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' RESPONSE TO PLAINTIFF'S MOTION FOR MANDAMUS OR PRELIMINARY INJUNCTION**

NOW COME COA Defendants,[1] to oppose Plaintiff's motion for a preliminary injunction or for a writ of mandamus.[2] [DE 2] Plaintiff has failed to show that he is likely to succeed in proving that disclosure of the individual votes of state appellate court judges on the Election Suspension Orders is required by the First Amendment. Nor does Plaintiff support his request for this extraordinary relief by a showing of any irreparable harm in the requested relief's absence, that the public interest favors granting relief, or that the applicable equities favor relief. Thus, the Court should deny Plaintiff's motion.

INTRODUCTION

Plaintiff seeks injunctive relief or the "extraordinary remedy of mandamus" *N.C. State Conf. of the NAACP v. Berger*, 999 F.3d 915, 922 (4th Cir. 2021) (quoting and affirming lower court's denial of mandamus), but fails to establish in either his Amended Complaint or brief why

[1] Undersigned counsel does not represent Defendant Carpenter and Defendant Griffin in their individual capacities.
[2] Plaintiff's Motion for Mandamus or Preliminary Injunction ("Motion") [DE 2] states that "[t]he motion is predicated upon the Verified Complaint," which was filed on December 22, 2021. [DE 1] Plaintiff subsequently filed a Verified First Amended Complaint on January 10, 2022. [DE 12] COA Defendants submit this response in opposition to Plaintiff's motion in the event Plaintiff's Motion retains validity in light of the nullification of the predicate complaint. COA Defendants have not identified any controlling authority providing guidance in this scenario.

such extreme measures by this Court are warranted. Plaintiff alleges that the First Amendment to the United States Constitution vests in federal courts the authority to mandate, by entry of injunction or issuance of a writ of mandamus, the clerks, judges and justices of North Carolina's appellate courts to disclose judicial processes and reveal internal deliberations, including the votes of each individual judge on certain orders issued by those courts. Because the First Amendment to the Constitution of the United States does not require such disclosures, Plaintiff's motion for a preliminary injunction or a writ of mandamus should be denied because he has shown no likelihood of success on the merits. The *status quo* evinces no irreparable harm to Plaintiff or equities that favor intervention and interference by this Court.

STATEMENT OF FACTS

The COA Defendants rely on and incorporate by reference the statement of facts as recited in the memorandum of law in support of their motion to dismiss. [DE 17-1 at 3-4]

LEGAL STANDARD

Plaintiff seeks a writ of mandamus or preliminary and permanent injunction to mandate disclosure of individual votes of North Carolina's appellate judges and justices "on any matter" [DE 12 at 18], including specific disclosure of all votes on Election Suspension Orders. Plaintiff's Motion is predicated on the All Writs Act, which provides that a federal court may issue writs as "necessary and appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651. Plaintiff seeks the same relief pursuant to Rule 65 of the Federal Rules of Civil Procedure, which authorizes a court to order temporary or permanent injunctive relief against a party. Fed. R. Civ. P. 65. At the outset, COA Defendants note that these remedies are mutually exclusive. *See, e.g., Burgess v. Wilbur*, 50 F.2d 502, 503 (D.C. Cir. 1931) ("Injunction and mandamus cannot be obtained in the same proceeding.").

Mandamus is to be used "only in the clearest and most compelling cases." *Cartier v. Sec'y of State*, 506 F.2d 191, 199 (D.C. Cir. 1974). Plaintiff must show that a federal court has an independent basis for subject matter jurisdiction for a writ of mandamus to be issued. *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34–35 (1980) (per curiam). Additionally, to be eligible for a writ of mandamus, (1) the right to issuance of the writ must be clear and indisputable; (2) there must be no other means to attain the relief requested; and (3) the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances. *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 380–381 (2004). The Plaintiff must "satisfy the heavy burden required to justify the extraordinary remedy of mandamus." *In re Cheney*, 334 F.3d 1096, 1098 (D.C. Cir. 2003), *vacated and remanded sub nom. Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367 (2004)).

"A preliminary injunction is 'an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief' and may never be awarded 'as of right.'" *Mountain Valley Pipeline, LLC v. W. Pocahontas Properties Ltd. P'ship*, 918 F.3d 353, 366 (4th Cir. 2019) (citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22, 24 (2008)). The purpose of a preliminary injunction is "to preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981).

The test for the issuance of a preliminary injunction turns on the balance of the four *Winter* factors: (1) likelihood of success on the merits; (2) irreparable harm in the absence of an injunction; (3) equities to the parties; and (4) the public interest. Plaintiff bears the burden of proof on each factor. *Winter*, 555 U.S. at 20. Additionally, a plaintiff must show that success on the merits is likely "regardless of whether the balance of hardships weighs in his favor." *Real Truth About Obama, Inc. v. Fed. Election Comm'n*, 575 F.3d 342, 346 (4th Cir. 2009), *cert. granted, judgment*

vacated, 559 U.S. 1089 (2010), and *adhered to in part sub nom. The Real Truth About Obama, Inc. v. F.E.C.*, 607 F.3d 355 (4th Cir. 2010). This burden requires more than simply showing that "grave or serious questions are presented." *Id*. at 347.

For reasons described below, Plaintiff fails to meet criteria required under either test for the extraordinary relief requested.

ARGUMENT

I. THE COURT SHOULD DENY PLAINTIFF'S PETITION FOR WRIT OF MANDAMUS.

This Court does not have jurisdiction to issue a writ of mandamus against state judicial officials and Plaintiff fails to establish that he has a clear, indisputable right to the requested relief. Accordingly, this Court should deny Plaintiff's petition for writ of mandamus pursuant to 28 U.S.C. § 1651.

A. The Court lacks jurisdiction to grant mandamus relief against COA Defendants

This Court does not have mandamus jurisdiction over state courts or officials. The All Writs Act authorizes the federal appellate courts to issue a writ of mandamus "only incidental to an in aid of [its] appellate jurisdiction, which Congress has given it over district courts, and administrative boards and agencies." *In re Martin*, 834 F. App'x 45, 46 (4th Cir. 2021) Federal appellate courts may compel a federal district court to act pursuant to a writ of mandamus, but a federal court "does not have jurisdiction to grant mandamus relief against state courts . . . ." *See, e.g., In re Fullard*, 2022 U.S. App. LEXIS 531 (4th Cir. 2022) (quoting *Gurley v. Superior Ct. of Mecklenburg Cty.*, 411 F.2d 586, 587 (4th Cir. 1969) (per curium)). The United States Court of Appeals for the Fourth Circuit has explicitly recognized this limitation on its authority to grant mandamus relief: "since this court lacks appellate jurisdiction over the courts of the State of North

Carolina, we also lack jurisdiction to issue the requested writ of mandamus." *Gurley*, 411 F.2d at 587.

Even when requested against a federal district court, the Supreme Court of the United States has warned that only "exceptional circumstances . . . will justify the invocation of this extraordinary remedy." *Will v. United States*, 389 U.S. 90, 95 (1967). The U.S. Court of Appeals for the Fourth Circuit has also recognized that extraordinary writs do not reach cases where judges neither exceed nor refuse to exercise jurisdiction, even if they err in matters within their jurisdiction. *Cent. S.C. Chapter, Soc. of Pro. Journalists, Sigma Delta Chi v. U.S. Dist. Ct. for Dist. of S.C.*, 551 F.2d 559 (4th Cir. 1977). It is plainly within the Court of Appeals' authority and jurisdiction to maintain the confidentiality of internal court processes and deliberations, and there is no merit to any suggestion that the COA Defendants have exceeded or failed to exercise their jurisdiction. *Id.* It is well within the bounds of judicial discretion to issue orders for the court without designating the individual judges participating in a vote or the explicit votes of each judge. The relief Plaintiff seeks is simply unavailable as against the COA Defendants—or any Defendants named in Plaintiff's Verified First Amended Complaint.

Plaintiff also cites 28 U.S.C. § 1361 in his brief supporting his petition for writ of mandamus, but that statute, again, only extends jurisdiction of the federal courts to grant relief against federal employees and officers. *See Banks v. Hornak*, 698 F. App'x 731, 737 (4th Cir. 2017) (explaining that § 1361 grants authority to the federal district courts to compel "an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.") The COA Defendants are not subject to the statutory provisions upon which Plaintiff's Motion relies. As a result, this Court lacks jurisdiction to grant Plaintiff's requested relief, which necessarily defeats Plaintiff's petition for writ and compels this Court's denial.

B. Plaintiff has failed to show that mandamus is warranted here.

Even if this Court had jurisdiction to grant the requested relief, which COA Defendants do not concede, Plaintiff has not provided the requisite showing for issuance of the writ. Warning that the writ "is one of the most potent weapons in the judicial arsenal," the Supreme Court has laid out three conditions that must be satisfied to justify issuance. *Cheney*, 542 U.S. at 380 (internal citations omitted). First, the petitioner must have no other adequate remedy—"a condition designed to ensure that the writ will not be used as a substitute for the regular appeals process." *Id.* at 380–81 (internal citations omitted). Second, the petitioner must demonstrate that his right to the writ is "clear and indisputable." *Id.* at 381 (internal citations omitted). Third, even if the first two prongs are met, the issuing court must be satisfied that the writ is appropriate under the circumstances. *Id.*

Here, Plaintiff fails the first prong simply by his request for alternate relief. The availability, even theoretically, of injunctive relief forecloses the option for mandamus relief. *See Id.* at 380 ("the party seeking issuance of the writ [must] have no other adequate means to attain the relief he desires . . .") (citation omitted). Further, Plaintiff's petition for a writ of mandamus is premature in that it seeks a preemptive ruling on the merits of Plaintiff's constitutional claims. *See Chaplaincy of Full Gospel Churches v. Johnson*, 276 F. Supp. 2d 82, 84 (D.D.C. 2003) (holding that ongoing litigation in the matter may constitute an alternative adequate remedy, which in turn deprives the court of jurisdiction). For the reasons outlined more fully in COA Defendants' Motion to Dismiss, incorporated by reference here, and in section II, *infra*, Plaintiff has neither shown a "clear and indisputable" right to the relief he seeks, nor that the disclosure of details regarding judicial policies and the deliberative process is appropriate in these–or any–circumstances. *Accord Cheney*, 542 U.S. at 372 (citing *Clinton v. Jones*, 520 U.S. 681, 707 (1997) ("Special

considerations control when the Executive's interest in maintaining its autonomy and safeguarding its communications' confidentially are implicated.") Plaintiff has not satisfied any of the three conditions for issuance of a writ of mandamus. This Court should decline to award any preliminary relief, including a writ of mandamus, and instead allow the litigation to proceed, including ruling on COA Defendants' pending dismissal motion.

II. THE COURT SHOULD DENY PLAINTIFF'S REQUEST FOR PRELIMINARY INJUCNTION.

To the extent Plaintiff seeks a preliminary injunction in this matter, it too should be denied. Like a writ of mandamus, "[a] preliminary injunction is an extraordinary remedy." *See Winter*, 555 U.S. at 24 (vacating preliminary injunction issued by lower court). To prevail on a motion for preliminary injunction, a Plaintiff must establish a likelihood of success on the merits, show that he will suffer irreparable harm in the absence of preliminary relief, demonstrate that the balance of equities favors granting the relief, and that an injunction is in the public interest. *See, e.g., id.* at 20. Here, these four requirements have not been met and Plaintiff's motion should be denied.

A. Plaintiff Has Not Shown a Likelihood of Success on the Merits.

Plaintiff's First Amendment claims unequivocally lack merit. Plaintiff summarily concludes that his claims have a high likelihood of success, while overlooking the many factors that weigh against the extraordinary remedy he seeks. As discussed in detail in COA Defendants' motion to dismiss, Plaintiff's claims are barred by judicial immunity, qualified immunity, sovereign immunity, and judicial privilege.

Even if this suit was not barred, Plaintiff's Complaint is based solely on the allegation that a lack of access to records identifying how each judge has voted on the Election Suspension Orders denies his First Amendment rights.

Plaintiff asserts that a lack of access to the identity of how each judge voted in the Panel

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

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

1, 3, 404 U.S. App. D.C. 286 (D.C. Cir. 2013)).

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

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

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

against individual members' analysis and application of the law, and allows for expedited resolution in matters that are either time-sensitive or lacking in complexity or disagreement among court members.[3]

Additionally, Plaintiff fails the logic prong of the test as well. "The logic prong asks whether public access plays a significant role in the process in question." *Appelbaum*, 707 F.3d at 292. Logic and reason bolster the need for anonymity and expedient resolution in certain matters. Maintaining the confidentiality of internal workings of the Court and the deliberative process are not only the norm, but serve the important purpose of allowing individual judges autonomy and flexibility in discussing and considering issues before the Court. Federal Courts also recognize the value of confidentiality in this setting. *See* U.S. Court of Appeals for the Fourth Circuit Appellate Procedure Guide (Dec. 2021) (stating that the identity of an argument panel is kept confidential until the morning of oral argument, and allowing a majority of the court's active judges to vote to hear a case en banc but declining to disclose how each judge voted.) Public access does not play a significant role in this process.

Plaintiff's brief suggests the doctrine of public access to the judiciary tilts in his favor on the merits of his First Amendment claims, but Plaintiff stretches that doctrine far beyond what is being sought here. (DE 2 at p. 5) Public access to court proceedings and North Carolina's public records statute hardly warrant federal intrusion into the private deliberations and decisions of the state's appellate courts with regard to information traditionally, historically, and logically kept shielded from the public. Because Plaintiff's demand for records that reflect the identity and how each individual judge voted on motions and petitions like the Suspension Orders fails the

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

"experience and logic" test, there is no First Amendment right to access them.

Even if Plaintiff showed that he had a qualified constitutional right to access the votes of each individual judge, such right is not absolute. *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 9, 106 S. Ct. 2735, 2740-41 (1986). "[T]here are some limited circumstances in which the right … might be undermined by publicity." *Id.* In those cases, competing considerations may "override the qualified First Amendment right of access." *Id.*

For these reasons, Plaintiff has failed to establish any likelihood of success on the merits and preliminary injunctive relief should be denied.

B. Plaintiff Fails to Show A Likelihood of Irreparable Harm in the Absence of the Request Sought.

Once a Plaintiff establishes a likelihood of success on the merits (which here Plaintiff has not accomplished), the Court then "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief," and "should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Winter*, 555 U.S. at 24. (citations omitted).

Plaintiffs must make a clear showing that they will likely be irreparably harmed absent preliminary relief. *Real Truth About Obama, Inc.*, 575 F.3d at 347. An averment that the plaintiff's harm might simply outweigh the defendant's harm is insufficient. *Id.* Plaintiff has failed to meet this second *Winters* factor.

Plaintiff fails to show that he is harmed absent disclosure of how each individual judge voted on the Election Suspension Orders. Even if Plaintiff was successful in establishing harm, he nevertheless is unable to demonstrate why any such harm is irreparable. Any alleged harm to Plaintiff's constitutional right of access to judicial records could be cured in the due course of this litigation.

Indeed, any speculative harm to the Plaintiff as identified in the First Amended Complaint is far outweighed by the risk to the judiciary in forcing disclosure of the information sought. In the very likely event that Plaintiff's claims are dismissed, preliminary injunctive relief requiring disclosure cannot be undone, and contravenes the preliminary injunction's purpose of maintaining the *status quo* while litigation proceeds. *See Camenisch*, 451 U.S. at 395. Moreover, opening the State's appellate courts to this kind of demand by potential litigants (or relief by a federal district court) sets a dangerous precedent in that it harms the integrity of the court, violates principles of federalism, and violates judicial immunity and the abstention doctrine.

C. The Equities Tilt in COA Defendants Favor and an Injunction is Not in the Public Interest.

In addition to the reasons outlined above, the balance of equities tips in favor of Defendants, not Plaintiff, and the requested relief is not in the public interest. *See Winter*, 555 U.S. at 20.

Plaintiff seeks extreme intrusion into the state court system, and fails to honor the federal courts' requirement to exercise restraint in the day-to-day administration of state court proceedings. *See Middlesex Cty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 431–32 (1982) (explaining that comity requires "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.") A preliminary injunction issued by this Court would also improperly interfere in matters of public importance to the state over which the State appellate courts have jurisdiction. *See Younger v. Harris*, 401 U.S. 37 (1971) (cautioning that federal courts should not intervene with a pending state action). The *Rooker-Feldman* doctrine also prohibits federal courts from intervening in state court actions. *See, e.g.,*

Jordahl v. Democratic Party of Virginia, 122 F.3d 192, 202 (4th Cir. 1997) (affirming dismissal of suit by district court where the *Rooker-Feldman* doctrine is implicated and reinforces the important principle that review of state court matters must be made in the state appellate courts, and eventually the Supreme Court, not by federal district courts or courts of appeal.)

Finally, the ability of the court to issue orders as one, unified body—particularly about issues of public interest and importance—in turn promotes public confidence in the judiciary and benefits the public. This Court should deny Plaintiff's requested relief.

CONCLUSION

For these reasons, the Court should deny Plaintiff's petition for writ of mandamus and motion for preliminary injunction.

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

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CERTIFICATE OF SERVICE

I hereby certify that on this date I electronically filed the foregoing **COURT OF APPEALS DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION** with the clerk of Court using the CM/ECF system which will send notification of such to all counsel of record in this matter.

This 31st day of January, 2021.

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