IN THE 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.**	**SUPREME COURT DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS**

NOW COME Supreme Court Defendants to respectfully submit this memorandum of law in support of their motion to dismiss Plaintiff's Verified First Amended Complaint ("Plaintiff's Complaint") pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. These Defendants ask the Court to dismiss Plaintiff's Complaint for lack of federal jurisdiction and on the basis of applicable immunities. Alternatively, this Court should abstain from exercising its jurisdiction.

INTRODUCTION

Plaintiff requests an unprecedented relief from this Court: a federal decree that directs state appellate courts to issue all orders, including emergency rulings, in the manner that discloses how each individual Justice or Judge voted. Even though the Nation's highest federal tribunal itself issues a large number of orders on its non-merits and emergency docket anonymously, according to Plaintiff, anything short of the mandatory disclosure of all votes violates the First Amendment to the U.S. Constitution. And so, without citing a single case that establishes a constitutional requirement of public disclosure concerning any details of appellate court deliberations including individual Judges' views or votes, Plaintiff seeks to compel such disclosure, by a federal decree,

as to the three emergency orders issued by the North Carolina appellate courts in the ongoing state redistricting litigation. In addition to this forced disclosure, Plaintiff also requests the Court to assess punitive and compensatory damages against the Clerks of Court and each and every Justice and Judge of the state's appellate division, citing their alleged "malicious intention" in issuing these orders anonymously. DE 12 at 18 ¶¶ 72-73.

To be clear: Plaintiff is not entitled to pry into the North Carolina Supreme Court's deliberative processes under the guise of the First Amendment, and even less so entitled to access any records of judicial deliberations and votes with respect to North Carolina's appellate court orders in the manner and format of his choosing. This Court, however, does not have to grapple with merits of Plaintiff's unsupported claims. Plaintiff's Complaint fails to meet the basic threshold criteria for federal jurisdiction and should be dismissed on that basis.

First, Plaintiff's Complaint against the Supreme Court Defendants is barred by North Carolina's sovereign immunity guaranteed by the Eleventh Amendment to the U.S. Constitution. Plaintiff's request for relief does not fall under any exception to that immunity and should be rejected for that reason alone.

Second, 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. Whatever the merits of a public debate regarding the benefits of disclosing the judicial deliberations in non-merits or emergency orders, a constitutional mandate requiring disclosures intrudes deeply on the delicate relationship between federal and state governments, infringes upon the ongoing sensitive state litigation and violates a federal non-intervention policy that predates the U.S. Constitution. This Court should abstain from exercising federal jurisdiction to adjudicate Plaintiff's claims, even if it determines that its jurisdiction extends to this action.

Finally, through artful pleading that employs a moniker of individual capacity claims, Plaintiff seeks to avoid the application of North Carolina's sovereign immunity to bar his lawsuit in toto. Plainly though, the request to condemn the Supreme Court's judicial practices that encompass anonymous rulings on the Court's non-merits docket is directed to the Court as an institution, rather than to any individual Justice. Plaintiff's claims against these Defendants individually are redundant of his official capacity claims, and feature not a single thread of facts to support individual liability. This Court should reject that thinly veiled litigation strategy from the outset. And even if Plaintiff asserted some facts in support of these claims, absolute judicial or, alternatively, qualified immunity of Justices and Clerks protects all of the activities related to the December 2021 appellate court orders and shields all Defendants from this lawsuit nonetheless.

STATEMENT OF THE FACTS AS ALLEGED BY PLAINTIFF

Redistricting Litigation in N.C. League of Conservation Voters, Inc., et al., v. Representative Destin Hall, et. al. and Harper, et al., v. Representative Destin Hall (Wake County Superior Court, Docket Nos. 21 CVS 015426 and 21 CVS 500085).

North Carolina has recently "gained a congressional seat due to population growth" based on the Census Bureau data. DE 12-7 at 6. On November 4, 2021, the General Assembly enacted a set of laws to establish new redistricting maps. DE 12-7 at 7. Litigation over these maps ensued.

In the ongoing two state court cases that are pertinent to the case before this Court ("maps litigation"), voting rights groups and individual voters alleged that the North Carolina General Assembly's "enacted redistricting maps for state legislative and congressional districts (hereinafter referred to as 'Enacted Plans') constitute extreme partisan gerrymanders" in violation of multiple articles of the North Carolina Constitution. DE 12-7 at 4-6. In maps litigation, plaintiffs have moved for a preliminary injunction prohibiting the State "from preparing for, administering, or conducting the March 8, 2022, primary elections and any subsequent elections for the United States House of Representatives using the Enacted Plans" and for "a remedial process to create a

new plan that complies with the North Carolina Constitution," DE 12-7 at 5-6. The state court three-judge panel heard these motions for preliminary injunction and, on December 3, 2021, denied the motions for plaintiffs' failure to show a likelihood of success. DE 12-7 at 7-13. Maps litigation plaintiffs appealed from that order. The lawsuit before this Court stems from the three orders issued by the North Carolina appellate courts concerning this maps litigation.

North Carolina Appellate Courts' Emergency Orders and Plaintiff's Records Requests.

Dan Bishop is the incumbent member of the U.S. House of Representatives representing the Ninth District of North Carolina. DE 12 at 2 ¶ 11. He intends to run for reelection in 2022. DE 12 at 3 ¶ 12. On December 6, 2021, Plaintiff mailed a notice of candidacy for the primary election for his office scheduled for March 8, 2022. DE 12 at 3 ¶¶ 13-15. Subsequently, Plaintiff learned that an anonymous three-judge petitions panel of the North Carolina Court of Appeals ("COA") enjoined the North Carolina State Board of Elections "from opening of the candidate-filing period for the 2022 primary elections for Congress, the North Carolina Senate, and the North Carolina House of Representatives." DE 12 at 3 ¶¶ 15, 16, see DE 12-1. The order was issued on December 6, 2021, and was signed by COA's Clerk of Court Eugene H. Soar "By order of the Court." DE 12-1 at 2. Later on December 6, 2021, the COA "upon a vote of the majority of judges of the Court," vacated a stay of elections and granted an en banc review. DE 12-2 at 2. The order was again signed by Defendant Soar "By order of the Court." DE 12-2 at 2.

On December 8, 2021, the North Carolina Supreme Court issued an order which, in part, allowed redistricting lawsuit plaintiffs' Petition for Discretionary Review Prior to Determination by the Court of Appeals, Motion to Suspend Appellate Rules to Expedite a Decision, and Motion to Suspend Appellate Rules and Expedite Schedule, ("order" or "December 8 order"). DE 12-3. The effect of the order was a temporary stay of the candidate-filing period for the 2022 elections

for all offices in North Carolina until a final judgment on the merits of the redistricting lawsuit. DE 12 at 5, DE 12-3 at 4. The order was issued "By order of the Court in Conference" and was signed by Associate Justice Tamara Barringer "For the Court." DE 12-3 at 5, DE 12-5 at 1, 13, 14.

Plaintiff requested the Supreme Court records that disclose the "identity of the justice who signed the orders for the court[,]" and the "votes of the justices in conference[.]" DE 12-4. Defendant Funderburk responded disclosing the records in the Clerk's possession that included the December 8 order and documents showing that Justice Barringer signed that order "For the Court[.]" DE 12-5 at 1. Defendant Funderburk further disclosed that the Clerk's office had no other responsive records. DE 12-5 at 1; DE 12 at 6 ¶ 29. On December 22, Plaintiff issued another request for records declaring that absent the receipt of responsive documents "by 2 p.m. today[,]" he intended to file a federal lawsuit "to enforce this constitutional entitlement." DE 12-6.

Procedural Background of This Civil Lawsuit.

On December 22, Plaintiff sued all Justices, Judges and Clerks of the North Carolina Court of Appeals and the North Carolina Supreme Court, in their official capacity. 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 2 ¶ 1. Plaintiff requested "Mandamus or preliminary and permanent injunctions against Defendants … prohibiting them permanently 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 16-17 ¶ 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 or Court of Appeals as unconstitutional[.]" DE 1 at 17 ¶ 2. In addition

to filing his Complaint, Plaintiff filed a motion for mandamus or preliminary injunction. DE 2. Defendants received extensions of time to respond to Plaintiff's Complaint and pending motion. DE 11.

On January 10, 2022, Plaintiff filed his Verified First Amended Complaint, DE 12, adding individual capacity claims against each Defendant. DE 12 at 17-18 ¶¶ 70-73. Plaintiff alleged that "each of the Defendants has acted with malicious intention to deprive Bishop of his clearly established constitutional right of access[,]" and requested nominal, actual and punitive damages "against each of the Defendants in his or her individual capacity." DE 12 at 18 ¶¶ 72-73.

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 18 ¶ 2, and for declaratory judgment "declaring that Bishop is entitled to access to the recorded votes on the Election Suspension Orders[,]" DE 12 at 19 ¶ 3.

Supreme Court Defendants now request this Court to dismiss Plaintiff's Complaint pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure because Defendants are entitled to immunity from suit and, even if an exception to immunity exists, abstention is appropriate.

LEGAL STANDARD

Federal courts lack jurisdiction to adjudicate the merits of Plaintiff's Complaint. This Court therefore must dismiss this Complaint for a lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). This threshold question must be addressed by the Court before considering the merits of the case. *Jones v. Am. Postal Workers Union*, 192 F.3d 417, 422 (4th Cir. 1999). Plaintiff has the burden of proving that subject matter jurisdiction exists. *Richmond, Fredericksburg &*

Potomac R. Co. v. United States, 945 F.2d 765, 768 (4th Cir. 1991). Here, Plaintiff's Complaint itself establishes that immunity bar applies and subject matter jurisdiction is lacking.

Supreme Court Defendants' motion to dismiss should be decided under Rule 12(b)(1) standards. The Eleventh Amendment immunity is a block on the exercise of federal courts' subject matter jurisdiction. *Biggs v. Meadows*, 66 F.3d 56, 60 (4th Cir. 1995). Similarly, "courts have often considered immunity arguments, including arguments of judicial immunity, on Rule 12(b)(1) motions to dismiss." *Chien v. Motz*, No. 3:18-cv-106, 2019 U.S. Dist. LEXIS 14541, at *18 (E.D. Va. 2019) (collecting cases). Requests to abstain are frequently viewed through the lenses of either 12(b)(1) or 12(b)(6) motions to dismiss. *See, e.g., Berry v. S.C. Dep't of Soc. Servs.*, No. 95-2678, 1997 U.S. App. LEXIS 22647, at *2 (4th Cir. 1997).

STATEMENT OF THE LAW

I. NORTH CAROLINA'S SOVEREIGN IMMUNITY AND THE TERMS OF THE ELEVENTH AMENDMENT BAR PLAINTIFF'S CLAIMS.

Supreme Court Defendants are immune from this lawsuit pursuant to North Carolina's sovereign immunity as guaranteed by the Eleventh Amendment. The Eleventh Amendment is a complete bar to suit against a state in federal court. *See, e.g., Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993). Eleventh Amendment immunity deprives a federal court of jurisdiction to hear a suit against a state. *Pennhurst State School and Hosp. v. Halderman*, 465 U.S. 89, 100 (1984); *Edelman v. Jordan*, 415 U.S. 651, 662-63 (1974); *Hans v. Louisiana*, 134 U.S. 1, 16-17 (1890). A state's immunity ensures that a federal court could not entertain a suit brought by citizens against foreign or their own states. *See*, *e.g., Pennhurst*, 465 U.S. at 98; *North Carolina v. Temple*, 134 U.S. 22 (1890); *Fitts v. McGhee*, 172 U.S. 516 (1899).

State's sovereign immunity extends to "arms of the State," *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977), including state agencies and officers acting in their

official capacity. *Gray v. Laws*, 51 F.3d 426, 430 (4th Cir. 1995); *Ballenger v. Owens*, 352 F.3d 842, 845 (4th Cir. 2003). After all, "a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office." *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989). And just "as when the State itself is named as the defendant, a suit against state officials that is in fact a suit against a State is barred regardless of whether it seeks damages or injunctive relief." *Pennhurst*, 465 U.S. at 101-02; *Kitchen v. Upshaw*, 286 F.3d 179, 183-84 (4th Cir. 2002).

Under those principles, Plaintiff's official capacity claims, DE 12 at 15-17 ¶¶ 60-69, are barred by North Carolina's sovereign immunity and should be dismissed in the absence of any applicable exceptions. The exceptions to sovereign immunity may allow a lawsuit against state officials (1) where Congress has properly abrogated a state's immunity, *Fitzpatrick v. Bitzer*, 428 U.S. 445, 452-56 (1976); (2) where a state has waived its immunity to suit in federal court, *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 670 (1999); or (3) where a private party sues an appropriate state officer for prospective injunctive or declaratory relief from an ongoing violation of federal law, *Ex parte Young*, 209 U.S. 123, 155-56 (1908).

These exceptions to sovereign immunity are exceedingly narrow, and none defeat North Carolina's immunity under the facts pled by Plaintiff here. First, Congress has not abrogated the state's immunity with respect to Plaintiff's First Amendment claim. Plaintiff bases his lawsuit on 42 U.S.C. § 1983, but it is well-settled that Congress did not abrogate sovereign immunity or other applicable immunities when it created a private right of action under section 1983. *Will*, 491 U.S. at 66; *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951); *Burns v. Reed*, 500 U.S. 478, 484 (1991). Second, the State of North Carolina has not consented to suit in federal court by any express waiver. Here, Eleventh Amendment immunity applies because "the Congress has made no move

to impose § 1983 liabilities upon states, and North Carolina has done nothing to waive its immunity." *Bright v. McClure*, 865 F.2d 623, 626 (4th Cir. 1989) (citing *McConnell v. Adams*, 829 F.2d 1319, 1328 (4th Cir. 1987)). Therefore, this suit against the Supreme Court Defendants does not fall under the first two exceptions to the sovereign immunity doctrine.

The *Ex Parte Young* exception to the Eleventh Amendment immunity does not apply either. The *Ex Parte Young* doctrine established a narrow exception to sovereign immunity to seek prospective relief against state officers who are charged with enforcing an unconstitutional state law. Under this doctrine, a plaintiff must sue an official who is "directly involved" in enforcing state laws and policies that are contrary to federal law. *Waste Management Holdings, Inc. v. Gilmore*, 252 F.3d 316, 332 (4th Cir. 2001). Here, Plaintiff sued the Chief Justice, Associate Justices and Clerk of the North Carolina Supreme Court. *Ex Parte Young* exception, by its own express terms, does not apply to these judicial officials.

As the *Ex Parte Young* court explained "the right to enjoin an individual, even though a state official does not include the power to restrain a court from acting in any case brought before it," since "an injunction against a state court would be a violation of the whole scheme of our Government." 209 U.S. at 163. "The difference between the power to enjoin an individual from doing certain things, and the power to enjoin courts from proceeding in their own way to exercise jurisdiction is plain, and no power to do the latter exists …." *Id.* With that, the *Ex Parte Young* exception to sovereign immunity "does not normally permit federal courts to issue injunctions against state-court judges or clerks. Usually, those individuals do not enforce state laws as executive officials might[.]" *Whole Woman's Health v. Jackson*, 211 L. Ed. 2d 316, 326, 334, 142 S. Ct. 522 (2021) (unanimously rejecting the *Ex Parte Young* relief against state-court judges, and with majority reaching the same conclusion with respect to state-court clerks).

Plaintiff does seek here equitable relief - injunctions and declaration of unconstitutionality - presumably in an attempt to fit under the *Ex Parte Young* exception that permits prospective relief against certain public officers. DE 12 at 18-19. In that endeavor, in addition to the fact that judges and clerks are not charged with enforcement of laws, he faces two other obstacles.

First, injunctive relief is generally not available against judicial officials. Available relief against all Supreme Court Defendants is limited by a 1996 amendment to section 1983 such "that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable." 42 U.S.C. § 1983 (amended by Pub. L. No. 104-317, tit. III, § 309(c), 110 Stat. 3847, 3853 (Oct. 19, 1996) (Federal Courts Improvement Act of 1996 ("FCIA")). Plaintiff's request for injunctive relief is barred against the Supreme Court Defendants, because this requested "injunction against a state court would be a violation of the whole scheme of our Government[,]" *Ex parte Young*, 209 U.S. at 163, and section 1983 does not prohibit declaratory relief under proper circumstances. Additionally, injunctive relief is not appropriate here because, as discussed *infra* on pp 10-12, Plaintiff does not request a prospective relief in the true legal sense.

With respect to the request for declaratory relief, the plain language of section 1983, indicates that declaratory relief is available. Yet, it is inaccurate to argue that once a request for a declaratory judgment is presented, it must then be granted. Here, there simply are no circumstances in which declaratory relief would be warranted.

First, "[i]f a declaratory judgment proceeding actually constitutes a suit against the sovereign, it is barred absent a waiver of sovereign immunity." *Goldstein v. Moatz*, 364 F.3d 205, 219 (4th Cir. 2004). "[I]n such a situation, 'the compulsion, which the court is asked to impose, may be compulsion against the sovereign, although nominally directed against the individual

officer.'" *Id.* (quoting *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 688 (1949)). Here, any declaratory order declaring that Plaintiff "is entitled to access to the recorded votes" in respect to the December 8 order is directed to the North Carolina Supreme Court as a whole. Therefore, the declaratory judgment request fails for that reason alone.

Second, there is no equitable basis for the grant of declaratory relief here, where Plaintiff does not seek any prospective relief at all but seeks only a declaration as to the alleged past wrongdoings. *See Clay v. Osteen*, 2010 U.S. Dist. LEXIS 111395 (M.D.N.C. 2010). The *Ex Parte Young* declaratory relief applies only to prospective requests to define legal rights in connection with future conduct. *Id.*; *Johnson v. McCuskey*, 72 Fed. Appx. 475, 477 (7th Cir. 2003). Declaratory judgment is meant to define the legal rights and obligations of the parties in anticipation of some future conduct, not simply to proclaim liability for a past act. In the true legal sense, here, Plaintiff asks this Court, on constitutional grounds, to overturn the North Carolina Supreme Court's determination that its order was to be published "For the Court" instead of an authored opinion disclosing votes by each involved Justice. In essence, he seeks a declaration that the manner in which the Court order was issued suffered from constitutional deficiencies. That request is not seeking any prospective relief. Plaintiff's "request for declaratory relief merely seeks to strip Defendants of judicial immunity and thereby impose liability." *Clay*, 2010 U.S. Dist. LEXIS 111395, at *12-13; see also *Justice Network Inc. v. Craighead Cty.*, 931 F.3d 753, 764 (8th Cir. 2019) (retrospective declaratory relief against judges is barred by the Eleventh Amendment).

Third, courts have wide discretion to decline to enter declaratory relief on other grounds. *Wilton v. Seven Falls Co.*, 515 U.S. 277, 287 (1995). "By the Declaratory Judgment Act, Congress sought to place a remedial arrow in the district court's quiver; it created an opportunity, rather than a duty, to grant a new form of relief to qualifying litigants." *Id.* at 288. Because the declaratory

judgment requested by Plaintiff does not stem from an established right to votes disclosures, DE 16 at 6-11, yet encroaches deeply on the inner workings and deliberative processes of the North Carolina's highest state court, declaratory relief is not proper under this Court's broad discretion.

It is true that Eleventh Amendment immunity generally bars official capacity claims only. But the individual capacity claims asserted against the Supreme Court Defendants for the alleged violation of Plaintiff's constitutional rights simply rehash the factual allegations regarding judicial conduct with respect to the December 8 order and throw the phrase "malicious intention" into the mix. DE 12 at 17-18 ¶¶ 70-73. Plaintiff alleges no new facts against any of these Defendants personally. At bottom, these individual claims are unsupported and redundant "rendering the outcome of the § 1983 claims dispositive of the independent constitutional claims" against Defendants individually. *Capogrosso v. Supreme Court of N.J.*, 588 F.3d 180, 185 (3d Cir. 2009). North Carolina's sovereign immunity should bar recovery against these Defendants in full.

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

Even though federal courts have an obligation to exercise their proper jurisdiction, there are classes of cases in which "the withholding of authorized equitable relief because of undue interference with state proceedings is 'the normal thing to do[.]'" *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans, ("NOPSI")*, 491 U.S. 350, 359 (1989) (citing *Younger v. Harris*, 401 U.S. 37, 45 (1971)). Several abstention doctrines prohibit a federal court from deciding a case within its jurisdiction when a state proceeding is pending or state judicial processes are implicated in order to avoid friction between federal and state courts. "The long-standing public policy against federal court interference with state court proceedings antedates the Constitution." *Lynch v. Snepp*, 472 F.2d 769, 772 (4th Cir. 1973). The Fourth Circuit applied these abstention principles to withhold jurisdiction in cases invoking the First Amendment rights. *Id.* at 775 ("Despite the

'firstness' of the first amendment, we do not believe that every case asserting a first amendment violation is a proper one for a federal court to interfere with a state proceeding.") There is also strong precedent for abstaining in cases, such as this one, involving litigation over the core state function of redistricting. *See Growe v. Emison,* 507 U.S. 25, 34 (1993) ("Absent evidence that these state branches will fail timely to perform that duty, a federal court must neither affirmatively obstruct state reapportionment nor permit federal litigation to be used to impede it.")

Here, even if this Court found that it had jurisdiction to hear Plaintiff's claims, it should nevertheless abstain from adjudicating them. That is so because Plaintiff, under the guise of the First Amendment challenge, seeks an imposition of a truly extraordinary and unprecedented remedy: a federal decree that would have the effect of constitutionally mandating disclosure of judicial deliberations over orders issued by the state appellate courts. Such a decree would immediately intrude upon the internal workings of the North Carolina judiciary in the ongoing maps litigation by rejecting the choice of the state's appellate courts, including its highest, to issue these emergency orders in conference, bearing the inscription "For the Court," DE 12-3 at 5, or by "By order of the Court[,]" DE 12-2, instead by full-fledged, authored opinions. That request, on its own, hinders the deliberative processes of North Carolina's appellate courts and intrudes upon administration of state judicial business. But a decree requested by Plaintiff would not stop there. The implication of a declaratory judgment that constitutionally mandates disclosure of the deliberations of the Court, including whether and how a vote was taken, as requested by Plaintiff, DE 12 at 19 ¶ 3, is that the state judiciary is to abandon its long held and current practices, undergo a reform of its non-merits judicial processes, and then stand ready for additional federal challenges to whatever practices, rules and procedures it may promulgate. The wide reach of the ripple effect that accompanies the requested relief is difficult to overstate. This Court should abstain under

O'Shea and *Younger* principles. *O'Shea v. Littleton*, 414 U.S. 488 (1974); *Younger*, cited *supra*.

A. *O'Shea* Requires Abstention to Avoid Intrusion in State Court Appellate Processes.

The *O'Shea* plaintiffs sought injunctions in connection with the discriminatory administration of the criminal justice system in an Illinois county. 414 U.S. at 491-92. They challenged criminal prosecutions "brought under seemingly valid state laws" and, in essence, sought an order that would likely lead to future "interruption of state proceedings to adjudicate assertions of noncompliance" by the defendants. *Id.* at 500. The U.S. Supreme Court held that "an injunction aimed at controlling or preventing the occurrence of specific events that might take place" in future proceedings would lead to the federal interference in state judicial proceedings prohibited under the abstention principles. *Id.* The *O'Shea* Court announced an abstention doctrine that aims to protect state judicial processes from intrusions by federal courts. Federal courts may not exercise their jurisdiction over lawsuits that seek to impose "an ongoing federal audit of state . . . proceedings." *Id.* Plaintiff's request for equitable relief here amounts to the prohibited "audit."

The original Complaint in this case directly invited this Court to intrude in all appellate state court proceedings, as it demanded a declaration of unconstitutionality and "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 16-17 ¶ 1; DE 1 at 17 ¶ 2. Plaintiff narrowed the phrasing of the requested relief to now ask for injunctions against state court officials "prohibiting them denying or delaying access by Bishop to the recorded votes on the Election Suspension Orders[,]" DE 12 at 18 ¶ 2, and for a declaratory judgment "declaring that Bishop is entitled to access to the recorded votes on the Election Suspension Orders[,]" DE 12 at 19 ¶ 3. Yet, even with this amendment, no mistake can be made: Plaintiff requests the type of audit of the state judicial processes the *O'Shea* holding

guarded against. Any federal order declaring that state court orders are to feature judicial votes or risk being in violation of the U.S. Constitution, has an effect of engrafting new procedures upon the existing state appellate practices that would affect all non-merits or emergency orders, of which typically there are hundreds a year from the Supreme Court.

It's not difficult to imagine the type of mischief the relief requested by Plaintiff would accomplish. Having secured a declaration that judicial votes must be disclosed in this matter, a favorable judgment for Plaintiff would also enable other state litigants in future court actions to demand disclosures of votes in a variety of proceedings under the newly announced constitutional principles, and to march to federal courts for interpretations and injunctions. This relief would constitute not only the immediate interference in the ongoing maps litigation, but also the kind of continuing audit and future challenges found to be objectionable in *O'Shea*. *See Kaufman v. Kaye*, 466 F.3d 83, 87 (2d Cir. 2006) (abstention is warranted where "any remedy fashioned by the state would then be subject to further challenges in the district court.")

Indeed, it is difficult to picture a more intrusive and unjustified intervention into internal judicial and deliberative processes and administration of state court business, than the declaration of unlawfulness of the admittedly existing "custom or practice" under federal law and subsequent forced disclosures. DE 12 at 9-11 ¶¶ 45, 46, 52. That declaration, of course, would fly in the face of the practice followed by the U.S. Supreme Court that issues many of its non-merits and emergency rulings anonymously.[1] And Plaintiff offers no limiting principles to this "must disclose" theory. After all, if the Court's deliberations must, as Plaintiff demands, be disclosed in this sensitive state court case, state appellate courts would be required under the principles of

[1] *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).

federal law to change their deliberative process and issue each and every order and opinion in a format that discloses the views and votes of each Judge or Justice. Are there any exceptions under which a vote without a forced disclosure might be appropriate in state courts? Must all rulings on emergency applications for relief and non-merits interlocutory rulings be subject to the forced disclosure requirement under Plaintiff's First Amendment theory? Should disclosure requirements vary based on the issuing state appellate tribunal, i.e., COA petitions panel, COA *en banc* or the North Carolina Supreme Court in conference? Are all notes, e-mails or any other records that may reflect on the deliberations, decision-making and the ultimate decision of each Judge or Justice also subject to disclosure under the Plaintiff's view of the First Amendment? Does the U.S. Supreme Court's long-standing practice of issuing non-merits orders anonymously violate the Constitution too?

The list of questions regarding North Carolina's appellate processes presented by Plaintiff to this federal Court could go on for pages. But Plaintiff has not even attempted to get a resolution to these record access questions from the state courts in the first instance. As Plaintiff observes, North Carolina litigants have an opportunity to present their challenges concerning access to state court proceedings in state courts. DE 2-1 at 5. Indeed, state courts are well equipped to consider the constitutional questions raised by Plaintiff. *See Virmani v. Presbyterian Health Servs. Corp.*, 350 N.C. 449, 472, 515 S.E.2d 675, 691 (1999); *Doe v. Doe*, 263 N.C. App. 68, 76, 823 S.E.2d 583, 588 (2018); *see also* N.C. Gen. Stat. § 1-72.1. Abstention is appropriate where, as here, a plaintiff has an opportunity to raise the constitutional claims at issue in state courts. *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 437 (1982). And "if he is dissatisfied with the decisions of [state courts], he may petition … the Supreme Court of the United States for review." *Kaufman*, 466 F.3d at 87-88 (quoting *Spargo v. New York State Comm'n on*

Judicial Conduct, 351 F.3d 65, 74 (2d Cir. 2003) (abstention applies).

Under these circumstances, "relief now sought by [plaintiff] would be so intrusive in the administration of the [state] court system that [a federal court] must, based on applicable precedent, abstain." *Kaufman*, 466 F.3d at 86 (relying on *O'Shea* principles). In light of the extensive concerns about federal intrusion in and a resulting audit of the state judicial system, the need to abstain the federal court's jurisdiction over Plaintiff's Complaint is appropriate and "near absolute." *Parker v. Turner*, 626 F.2d 1, 8 (6th Cir. 1980). This Court should dismiss Plaintiff's challenges to the manner the state appellate system administers its non-merits and emergency orders' docket based on the teachings of *O'Shea* and its progeny.

B. *Younger* Warrants Abstention with Respect to the Ongoing State Litigation.

The abstention is proper here too based on the application of *Younger* abstention principles. Whereas *O'Shea* abstention focuses on avoiding federal court's audit of state judicial processes and intrusion in state judicial business, *Younger* is concerned with the principles of comity and giving due deference to state court's pending cases.

In *Younger*, a criminal defendant sought to avoid the state criminal proceedings by initiating a federal suit seeking injunctive relief from prosecution on the grounds that the implicated criminal statute violated the U.S. Constitution. In dismissing the suit, the U.S. Supreme Court offered several reasons for abstaining. Significantly, the Court supported the withholding of federal jurisdiction by concluding that principles of "Our Federalism" mandated abstention. 401 U.S. at 44. In doing so, the Supreme Court emphasized "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments," and highlighted "a system … in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in

ways that will not unduly interfere with the legitimate activities of the States." *Id.* *Younger* abstention stems from the federal courts' sense of comity and recognition of "the heart of the states' identity under the Constitution." *Middlesex*, 457 U.S. at 432. This notion of *Younger* comity protects the independence of state government functions and hinges on the "continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Id.* at 431-32.

Younger exemplifies a class of cases in which federal-court abstention is required when there is a parallel, pending state proceeding. The Supreme Court has extended *Younger* abstention to state civil proceedings that implicate a state's interest in enforcing the orders and judgments of its courts. *Pennzoil Co. v. Texaco Inc.*, 481 U.S. 1 (1987); *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 608 (1975). "If the State's interests in the proceeding are so important that exercise of the federal judicial power would disregard the comity between the States and the National Government," abstention is proper. *Pennzoil*, 481 U.S. at 11. *Younger* circumstances now encompass pending "civil proceedings involving certain orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions." *NOPSI*, 491 U.S. at 367-68; *see Sprint Commc'ns, Inc. v. Jacobs*, 579 US 69, 78 (2013). For example, the Supreme Court has held that federal courts should abstain from section 1983 constitutional challenges to state contempt procedures when a state judge has imposed civil contempt sanctions on a party to state litigation who has ignored state court orders. *Juidice v. Vail*, 430 U.S. 327, 329-30 (1977).

Courts generally examine three factors to determine whether federal jurisdiction should be withheld under *Younger.* Federal courts should refrain from exercising their jurisdiction if "(1) there is an ongoing state judicial proceeding that began prior to substantial progress in the federal proceeding, (2) that proceeding implicates important, substantial, or vital state interests, and (3)

there is an adequate opportunity to raise constitutional challenges within the framework of the state judicial process." *Golphin v. Thomas*, 855 F.3d 278, 285 (4th Cir. 2017).

Here, all three criteria are present. There is an ongoing state proceeding that is set to determine the validity of North Carolina's new congressional district maps under the terms of the Constitution of North Carolina. See DE 12-3 at 4-5. That lawsuit undoubtedly implicates important state interests. DE 12-3 at 3. Plaintiff alleges as much. DE 12 at 6, 12-15 ¶¶ 26, 57. It is difficult to envision a more weighty state interest for *Younger* purposes than ensuring that states retain their ability to issue and enforce state court judgments and orders in cases brought pursuant to state constitutional mandates in the manner that best suits their own state judicial systems and processes. It is a vital interest for *Younger* purposes. *Pennzoil*, 481 U.S. at 12-13.

On the last *Younger* factor, a federal court should abstain "unless state law clearly bars the interposition of the constitutional claims." *Moore*, 442 U.S., at 426, 430; *Gibson v. Berryhill*, 411 U.S. 564 (1973); *Juidice*, 430 U.S. at 330. As argued *supra* on pp 16-17, there is an opportunity to raise Plaintiff's constitutional issues in state courts, and Plaintiff fails to allege that such a bar exists under the North Carolina law. Moreover, parties to the underlying maps litigation have an opportunity to raise any constitutional concerns about state orders in the due course of that litigation. The third *Younger* requirement is deemed satisfied where a state-court non-party has a "substantial stake" in the state litigation. *Hicks v. Miranda*, 422 U.S. 332, 348-49 (1975) (*Younger* applies where interests of federal litigants "intertwined" with interests of state litigants in a pending state case). Finally, minimal respect for the state processes precludes a presumption that state courts will not safeguard federal constitutional rights. *Middlesex*, 457 U.S. at 431-32. Plaintiff's Complaint failed to rebut that presumption. *Younger* abstention bars Plaintiff's request for relief.

Guided by considerations of comity and respect for North Carolina's judicial processes and

due deference to the ongoing state proceedings, this Court should abstain its jurisdiction.

III. THE SUPREME COURT DEFENDANTS' ABSOLUTE JUDICIAL OR, ALTERNATIVELY, QUALIFIED IMMUNITY BARS PLAINTIFF'S CLAIMS.

Judicial immunity from federal suits that challenge judicial actions is absolute. A judicial officer is immune from lawsuit or liability for his judicial acts. *Stump v. Sparkman*, 435 U.S. 349, 359 (1978). Plaintiff's claims against all Defendants are barred by that immunity. Moreover, even if this Court were to find that any of the Supreme Court Defendants' actions were administrative, DE 12 at 8 ¶¶ 38-39, those claims are nevertheless barred by the doctrine of qualified immunity. Plaintiff's individual and official capacity claims should be dismissed on those bases.

A. Absolute Judicial Immunity Bars All Relief Against Supreme Court Defendants.

1. The Chief Justice and Associate Justices are absolutely immune from civil suit with respect to actions taken in connection to the December 8 order.

Judicial immunity is a concept deeply rooted in American jurisprudence. *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1871). In *Bradley*, the Supreme Court acknowledged that judicial immunity has been a long-settled law in England and in the United States, as "[a] greater indignity could hardly be offered to a judge than to threaten him with personal chastisement for his conduct on the trial of a cause." *Bradley*, 80 U.S. at 356. This immunity protects judges from the burdens that accompany litigation and reduces the risk that aggrieved litigants will file suits against judges as a means of collaterally attacking adverse judgments. *Mireles v. Waco*, 502 U.S. 9, 11 (1991); *Mitchell v. Forsyth*, 472 U.S. 511, 521-22 (1985).

Judicial officers' immunity is absolute. It bars any suit against a judicial officer arising out of his or her judicial acts. *See, e.g.*, *Forrester v. White*, 484 U.S. 219, 227-29 (1988); *Stump*, 435 U.S. at 360, 362. A judge is absolutely immune from liability for his judicial acts even if he commits grave procedural errors. *Stump*, 435 U.S. at 359. Here, Plaintiff alleges, without setting forth any facts in support of that claim, that "each of the Defendants has acted with malicious

intention" to deprive him of his constitutional right of access. DE 12 at 18 ¶ 72. Of course, similar claims against judges have been recognized for their true essence as a tool in an attempt to pierce immunity, and have been categorized as frivolous. *See Clay*, 2010 U.S. Dist. LEXIS 111395, at *11-12. Moreover, judicial immunity "applies even when the judge is accused of acting maliciously and corruptly," because protecting a judge even under those circumstances is "for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences." *Pierson v. Ray*, 386 U.S. 547, 554 (1967). So, this suit would be barred by judicial immunity even with Plaintiff's allegation of malice, and even if such allegation was actually supported.

Two conditions must be present to trigger judicial immunity. Judicial officials must act in their judicial capacities and not "in the complete absence of jurisdiction." *King v. Myers*, 973 F.2d 354, 356-57 (4th Cir. 1992). These requirements are clearly satisfied here. Judicial deliberations in respect to an order and issuance of an order are squarely judicial acts. Many acts by the court officials have been classified as judicial acts. *See, e.g.*, *Martinez v. Winner*, 771 F.2d 424, 434 (10th Cir. 1985) (act of assigning cases); *Rosenthal v. Justices of the Supreme Court*, 910 F.2d 561 (9th Cir. 1990) (act of signing of an order on behalf of state supreme court). Plainly, the issuance of an order by the North Carolina Supreme Court, and the decision to issue it with a designation "For the Court" satisfies the judicial capacity requirement; it's a core judicial function.

As to the second prerequisite of judicial immunity, the North Carolina Supreme Court acted on "Plaintiff's Petitions for Discretionary Review Prior to Determination by the Court of Appeals, Motion to Suspend Appellate Rules to Expedite a Decision, and Motion to Suspend Appellate Rules and Expedite Schedule." DE 12-3 at 3. The Supreme Court was clearly within its jurisdiction

to act on the Petitions. *See* N.C. R. App. P., Rules 2 and 15. Plaintiff fails to establish or even allege that Defendants acted in the complete absence of jurisdiction. Judicial immunity applies.

Plaintiff sues Defendants under section 1983. However, as mentioned above, the doctrine of judicial immunity specifically applies to bar actions against judicial officials brought under that law. *Pierson*, 386 U.S. at 553-54; *Mireles*, 502 U.S.at 13; *Forrester*, 484 U.S. at 229; *Mays v. Sudderth*, 97 F.3d 107, 110 (5th Cir. 1996) (section 1983 does not abrogate judicial immunity).

In addition to prohibiting a suit for money damages against judges, the absolute judicial immunity bars equitable relief. *Malave v. Abrams*, 547 F. App'x 346, 347 (4th Cir. 2013). Several older cases held that judicial officers acting in their judicial capacities were not immune from actions under § 1983 seeking prospective injunctive relief. *Pulliam v. Allen*, 466 U.S. 522, 541-42 (1984); *Forrester*; *Timmerman v. Brown*, 528 F.2d 811 (4th Cir. 1975). However, Congress responded to *Pulliam* and *Forrester* in 1996 by amending § 1983 to abrogate those holdings. *See supra* at p 10; 42 U.S.C. § 1983; *Malave*, 547 F. App'x at 347. Now, judicial immunity generally bars all claims for monetary or equitable relief against judicial officials acting in their judicial capacity. Only when a declaratory decree is violated or declaratory relief is unavailable could Plaintiff possibly avoid judicial immunity. 42 U.S.C. § 1983. Here, as explained above, Plaintiff has not alleged that the Supreme Court Defendants violated a declaratory decree or that declaratory relief is unavailable. Thus, judicial immunity bars all of Plaintiff's claims for relief.

2. The Clerk of the Supreme Court is absolutely immune from civil suit with respect to her actions taken in connection to the Supreme Court's December 8 order.

Plaintiff's allegations against the Clerk of the Supreme Court fare no better. First, Plaintiff alleged, and attached supporting documents, that Clerk Funderburk released all documents in Clerk's possession, and advised Plaintiff of this full disclosure. DE 12-5 at 1; DE 12 at 6 ¶ 29. That allegation defeats all claims against Clerk Funderburk from the outset.

However, even if Plaintiff's conflicting inference "that Defendant Funderburk has administrative custody of recorded votes of the justices" is accurate, Clerk Funderburk has absolute quasi-judicial immunity for those tasks, which she performed as an integral part of the judicial process. DE 12 at 8 ¶ 39. At best, she is alleged to have some responsibility for release of the Supreme Court order signed "For the Court," DE 12-5, coupled with her alleged failure to disclose "recorded votes of the justices" in respect to that order that are "inferred" to be in her "administrative custody[.]" DE 12 at 8 ¶ 39. But Plaintiff is not alleging that the Clerk changed this order to conceal the votes in disregard of any Court instruction, violated any duty or disobeyed any command of the Court in connection with the December 8 order.

Under Plaintiff's allegations, the Clerk 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*, 211 L. Ed. 2d at 326 ("nothing … supports the[] novel suggestion that we should allow a … relief against state-court clerks, all while simultaneously holding the judges they serve immune."); *McCray v. State of Md.*, 456 F.2d 1, 5 n.11 (4th Cir. 1972) ("Since judges are immune from suit for their decisions, it would be manifestly unfair to hold liable the ministerial officers who merely carry out that judicial will."); *Dalenko v. Stephens*, 917 F. Supp. 2d 535, 552 (E.D.N.C. 2013) (assistant clerk of court is immune for actions taken pursuant to court orders.). Plaintiff's claim against Clerk Funderburk for her alleged failure to disclose any "recorded votes of justices" is barred by quasi-judicial immunity.

B. Alternatively, Qualified Immunity Bars Individual Relief against all Defendants.

Acts that form the basis of Plaintiff's Complaint are quintessentially judicial in nature: the method of judicial deliberations in conference, the content of those deliberations, and determining how the resulting Court's order will be issued are all plainly judicial acts. Judicial immunity

requires dismissal under these circumstances. But even if this Court determines that some of these acts could be characterized as administrative, Defendants are protected by qualified immunity.

Qualified immunity prevents government officials from being sued individually over conduct that did not violate clearly established federal law about which a reasonable person would have known. At the pleading stage, qualified immunity bars a claim unless (1) the complaint plausibly alleges a violation of federal law, and (2) the legal principle at issue was clearly established. *Ashcroft v. al-Kidd*, 563 U.S. 731, 735, 741 (2011). To be clearly established, the legal principle that a defendant is accused of violating had to be clear such "that every 'reasonable official would have understood that what he is doing violates'" that principle. *Id.* at 741 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). In other words, "qualified immunity affords protection to a government officer who takes an action that is not clearly forbidden—even if the action is later deemed wrongful." *Rogers v. Pendleton*, 249 F.3d 279, 286 (4th Cir. 2001).

On December 8, the North Carolina Supreme Court spoke as an institution through its formal order signed "For the Court." DE 12-3. Here, a reasonable judicial official could conclude that issuance of court orders without a disclosure of how the deliberations were conducted is clearly permitted under the existing judicial state practices. DE 12 at 9-10. This court practice exists throughout the Nation, and the U.S. Supreme Court itself issues many such orders anonymously. But even if some other record reflecting the state appellate courts' deliberations or votes did exist, a reasonable official could well conclude that in-chambers or in-conference records reflecting those deliberations, if any, are not subject to public disclosure since a judge may not be compelled to disclose mental processes used in formulating official judgments or motivations in the performance of judicial duties. *See e.g., United States v. Morgan*, 313 U.S. 409, 422 (1941); *Fayerweather v. Ritch*, 195 U.S. 276, 306-07 (1904). Under these circumstances, even if another

record existed and a reasonable official's understanding about its confidentiality was in any way misguided, qualified immunity protects these Defendants from individual capacity lawsuits. *See Allen v. Cooper*, 895 F.3d 337, 357 (4th Cir. 2018) (finding that qualified immunity applies when "reasonable officials in the position of the North Carolina officials would not have understood beyond debate" that they violated any constitutional rights). Plaintiff failed to show that these Defendants violated or were under impression that they might be violating any clearly established law by issuing the December 8 order in its current format.[2] Qualified immunity applies.

The concept of qualified immunity protects the clerks of court too. A clerk of superior court who erroneously took political affiliations into account in submitting nominees for magisterial positions to superior judge was entitled to qualified immunity, where that clerk was unaware of legal precedent that "a public employee may not be discharged because of political affiliation[.]" *Bright*, 865 F.2d at 625. Here, Plaintiff cannot show that clearly established federal law requires disclosure of any judicial votes on non-merits orders, or that Clerk Funderburk either had possession of any records relating to the alleged judicial votes or was aware of any such law. The individual capacity claim against her is therefore barred by qualified immunity.

CONCLUSION

Plaintiff came short of showing that he could be entitled to any relief on his claims here. For the foregoing reasons, the Supreme Court Defendants respectfully request that this Court dismiss Plaintiff's Complaint on jurisdictional and immunity grounds or, alternatively, exercise its discretion to abstain federal jurisdiction over Plaintiff's claims.

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

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[2] Tellingly, Plaintiff's original Complaint sought "*to establish a First Amendment right* to compel public disclosure of the votes[.]" DE 1 at 2 ¶ 1 (emphasis added).

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CERTIFICATE OF SERVICE

I hereby certify that on January 31, 2022, a copy of the foregoing SUPREME COURT 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/Olga E. Vysotskaya de Brito

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