UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
Civil Action No. 3:21-cv-679

DAN BISHOP, **Plaintiff,** **v.** **AMY L. FUNDERBURK, et al.,** **Defendants.**	**COURT OF APPEALS DEFENDANTS' MOTION TO DISMISS**

NOW COME Clerk of the North Carolina Court of Appeals Eugene H. Soar, Chief Judge Donna Stroud, Judge Chris Dillion, Judge Richard Dietz, Judge John M. Tyson, Judge Lucy Inman, Judge Valerie Zachary, Judge Hunter Murphy, Judge John Arrowood, Judge Allegra Collins, Judge Toby Hampson, Judge Jeffrey Carpenter, Judge April Wood, Judge Fred Gore, Judge Jefferson Griffin and Judge Darren Jackson, of the North Carolina Court of Appeals, and all sued in their official and individual capacities[1], (hereinafter collectively referred to as the "COA Defendants"), to respectfully move the Court to dismiss Plaintiff's First Amended Complaint against the COA Defendants in the above captioned matter pursuant to Rules 12(b)(1), 12(b)(2), 12(b)(4), 12(b)(5), and 12(b)(6) of the Federal Rules of Civil Procedure as stated more fully in the memorandum of law filed contemporaneously herewith. To the extent this Court finds that it possesses jurisdiction over Plaintiff's Amended Complaint, the Court should abstain from exercising its jurisdiction.

[1] Undersigned counsel does not represent Defendant Carpenter and Defendant Griffin in their individual capacities.

Respectfully submitted, this the 31st day of January, 2022.

JOSHUA H. STEIN

Attorney General

/s/ Elizabeth Curran O'Brien

Elizabeth Curran O'Brien
Special Deputy Attorney General
N.C. State Bar No. 28885
North Carolina Department of Justice
P.O. Box 629
Raleigh, NC 27602-0629
Telephone: (919) 716-0091
Facsimile: (919) 716-6755
Email: eobrien@ncdoj.gov
Counsel for COA Defendants

CERTIFICATE OF SERVICE

I hereby certify that on January 31, 2022, a copy of the **COURT OF APPEALS DEFENDANTS' MOTION TO DISMISS** was filed electronically using the Court's ECF system, which will send notice electronically to all counsel of record who have entered an appearance in this case.

/s/Elizabeth Curran O'Brien
Elizabeth Curran O'Brien
Special Deputy Attorney General

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
Civil Action No. 3:21-cv-679

DAN BISHOP, **Plaintiff,** **v.** **AMY L. FUNDERBURK, et al.,** **Defendants.**	**COURT OF APPEALS DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS**

NOW COME COA Defendants[1] to respectfully submit this memorandum of law in support of their Motion to Dismiss Plaintiff's Verified First Amended Complaint pursuant to Rules 12(b)(1), 12(b)(2), 12(b)(4), 12(b)(5), and 12(b)(6) of the Federal Rules of Civil Procedure. Alternatively, this Court should abstain from exercising its jurisdiction.

INTRODUCTION

Plaintiff's lawsuit attacks the very heart of judicial independence – the confidentiality and sanctity of the deliberative process. Plaintiff seeks to compel, by federal decree, disclosure of the votes of the justices and judges regarding the three emergency orders issued by the North Carolina appellate courts in ongoing state redistricting litigation. Additionally, Plaintiff requests the Court to assess punitive and compensatory damages against the Clerk of Court and each Judge of the North Carolina Court of Appeals, alleging they acted with "malicious intention" in issuing these orders anonymously. [DE 12 at ¶¶ 72-73]

This Court should dismiss Plaintiff's Amended Complaint because he fails to invoke the jurisdiction of this Court over the COA Defendants in both their official and individual capacities,

[1] Undersigned counsel does not represent Defendant Carpenter and Defendant Griffin in their individual capacities.

and he fails to state a claim because Plaintiff possesses no First Amendment right to the records which he seeks.

STATEMENT OF THE CASE

Plaintiff filed his initial Complaint against all Justices, Judges and Clerks of the North Carolina Court of Appeals and the Supreme Court of North Carolina, in their official capacities, on December 22. [DE 1] In the original Complaint, Plaintiff alleged that the named Justices, Judges and Clerks violated his First Amendment right to "public disclosure of the votes of Justices and Judges of the North Carolina Supreme Court and North Carolina Court of Appeals to suspend the 2022 election." [DE 1 at ¶ 1] Plaintiff requested "Mandamus and preliminary or permanent injunctions against Defendants … prohibiting them from continuing their policies and practices resulting in denial or delay of access to votes on any matter by a justice or judge of the Supreme Court or Court of Appeals." [DE 1 at ¶ 1] He also requested a declaratory judgment "declaring Defendants' policies and practices that knowingly deny or delay access to votes by a justice or judge of the Supreme Court and Court of Appeals as unconstitutional[.]" [DE 1 at ¶ 2] In addition to filing his Complaint, Plaintiff also filed a motion for mandamus or preliminary injunction. [DE 2] All Defendants received extensions of time to respond to Plaintiff's Complaint and pending motion until January 31, 2022. [DE 11]

On January 10, 2022, Plaintiff filed his Verified First Amended Complaint. [DE 12] The Amended Complaint added individual capacity claims against each Defendant. [DE 12 at ¶¶ 70-73] In support of these new individual capacity claims, Plaintiff alleges that "each of the Defendants has acted with malicious intention to deprive Bishop of his clearly established constitutional right of access." [DE 12 at ¶ 72] He also requests nominal, actual and punitive damages "against each of the Defendants in his or her individual capacity." [DE 12 at ¶ 73]

Besides adding the individual capacity claims, Plaintiff also amended the scope of the requested declaratory and injunctive relief. The Complaint now asks for mandamus or injunctions against all Defendants "prohibiting them denying or delaying access by Bishop to the recorded votes on the Election Suspension Orders[,]" [DE 12 at ¶ 2] and for declaratory judgment "declaring that Bishop is entitled to access to the recorded votes on the Election Suspension Orders[,]" [DE 12 at ¶ 3].

For the reasons stated below, the Court of Appeals Defendants request this Court to dismiss Plaintiff's Complaint.

STATEMENT OF THE FACTS AS ALLEGED BY PLAINTIFF APPLICABLE TO THE COA DEFENDANTS

Plaintiff is a member of Congress representing North Carolina's Ninth District. [DE 12 at ¶ 11] Plaintiff intends to run for re-election in 2022. [DE 12 at ¶ 12] Prior to the Election Suspension Orders (as defined in the Verified First Amended Complaint) relevant to this lawsuit, the candidate filing for office was to occur between Noon on December 6 until the 17th, 2021 and the primary election was scheduled to take place on March 8, 2022. [DE 12 at ¶¶ 13, 26] Plaintiff alleges that on December 6, 2021, the first day established by the North Carolina State Board of Elections ("Board") for candidate filing, he transmitted his notice of candidacy and the required filing fee by mail to the Board. [DE 12 at ¶ 14] Plaintiff's notice of candidacy and filing fee were received by the State Board of Elections on Wednesday, December 8. [DE 12 at ¶ 22] The State Board of Elections accepted Plaintiff's notice, retained his filing fee, and acknowledged filing of his notice of candidacy. [DE 12 at ¶ 27]

On December 6, 2021, a panel of the North Carolina Court of Appeals issued an order in *NC League of Conservation Voters et al. v. Hall et al.*, temporarily enjoining the State Board of Elections from opening the candidate filing period for the 2022 primary elections for Congress,

the North Carolina Senate and the North Carolina House of Representatives, pending the Court's ruling on a petition for writ of *supersedeas*. [DE 12 at ¶ 15; Am. Compl. Ex A] The panel order was issued "by order of the Court" and signed by Defendant Soar, Clerk of the Court of Appeals; it did not identify which judges served on the panel[2] issuing the order or their respective votes. [DE 12 at ¶ 16; Ex A]

Later that same day, another order was issued by the Court of Appeals in the *NC League of Conservation Voters* lawsuit, stating that, "upon a vote of the majority of judges," the Court would rehear the matter *en banc*, vacating the temporary stay of the candidate filing period ordered earlier that day. [DE 12 at ¶ 18; Ex. B] The order was signed by Defendant Soar, and did not identify the individual judges who made up the "majority of judges," nor did it identify how each participating judge voted. [DE 12 at ¶ 19; Ex. B]

Plaintiff is not a party to and has no connection to either the *NC League of Conservation Voters* matter or the *Harper* matter. The Verified First Amended Complaint refers to the orders issued in those cases, as outlined above, as the "Election Suspension Orders." *Id.*

On December 22, 2021, Plaintiff sent a written demand, by hand-delivery and email, to the clerks of both appellate courts, the Chief Justice of the North Carolina Supreme Court and the Chief Judge of the North Carolina Court of Appeals for "timely public access to recorded votes on the several orders alleged, clarifying and expanding the grounds for such demand."[3] [DE 12 at ¶ 35; Ex. F] Plaintiff alleges that both the clerks of court and each individual justice and judge has the ability to furnish access to the votes but has failed to produce them in response to Plaintiff's

[2] On or about December 10, the appellate courts published a notice on its website announcing that, "[t]o ensure the confidentiality of the petitions panel and to avoid potential judge-shopping, please be advised that the panel membership has been changed as of December 10." [DE 12 at ¶ 33]

[3] While Plaintiff alleges in his Amended Complaint he made previous contact with the Supreme Court Defendants, the December 22 letter was his first and only contact with the COA Defendants.

requests. [DE 12 at ¶¶ 38-41]

LAW AND ARGUMENT

I. THIS COURT LACKS PERSONAL JURISDICTION OVER THE COA DEFENDANTS IN THEIR INDIVIDUAL CAPACITIES.

a. Standard of Review

"Before a federal court may exercise personal jurisdiction over a defendant, the procedural requirement of service of summons must be satisfied." *Omni Cap. Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987). "Absent consent or waiver, a failure to obtain proper service on the defendant deprives the court of personal jurisdiction over the defendant." *Koehler v. Dodwell*, 152 F.3d 304, 306 (4th Cir. 1998), *Fed. Deposit Ins. Corp. v. Schaffer*, 731 F.2d 1134, 1135–36 (4th Cir. 1984); *Cherry v. Spence*, 249 F.R.D. 226, 228–29 (E.D.N.C. 2008). "A court cannot exercise personal jurisdiction over a party until they have been properly served in accordance with the applicable rules." *Haberman v. Banc of Am.*, 2014 U.S. Dist. LEXIS 112108, *2 (W.D.N.C. Aug. 13, 2014). The Plaintiff bears the burden of showing that he effected service of process properly and establishing that the court has personal jurisdiction over all defendants. *Saimplice v. Ocwen Loan Servicing Inc.*, 368 F. Supp. 3d 858, 865 (E.D.N.C. 2019), *See also Scott v. Maryland State Dep't of Lab.*, 673 F. App'x 299, 304 (4th Cir. 2016) (per curiam) (unpublished); *Pitts v. O'Geary*, 914 F. Supp. 2d 729, 733 (E.D.N.C. 2012); *Mylan Lab'ys, Inc. v. Akzo, N.V.*, 2 F.3d 56, 60 (4th Cir. 1993) (holding the plaintiff must prove service of process if challenged).

A motion under Rule 12(b)(4) challenges the sufficiency of process, while a motion under Rule 12(b)(5) challenges the sufficiency of service of process. *See* Fed. R. Civ. P. 12(b)(4), (b)(5). "When the process gives the defendant actual notice of the pendency of the action, the rules . . . are entitled to a liberal construction" and "every technical violation of the rule or failure of strict compliance may not invalidate the service of process." *Armco, Inc. v. Penrod-Stauffer Bldg. Sys., Inc.*, 733 F.2d 1087, 1089 (4th Cir. 1984). Nevertheless, "the rules are there to be followed, and

plain requirements for the means of effecting service of process may not be ignored." *Id.; see also Tart v. Hudgins*, 58 F.R.D. 116, 117 (M.D.N.C. 1972) (observing that a liberal interpretation of process requirements "does not mean ... that the provisions of the Rule may be ignored if the defendant receives actual notice").

In this matter, Plaintiff's failure to effect service of process on the COA Defendants in their individual capacities is more than a mere technicality. Therefore, this Court lacks personal jurisdiction over the COA Defendants in their individual capacities.

b. Plaintiff Failed to Serve the Court of Appeals Defendants in their Individual Capacities.

This Court lacks personal jurisdiction over the COA Defendants in their individual capacities because Plaintiff has neither issued summons, nor properly served any of the COA Defendants individually with the Amended Complaint.

On December 28, 2021, the Court issued summons electronically, with instructions for Plaintiff to serve. [DE 3] On January 4, 2022, Plaintiff filed an "Affidavit of Service," which is a document signed by Special Deputy Attorney General Olga E. Vysotskaya de Brito, accepting service of the Original Complaint on behalf of all defendants *in their official capacities*. [DE 5] Later the same day, undersigned counsel entered a limited notice of appearance on behalf of the COA Defendants in the original official capacity lawsuit. [DE 9]

On January 10, 2022, Plaintiff filed his Amended Complaint, adding individual capacity claims as to each previously named defendant. [DE 12] That same evening, Plaintiff emailed[4] undersigned counsel a copy of the filed Amended Complaint, along with a redline version comparing the amended complaint to the original complaint. Plaintiff did not request the

[4] LCvR 4.1.1 explicitly provides that service of a summons and complaint by electronic means is not permitted for purposes of obtaining personal jurisdiction.

undersigned to accept service on behalf of the COA Defendants in their individual capacities, nor has the undersigned notified Plaintiff that she has authorization to accept service on behalf of the COA Defendants in their individual capacities.

When Plaintiff amended his complaint to add individual capacity claims against each of the COA Defendants, he changed the status of the defendants, thus adding new parties who must be served. *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 466 (2000) (holding Rule 15 assumes an amended pleading will be filed and served on the adverse party); *see also Eaglesmith v. Ward*, 73 F.3d 857 (9th Cir. 1995), *as amended* (Jan. 23, 1996) (new service of process required if there is change in status of defendants); *Jackson v. Hayakawa*, 682 F.2d 1344 (9th Cir. 1982) (new service is required where amended complaint includes "a change in the status of defendants" to include claims against them in their personal capacities); *Love v. Hayden*, 757 F. Supp. 1209, 1211 (D. Kan. 1991) (court had no personal jurisdiction over state officials sued in their individual capacities when plaintiff filed amended complaint to add individual capacity claims but failed to effect new service); *Hovey v. Vermont*, No. 5:16-CV-266, 2017 WL 2167123, at *5 (D. Vt. May 16, 2017) (adding claims against a party in his or her individual capacity when she is already named in her official capacity is equivalent to adding an entirely new party—the defendant must therefore be served in accordance with Fed. R. Civ. P. 4, rather than by merely serving papers to the attorney of a party who has already made an appearance).

"The distinction between official-capacity suits and personal capacity suits is more than 'a mere pleading device.'" *Hafer v. Melo*, 502 U.S. 21, 27 (1991). In other words, state officials sued in their official capacity assume the identity of the government that employs them, while state officials sued in their individual capacity come to the court as individuals. *Id.* "A defendant sued in his official capacity is a different "legal personage" than one sued in his individual capacity."

Guy v. Jones, 747 F. Supp. 314, 316 (E.D.N.C. 1990) (citing *Karcher v. May*, 484 U.S. 72, 78 (1987).

In this matter, the distinction between service of the official capacity lawsuit and the individual capacity lawsuit is not merely technical, nor does actual notice of the amended complaint cure the defect. Although the North Carolina Attorney General was authorized to accept service on behalf of the COA Defendants for claims filed against them in their official capacities, such authorization does not extend to acceptance of service for claims against them in their individual capacities.[5] Plaintiff must comply with Fed. R. Civ. P. 4(e) to properly bring the COA Defendants, in their individual capacities, before the jurisdiction of this Court. See *Mack v. Fox*, No. 1:07CV760, 2008 WL 4832995, at *3 (M.D.N.C. Nov. 4, 2008), *report and recommendation adopted,* No. 1:07CV760, 2008 WL 7674789 (M.D.N.C. Dec. 10, 2008) (finding that service pursuant to Federal Fed. R. Civ. P. 4(j)(2) is insufficient to confer jurisdiction over judicial officers sued in their individual capacity; rather, the judicial officials sued in their individual capacity must be served in accordance with Fed. R. Civ. P. 4(e)).

While North Carolina Rule of Civil Procedure 4(j)(3) allows for service upon the Attorney General for actions brought against the State (such as an official capacity lawsuit), it does not provide for service upon the North Carolina Attorney General for lawsuits brought against state officials sued in their individual capacity.[6] Plaintiff's amendment changed the status of the defendants, thus Plaintiff is required to issue and effect new service of process. Because he failed to do so, this Court does not have personal jurisdiction over the COA Defendants in their individual capacities.

---

[5] Defense of official capacity lawsuits against state officials is governed by statute in North Carolina. The Attorney General is statutorily mandated to represent the State in any cause in which the State is a party (such as the official capacity lawsuit brought in the original complaint). N.C. Gen. Stat. § 114-2(1). However, when a state official is sued in his or her individual capacity, representation by the Attorney General is not mandated, but rather is authorized only upon request of the state official sued in their individual capacity. N.C. Gen. Stat. § 143-300.3.

[6] State officials sued in their individual capacities are not statutorily presumed to be represented by the Attorney General. *See supra* n. 5.

Because there has been no process at all as relates to these defendants, consequently Plaintiff's individual capacity claims are subject to dismissal pursuant to Fed. R. Civ. P. 12(b)(4). Additionally, Plaintiff's only conceivable attempt at service of the Amended Complaint on the COA Defendants in their individual capacities, was via an email to undersigned who possessed no authority to accept service on behalf of the COA Defendants in their individual capacities. Therefore, Plaintiff's individual capacity claims are subject to dismissal pursuant to Fed. R. Civ. P. 12(b)(5). Finally, Plaintiff's failure to obtain proper service on the COA Defendants in their individual capacities deprives this Court of personal jurisdiction over the COA Defendants in their individual capacities. Accordingly, Plaintiff's individual capacity claims are subject to dismissal pursuant to Fed. R. Civ. P. 12(b)(2).

II. THIS COURT LACKS SUBJECT MATTER JURISDICTION

a. The Eleventh Amendment Bars Plaintiff's Claims

The COA Defendants adopt and incorporate by reference, as if fully set forth herein, the legal analysis by the Supreme Court Defendants in DE 15, Section I, pp. 6-12. The COA Defendants sued in their official capacities, are immune from this lawsuit pursuant to North Carolina's sovereign immunity as guaranteed by the Eleventh Amendment, in the same manner as the Supreme Court Defendants[7].

In this matter, Plaintiff attempts to fit under the *Ex parte Young* exception by seeking equitable relief. [DE 12 at pp. 18-19] However, he fails for three reasons: (1) judges and clerks are not charged with enforcement of laws; (2) section 1983 by its explicit language, prohibits the granting of injunctive relief against "a judicial officer for an act or omission taken in such officer's judicial capacity, unless a declaratory decree was violated or declaratory relief was unavailable."

[7] In the interest of judicial economy, throughout this brief, COA Defendants adopt and incorporate by reference the legal analysis presented by the Supreme Court Defendants when the presentation herein would be duplicative.

42 U.S.C. § 1983; and (3) because this case does not involve a circumstance where a declaratory decree was violated or declaratory relief was unavailable. Declaratory relief is not unavailable simply because it is not warranted. *See Koon v. Toal*, 2015 U.S. Dist. LEXIS 144980, *9 (S.C.D.C. Sept. 30, 2015) (Declaratory relief was not unavailable when Plaintiff showed no legal basis for entry of declaratory judgment).

III. ABSOLUTE JUDICIAL IMMUNITY, OR IN THE ALTERNATIVE, QUALIFIED IMMUNITY, BARS PLAINTIFF'S CLAIMS

a. The Court of Appeals Judges

The COA Defendants, adopt and incorporate by reference as if fully set forth herein, the legal analysis by the Supreme Court Defendants in DE 15, Section III, pp. 20-25. Plaintiff's claims against all COA Defendants, including those against Defendant Soar, are barred by absolute judicial immunity. While it is clear that the actions challenged in this matter are judicial in nature, even if this Court were to find that any of the COA Defendants' actions were administrative, [DE 12 at 8 ¶¶ 38-39], those claims are barred by the doctrine of qualified immunity.

The North Carolina Court of Appeals was clearly within its jurisdiction to enter the Panel Order and the En Banc Order. *See* N.C. R. App. P., Rules 8(a) and 31.1. Plainly, the issuance of the Panel Order and the En Banc Order satisfies the judicial capacity requirement; it's a classical judicial function. Furthermore, Plaintiff fails to establish or even allege that the Court of Appeals acted in the complete absence of jurisdiction. Finally, Plaintiff's factually unsupported claim that each of the COA Defendants acted with malicious intention is of no matter. Judicial immunity applies even when a judge is accused of acting with malice. *Pierson v. Ray*, 386 U.S. 547 (1967)

Furthermore, Plaintiff has not alleged that the COA Defendants violated a declaratory decree or that declaratory relief is unavailable under section 1983. Thus, judicial immunity extends to bar Plaintiff's claims for equitable relief as well as his claims for damages.

b. Clerk Soar

Defendant Soar is also immune from this suit. Plaintiff alleges that Defendant Soar has "administrative custody of recorded votes of the judges on the Panel Order and the En Banc Order" . . . "based on the general role of court clerks." [DE 12 at ¶ 38] Even if this allegation is accurate, Defendant Soar has absolute quasi-judicial immunity for those tasks, which he performed as an integral part of the judicial process. Plaintiff makes no allegation that Defendant Soar did anything other than follow the court's direction.

Here, Defendant Soar is immune from this action because court clerks are accorded derivative absolute immunity when they act in obedience to a judicial order or under the court's direction. *See, e.g.*, *Whole Woman's Health v. Jackson*, 142 S. Ct. 415 (2021). Plaintiff's claim against Defendant Soar for his alleged failure to disclose any "recorded votes of judges" is barred by quasi-judicial immunity.

c. Qualified Immunity Bars Individual Relief against all Defendants.

The court practice of issuance of court orders without disclosure of a breakdown reflecting the individual Judges' votes is clearly permitted under the existing judicial state practices. [DE 12 at 9-10] Further, this court practice exists throughout the nation and is, indeed, employed in the non-merits and emergency proceedings before the United States Supreme Court.[8] Moreover, a reasonable judicial official could also conclude that his or her deliberative notes and chamber records reflecting a vote, if any, are not subject to public disclosure, because the United States Supreme Court makes it clear that a judge may not be compelled to disclose mental processes used

[8] See "The 'Shadow Docket': The Supreme Court's Non-Merits Orders." (Aug. 27, 2021). Congressional Research Service, https://crsreports.congress.gov/product/pdf/LSB/LSB10637 (accessed Jan. 19, 2022) (explaining that many non-merits orders of the U.S. Supreme Court do not disclose how Justices of that Court voted).

in formulating official judgments or the reasons that motivated him in the performance of his official duties. *See e.g., United States v. Morgan*, 313 U.S. 409, 422 (1941); *Fayerweather v. Ritch*, 195 U.S. 276, 306–07 (1904).

Plaintiff fails to show how any of the COA Defendants would have possibly construed issuing the Panel Order and the En Banc in accordance with established state judicial practices to be a violation of a clearly established federal legal principle. Therefore, to the extent any of the actions of the COA Defendant may be classified as administrative, qualified immunity applies.

Defendant Soar is also entitled to qualified immunity. Plaintiff has not, and cannot, show that clearly established federal law requires state Judges or Clerks of Court to disclose individual votes in emergency and non-merits orders, or that Clerk Soar was aware of any such law. Individual capacity claims against Defendant Soar are therefore barred by qualified immunity.

IV. PLAINTIFF HAS OTHERWISE FAILED TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED

a. Standard of Review

This Court may dismiss any complaint that fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). In considering a motion to dismiss brought pursuant to Fed. R. Civ. P. 12(b)(6), the court must assess the legal sufficiency of the allegations. *Francis v. Giacomelli*, 588 F.3d 186, 192 (4th Cir. 2009). A plaintiff's well-pled allegations are taken as true, and the complaint, including all reasonable inferences therefrom, is liberally construed in the plaintiff's favor. *McNair v. Lend Lease Trucks, Inc.*, 95 F.3d 325, 327 (4th Cir. 1996). However, while the court "must take the facts in light most favorable to the plaintiff," the court "need not accept as true unwarranted inferences, unreasonable conclusions, or arguments." *E. Shore Markets, Inc. v. J.D. Assocs. Ltd. P'ship*, 213 F.3d 175, 180 (4th Cir. 2000); *see Papasan v. Allain*, 478 U.S. 265, 286 (1986) (on a motion to dismiss for failure to state a claim, courts "are not bound

to accept as true a legal conclusion couched as a factual allegation").

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Detailed factual allegations are not required, but "it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* Requiring a claim to be plausible does not impose a probability requirement at the pleading stage. *Thomas v. Collins*, 323 U.S. 516, 556 (1945). However, the plausibility requirement requires more than a "sheer possibility that a defendant has acted unlawfully." *Ashcroft*, 556 U.S. at 678. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions" and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* "Only a complaint that states a plausible claim for relief survives a motion to dismiss." *Id.* at 679.

b. Plaintiff Has No First Amendment Right Of Access To The Records Of Votes Of The Court Of Appeals Panel Order And En Banc Order

Plaintiff asserts that a lack of access to the identity of how each judge voted in the Panel Order and En Banc Order denies his First Amendment rights. However, the First Amendment right to access in not absolute, rather, it only applies to particular judicial records and documents. *United States v. Appelbaum (In re United States)*, 707 F.3d 283, 290 (4th Cir. 2013). For a right of access to a document to exist under the First Amendment, Plaintiff must establish that (1) he is denied access to an existing court document, (2) the document he is being denied access to is classified as a "judicial record," and (3) this judicial record is of a type protected by the First Amendment. *Id.* at 290-91. Even if Plaintiff could meet these criteria, he must also show that this qualified First

Amendment right is not defeated by countervailing considerations. Plaintiff fails on all fronts.

First, Plaintiff fails to show that any document exists that shows the recorded votes of the Court of Appeals Judges. Instead, Plaintiff infers "based upon the general role of court clerks" that Defendant Soar has "administrative custody of recorded votes of the judges on the Panel Order and the En Banc Order." [DE 12 at ¶ 38] Plaintiff attempts to construe Defendant Soar's and Defendant Stroud's silence in response to his written request for disclosure of an additional document disclosing the individual votes of the justices, as an admission that such record indeed exists. [DE 12-1 at ¶¶ 34, 35, 37] Plaintiff fails to meet the first prong of this test because has not shown that an actual court document exists to which a First Amendment right of access can attach. Second, assuming arguendo that individual judges and justices kept notes or other paperwork that reflected how they deliberated and voted on an order, unlike the court orders themselves which are classified as judicial records, *Appelbaum*, 707 F.3d at 290, such judges' personal notes are not records of the court. "[W]hether something is a judicial record depends on 'the role it plays in the adjudicatory process.'" *League of Women Voters of the United States v. Newby*, 447 U.S. App. D.C. 397, 402, 963 F.3d 130, 135 (2020) (citing *SEC v. American International Group*, 712 F.3d 1, 3, 404 U.S. App. D.C. 286 (D.C. Cir. 2013)).

Second, even if some type of documentary record exists with regard to the Court's December 6 orders, this record is not a "judicial record" to which there is a First Amendment right of access. The only judicial records recognized in this Circuit are documents that are filed with the court that play a role in the adjudicative process, or adjudicate substantive rights, and those records that are judicially authored or created. *Appelbaum*, 707 F.3d at 290–91. Plaintiff has been provided the only judicial records to which he has a right of access – the Panel Order and En Banc Orders themselves. DE 12-1, 12-2.

Third, Plaintiff's claims are subject to, and in turn fail, the "experience and logic" test. *E.g., Appelbaum* at, 291. The experience and logic test inquires whether (1) the place and process have historically been open to the press and general public, and (2) public access plays a significant positive role in the functioning of the particular process in question. *Id.* (citing *Balt. Sun Co. v. Goetz*, 886 F.2d 60, 63 (4th Cir. 1989)). Here, neither prong is satisfied. Plaintiff fails to show that the North Carolina Court of Appeals has historically given access to identity of judges' votes on its orders.

Plaintiff's Complaint concedes that the North Carolina appellate courts regularly issue "orders that do not disclose on their face the votes of individual justices and judges." [DE 12 at 9, ¶ 45] Plaintiff's Complaint also references the statutory authority granting the COA Defendants' authority to issue orders by a vote of a majority of the 15 sitting members of the Court of Appeals. [DE 12 at 10, ¶ 46 (citing N.C. Gen. Stat. § 7A-16)]. Individual votes are not always published, open to inquiry, or subject to demand for disclosure. For example, per curiam opinions are by definition issued on behalf of the court as a whole and serve the judiciary's continuing struggle to balance its institutional role as an agent of consensus against individual members' analysis and application of the law, and allows for expedited resolution in matters that are either time-sensitive or lacking in complexity or disagreement among court members.[9]

Plaintiff fails the logic prong of the test as well. "The logic prong asks whether public access plays a significant role in the process in question." *Appelbaum*, 707 F.3d at 292. Logic and reason bolster the need for anonymity and expedient resolution in certain matters. Maintaining the confidentiality of internal workings of the Court and the deliberative process are not only the norm, but serve the important purpose of allowing individual judges autonomy and flexibility in

[9] *See* Ray, L.K. THE ROAD TO BUSH V. GORE: THE HISTORY OF THE SUPREME COURT'S USE OF THE PER CURIAM OPINION, 79 Neb. L. Rev. 517, 521.

discussing and considering issues before the Court. Federal Courts also recognize the value of confidentiality in this setting. *See* U.S. Court of Appeals for the Fourth Circuit Appellate Procedure Guide (Dec. 2021) (stating that the identify of an argument panel is kept confidential until the morning of oral argument, and allowing a majority of the court's active judges to vote to hear a case en banc but declining to disclose how each judge voted.)

Because Plaintiff fails to demonstrate a First Amendment right to access, his Amended Complaint should be dismissed for failing to state a claim.

V. THIS COURT SHOULD ABSTAIN ITS JURISDICTION TO AVOID INTERFERENCE WITH NORTH CAROLINA'S JUDICIAL PROCESSES AND TO PREVENT INTRUSION IN THE ONGOING STATE LITIGATION.

Plaintiff's lawsuit strikes at the heart of North Carolina's right to operate its own judicial system in the manner that fits the state's judicial practices, traditions and needs. For the reasons thoroughly explained by the Supreme Court Defendants, even if this Court finds that it has jurisdiction to hear Plaintiff's claims, it should nevertheless abstain from adjudicating them. The COA Defendants, adopt and incorporate by reference as if fully set forth herein, the legal analysis by the Supreme Court Defendants in DE 15, Section II, pp. 12-19.

CONCLUSION

For the foregoing reasons, the Court of Appeals Defendants respectfully request that this Court dismiss Plaintiff's Amended Complaint pursuant to Rule 12(b)(1), (2), (4), (5), and (6), or, alternatively, exercise its discretion to abstain federal jurisdiction over Plaintiff's claims.

Respectfully submitted, this 31st day of January, 2022.

JOSH STEIN
Attorney General

/s/*Elizabeth Curran O'Brien*
Elizabeth Curran O'Brien
Special Deputy Attorney General
North Carolina State Bar No. 28885
Email: eobrien@ncdoj.gov
N.C. Department of Justice
Post Office Box 629
Raleigh, NC 27602
Telephone: (919) 716-0091
Facsimile: (919) 716-6759
Counsel for the COA Defendants

CERTIFICATE OF SERVICE

I hereby certify that on January 31, 2022, a copy of the **COURT OF APPEALS DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS** was filed electronically using the Court's ECF system, which will send notice electronically to all counsel of record who have entered an appearance in this case.

/s/Elizabeth Curran O'Brien
Elizabeth Curran O'Brien
Special Deputy Attorney General