue a similar dismissal for other tax years in which the same credit was claimed by the same taxpayer. It appears the Department moved quickly to avert a ruling it perceived as likely to be issued against its own interests, while it nonetheless continues to litigate the exact same fact pattern for other tax years. This is particularly concerning because, while there are nuances among the various solar investment structures, they all are very similar (i.e., investments to secure tax credits), yet the Department, with the guidance of its counsel, presses on.

It is also noteworthy that a number of the solar tax credit cases appear to have been quietly resolved, with the Department withdrawing its assessments and honoring the tax credits. This has undermined the business community's confidence in the fairness and apolitical administration by the Department of the state's tax laws.

While Ms. Jacobs has been General Counsel to the Department, the Department has also recently urged the North Carolina Supreme Court to reverse a recent sales tax decision from the North Carolina Business Court, the Court to which the Governor's nominee hopes to ascend. The Business Court held that, although there were good arguments on both sides, the case was directly controlled by a longstanding decision of the United States Supreme Court. The Department is nevertheless urging that the North Carolina Supreme Court should treat this binding and well-settled United States Supreme Court precedent as "implicitly overruled," despite the fact that the United States Supreme Court has unequivocally stated that only it may overrule its prior decisions.

In sum, it would be difficult for the business community to justify supporting this nominee for this position. This nominee's long association with the Department during this troubled time as one architect of its litigation strategy make it impossible to separate our concerns about the Department's actions from the nominee.

If you have questions, I hope you will feel free to be in touch.

Sincerely,

Ray Starling  
General Counsel, NC Chamber  
President, NC Chamber Legal Institute

Andy Ellen  
President and General Counsel  
North Carolina Retail Merchants Association

J. Michael Carpenter  
General Counsel  
North Carolina Home Builders Association

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<sup>1</sup> Patrick Gleason, "Like Joe Biden, North Carolina Governor Roy Cooper's Administration Advances Policies That Contradict Stated Climate Goals." March 28, 2022. Accessible at: <https://www.forbes.com/sites/patrickgleason/2022/03/28/like-joe-biden-north-carolina-governor-roy-coopers-administration-advances-policies-that-contradict-stated-climate-goals/?sh=28ac5c6b1cc8>