IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

DAN BISHOP, **Plaintiff,** **v.** **AMY L. FUNDERBURK, et al.,** **Defendants.**	**Civil Action No. 3:21-cv-679** **RESPONSE TO DEFENDANTS' MOTIONS TO DISMISS, AND REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION OR MANDAMUS**

TABLE OF CONTENTS

INTRODUCTION 2

ARGUMENT 2

I. THE MOTIONS TO DISMISS MUST BE DENIED. 2

A. *Ex Parte Young* Applies Because the Defendant State Judicial Officials Enforce a Practice Denying Constitutional Access Rights 3

B. The Court Cannot Abstain. 7

1. The parallel state proceeding required for Younger abstention does not exist. 8

2. No "ongoing audit" is sought as required for O'Shea abstention. 9

C. Judicial Immunity Is Inapplicable to Administrative Acts and Omissions. 14

D. Qualified Immunity Does Not Apply. 18

E. The Service of Process Objection Is Premature. 18

II. DEFENDANTS FAIL TO REFUTE THE SHOWING IN SUPPORT OF A PRELIMINARY INJUNCTION. 19

A. Records of the Judges' Votes Are Subject to the Right of Access. 19

1. A vote record created by the court is a judicial record. 20

2. The judges' votes come after deliberation concludes and are straightforward, factual information about court action. 20

3. The experience and logic test supports access to the votes. 24

B. The Burden Is Defendants' to Show Compelling Reasons Defeating Access. 26

C. Timely Access Requires a Preliminary Injunction 27
CONCLUSION 29

INTRODUCTION

Plaintiff's Verified Amended Complaint seeks access by right under the First Amendment to the Defendant judges' and justices' votes on three orders issued in early December 2021. Plaintiff has moved for a preliminary injunction or mandamus in order to receive timely relief from the denial of his right of access. The Defendant appellate clerks, judges and justices responded, denying Plaintiff's entitlement to preliminary injunction or mandamus, and moved to dismiss Plaintiff's claims.

Plaintiff now replies in support of his motion for preliminary injunction and response to Defendants' motions to dismiss. The Court should grant the motion for preliminary injunction and deny Defendants' motions.

ARGUMENT

I. THE MOTIONS TO DISMISS MUST BE DENIED.

Defendants' arguments on their Motions to Dismiss, DE-15, -17, are an exercise in avoidance. Defendants seek dismissal based on Eleventh Amendment sovereign immunity, federal abstention under *Younger v. Harris* and *O'Shea v. Littleton*, and absolute judicial/quasi-judicial immunity and qualified immunity. But despite citing to over 70 unique cases, their filed briefs cite no cases arising in the context of a First Amendment claim for public access to judicial records, except for *United States v. Applebaum*, which they miscite.

Since the Supreme Court articulated the First Amendment right of public access to criminal court proceedings and records in a quartet of cases,[1] the law has undergone robust development in the federal circuit courts, every one of which, having "consider[ed] the issue[,] has uniformly concluded that the right applie[s] to both civil and criminal proceedings." *Courthouse News Serv. v. Planet (Planet III)*,[2] 947 F.3d 581, 590 & n.3 (9th Cir. 2020) (collecting cases). Many of those federal cases, just like the original four, have corrected unconstitutional access issues in state court systems. Not surprisingly, many, especially recent ones, have addressed the threshold issues raised by Defendants' motions vis-à-vis state court judges and clerks.

Defendants cite none of them. They omit even to mention the binding holdings on abstention and liability in *Courthouse News Serv. v. Schaefer*, 2 F.4th 318, 324-25, 329 (4th Cir. 2021) or their implications here, despite Plaintiff referencing that holding in his opening brief. DE-2-1. These context-specific cases make clear that Defendants' attacks on subject matter jurisdiction are specious.

A. *Ex Parte Young* Applies Because the Defendant State Judicial Officials Enforce a Practice Denying Constitutional Access Rights.

Defendants argue that the *Ex Parte Young* exception to Eleventh Amendment immunity is inapplicable because Defendants are "judicial officials," as opposed to executive branch officials "'directly involved' in enforcing state laws and policies that

---

[1] *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576-78 (1980); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 603-11 (1982); *Press-Enter. Co. v. Superior Court (Press I)*, 464 U.S. 501 (1984); *Press-Enter. Co. v. Superior Court (Press II)*, 478 U.S. 1 (1986).

[2] *Planet I* is introduced in the discussion of abstention below. *Planet II is Courthouse News Serv. v. Planet*, 614 F. App'x. 912 (9th Cir 2015), not cited in the brief but mentioned here to avoid confusion.

are contrary to federal law." DE-15 p. 9 (citing *Waste Management Holdings, Inc. v. Gilmore*, 252 F.3d 316, 332 (4th Cir. 2001) (dismissing state governor as defendant because of lack of specific duty to enforce challenged statutes) and *Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 532, 211 L.Ed.2d 316, 326, (2021) (noting that *Ex Parte Young* "does not *normally* permit federal courts to issue injunctions against state-court judges or clerks" given lack of enforcement role) (emphasis added)).

Although state judges and clerks usually do not enforce laws and are usually therefore not appropriate *Ex Parte Young* defendants, *Jackson* itself observed that a judicial official can be a proper defendant, including "to prevent the judge from enforcing a rule of his own creation." 142 S. Ct. at 533, 211 L.Ed.2d at 328 (citing *Pulliam v. Allen*, 466 U.S. 522, 526, 538 n.18 (1984), which affirmed "prospective injunctive relief" against state magistrate who made it a "practice to require bond for nonincarcerable offenses"). It is self-evident that to enforce in federal court a right of public access to state court records, the claim must be pursued against clerks and judges who have custody of the records and deny access to them. If this were not so, the result in *Schaefer*, affirming declaratory relief against state court clerks in their official capacity, 2 F.4th at 322, 329, would not have been possible.

Schaefer affirmed the following reasoning by the district court, explaining the application of *Ex Parte Young* <u>against state court clerks</u>:

> In order to prevail in a section 1983 case, … a plaintiff must prove that (1) he was deprived of a federally protected right (2) by a "person" (3) acting under color of state law. *Lytle v. Doyle*, 326 F.3d 463, 471 (4th Cir. 2003). Section 1983 liability attaches where the deprivation of constitutional rights was caused by an official policy, custom, or practice. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690-91, (1978); *see also L.A.*

County v. Humphries, 562 U.S. 29, 36 (2010) ("usage" and "practice" are customs for which Section 1983 liability is appropriate).

…

State officials acting in their official capacities are generally not suable "persons" under section 1983. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989). However, state officials in their official capacities are section 1983 "persons" when the plaintiff seeks prospective, equitable relief.

In order to bring itself within the "*Ex Parte Young* exception," a plaintiff's complaint need only plead that an ongoing violation of federal law is occurring; actually proving an ongoing violation is not necessary.

…

… Plaintiff's complaint pleaded ongoing violations of federal law and asked for declaratory and injunctive relief to prevent future violations. … Accordingly, Plaintiff's lawsuit properly brings the instant claims against Defendants as section 1983 persons.

An official acts under color of state law where he or she performs state action. *West v. Atkins*, 487 U.S. 42, 49-50 (1988). Defendants[3] are duly elected state officials under the Constitution of Virginia and have the authority to create policies and sanction customs in their offices. The practices and customs at issue in this case were the result of Defendants using their powers bestowed upon them by virtue of their state office. …

…

… A policy, custom or practice can be proved in four ways:

> (1) through an express policy, …; (2) through the decisions of a person with final policymaking authority; (3) through an omission, such as a failure to properly train officers, …; or (4) through a practice that is so persistent and widespread as to constitute a custom or usage with the force of law.

---

[3] Defendants Schaefer and Smith were sued "in [their] Official Capacity as the Clerk of the Circuit Court for" a city and county in Virginia. *Courthouse News Serv. v. Schaefer*, 440 F. Supp. 3d 532, 532 (E.D. Va. 2020)

> …
>
> The delays in access at the Prince William and Norfolk Circuit Courts during the relevant period resulted from customs and practices implemented by Defendants or their employees acting on their behalf, which created "a practice that [was] so persistent and widespread as to constitute a custom or usage with the force of law." *Lytle,* 326 F.3d at 471. …
>
> …
>
> Accordingly, Plaintiff proved that the deprivation of a federally protected right was the result of a practice or custom pursuant to section 1983.

Courthouse News Serv. v. Schaefer, 440 F. Supp. 3d 532, 552-55 (E.D. Va. 2020) (some citations omitted or abbreviated), *aff'd*, 2 F.4th 318 (4th Cir. 2021).

A month ago, the Eastern District of Virginia denied another sovereign immunity-based motion to dismiss in a different public access case. *Courthouse News Serv. v. Hade,* Case No. 3:21-cv-460, 2022 U.S. Dist. LEXIS 7843 at *11, 2022 WL 141532 (E.D. Va. Jan. 14, 2022). There, the complaint challenged Virginia statutes limiting electronic access to court records. The motion to dismiss alleged that the defendant administrator of the state court system[4] lacked any "special relation" to the statutes or enforcement role, as needed to sustain the *Ex Parte Young* exception. *Id.* at *8-9. The court, however, held to be sufficient allegations that, in response to plaintiff's request for access, OES had articulated the statutory access limitation, giving rise to the "reasonable inference" that OES would deny access. *Id.* at *9-10.

[4] The defendant Executive Secretary of Office of the Executive Secretary ("OES") of the Virginia Supreme Court is the Virginia counterpart to the North Carolina Administrative Office of the Courts.

Under the "expansive" *Ex Parte Young* exception, the allegations were sufficient to overcome the motion to dismiss. *Id.* at *8, 11.

Here, fulfilling the claim elements prescribed by *Schaefer* and *Hade*, the Amended Complaint alleges the denial of a First Amendment right of access by state court officials with access to portions or all of the records sought, who "are following an unwritten, extralegal custom or practice" of refusing access. DE-12 ¶ 52. It seeks (in the official capacity claim) solely injunctive and declaratory relief. Plaintiff need not prove the case at the pleading stage to prevent dismissal. The Fourth Circuit's affirmance in *Schaefer* is precedential and obliges this Court to apply *Ex Parte Young*.

While omitting to disclose the district and appeals court opinions in *Schaefer*, however, Defendants cite to unreported district court opinions on dissimilar facts to argue that *Ex Parte Young* is inapplicable because Plaintiff does not seek prospective relief "[i]n the true legal sense." DE-15 p. 11; DE-17 p. 11. Suffice it to say, Plaintiff seeks prospective relief in exactly the way the *Schaefer* plaintiff did, to abate Defendants' ongoing denial of access.

B. <u>The Court Cannot Abstain.</u>

Equally clearly, the Fourth Circuit's affirmance in *Schaefer* prohibits dismissal for abstention here. Defendants argue abstention under *Younger v. Harris* and *O'Shea v. Littleton*. *Schaefer* evaluated and rejected both abstention doctrines. 2 F.4th at 324-25.

Federal courts have "a strict duty," *Schaefer* noted, "to exercise the jurisdiction that is conferred upon them by Congress." *Id.* at 324 (quoting *Quackenbush v.*

Allstate Ins. Co., 517 U.S. 706, 716 (1996)) (internal quotes omitted). Only when a "carefully defined" and "specific" abstention doctrine applies may a court abstain. *Id.*

1. *The parallel state proceeding required for Younger abstention does not exist.*

The *Schaefer* court dispatched *Younger* abstention in a single paragraph, noting, "The Supreme Court has been explicit that *Younger* abstention is impermissible absent any pending proceeding in state tribunals." *Id.* (citing *Ankenbrandt v. Richards*, 504 U.S. 689, 705 (1992)). By that is meant a state proceeding "against [the] federal plaintiff." *Steffel v. Thompson*, 415 U.S. 452, 454 (1974).[5] In *Schaefer*, the plaintiff sought same-day access to newly filed civil complaints in state court. Even though affording that relief via declaratory judgment required changing administrative practices for the handling of case filings, it did not "interfere" with "any ongoing state proceeding." *Id.* The court contrasted the proper application of *Younger* abstention by citation to *Nevins v. Gilchrist*, 319 F.3d 151, 152-53 (4th Cir. 2003), where the federal plaintiffs sought to enjoin state criminal drug prosecutions against themselves.

Defendants assert that the parallel pending state proceeding is the case in which the orders were entered to which Plaintiff seeks access. DE-15 p. 19. However,

[5] In *Younger*, *Nevins*, and all of the cases cited by Defendants, the parallel pending state proceeding involved the federal plaintiff. *See, e.g., Middlesex Cty. Ethics Comm. v. Garden State Bar Ass'n.*, 457 U.S. 423, 428-29 (1982) (plaintiff faced state bar disciplinary proceeding); *Pennzoil Co. v. Texaco, Inc.*, 41 U.S. 1, 4 (1987) (plaintiff anticipated $11 billion adverse state court judgment); *Hoffman v. Pursue, Ltd.*, 420 U.S. 592, 598 (1975) (plaintiff faced state court nuisance action); *see also Sprint Comms. v. Jacobs*, 571 U.S. 69, 72-73 (2013) (clarifying that *Younger* abstention is limited to federal claims that would enjoin state criminal or quasi-criminal civil proceeding or affect a state's interest in enforcing its courts' judgments and orders).

Plaintiff alleged, and Defendants do not dispute, that he has no connection to that litigation, DE-12 ¶¶ 21, 28, and nothing about it concerns the public access issue presented here. If Plaintiff's interest in seeking records alone rendered *Younger* applicable, *Younger* would have also applied in *Schaefer*. *Schaefer's* holding that it did not apply prevents its application here.

2. *No "ongoing audit" is sought as required for O'Shea abstention.*

O'Shea abstention applies where the plaintiff seeks, through injunctive relief, "an ongoing federal audit of the state judiciary." *Courthouse News Serv. v. Planet (Planet I)*, 750 F.3d 776, 790 (9th Cir. 2014). *Schaefer* rejected *O'Shea* abstention on the ground that it "concern[s] a federal court's ability to issue specific injunctive relief," and the district court had awarded only declaratory relief — declaring that the First Amendment obliged the state court clerks to provide same-day access to newly filed civil complaints. 2 F.4th at 324. This holding squarely refutes Defendants' argument that Plaintiff — by seeking a declaration of entitlement to access to the documents disclosing votes on the just three orders — seeks "the type of audit … the *O'Shea* holding guarded against." DE-15 p. 14. *Schaefer* precludes applying *O'Shea* abstention to Plaintiff's demand for declaratory relief.

Furthermore, *Schafer* expressly disapproved the abstention holding in *Courthouse News Serv. v. Brown*, 908 F.3d 1063 (7th Cir. 2018), where injunctive relief had been awarded below. *Schaefer* observed that, in *Brown,* "the district court had *granted* a preliminary injunction" to implement same-day access to newly filed complaints, but the Seventh Circuit reversed on abstention grounds, even though "none of the principal categories of abstention constituted a perfect fit," basing its

decision "on the more general principles of federalism." 2 F.4th at 325 n.2. This approach to abstention, *Schaefer* said, "is inconsistent with our precedent and Supreme Court guidance." *Id.* (citing *Martin v. Stewart*, 499 F.3d 360, 364 (4th Cir. 2007) (federal courts may abstain only if a case falls into one of the recognized "specific doctrines")); *see also Planet III*, 947 F.3d at 591 n.4 (also disapproving *Brown's* abstention holding).

Defendants' argument here for *O'Shea* abstention suffers from the defect that *Schaefer* identified in *Brown*. Defendants do not identify any "ongoing federal audit" sought by Plaintiff. As they acknowledge, the sole request for injunctive relief in the Amended Complaint is to prohibit court officials from continuing to deny access to the recorded votes on the three orders. DE-15 p. 14. Nevertheless, Defendants mischaracterize Plaintiff's demanded relief as "mandating disclosure of judicial deliberations," "intrud[ing] upon the internal workings of the [state] judiciary," constraining the form of orders, etc.

Plaintiff has asked for none of these things. Defendants invoke them as the kind of imprecise appeal to principles of federalism engaged in by *Brown* and disapproved of in *Schaefer* and *Martin*. There are no grounds for *O'Shea* abstention under the binding law of the Fourth Circuit.

Nor is Defendants' argument for *O'Shea* abstention supported by their extensive citation to *Kaufman v. Kaye*, 466 F.3d 83 (2d Cir. 2006). DE-15 pp. 15-17. In *Kaufman*, the plaintiff sought a declaratory judgment "and an injunction requiring the State of New York to establish a new system for assigning appeals" to judges. *Id.*

at 86. Upending the judge-assignment policy for a state court system is many orders of magnitude more intrusive than enjoining North Carolina appellate clerks and/or judges to disclose the voting record for three orders.

Moreover, although undisclosed in Defendants' briefs, shortly before the Second Circuit decided *Kaufman*, it rejected abstention in a case brought for public access to state court records. *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 86 (2d Cir. 2004). *Pellegrino* arose after revelations that the Connecticut court system had for 38 years routinely and completely sealed thousands of civil case files, sometimes even the existence of the file, often "simply at the behest of prominent individuals who were parties." *Id.* at 86. Indications were that much sealing may have occurred or been enlarged or modified through administrative action and very little by individuated sealing orders. *Id.* at 86, 87-88, 98.

The Hartford Courant sued for "[a] temporary and permanent order requiring [the chief court administrator and chief justice] to provide … the docket sheet or such other document as will disclose," for most of the sealed cases, the names and alignment of parties, nature of the case, and descriptions of all file contents. *Id.* at 89. After concluding that the constitutional right of access applied, *id.* at 96, and that the judicial officials could be proper defendants, *id.* at 98, the court explained at length why abstention doctrines were inapplicable. *Id.* at 99-102.

The court rejected abstention under *Pullman* (no applicable state statute at issue and inappropriate with First Amendment issues at stake), *id.* at 100, *Younger* (no state proceeding with same constitutional issues to be resolved), *id.* at 100-01,

Rooker-Feldman (no party identity or prospect of reviewing orders of a state court), *id.* at 101, and *Burford* doctrines (no complex state regulatory scheme), *id.* at 102. The court did not address *O'Shea* abstention explicitly, but its omission is convictive: despite evaluating every conceivable basis for federal abstention, neither the defendants nor the court thought *O'Shea* sufficiently applicable even to mention. The prospect of injunctive relief granting access to docket sheets — even thousands of them — would not constitute an ongoing audit of a state judicial system.

So established is the *Pellegrino* holding in the Second Circuit that, a year ago, the court affirmed a preliminary injunction against the Connecticut court administrators and clerks in another First Amendment right-of-public-access case without abstention being raised at either the trial or appellate level. *Hartford Courant Co., LLC v. Carroll*, 986 F.3d 211, 215 (2d Cir. 2021) (affirming right of access to records of criminal prosecutions of juveniles whose cases were transferred en masse to regular criminal court);[6] *Hartford Courant Co., LLC v. Carroll*, 474 F. Supp. 3d 483 (D. Conn. 2020) (district court opinion; no abstention issue addressed); *see also Courthouse News Serv. v. Gabel*, Case No. 2:21-cv-132, 2021 U.S. Dist. LEXIS 224271 at *24, 33-34, 2021 WL 5416650 (D. Vt. Nov. 19, 2021) (in public-access-to-newly-filed-complaints case, rejecting abstention in recognition of *Pellegrino*,

---

[6] The Third Circuit — in a similarly straightforward merits-based resolution without exhaustive procedural litigation over abstention, immunities and the like — held that a statutory corporate arbitration program in Delaware state court violated the First Amendment right of public access by barring the public from the proceedings and records. *Del. Coalition for Open Gov't, Inc. v. Strine*, 733 F.3d 510, 513 (3d Cir. 2013) (affirming judgment against the judges of the Delaware Court of Chancery).

notwithstanding *Kaufman*). Second Circuit authority does not support abstention here, under *O'Shea* or any other doctrine.

In 2014, in *Planet I*, the Ninth Circuit followed and extended *Pellegrino* in another lengthy analysis rejecting abstention, expressly addressing the *O'Shea* doctrine. 750 F.3d at 782-90 ("We join the Second Circuit …."; citing *Pellegrino*). Ruling also in the context of a claim for public access to court records, the court elaborated on why federal courts "disfavor abstention in First Amendment cases because of the risk … that the delay that results from abstention will itself chill the exercise of the rights that the plaintiffs seek to protect by suit," *id.* at 787 (internal quotes omitted). As the Fourth Circuit also has recognized, this principle has been declared by the Supreme Court. *North Carolina Right to Life, Inc. v. Bartlett,* 168 F.3d 705, 711 n.1 (4th Cir. 1999) (quoting *City of Houston v. Hill*, 482 U.S. 451, 467 (1987) and *Zwickler v. Koota,* 389 U.S. 241, 252 (1967)).[7]

As to *O'Shea* abstention, *Planet I* held that to enjoin the state court clerk from denying same-day access to newly filed civil complaints "poses little risk of an 'ongoing federal audit' or 'a major continuing intrusion of the equitable power of the federal courts into the daily conduct of state … proceedings.'" 750 F.3d at 790-92

[7] Defendants misleadingly imply almost the opposite, opening their discussion of abstention citing to *Lynch v. Snepp*, 472 F.2d 769 (4th Cir. 1973), for the proposition that "The Fourth Circuit applied [sic] these [several abstention doctrines] to withhold jurisdiction in cases invoking the [sic] First Amendment rights" and quoting, "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." *Id.* at 775. *Lynch* abstained only on *Younger* grounds, once again due to a prior pending state criminal case against the federal plaintiff, not present here.

(reversing district court decision to abstain). "Accepting [the defendant's] view that *O'Shea* applies 'when litigants seek federal court injunctions to reform the institutions of state government,' the court observed, "would justify abstention as a matter of course in almost any civil rights action under § 1983." *Id.* at 792. Defendants here advance the same view. Because this case poses far less intrusion than even that in *Planet I*, *Gabel* or *Pellegrino*, *O'Shea* abstention is unsupportable.

C. Judicial Immunity Is Inapplicable to Administrative Acts and Omissions.

Defendants argue that "judicial immunity bars all of Plaintiff's claims for relief" because "the issuance of an order …, and the decision to issue it with a designation 'For the Court' are" judicial acts, done in the Defendant judges' judicial capacity. DE-15 p. 21-22; DE-17 p. 11. The Defendant clerks, they argue, "are accorded derivative absolute immunity when they act in obedience to a judicial order or under the court's direction," and "Plaintiff makes no allegation that [the Defendant clerks] did anything other than follow the court's direction." DE-15 p. 23; DE-17 p. 12. This argument suffers from a leap in logic and, once again, from ignoring all context-specific federal case law, including *Schaefer*.

Plaintiff does not disagree that entering and determining the form of the three orders were within the judicial capacity. But this action does not in any way contest — or to use Defendants' inapt term, collaterally attack — the orders or their form. The only act or omission for which the Amended Complaint seeks relief under Section 1983 is the refusal of access to the records documenting the Defendant judges' and justices' votes on the orders.

The Amended Complaint alleges that each Defendant judge and clerk committed or participated in the refusal of access. DE-12 ¶¶ 36-41. Plaintiff did not allege that the Defendant clerks "follow[ed] the court's direction" in denying access. Contrarily, he alleged that no law or rule mandates secrecy for recorded votes of the judges and that no public decision was taken by either appellate court to seal the recorded votes. DE-12 ¶¶ 50-51. Defendants refuse access, the Amended Complaint alleges, pursuant to "an unwritten, extralegal custom or practice that is without rational basis." DE-12 ¶ 52.

Defendants cite no case dismissing for judicial immunity on such facts. Furthermore, their repeated assertions that "equitable relief" is barred — including apparently declaratory relief,[8] DE-15 p. 10 — cannot even be squared with the amended language of Section 1983 that they do cite.

That language partially abrogated *Pulliam v. Allen* by disallowing injunctive relief "in any action brought 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." 42 U.S.C. § 1983. Implicitly, it contemplates that declaratory relief is available in some cases even against a judicial officer acting in a judicial capacity. *See Daker v. Keaton*, ___ Fed. Appx. ___, 2021 U.S. App. LEXIS 23981 at *4 (11th Cir. 2021) ("Judicial officers also are not absolutely immune from

[8] "'[A] particular declaratory judgment draws its equitable or legal substance from the nature of the underlying controversy.'" *Denny's, Inc. v. Cake*, 364 F.3d 521, 526 (4th Cir. 2004) (quoting *Transamerica Occidental Life Ins. Co. v. DiGregorio*, 811 F.2d 1249, 1251 (9th Cir. 1987)). Declaratory relief sought here is equitable.

suits for declaratory relief if the plaintiff establishes a violation, a serious risk of continuing irreparable injury if the relief is not granted, and the absence of an adequate remedy at law.") (citing *Bolin v. Story*, 225 F.3d 1234, 1242 (11th Cir. 2000)). The Fourth Circuit's binding affirmance of declaratory relief in *Schaefer* at a minimum defeats Defendants' unsupported assertion that declaratory relief is barred here — whether or not the denial of access to voting records constituted acting in judicial capacity.

The broader public access case law indicates that judicial immunity is simply inapplicable because denial of public access by means other than sealing orders is administrative action, not judicial action. The district court in both *Schaefer* (affirmed by the Fourth Circuit) and *Hade* left standing the plaintiff's demands for both declaratory and injunctive relief pursuant to 42 U.S.C. § 1983, implicitly holding that the denial of access was administrative and not done in judicial capacity.[9] Other cases have explicitly denied applicability of judicial immunity.

In *Bly v. Circuit Court for Howard Cty.*, the court denied the defendant state court judge's and clerk's motion to dismiss, on grounds of judicial immunity, a complaint alleging denial of public access to the plaintiff's own, 30-year-old, state criminal court file. Case No. 1:18-cv-1333, 2019 U.S. Dist. LEXIS 107523 at *11, *18, 2019 WL 2642831 (D. Md. Jun. 26, 2019). The Fourth Circuit affirmed. *Bly v. Circuit*

---

[9] In *Schaefer*, the district court did not dismiss, but denied a permanent injunction "without prejudice" because of the defendant court clerks' voluntary compliance efforts, but it retained jurisdiction for the plaintiff to renew its request later if necessary. 440 F. Supp. 3d at 563-64.

Court for Howard Cty., 806 Fed. Appx. 194, 195 (4th Cir. 2020) (per curiam). "If Bly's case files were sealed by Court order," the district court held, "Judge Gelfman and Clerk Robey would likely be entitled to absolute judicial immunity. But if the case files were kept from Bly for some other reason, … then the involved Defendants may not be entitled to absolute judicial immunity." *Id.* at *20.

Collins v. Lippman, Case No. 04-cv-3215, 2005 U.S. Dist. LEXIS 11116, 2005 WL 1367295 (E.D.N.Y Jun. 8, 2005), likewise denied a motion to dismiss on grounds of judicial immunity by the defendant administrative judge and criminal court clerk in response to the complaint of an inmate alleging denial of access to docket sheets and other court records. *Id.* at *1, 2, 7. The court summarized the law:

> "If the relevant action is judicial in nature, the judge is immune so long as it was not taken in the complete absence of jurisdiction." By contrast, a judge is not immune when he or she "acted in the clear absence of all jurisdiction," or "if the action in question, as when the judge performs an administrative, legislative, or executive act."

Id. at *7-8 (citations omitted) (quoting *Huminski v. Corsones*, 396 F.3d 53, 75 (2d Cir. 2005)). The court concluded that the administrative judge's "alleged failure to direct [the clerk] to provide copies of all the documents requested … appears to be an administrative function and, therefore beyond the scope of judicial immunity." *Id.* at *9, 10; *see also Pellegrino*, 380 F.3d at 98 (holding chief court administrator and chief justice of Connecticut court system to be appropriate defendants as to docket sheets and case files sealed administratively rather than by individual case sealing orders). Defendants offer no authority to contrary and have, therefore, not established that judicial immunity bars any of the claims here.

D. Qualified Immunity Does Not Apply.

In response to Plaintiff's individual-capacity claims, DE-12 ¶¶ 70-73, Defendants argue that they are entitled to dismissal on ground of qualified immunity because the legal principle establishing Plaintiff's First Amendment right of public access to judicial records is not clearly established. DE-15 p. 25. However, the Amended Complaint alleged that the right is clearly established by citation to the Fourth Circuit's explicit statement that it is "well settled," in *Co. Doe v. Pub. Citizen*, 749 F.3d 246, 265 (4th Cir. 2014), and that the core of this right is access to decisions and actions of the court itself, *id.* at 267-68. Defendants have made no effort to distinguish or refute the authority of *Co. Doe*. Their sole argument is that their votes should be considered part of their confidential deliberative process rather than indicia of their decisions. Because this contention is untenable, as discussed below, Defendants have not successfully refuted the allegation that the public access right is clearly established.

In *Bly*, on precisely this reasoning — and by citation to *Co. Doe* — the court denied a motion to dismiss on grounds of qualified immunity. 2019 U.S. Dist. LEXIS 107523, at *17. The same conclusion is warranted here.

E. The Service of Process Objection Is Premature.

The Court of Appeals judges and clerk alone moved to dismiss the individual-capacity claim pursuant to Rule 12(b)(4) and (5) on grounds of insufficient process and service of process. The argument rests on the obscure point that, despite Defendants' acceptance of service, the addition of individual-capacity claims via the amended complaint requires re-serving them because it is tantamount to adding a

new party. DE-17 pp. 6-10. Assuming their contention to be legally correct as to the need for further service, their motion to dismiss is premature.

The Amended Complaint was filed January 10, 2022. DE-12. Plaintiff's 90-day period to serve the new pleading is unexpired and has approximately 60 days yet to run. Fed. R. Civ. P. 4(m). It is also moot given that all of the movants have agreed to accept service again through counsel. In any event, incomplete service of process for the individual-capacity claims has no impact on the pending motion for preliminary injunction or mandamus because that relief lies in the official-capacity claims.

II. DEFENDANTS FAIL TO REFUTE THE SHOWING IN SUPPORT OF A PRELIMINARY INJUNCTION.

Having disposed of the non-merits motions to dismiss, the remaining issue is whether records of the judges' and justices' votes are subject to the First Amendment right of public access to judicial proceedings and records. Defendants argue that Plaintiff's motion for preliminary injunction fails on all four prongs of the required *Winter* showing: likelihood of success on the merits; irreparable harm; balance of hardships; and public interest. The Court of Appeals Defendants (although not the Supreme Court Defendants) contend that the deficiencies in the merits require dismissal pursuant to Rule 12(b)(6). These arguments miss the mark.

A. Records of the Judges' Votes Are Subject to the Right of Access.

Defendants argue that Plaintiff's showing of likelihood of success fails because a record of the judges' votes is not a "judicial record"; is within the scope of judicial

deliberation which occurs in private; and fails the experience and logic test. These arguments are wrong.

1. A vote record created by the court is a judicial record.

According to Defendants, *United States v. Appelbaum*, 707 F.3d 283, 290 (4th Cir. 2013), instructs that a documentary record of the votes of the judges is not a "judicial record" because it is not "filed with the court." DE-16 p. 7. To the contrary, *Appelbaum* made exactly the opposite point: "Although we have never explicitly defined 'judicial records,' it is commonsensical that judicially authored or created documents are judicial records." 707 F.3d at 290. The point Defendants urge — that only documents "filed with the court that play a substantive role in the adjudicative process" are judicial records — is precisely the mistaken view that the *Appelbaum* rejected: "[T]he Government contends that § 2703(d) orders themselves are not 'judicial records' because they are 'not useful to the judicial process' …." 707 F.3d at 290 n.6. "This argument is unavailing," the court stated, because it recites a standard applicable "to documents filed with the court, <u>not by the court</u>." *Id.* (emphasis added).

A record of the judges' votes is a record created "by the court." Under *Appelbaum's* commonsense test, it is a judicial record susceptible to the First Amendment right of public access.

2. The judges' votes come after deliberation concludes and are straightforward, factual information about court action.

Defendants compound their misreading of *Appelbaum* by insisting that the judges' votes are part of the judicial deliberative process and that to disclose them would intrude upon that process. DE-16 p. 7. Nothing that Plaintiff seeks here

intrudes upon judicial deliberation. Judge Easterbrook's oft-quoted phrase[10] has two clauses: "Judges deliberate in private but issue public decisions …." *Hicklin Eng'g, LLC v. Bartell*, 439 F.3d 346, 348 (7th Cir. 2006). Votes are not deliberation; they are decision.

To "deliberate" is "to think about and weigh or discuss issues and decisions carefully." Merriam-Webster's Dictionary of Law (2011). To "vote" is "to choose, endorse, decide the disposition of, defeat, or authorize by vote." *Id.*

Statutes commonly treat voting and deliberating as distinct actions. *See, e.g.,* 29 U.S.C. § 411 (union member has equal right "to participate in the deliberations and voting"); N.C. Gen. Stat. §§ 14-234 ("No public officer who will receive a direct benefit from a [public] contract … may deliberate or vote on the contract."), 143-318.10 (for open meetings law, an "official meeting" is one "for the purpose of conducting hearings, participating in deliberations, or voting upon" public business).

Defendants have not cited any authority that voting by a deliberative body is a component of the deliberation nor any public access case law that identifies the line between deliberation and decision. *Copley Press, Inc. v. Superior Court*, 64 Cal. App. 4th 106 (Cal. Ct. App. 1992), is a well-known case that explains that line and reasoning behind it.

---

[10] Quoted 120 times according to Lexis, usually by citation to *Hicklin Eng'g*, although Judge Easterbrook first coined it in *In re Krynicki*, 983 F.2d 74 (7th Cir. 1992). *See, e.g., Carr v. Forbes, Inc.*, 121 F. Supp. 2d 485, 496 (D.S.C. 2000), *aff'd.*, 259 F.3d 273 (4th Cir. 2001); *Doe v. Doe*, 823 S.E.2d 583, 602 (N.C. Ct. App. 2018).

The issue in *Copley Press* was whether informal "minute books of the clerks serving six specific superior court judges" were subject to the right of public access as "the only easily accessible source of the daily chronology of court activities." *Id.* at 109. The court identified "a clear dichotomy between two classes of documents" associated with the work of courts. *Id.* at 113. "Category I," the court stated, is official records such as orders and judgments, filed pleadings and motions. *Id.* Category II comprises writings that are "preliminary," such as drafts of judgments and jury instructions, judges' personal notes, and original court reporter notes. *Id.* at 114. "If we look to the courts of appeal, we will find enormous quantities of initial drafts, memoranda, critical analyses of others' work and all kinds of preliminary writings," also belonging to Category II. *Id.*

"[T]he public and press have a justifiable interest" in Category I, the court observed, *id.* at 113, but "none of [Category II] should be the subject of public inspection" because they are "tentative, often wrong, and sometimes misleading," and "do not constitute court action," *id.* at 114. To require Category II to be available to the public would pose "more harm … to the judicial process … than would ever be overborne by any benefit the public might derive." *Id.* at 115.

Having identified this "dichotomy," and the risk that justifies withholding Category II from the public, *Copley Press* noted that "certain kinds of documents are on the margin of the classes' definitions. The clerk's rough minutes are of this nature." *Id.* Although "not official records of the court," "[o]n the other hand, they do not partake of the discretionary and incomplete content that characterizes the judge's

bench notes or the first drafts of various court documents." *Id.* Given their utility as "a continuous chronology of each court's daily activities," and their presumptively "accurate, descriptive and nondiscretionary information," the court "rule[d] that the clerk's rough minutes are court records" subject to public inspection. *Id.*

Copley Press teaches that the principle of withholding deliberative materials from public view extends only so far as its rationale: to prevent the public being misled about the judicial process and court actions. Accurate information comes within the scope of the public access right even if informal because withholding it cannot be justified.

A record depicting the votes of appellate judges is less "on the margin" than the clerk's rough minutes addressed in *Copley Press*. Votes are the epitome of "accurate, descriptive and nondiscretionary information," and simply don't "contain tentative or erroneous information … the release of which … would be detrimental to the judicial process." The information a record of votes would convey is useful to the public because, in the case of the unsigned but official Election Suspension Orders, the judges' individual decisions are not known.

Avoiding accountability for individual judges elected by the public is not a legitimate reason for concealing the voting record. Indeed, that was the emphatic theme of the Fourth Circuit in *Co. Doe*, which Defendants have completely failed to address:

> "Public access serves to promote trustworthiness of the judicial process, to curb judicial abuses, and to provide the public with a more complete understanding of the judicial system, including a better perception of fairness." As Judge Easterbrook, writing for the Seventh Circuit, stated:

> "The political branches of government claim legitimacy by election, judges by reason. Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like a fiat and requires rigorous justification."

749 F.3d at 266 (citation omitted from quotation) (quoting *Littlejohn v. Bic Corp.*, 851 F.2d 673, 682 (3d Cir. 1988) and *Hicklin Eng'g*, 439 F.3d at 348). Because the record of votes conveys truthful and useful information about the actions of the courts, it is subject to the First Amendment right of public access.

3. The experience and logic test supports access to the votes.

Plaintiff's opening brief explained the tradition in North Carolina of publishing or otherwise disclosing votes of individual appellate judges in signed opinions and demonstrated that this serves, especially for elected judges, the logical function of public accountability that the Fourth Circuit identified in *Schaefer* as an "essential component of our structural self-government." DE-2 p. 5. Defendants respond that the experience test is not met because the appellate courts "have not revealed the individual votes of Justices [and judges] on petitions, writs and non-dispositive motions" on their orders dockets. DE-16 p. 9. "There is no indication on any of these orders of the individual Justices' views or votes on the matter before them." *Id.* p. 10.

If this was ever true factually, it isn't any longer. In the cases giving rise to the Election Suspension Orders, the North Carolina Supreme Court on February 4, 2022, entered an order on the orders docket invalidating the General Assembly's districting plans, which included a signed dissenting opinion joined by three of the seven justices (the "Invalidation Order"). By implication, the dissent revealed that

all four remaining justices voted in favor. Plaintiff asks the court to take judicial notice of the order of which a copy is attached as Exhibit A to this brief.

The Invalidation Order serves only to illustrate by additional example a phenomenon already alleged in the Verified Amended Complaint. There is no obvious or rational basis for distinguishing between actions of the appellate court taken by published or publicly available decision and those taken by unpublished order. DE-12 ¶¶ 46-47. The Panel Order and the Supreme Court Order both granted preliminary injunctions that the trial court in those cases denied. The Amended Complaint alleges that such a reversal typically occurs via signed opinion disclosing the votes of the justices or judges. *Id.* ¶ 48 (citing examples). In fact, because the Supreme Court Order irretrievably changed the statutory primary election date, it was in effect a reversal and a permanent injunction.

Plaintiff does not suggest that the appellate courts cannot issue decisions via orders and without signed opinions, but the choice to use an order rather than a decision as the instrument of court action, for reasons of speed, convenience or an arbitrary reason, does not justify refusing public access upon request to a record of the votes. Arbitrary distinctions and departures from a tradition of access do not disprove the tradition of access. That is why the federal court in *Pellegrino* could restore public access after 38 years of the administrative sealing of court files in the Connecticut court system, and the federal court in *Strine* could restore public access to proceedings having the nature of civil trials but statutorily renamed arbitrations. 733 F.3d at 515 ("A First Amendment right that mandated access to civil trials, but

allowed closure of identical 'sivel trials' would be meaningless. Thus, the Supreme Court has held that 'the First Amendment question cannot be resolved solely on the label we give the event, i.e., "trial" or otherwise."') (quoting *Press II*, 478 U.S. at 7).

Defendants likewise fail to refute Plaintiff's explanation of the logic of access. Despite the Election Suspension Orders stopping a statewide election in its tracks, Defendants assure the Court that so-called "non-merits orders" have reduced precedential value and, contradictorily, that they are "generally non-precedential," so that "the need for public disclosure of votes is lessened." DE-16 pp. 10-11. They cite no North Carolina authority in support of the proposition for differing precedential value and no authority explaining what amount of precedential value or merits-determination triggers the right of public access if stopping an election won't do it.

Finally, Defendants assert that the "[p]ublic interest is [] served" by being kept ignorant of how appellate judges vote between elections by public — "in cases that deal with hot-button political matters and in cases that do not" — because to do otherwise might "erod[e] public confidence in the integrity of the state's [] appellate court[s]." DE-16 pp. 13-14. Defendants cite no authority articulating this remarkable view of the public interest, and it flies in the face of the binding rulings in *Co. Doe* and *Schaefer*. Indeed, Defendants' argument serves only to reinforce Plaintiff's showing on the merits.

B. The Burden Is Defendants' to Show Compelling Reasons Defeating Access.

Defendants also assail Plaintiff for failing to "show that this qualified First Amendment right is not defeated by countervailing considerations." *See* DE-17 pp

14-15. This argument mistakes the parties' respective burdens on a motion for preliminary injunction concerning a First Amendment violation.

"A first amendment right of access can be denied only by proof of a compelling governmental interest and proof that the denial is narrowly tailored to serve that interest." *Baltimore Sun Co. v. Goetz,* 886 F.2d 60, 64 (4th Cir. 1989) (citations and quotation marks omitted). "The burden to overcome a First Amendment right of access rests on the party seeking to restrict access, and that party must present specific reasons in support of its position." *Va. Dep't of State Police v. Wash. Post,* 386 F.3d 567, 575 (4th Cir. 2004).

When the government bears the burden of demonstrating a compelling interest as part of its affirmative defense at trial on the merits, "[t]he burdens at the preliminary injunction stage track the burdens at trial." *Gonzalez v. O Centro Espirita,* 546 U.S. 418, 429 (2006). If the government fails on either prong of the compelling interest test, "the movant[] must be deemed likely to prevail." *Id.* (brackets altered and quotations omitted) (quoting *Ashcroft v. Am. Civil Liberties Union,* 542 U.S. 656, 666 (2004)). It is Defendants who have failed to prove "countervailing considerations" justifying denial of public access to voting records. Plaintiff has met his burden to show likelihood of success on the merits by showing that voting records of the judges are court records — depicting court action — which are factual and non-preliminary.

C. Timely Access Requires a Preliminary Injunction

Because Plaintiff has shown likelihood of success on the merits of a First Amendment claim, and the Defendants have failed their burden of demonstrating a

compelling interest, the remainder of the *Winter* analysis is abbreviated. *Centro Tepeyac v. Montgomery Cty.*, 722 F.3d 184, 190-91 (4th Cir. 2013) (en banc). With respect to "the second *Winter* factor (the likelihood of irreparable harm), … in the context of an alleged violation of First Amendment rights, a plaintiff's claimed irreparable harm is inseparably linked to the likelihood of success on the merits of plaintiff's First Amendment claim." *Id.* at 190 (internal quotes omitted); *see also Leaders of a Beautiful Struggle v. Balt. Police Dep't*, 2 F.4th 330, 346 (4th Cir. 2021) (en banc) (applying same rule for deprivation of Fourth Amendment rights). "The Supreme Court has explained that 'loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" 722 F.3d at 191 (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).

Similarly, the third and fourth *Winter* factors (the balance of equities and the public interest) are deemed established when there is a likely First Amendment violation. *Id.* "'[A] state is in no way harmed by the issuance of a preliminary injunction which prevents the state from enforcing restrictions likely to be found unconstitutional. If anything, the system is improved by such an injunction. … [U]pholding constitutional rights surely serves the public interest.'" *Id.*; *see also Leaders of a Beautiful Struggle*, 2 F.4th at 346 (applying same rule in Fourth Amendment context).

Defendants' argument on the final three *Winter* factors fails to cite or apply any First Amendment authority whatsoever. As a result, they overlook all of these principles. The same oversight recurs in their objection that a preliminary injunction

would "give this Plaintiff the ultimate relief he seeks in his action." DE-16 p. 12. This result is inevitable with a likely First Amendment violation:

> The [defendant] argues that a preliminary injunction is inappropriate here because it would grant … affirmative relief rather than preserving the status quo. The Supreme Court has long since foreclosed this argument. *See Ashcroft v. ACLU*, 542 U.S. 656, 670-71, 124 S. Ct. 2783, 159 L.Ed.2d 690 (2004) (finding a pre-enforcement preliminary injunction appropriate to protect First Amendment rights because "speakers may self-sensor rather than risk the perils of trial"); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931, 95 S. Ct. 2561, 45 L.Ed.2d 648 (1975) ("Prior to final judgment there is no established declaratory remedy comparable to a preliminary injunction; unless preliminary relief is available upon a proper showing, plaintiffs in some situations may suffer unnecessary and substantial irreparable harm.")

Am. Civil Liberties Union v. Alvarez, 679 F.3d 583, 590 (7th Cir. 2012). Because all *Winter* factors are satisfied, preliminary injunction should issue.

CONCLUSION

For these reasons, Plaintiff requests that the Court deny Defendants' motions to dismiss and enter a preliminary injunction.

This 15th day of February, 2022.

/s/J. Daniel Bishop
J. Daniel Bishop (N.C. State Bar No. 17333)
2216 Whilden Court
Charlotte, North Carolina 28211
Telephone: (704) 619-7580
E-mail: dan@votedanbishop.com

Attorney for Plaintiff

No. 413PA21 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

* * * * * * * * * * * * * * * *

REBECCA HARPER; AMY CLARE OSEROFF; DONALD RUMPH; JOHN ANTHONY BALLA; RICHARD R. CREWS; LILY NICOLE QUICK; GETTYS COHEN, JR.; SHAWN RUSH; JACKSON THOMAS DUNN, JR.; MARK S. PETERS; KATHLEEN BARNES; VIRGINIA WALTERS BRIEN; and DAVID DWIGHT BROWN

v.

REPRESENTATIVE DESTIN HALL, in his official capacity as Chair of the House Standing Committee on Redistricting; SENATOR WARREN DANIEL, in his official capacity as Co-Chair of the Senate Standing Committee on Redistricting and Elections; SENATOR RALPH HISE, in his official capacity as Co-Chair of the Senate Standing Committee on Redistricting and Elections; SENATOR PAUL NEWTON, in his official capacity as Co-Chair of the Senate Standing Committee on Redistricting and Elections; SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES TIMOTHY K. MOORE; PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE PHILIP E. BERGER; THE NORTH CAROLINA STATE BOARD OF ELECTIONS; and DAMON CIRCOSTA, in his official capacity

Wake County

NORTH CAROLINA LEAGUE OF CONSERVATION VOTERS, INC.; HENRY M. MICHAUX, JR.; DANDRIELLE LEWIS; TIMOTHY CHARTIER; TALIA FERNÓS; KATHERINE NEWHALL; R. JASON PARSLEY; EDNA SCOTT; ROBERTA SCOTT; YVETTE ROBERTS; JEREANN KING JOHNSON; REVEREND REGINALD WELLS;

YARBROUGH WILLIAMS, JR.; REVEREND DELORIS L. JERMAN; VIOLA RYALS FIGUEROA; and COSMOS GEORGE)

v.)

REPRESENTATIVE DESTIN HALL, in his official capacity as Chair of the House Standing Committee on Redistricting; SENATOR WARREN DANIEL, in his official capacity as Co-Chair of the Senate Standing Committee on Redistricting and Elections; SENATOR RALPH E. HISE, JR., in his official capacity as Co-Chair of the Senate Standing Committee on Redistricting and Elections; SENATOR PAUL NEWTON, in his official capacity as Co-Chair of the Senate Standing Committee on Redistricting and Elections; REPRESENTATIVE TIMOTHY K. MOORE, in his official capacity as Speaker of the North Carolina House of Representatives; SENATOR PHILIP E. BERGER, in his official capacity as President Pro Tempore of the North Carolina Senate; THE STATE OF NORTH CAROLINA; THE NORTH CAROLINA STATE BOARD OF ELECTIONS; DAMON CIRCOSTA, in his official capacity as Chairman of the North Carolina State Board of Elections; STELLA ANDERSON, in her official capacity as Secretary of the North Carolina State Board of Elections; JEFF CARMON III, in his official capacity as Member of the North Carolina State Board of Elections; STACY EGGERS IV, in his official capacity as Member of the North Carolina State Board of Elections; TOMMY TUCKER, in his official capacity as Member of the North Carolina State Board of Elections; and KAREN BRINSON BELL, in her official capacity as Executive Director of the North Carolina State Board of Elections)

* * * * * * * * * * * * * * * *

Case 3:21-cv-00679-MOC-DCK Document 23-1 Filed 02/15/22 Page 2 of 20

ORDER

This matter was heard on direct appeal from an order of a three-judge panel of the Superior Court in Wake County, filed 11 January 2022. The case was fully briefed and argued before this Court on 2 February 2022 and is ready for decision. Because time is pressing, the Court enters the following order, to be followed by an opinion; based on the matters presented to the Court, including the findings of fact of the three-judge panel, it is ordered:

1. "It is the state judiciary that has the responsibility to protect the state constitutional rights of the citizens; this obligation to protect the fundamental rights of individuals is as old as the State." *Corum v. Univ. of N.C.*, 330 N.C. 761, 783 (1992). The North Carolina General Assembly, in turn, has the duty to reapportion North Carolina's congressional and state legislative districts; however, exercise of this power is subject to limitations imposed by other constitutional provisions, including the Declaration of Rights. "The civil rights guaranteed by the Declaration of Rights in Article I of our Constitution," including the free elections clause, N.C. Const. art. I, § 10, the equal protection clause, N.C. Const. art. I, § 19, the free speech clause, N.C. Const. art. I, § 14, and the freedom of assembly clause, N.C. Const. art. I, § 12, "are individual and personal rights entitled to protection against state action." *Corum*, 330 N.C. at 782. It is the duty of this Court "to ensure that the violation of these rights is never permitted by anyone who might be invested under the Constitution with the powers of the State," *id.* at 783, including the legislative power

Case 3:21-cv-00679-MOC-DCK Document 23-1 Filed 02/15/22 Page 3 of 20

of apportionment. *See Stephenson v. Bartlett*, 355 N.C. 354, 380–81 (2002). We conclude that claims asserting that congressional and state legislative districting plans enacted by the General Assembly are unlawful partisan gerrymanders that violate the free elections clause, the equal protection clause, the free speech clause, and the freedom of assembly clause of the Declaration of Rights in article I, sections 10, 19, 14, and 12, respectively, of the North Carolina Constitution are, consistent with the text and structure of our State's constitution and our system of separation of powers, justiciable in North Carolina courts.

2. This Court concludes that, to the extent Legislative Defendants have challenged any of the trial court's findings of fact, these findings are supported by competent evidence and are therefore not clearly erroneous. Accordingly, all of the trial court's factual findings are binding on appeal and we adopt them in full.

3. Based on the trial court's factual findings, we conclude that the congressional and legislative maps enacted in S.L. 2021-175 ("An Act to Realign North Carolina House of Representatives Districts Following the Return of the 2020 Federal Decennial Census"), S.L. 2021-173 ("An Act to Realign the Districts of the North Carolina State Senate Following the Return of the 2020 Federal Decennial Census"), and S.L. 2021-174 ("An Act to Realign the Congressional Districts Following the Return of the 2020 Federal Decennial Census") are unconstitutional beyond a reasonable doubt under the free elections clause, the equal protection clause, the free speech clause, and the freedom of assembly clause of the North

Carolina Constitution. We hereby enjoin the use of these maps in any future elections, commencing with the upcoming candidate filing period scheduled to commence on **24 February 2022** for elections in 2022, including primaries scheduled to take place on **17 May 2022**.

4. To comply with the limitations contained in the North Carolina Constitution which are applicable to redistricting plans, the General Assembly must not diminish or dilute any individual's vote on the basis of partisan affiliation. The fundamental right to vote includes the right to enjoy "substantially equal voting power and substantially equal legislative representation." *Stephenson*, 355 N.C. at 382. This encompasses the opportunity to aggregate one's vote with likeminded citizens to elect a governing majority of elected officials who reflect those citizens' views. When, on the basis of partisanship, the General Assembly enacts a districting plan that diminishes or dilutes a voter's opportunity to aggregate with likeminded voters to elect a governing majority—that is, when a districting plan systematically makes it harder for one group of voters to elect a governing majority than another group of voters of equal size—the General Assembly unconstitutionally infringes upon that voter's fundamental right to vote.

5. The General Assembly violates the North Carolina Constitution when it deprives a voter of his or her right to substantially equal voting power on the basis of partisan affiliation. Showing that a reapportionment plan makes it systematically more difficult for a voter to aggregate his or her vote with other likeminded voters—

which can be measured either by comparing the number of representatives that a group of voters of one partisan affiliation can plausibly elect with the number of representatives that a group of voters of the same size of another partisan affiliation can plausibly elect, or by comparing the relative chances of voters from each party electing a supermajority or majority of representatives under various possible electoral conditions—suffices to establish the diminishment or dilution of a voter's voting power on the basis of his or her views. Here, the trial court specifically found that the General Assembly diminished and diluted the voting power of voters affiliated with one party on the basis of party affiliation. *See, e.g., N.C. League of Conservation Voters, Inc. v. Hall*, No. 21 CVS 015426, 2022 WL 124616, at *29 (N.C. Super. Ct. Jan. 11, 2022) (¶¶ 140, 142). Such a plan is subject to strict scrutiny and is unconstitutional unless the General Assembly can demonstrate that the plan is "narrowly tailored to advance a compelling governmental interest." *Stephenson*, 355 N.C. at 377. Achieving partisan advantage incommensurate with a political party's level of statewide voter support is neither a compelling nor a legitimate governmental interest.

6. There are multiple reliable ways of demonstrating the existence of an unconstitutional partisan gerrymander. In particular, mean-median difference analysis, efficiency gap analysis, close-votes, close seats analysis, and partisan symmetry analysis may be useful in assessing whether the mapmaker adhered to traditional neutral districting criteria and whether a meaningful partisan skew

necessarily results from North Carolina's unique political geography. If some combination of these metrics demonstrates there is a significant likelihood that the districting plan will give the voters of all political parties substantially equal opportunity to translate votes into seats across the plan, then the plan is presumptively constitutional. The General Assembly shall submit to the trial court in writing, along with their proposed remedial maps, an explanation of what data they relied on to determine that their districting plan is constitutional, including what methods they employed in evaluating the partisan fairness of the plan.

7. Federal law does not prohibit consideration of partisanship and incumbency protection in the redistricting process. *Stephenson*, 355 N.C. at 371. The federal Constitution does not prohibit reliance on partisan criteria in an effort to "achieve 'political fairness' between the political parties." *Gaffney v. Cummings*, 412 U.S. 735, 736 (1973). Incumbency protection may be a permissible redistricting criterion if it is applied evenhandedly, is not perpetuating a prior unconstitutional redistricting plan, and is consistent with the equal voting power requirements of the state constitution.

8. To comply with this Order, redistricting plans shall adhere to traditional neutral districting criteria and not subordinate them to partisan criteria. Traditional neutral districting criteria as enumerated in the North Carolina Constitution and this Court's precedents include the drawing of single-member districts which are as nearly equal in population as is practicable, which consist of contiguous territory, which are geographically compact, and which maintain whole counties. N.C. Const.

Case 3:21-cv-00679-MOC-DCK Document 23-1 Filed 02/15/22 Page 7 of 20

art. II, §§ 3, 5. The "Whole County Provision" must be applied in a manner consonant with the requirements of the Voting Rights Act and federal "one-person, one-vote" principles. *Stephenson*, 355 N.C. at 382. The General Assembly must first assess whether, using current election and population data, racially polarized voting is legally sufficient in any area of the state such that Section 2 of the Voting Rights Act requires the drawing of a district to avoid diluting the voting strength of African-American voters. Partisan advantage is not a traditional neutral districting criterion under state law.

9. In accordance with N.C.G.S. § 120-2.4(a), the General Assembly shall have the opportunity to submit new congressional and state legislative districting plans that satisfy all provisions of the North Carolina Constitution. The General Assembly shall submit such plans for review to the trial court on or before **18 February 2022** at 5:00 p.m. Should the General Assembly choose not to submit new congressional and state legislative districting plans on or before this deadline, the trial court will select a plan which comports with constitutional requirements based upon the findings it entered in its prior order. Regardless, all parties to this proceeding and intervenors may submit to the trial court proposed remedial districting plans by **18 February 2022** at 5:00 p.m., and comments on any maps submitted shall be filed with the trial court by **21 February 2022** at 5:00 p.m. The trial court will approve or adopt compliant congressional and state legislative districting plans no later than noon on **23 February 2022**. Any emergency application for a stay pending appeal

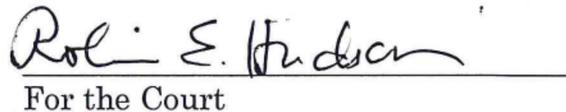
must be filed no later than **23 February 2022** at 5:00 p.m.

10. State Defendants are advised to anticipate that new districting plans for Congress, the North Carolina Senate, and the North Carolina House of Representatives will be available by **23 February 2022** and are directed to take all necessary measures to ensure that the **17 May 2022** primary election and all subsequent elections occur as scheduled using the remedial districting plans. Further, all ballot items, including referenda, that would have appeared on the **8 March 2022** ballot prior to this Court's prior Order enjoining elections for public office shall appear on the **17 May 2022** ballot; municipal elections in circumstances where a second primary is not required under N.C.G.S. § 163-111 will be conducted on **26 July 2022**.

Opinion to follow.

Remanded to the trial court for remedial proceedings.

By order of the Court in conference, this the 4th day of February 2022.



For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 4 day of February 2022.

AMY L. FUNDERBURK
Clerk of the Supreme Court

Chief Justice NEWBY dissenting.

I dissent from the decision of the Court which violates separation of powers by effectively placing responsibility for redistricting with the judicial branch, not the legislative branch as expressly provided in our constitution. As predicted by the Supreme Court of the United States, this Court's decision results in an "unprecedented expansion of judicial power." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019). " '[J]udicial action must be governed by *standard*, by *rule*,' and must be 'principled, rational, and based upon reasoned distinctions' found in the Constitution or laws. Judicial review of partisan gerrymandering does not meet those basic requirements." *Id.* (alteration and emphases in original) (citation omitted) (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 278, 279, 124 S. Ct. 1769, 1777 (2004) (plurality opinion)) (noting that the Supreme Court of United States has "never struck down a partisan gerrymander as unconstitutional—despite various requests over the past 45 years"). By choosing to hold that partisan gerrymandering violates the North Carolina Constitution and by devising its own remedies, there appears to be no limit to this Court's power.

"All political power is vested in and derived from the people; all government of right originates from the people, is founded upon their will only, and is instituted solely for the good of the whole." N.C. Const. art. I, § 2. Our state constitution is our foundational document for government; its text reflects the express will of the people. *State ex rel. Martin v. Preston*, 325 N.C. 438, 448, 385 S.E.2d 473, 478 (1989). The will of the people is best served, and everyone's rights are best protected, when the

plain language of the constitution is followed. Recognizing special rights to one favored person or group invariably diminishes the rights of others.

Unlike the United States Constitution, the North Carolina Constitution "is in no matter a grant of power." *McIntyre v. Clarkson*, 254 N.C. 510, 515, 119 S.E.2d 888, 891 (1961) (quoting *Lassiter v. Northampton Cnty. Bd. of Elections*, 248 N.C. 102, 112, 102 S.E.2d 853, 861 (1958)). Rather, "[a]ll power which is not limited by the Constitution inheres in the people." *Id.* (quoting *Lassiter*, 248 N.C. at 112, 102 S.E.2d at 861). The people act through the General Assembly. *Preston*, 325 N.C. at 448, 385 S.E.2d at 478. Since the General Assembly serves as the "agent of the people for enacting laws," *id.*, a restriction on the General Assembly is in fact a restriction on the people themselves. Therefore, this Court presumes that legislation is constitutional, and a constitutional limitation upon the General Assembly must be *express and proven beyond a reasonable doubt*. *Baker v. Martin*, 330 N.C. 331, 334, 410 S.E.2d 887, 889 (1991).

"The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." N.C. Const. art. I, § 6. "[A]s essentially a function of the separation of powers," *Baker v. Carr*, 369 U.S. 186, 217, 82 S. Ct. 691, 710 (1962), a court should not review questions better suited for the political branches. This Court must refuse to resolve a dispute "(1) when the Constitution commits [the] issue . . . to one branch of government; or (2) when satisfactory and manageable criteria or standards do not exist for judicial determination of the issue." *Hoke Cnty. Bd. of Educ. v. State*, 358 N.C. 605, 639, 599

S.E.2d 365, 391 (2004) (emphasis omitted) (citing *Baker*, 369 U.S. at 210, 82 S. Ct. at 706). The issue before us—partisan consideration in redistricting—is both constitutionally committed to another branch of government, the General Assembly, and lacking in satisfactory legal standards. Thus, a claim for partisan gerrymandering presents a nonjusticiable political question.

The North Carolina Constitution expressly acknowledges that the authority to redistrict belongs to the General Assembly. *See* N.C. Const. art. II, §§ 3, 5; U.S. Const. art. I, § 4, cl. 1. In a system based upon popular sovereignty, this structure makes sense because legislators, as opposed to judges, are in the best position to address the people's interests. *See Vieth*, 541 U.S. at 358, 124 S. Ct. at 1824 (Breyer, J., dissenting) ("It is precisely *because* politicians are best able to predict the effects of boundary changes that the districts they design usually make some political sense.").

The General Assembly's redistricting authority is checked by the people through express constitutional provisions as interpreted by this Court. Our constitution subjects redistricting by the General Assembly to only four express limitations. *See* N.C. Const. art. II, §§ 3, 5. Since these limitations say nothing about the permissibility of partisan gerrymandering, the issue has only two legitimate avenues for reform: a statute or a constitutional amendment that imposes a restraint for the Court to apply. As such, unless and until the people alter the law to either limit or prohibit the practice of partisan gerrymandering, this Court is without any satisfactory or manageable legal standard and thus must refuse to resolve such a claim.

A majority of this Court, however, tosses judicial restraint aside, seizing the opportunity to advance its agenda. There is no express provision of the constitution supporting the decision of the majority; there is no showing that the enacted redistricting plans are unconstitutional beyond a reasonable doubt. A summary pronouncement by the majority to the contrary does not make it so. In the majority's view, it is this Court, rather than the people, who hold the power to alter our constitution. Thus, the majority by judicial fiat amends the plain text of Article I, Sections 10, 12, 14, and 19, to empower courts to supervise the legislative power of redistricting arising from complaints of partisan gerrymandering. Such action constitutes a clear usurpation of the people's authority alone to amend their constitution. *See* N.C. Const. art. XIII, §§ 2, 3, 4.

In essence, the majority rules that the North Carolina Constitution now has a statewide proportionality requirement for redistricting. It seeks to support this view with various provisions of our Declaration of Rights that are designed to protect individual and personal rights. *Corum v. Univ. of N.C.*, 330 N.C. 761, 782, 413 S.E.2d 276, 289 (1992). In doing so, it magically transforms the protection of individual rights into the creation of a protected class for members of a political party, subjecting a redistricting plan to strict scrutiny review. The majority presents various views about what constitutes unconstitutional partisan gerrymandering. *See* Order, ¶¶ 4–6 (providing a variety of observations about what the constitution requires). Absent from the order is any mention of "extreme partisan gerrymandering," which was the issue presented to the Court. Perhaps the sentence best characterizing the majority's

holding is that "[t]he General Assembly violates the North Carolina Constitution when it deprives a voter of his or her right to substantially equal voting power on the basis of partisan affiliation." Order, ¶ 5. The question of *how much* partisan consideration is unconstitutional remains a mystery, as does what is meant by "substantially equal voting power on the basis of partisan affiliation." Any discretionary decisions constitutionally committed to the General Assembly in the redistricting process have now been transferred to the Court.

In seeking to hide its partisan bias, the majority states that "redistricting plans shall adhere to traditional neutral districting criteria and not subordinate them to partisan criteria." Order, ¶ 8. Ironically, the majority claims the General Assembly should not subordinate traditional neutral districting criteria to partisan considerations, but its litmus test of constitutionality *requires* a satisfactory partisanship analysis. In fact, only a satisfactory partisanship analysis makes a plan constitutional. But, the Court provides no guidance as to what constitutes an acceptable partisanship analysis. The Court further says that the constitution requires the use of various political science techniques of voting analysis. In addition to the remedial maps, the Court requires the General Assembly to report "an explanation of what data they relied on to determine that their districting plan is constitutional, including what methods they employed in evaluating the partisan fairness of the plan." Order, ¶ 6. Glaringly, it fails to mention which data or methods are acceptable or what results would be satisfactory. Apparently, the majority alone

knows what would be constitutional. Further, the Court allows other groups to submit alternate plans but does not mandate the same disclosures.

In rejecting the notion that claims of partisan gerrymandering present a justiciable issue, the Supreme Court of the United States noted the unreliability of political science models:

> Even the most sophisticated districting maps cannot reliably account for some of the reasons voters prefer one candidate over another, or why their preferences may change. Voters elect individual candidates in individual districts, and their selections depend on the issues that matter to them, the quality of the candidates, the tone of the candidates' campaigns, the performance of an incumbent, national events or local issues that drive voter turnout, and other considerations. Many voters split their tickets. Others never register with a political party, and vote for candidates from both major parties at different points during their lifetimes. For all of those reasons, asking judges to predict how a particular districting map will perform in future elections risks basing constitutional holdings on unstable ground outside judicial expertise.

Rucho, 139 S. Ct. at 2503–04.

Nonetheless, the Court mandates a political-science-based approach without complying with the direct statutory requirements triggered when a redistricting plan is found unconstitutional. North Carolina law requires that

> [e]very order or judgment declaring unconstitutional or otherwise invalid, in whole or in part and for any reason, any act of the General Assembly that apportions or redistricts State legislative or congressional districts shall find with specificity all facts supporting that declaration, shall state separately and with specificity the court's conclusions of law on that declaration, and shall, with specific reference to those findings of fact and conclusions of law, identify every defect found by the court, both as to the plan as a whole and as to individual districts.

N.C.G.S. § 120-2.3 (2021). The majority's order today provides no specificity—only a vague and undefined ambition of "political fairness"—which ultimately only the majority can measure and determine if its desired result is accomplished.

In 2019 the trial court required the General Assembly to redraw the districts. *Common Cause v. Lewis*, No. 18 CVS 014001, 2019 WL 4569584, at *135 (N.C. Super. Ct. Sept. 3, 2019). The 2020 election took place under these constitutionally compliant districts. The people have expressed their will by electing the current members of the General Assembly. The people were aware that the legislators elected in 2020 would be tasked with drawing new districts according to the census, *see* N.C. Const. art. II, §§ 3, 5, and by any standard, the process used by the General Assembly to follow the nonpartisan criteria meets the requirements of the 2019 trial court order. Thus, the General Assembly and any neutral observer would have to inquire what about our constitutional text has changed from 2019 to 2022 resulting in this newfound constitutional requirement.

The 2019 remedial order required that for a plan to be constitutional, "[p]artisan considerations and election results data *shall not be used* in the drawing of legislative districts." *Common Cause v. Lewis*, No. 18 CVS 014001, 2019 WL 4569584, at *136 (N.C. Super. Ct. Sept. 3, 2019) (emphasis added). The order today contradicts this directive by requiring partisan data be used. Similarly, the court-approved constitutional districts drawn in 2019 provided that Voting Rights Act districts are not required anywhere in North Carolina. The majority today also

contradicts that finding. It should be noted that the trial court here also found that no Voting Rights Act districts are necessary in North Carolina.

Finally, the majority's managed timeline is arbitrary and seems designed only to ensure this Court's continued direct involvement in this proceeding. Instead of following our customary process of allowing the trial court to manage the details of a case on remand, the majority follows the Governor's lead in mandating a May primary. No reason is given, nor does one exist—except for perceived partisan advantage—for not allowing the trial court to manage the remand schedule, including, if necessary, further delaying the primary.

To avoid the "smothering of freedom beneath the robes of a judicial despotism," *Dilday v. Beaufort Cnty. Bd. of Educ.*, 267 N.C. 438, 455, 149 S.E.2d 345, 347 (1966) (Lake, J., concurring), this Court should respect the constitutional role of the General Assembly. Further, the Court must provide a manageable standard to determine when a proposed redistricting plan is constitutional. The Court has failed to do so. The majority's requirements are so vague as to only allow this Court to ultimately determine a plan's constitutionality. With this ruling, the majority moves beyond traditional judicial decision-making in favor of judicially amending the constitution. I respectfully dissent.

Dissenting opinion to follow.

Justices BERGER and BARRINGER join in this dissenting opinion.

Copy to:
North Carolina Court of Appeals
Mr. Narendra K. Ghosh, Attorney at Law, for Harper, Rebecca, et al. - (By Email)
Mr. Terence Steed, Assistant Attorney General, for State Board of Elections, et al. - (By Email)
Mr. Amar Majmundar, Senior Deputy Attorney General, for State Board of Elections, et al. - (By Email)
Ms. Stephanie A. Brennan, Special Deputy Attorney General, for State Board of Elections, et al. - (By Email)
Mr. Burton Craige, Attorney at Law, for Harper, Rebecca, et al. - (By Email)
Mr. Paul E. Smith, Attorney at Law, for Harper, Rebecca, et al. - (By Email)
Mr. Phillip J. Strach, Attorney at Law, for Hall, Destin, et al. - (By Email)
Ms. Alyssa Riggins, Attorney at Law, for Hall, Destin, et al. - (By Email)
Mr. John E. Branch, III, Attorney at Law, for Hall, Destin, et al. - (By Email)
Mr. Thomas A. Farr, Attorney at law, for Hall, Destin, et al. - (By Email)
Mr. Stephen D. Feldman, Attorney at Law, for N.C. League of Conservation Voters, Inc., et al. - (By Email)
Mr. Adam K. Doerr, Attorney at Law, for N.C. League of Conservation Voters, Inc., et al. - (By Email)
Mr. Erik R. Zimmerman, Attorney at Law, for N.C. League of Conservation Voters, Inc., et al. - (By Email)
Mr. Ryan Y. Park, Solicitor General, for Governor Roy Cooper and Attorney General Joshua H. Stein - (By Email)
Mr. James W. Doggett, Deputy Solicitor General, for Governor Roy Cooper and Attorney General Joshua H. Stein - (By Email)
Mr. Zachary W. Ezor, Solicitor General Fellow, for Governor Roy Cooper and Attorney General Joshua H. Stein - (By Email)
Ms. Kellie Z. Myers, Trial Court Administrator - (By Email)
Mr. James R. Morgan, Jr., Attorney at Law, for NC Sheriffs' Association, et al. - (By Email)
Mr. Sean F. Perrin, Attorney at Law, for NC Sheriffs' Association, et al. - (By Email)
Mr. Edmond W. Caldwell, Jr., Executive Vice President and General Counsel, for NC Sheriffs' Association, et al. - (By Email)
Mr. Matthew L. Boyatt, Assistant Attorney General, for NC Sheriffs' Association, et al. - (By Email)
Ms. Hilary H. Klein, Attorney at Law, for Common Cause - (By Email)
Ms. Allison J. Riggs, Attorney at Law, for Common Cause - (By Email)
Mr. Mitchell Brown, Attorney at Law, for Common Cause - (By Email)
Ms. Katelin Kaiser, Attorney at Law, for Common Cause - (By Email)
Mr. Jeffrey Loperfido, Attorney at Law, for Common Cause - (By Email)
Ms. Noor Taj, Attorney at Law, for Common Cause - (By Email)
N.C. Supreme Court Clerk - (By Email)

Mr. Edwin Speas, Attorney at Law, for Buncombe County Board of Commissioners - (By Email)
Ms. Caroline P. Mackie, Attorney at Law, for Professor Charles Fried - (By Email)
Mr. Sam Hirsch, Attorney at Law, Pro Hac Vice, for N.C. League of Conservation Voters, Inc., et al. - (By Email)
Ms. Jessica Ring Amunson, Attorney at Law, Pro Hac Vice, for N.C. League of Conservation Voters, Inc., et al. - (By Email)
Mr. Zachary C. Schauf, Attorney at Law, Pro Hac Vice, for N.C. League of Conservation Voters, Inc., et al. - (By Email)
Ms. Urja Mittal, Attorney at Law, Pro Hac Vice, for N.C. League of Conservation Voters, Inc., et al.
Mr. Karthik P. Reddy, Attorney at Law, Pro Hac Vice, for N.C. League of Conservation Voters, Inc., et al.
Mr. J. Tom Boer, Attorney at Law, Pro Hac Vice, for Common Cause - (By Email)
Ms. Olivia T. Molodanof, Attorney at Law, Pro Hac Vice, For Common Cause - (By Email)
Mr. E. Mark Braden, Attorney at Law, Pro Hac Vice, for Hall, Destin, et al. - (By Email)
Ms. Katherine Mcknight, Attorney at Law, for Hall, Destin, et al. - (By Email)
Abha Khanna, Attorney at Law, Pro Hac Vice, for Harper, Rebecca, et al. - (By Email)
Ms. Lalitha D. Madduri, Attorney at Law, Pro Hac Vice, for Harper, Rebecca, et al. - (By Email)
Mr. Abraham Rubert-Schewel, Attorney at Law, for Campaign Legal Center - (By Email)
Mr. William C. McKinney, Attorney at Law, for Former Governors - (By Email)
Mr. John R. Wester, Attorney at Law, for N.C. League of Conservation Voters, Inc. - (By Email)
Mr. Jacob D. Shelly, Attorney at Law, Pro Hac Vice, for Harper, Rebecca, et al. - (By Email)
Mr. Graham W. White, Attorney at Law, Pro Hac Vice, for Harper, Rebecca, et al. - (By Email)
Ms. Elisabeth S. Theodore, Attorney at Law, Pro Hac Vice, for Harper, Rebecca, et al. - (By Email)
Mr. R. Stanton Jones, Attorney at Law, Pro Hac Vice, for Harper, Rebecca, et al. - (By Email)
Mr. Samuel F. Callahan, Attorney at Law, Pro Hac Vice, for Harper, Rebecca, et al. - (By Email)
Mr. Chris Lamar, Attorney at Law, Pro Hac Vice, for Campaign Legal Center
Mr. Orion de Nevers, Attorney at Law, Pro Hac Vice, for Campaign Legal Center
Ms. Ruth Greenwood, Attorney at Law, Pro Hac Vice, for Professor Charles Fried - (By Email)

Ms. Theresa Lee, Attorney at Law, Pro Hac Vice, for Professor Charles Fried - (By Email)

Mr. Nicholas Stephanopolous, Attorney at Law, Pro Hac Vice, for Professor Charles Fried - (By Email)

Ms. Mary Carla Babb, Special Deputy Attorney General, for State Board of Elections, et al. - (By Email)

Mr. Nathan A. Huff, Attorney at Law, for National Republican Congressional Committee - (By Email)

Mr. Jared M. Butner, Attorney at Law, for National Republican Congressional Committee - (By Email)

Ms. Kathleen F. Roblez, Attorney at Law, for NC NAACP - (By Email)

Ms. Caitlin Swain, Attorney at Law, for NC NAACP - (By Email)

Mr. Daryl V. Atkinson, Attorney at Law, for NC NAACP - (By Email)

Ms. Ashley Mitchell, Attorney at Law, for NC NAACP - (By Email)

Ms. Aviance Brown, Attorney at Law, for NC NAACP - (By Email)

Mr. Irving Joyner, Attorney at Law, for NC NAACP - (By Email)

West Publishing - (By Email)

LexisNexis - (By Email)