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

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

NOW COME COA Defendants, all sued in their official and individual capacities[1], by and through Special Deputy Attorney General Elizabeth Curran O'Brien, and hereby submit their reply to Plaintiff's Response to the COA Defendants' Motion to Dismiss.

In his Response, Plaintiff fails to demonstrate the existence of a qualified First Amendment right of access to disclosures of judicial votes on non-merits and emergency orders. For this reason, Plaintiff's Complaint should be dismissed for failure to state a claim. Plaintiff further fails to establish the jurisdiction of this Court over his claims, to refute the applicable immunities of the defendants, or alternatively, overcome the need for abstention.

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

ARGUMENT

I. THERE IS NO QUALIFIED FIRST AMENDMENT RIGHT TO THE INFORMATION PLAINTIFF SEEKS

Plaintiff fails to demonstrate that he possess a qualified First Amendment right of access to disclosure of votes on non-merits and emergency orders because the information he seeks is not a judicial record. Further, Plaintiff fails to show that the records he seeks, if they exist, have (1) historically been open to the press and general public, and (2) play a significant positive role in the functioning of the particular process in question. In other words, Plaintiff fails the "experience and logic" test.

a. ALLEGED RECORDS OF VOTES OF THE PANEL ORDER AND EN BANC ORDER ARE NOT JUDICIAL RECORDS

The information Plaintiff seeks is not a judicial record. The records he seeks are not part of the judicial file, and not publically available. Throughout his Amended Complaint and Response, Plaintiff conflates "judicial records" with records related to the deliberative judicial process. Plaintiff cites no case that holds that the identification of how individual judges vote on a non-merits order is a judicial record. The binding cases Plaintiff cites simply hold that court *orders* are judicial records to which a First Amendment right of access applies.

Plaintiff was provided the judicial records of the North Carolina Court of Appeals in the case – the Panel Order and the En Banc Order [DE 12-1, 12-2] – immediately upon request. These, along with documents filed by the parties, comprise the judicial records of the Court of Appeals case.

The cases cited by Plaintiff do not support his conclusion that the information he seeks is a judicial record. First, Plaintiff incorrectly asserts that *Applebaum* supports his position that any judicially authored or created document constitutes a judicial record. [DE 23, p. 20] *Applebaum* concerned whether the public had a First Amendment right of access to *orders* issued by the court under 18 U.S.C. § 2703(d), the Stored Communications Act. *United States v. Applebaum*, 707 F.3d 283 (4th Cir. 2013). The Fourth Circuit found that the court *orders* were judicial records. *Id.* at 290. The *Applebaum* court also considered whether the derivative motions were judicial records. The Court determined that they were judicial records, because they were filed with the court with the objective of obtaining judicial action or relief. *Id.* at 291. *Applebaum* does not support the conclusion that the identity of how individual judges voted on a non-merits emergency order is a judicial record.

Plaintiff next asserts that Judges' votes are not part of the judicial deliberation process. [DE 23, pp. 20] In support of this position, Plaintiff cites to *Hicklin v. Eng'g, LLC v. Bartell*, 439 F.3d 346 (7th Cir. 2006). *Hicklin* concerned litigation concerning trade secrets and whether the court could keep its *opinions* under seal. The court found that the court's *opinion* was a public record. This is vastly different than disclosing votes of non-merits emergency orders. Consistent with *Hicklin*, the decision of the Court of Appeals is public – the Panel Order and the En Banc Order. Plaintiff again conflates a decision, opinion or order of a court,

with the judicial deliberation process. *Hicklin* does not support Plaintiff's conclusion that a vote is an order, opinion or decision of a court.

Plaintiff next seeks to distinguish votes from deliberation by pointing to statutes completely unrelated to the judicial deliberative process. [DE 23, p. 21] These statutes, 28 U.S.C. § 411 (the bill of rights, constitution, and bylaws of labor organizations), N.C. Gen. Stat. § 14-234 (the North Carolina statute criminalizing self-dealing by public officials and employees with regard to government contracts), and N.C. Gen. Stat. § 143-318.10 (the North Carolina Open Meetings Law), are inapplicable to the issues in this case and provide no support for Plaintiff's position.

Plaintiff thereafter asks this Court to consider a non-binding California case, *Copley Press, Inc. v. Superior Court*, 6 Cal. App. 4th 106 (Cal. Ct. App. 1992), interpreting California law, which has not been adopted, or even cited by, any federal court or any North Carolina court. [DE 23 pp. 21-23] This case is easily distinguished, and not helpful in determining the issues in this matter.

In *Copley Press*, the petitioners sought access to the "minute books of the clerks serving six superior court judges to investigate the possibility that the judges' receipt of gifts from attorneys might have improperly influenced judicial conduct." *Id.* at 108. The petitioners in *Copley Press* sought to determine "which attorneys or law firms appeared before the judges over a period of time." *Id.* at 109. These records were basically the "rough minutes" of the court clerk that would later be recorded as formal minutes and become the official court record at a later time.

Id. at 110. The minutes are comprised of "the history of the proceedings in the courtroom, [the] ... convening [of] the case on each day; who was present; the witnesses called and the various matters that are in the ... proceedings in a trial of the case, ... all of the motions; who was present; the nature of the hearing and the decision of the judge...." *Id.* at 110. The records sought simply were the notes of the courtroom clerk documenting activity that occurred in open court on certain days. *Copley Press* does not deal in any way with the judicial deliberative process – in fact, the word "deliberate" does not even appear in the opinion.

Finally, Plaintiff cites to *Co. Doe* as authority for his assertion that his right of access to the judicial votes is well settled. In *Co. Doe*, the District Court allowed an entire lawsuit to be conducted under seal, and not be reflected on the public docket. *Co. Doe v. Public Citizen*, 749 F.3d 246 (4th Cir. 2014). When the District Court entered its judgment, it released its memorandum opinion on the public docket, but with redactions to virtually all of the evidence supporting its decision. *Id.* at 252-53. The pleadings, briefing, motions to dismiss and motions for summary judgment, remained under seal. *Id.* at 253. The Fourth Circuit held that the District Court's sealing order violated the public's right to access under the First Amendment. In essence, the *orders* of the court and court filings were found to be judicial records to which the public had a right of access. *Co. Doe* says nothing on the topic of the alleged right of access to judicial votes on orders issued by the state courts anonymously.

None of the cases cited by Plaintiff delve into records of judicial deliberations or records of votes on non-merits orders and are inapplicable to the facts in this case. Consequently, Plaintiff has failed to demonstrate that the information he seeks constitutes a judicial record, to which a qualified First Amendment right to access attaches. The judicial records to which Plaintiff is entitled – the Panel Order and the En Banc Order – were immediately provided upon his request.

b. PLAINTIFF FAILS THE EXPERIENCE AND LOGIC TEST

Plaintiff fails to demonstrate that the information he seeks has historically been open to the press and general public in the past. Plaintiff points to no instance of the Court of Appeals providing to the press or public the information he seeks on any prior non-merits order. He cannot do so, because decades of history show that the Court of Appeals has never provided to the press or public the information he seeks. For this reason alone, his claim fails.

Plaintiff asserts 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 23, p. 25] Plaintiff appears to not discern the distinction between merits decisions – opinions that a court issues after full briefing and oral argument – and non-merits decisions – such as the Panel Order and the En Banc Order. The procedures in non-merits orders in emergency matters differ significantly from merits cases.

In merits cases, the court issues an opinion after full briefing and oral arguments by the parties, as well as consideration of any amicus briefs. Conversely,

in non-merits matters, the court considers very minimal input from parties on an abbreviated timeline. The types of issues resolved in non-merits orders include motions for various reasons, such as extensions of time, as well as petitions of various types. Plaintiff's inability to discern the difference between these types of orders, issued by the Court as an institution, from published, merits opinions with precedential value does not negate the fact that they are intrinsically distinct.

The United States Supreme Court maintains a vigorous non-merits docket, and frequently issues orders without disclosing how individual Justices voted. As recently as February 7, 2022, United States Supreme Court Associate Justice Brett Kavanaugh defended the practice of issuing non-merits orders, which often includes unsigned orders similar to the Panel Order and En Banc Order. *Merrill v. Milligan*, 142 S. Ct. 879 (2022). Plaintiff points to none, and undersigned counsel can find no instances of individual United States Supreme Court Justices being compelled to identify how they voted in a non-merits order. It is axiomatic that if the final arbiter on the Constitution, the United States Supreme Court, does not view the public as having a First Amendment right of access to the identity of how they themselves vote on non-merits orders, one does not exist and this Court should not create one here.

Plaintiff's relies on *Pellegrino* and *Strine* to demonstrate that the non-disclosure of the identity of the Judges who voted on the orders is somehow an arbitrary departure from a tradition of access for the information he seeks. [DE 23, p. 25] These cases fail to support Plaintiff's argument. In *Pellegrino*, the Court

restored public access to docket sheets, records which were historically available to the public. *Hartford Courant Co. v. Pellegrino,* 380 F.3d 83, 94 (2nd Cir. 2004). In *Strine*, the court addressed whether certain court proceedings were traditionally open to the public. *Del. Coalition for Open Gov't, Inc. v. Strine*, 733 F.3d 510 (3rd Cir. 2013). These cases involved records and information with a tradition of public disclosure. Because Plaintiff cannot demonstrate a tradition of public access to the information he seeks here, his reliance upon these cases is misplaced.

Likewise, Plaintiff cannot demonstrate the "logic" prong of the "experience and logic" test. The logic prong inquires whether public access plays a significant role in the process in question. *Applebaum*, 707 F. 3d at 202. As asserted above, the Panel Order and En Banc are non-merits emergency orders that differ significantly than merits orders, which are determined after full briefing and oral argument by the parties.

Plaintiff fails to demonstrate how public access to how individual judges voted on the Panel Order and En Banc Order plays a positive role in the functioning of the judicial process. The COA Defendants ultimately did not decide the underlying matters of the Panel Order and En Banc Order on the merits. On February 14, 2022, the North Carolina Supreme Court issued its opinion, on the merits, after full briefing and oral argument, in a published opinion. *Harper v. Hall*, 2022-NCSC-17, 2022 WL 496215. Maintaining the confidentiality of the internal workings of the court and the deliberative process serves the important purpose of allowing individual judges' autonomy and flexibility in discussing and

considering issues before the court. Speculation regarding how the COA Defendants may have decided this case on the merits based upon how individual judges voted on an emergency, non-merits order does not satisfy the logic prong.

Finally, Plaintiff claims he is not suggesting that North Carolina appellate courts cannot issue decisions via orders and without signed opinions, but yet that is exactly the declaration he seeks. [DE 23, p. 25] If this Court finds that Plaintiff has a qualified First Amendment right of access to the information he seeks, then North Carolina appellate courts may no longer issue non-merits orders "for the Court," but instead must disclose the individual votes of each Judge in all of its orders on petitions, writs, and non-dispositive orders. Plaintiff seeks to fundamentally change the way North Carolina appellate courts issue non-merits orders – by demanding non-merits and emergency orders be authored by individual judges and not by the institution of the court as a whole.

II. STATE JUSTICES, JUDGES AND CLERKS ARE PROTECTED BY NORTH CAROLINA'S SOVEREIGN IMMUNITY UNDER EX PARTE YOUNG WITH RESPECT TO REQUESTS FOR JUDICIAL VOTES DISCLOSURES

In the interest of judicial economy and because the analysis is the same, the COA Defendants, adopt and incorporate by reference as if fully set forth herein, the legal analysis by the Supreme Court Defendants in DE 24, Section I, pp. 2-6.

III. ALTERNATIVELY THIS COURT SHOULD ABSTAIN ITS JURISDICTION

In the interest of judicial economy and because the analysis is the same, the COA Defendants, adopt and incorporate by reference as if fully set forth herein, the legal analysis by the Supreme Court Defendants in DE, Section II, pp. 6-9.

IV. THE STATE COURTS' ACTIONS TO ISSUE THE DECEMBER 2021 ORDERS ANONYMOUSLY ARE JUDICIAL ACTS PROTECTED BY THE ABSOLUTE JUDICIAL IMMUNITY, EVEN WHEN PLAINTIFF LABELS HIS LAWSUIT AS A CONSTITUTIONAL RIGHT OF ACCESS CASE

In the interest of judicial economy and because the analysis is the same, the COA Defendants, adopt and incorporate by reference as if fully set forth herein, the legal analysis by the Supreme Court Defendants in DE 24, Section III, pp. 9-12.

V. ALL INDIVIDUAL CAPACITY CLAIMS ARE ALTERNATIVELY BARRED BY QUALIFIED IMMUNITY, EVEN IF THE COURT DETERMINES THAT ANY OF THE COMPLAINED OF ACTIONS WERE ADMINISTRATIVE.

In the interest of judicial economy and because the analysis is the same, the COA Defendants, adopt and incorporate by reference as if fully set forth herein, the legal analysis by the Supreme Court Defendants in DE 24, Section IV, pp. 12-13.

CONCLUSION

Plaintiff has failed to demonstrate that he has a First Amendment right of access to the information that he seeks. Docket entries 12-1 and 12-2 are the judicial records of the North Carolina Court of Appeals to which Plaintiff has a First Amendment right of access. Plaintiff further fails to demonstrate that North Carolina appellate courts have historically given access to the information he seeks.

Plaintiff seeks to fundamentally change the way North Carolina appellate courts operate and asks this Court to issue a federal decree creating a new constitutional right of access to information that no court in the nation, including the United States Supreme Court, has recognized. For these reasons, and other important jurisdictional, immunity and abstention considerations, this court should dismiss Plaintiff's complaint.

Respectfully submitted, this the 22nd day of February, 2022.

JOSHUA H. STEIN

Attorney General

/s/ Elizabeth Curran O'Brien

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

CERTIFICATE OF SERVICE

I hereby certify that on February 22, 2022, a copy of the **COURT OF APPEALS DEFENDANTS' REPLY TO PLAINTIFF'S RESPONSE TO THEIR MOTION TO DISMISS** was filed electronically using the Court's ECF system, which will send notice electronically to all counsel of record who have entered an appearance in this case.

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