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

Civil Action No. 3:21-cv-679

DAN BISHOP, **Plaintiff,** **v.** **AMY L. FUNDERBURK, et al.,**[1] **Defendants.**	**SUPREME COURT DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS**

NOW COME the Supreme Court Defendants to respectfully submit this Reply in support of their motion to dismiss Plaintiff's Complaint. Plaintiff's Response, DE 23, makes several points irrefutable. First, in response to the Supreme Court Defendants' argument that there is no precedent that establishes a qualified First Amendment right to disclosures of judicial votes on non-merits and emergency orders, Plaintiff did not counter with a single case holding that such right exists. Nor had Plaintiff offered a rationale to support the extension of the First Amendment

[1] This lawsuit named as defendants several North Carolina Supreme Court judicial officials. One of those officials, the Clerk of the Supreme Court of North Carolina Amy L. Funderburk, is no longer in office. Defendant Funderburk was sued in both her official and individual capacity. Federal Rule of Civil Procedure 25(d) provides that public officials sued in their official capacity are automatically substituted by their successor in office. Applying this rule, the district court should take a judicial notice of Clerk Funderburk's separation from office, and note the automatic substitution of the official capacity action accordingly. The Supreme Court's new Clerk is Grant E. Buckner, and the undersigned counsel are authorized to represent Mr. Buckner in his official capacity. The undersigned counsel additionally continue to represent Clerk Funderburk in connection with the individual capacity claim against her. We respectfully request that the Court's docket and case caption be modified to reflect these changes.

law to mandate disclosures in the category of orders which many other courts, including the U.S. Supreme Court, issue anonymously. Under these circumstances, the Court should refuse to enter the sweeping equitable relief requested by Plaintiff and dismiss this lawsuit.

Plaintiff's Response further neglects to make any showing to support his threadbare allegations of Defendants' malicious intentions and advance his individual capacity claims. The lack of the argument on that point requires a finding that Plaintiff abandoned those claims.

Finally, Plaintiff fails to either offer convincing arguments or to point to any facts to establish the existence of federal jurisdiction over his claims, to counter the applicable immunities or, alternatively, overcome the need for abstention. Plaintiff's Complaint should therefore be dismissed.

ADDITIONAL STATEMENT OF THE LAW

I. 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.

As argued in the opening brief, North Carolina's sovereign immunity bars these claims against the Supreme Court Defendants. DE 15 at 7-12. To counter Defendants' argument that *Ex Parte Young* does not permit a suit against these judicial officers, Plaintiff cites two recent district court cases: *Courthouse News Serv. v. Schaefer*, 440 F. Supp. 3d 532 (E.D. Va. 2020), *aff'd*, 2 F.4th 318 (4th Cir. 2021) and *Courthouse News Serv. v. Hade*, Case No. 3:21-cv-460, 2022 U.S. Dist. LEXIS 7843 (E.D. Va. Jan. 14, 2022). Yet neither case supports Plaintiff's position.

In *Hade*, a media outlet sued the Executive Secretary of the Office of Executive Secretary of the Supreme Court of Virginia for access to filed circuit court records through an Internet portal, because Secretary serves as 'the administrator of the circuit court system, which includes the operation and maintenance of a case management system.'" *Courthouse News Serv. v. Hade*, 2021

U.S. Dist. Ct. Motions LEXIS 89104 *3. The issue before the Virginia's district court was not whether the Executive Secretary, unlike the Supreme Court Defendants here, was a judicial official whose conduct with respect to the Court's orders was protected by the Eleventh Amendment. DE 15 at 9 (citing *Whole Woman's Health v. Jackson*, 211 L. Ed. 2d 316, 326, 334, 142 S. Ct. 522 (2021)). The *Hade* court instead considered a different legal question under *Ex Parte Young*: whether an admittedly executive official,[2] a court system administrator, "maintains a 'special relation' to the challenged policy and has 'acted or threatened' to enforce it." *Hade*, Civil Action No. 3:21cv460-HEH, 2022 U.S. Dist. LEXIS at *10. The district court determined that the Executive Secretary refused access to the existing online court records pursuant to the non-attorney access restriction of Va. Code § 17.1-293(E)(7) on the grounds that the media outlet reporters seeking access to the records were not licensed attorneys. *Id*. at * 9 (citing *McBurney v. Cuccinelli*, 616 F.3d 393, 402 (4th Cir. 2010)). This refusal created a special relationship between the Executive Secretary and the challenged enforcement of Virginia's statute, and the court administrator was therefore a proper Defendant under *Ex Parte Young*. *Id*. at * 9-10.[3] Here, the Supreme Court Defendants are not executive officials charged with implementing an unconstitutional law to whom the *Ex Parte Young* exception applies, and, in any case, they have not refused access to the Court's December 8 order. DE 12-5 at 1; DE 12 at 6 ¶ 29. *Hade* simply fails to shed any light on the sovereign immunity issue implicated in this matter.

Likewise, Plaintiff cites extensively to parts of another district court opinion in *Schaefer* for a proposition that sovereign immunity does not bar his claims against the Supreme Court

[2] DE 23 at 6, fn. 4.

[3] Defense of sovereign immunity does not apply to municipalities, and therefore no sovereign immunity argument appears to have been made on behalf of the local court clerk also sued in that action. *See Jinks v. Richland Cnty.*, 538 U.S. 456, 466, 123 S. Ct. 1667, 155 L. Ed. 2d 631 (2003) ("[M]unicipalities, unlike States, do not enjoy a constitutionally protected immunity from suit.")

Defendants here. But a review of the district court's opinion discloses that the *Schaefer* court did not contend with the issue of sovereign immunity either.[4] Instead, the court addressed "(A) whether this case is moot; (B) whether Plaintiff has satisfied the elements required to impose section 1983 liability on Defendants; (C) whether the First Amendment provides a right of access to a subset of newly-filed civil complaints; (D) if there is a First Amendment right, was it violated by Defendants; and (E) what remedy, if any, should be granted." *Schaefer*, 440 F. Supp. 3d 5 at 551. As to *Schaefer* section 1983 claim, the district court was required to determine whether the named Circuit Court clerks were "suable 'persons' under section 1983" with respect to allowing access to public civil complaints filed in local courts. *Id*. at 552 (explaining that "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"). Because the district court concluded that the local court clerks were sued in their administrative capacities to prevent future violations of federal law that permits access to copies of newly-filed civil complaints, the *Ex Parte Young* exception applied to them.

First, the *Schaefer* decision does not contradict the Supreme Court Defendants' position, who acknowledged from the outset, that narrow exceptions to sovereign immunity do exist. DE 15 at 9-10. But, as the Supreme Court Defendants explained in their opening brief, *Ex Parte Young* does not carve out an exception for the type of relief Plaintiff requests here. DE 15 at 9-12. The *Schaefer* court did not have to tackle the issue of how section 1983 applies to judicial officials with respect to their deliberative decisions to issue orders with designation "For the Court" as opposed to opinions that disclose judicial votes. These types of judicial decisions are not subject to section 1983's reach. See *Whole Woman's Health v. Jackson*, 211 L. Ed. 2d 316, 326, 334, 142 S. Ct. 522

[4] Moreover, even if the *Schaefer* district court actually determined that sovereign immunity did not protect judicial officials, the Fourth Circuit, that reviewed the lower court's opinion, did not have an opportunity to rule on that issue and therefore did not bind this Court in that respect.

(2021); *Ex parte Young*, 209 U.S. 123, 163 (1908).

Second, section 1983 itself does not permit injunctive relief against judicial officials, DE 15 at 10-11, and the Fourth Circuit in its review of the district court opinion recognized, without further considering, that principle. *Courthouse News Serv. v. Schaefer*, 2 F.4th 318, 324 (4th Cir. June 24, 2021) (noting that "the Supreme Court held that the injunctive relief at issue was inappropriate" and that "the district court denied injunctive relief and [plaintiff] has not cross-appealed that denial.") As Supreme Court Defendants explained, the United States Congress limited availability of injunctive relief against judicial officials and superseded the earlier *Pulliam* decision to contrary. DE 15 at 9, 22 (citing Federal Courts Improvement Act of 1996 and explaining its effect on *Pulliam v. Allen*, 466 U.S. 522, 541-42 (1984)). Plaintiff offers no rebuttal to that point at all, see DE 23 at 3-7, and therefore this Court should deem Plaintiff's request for injunctive relief under *Ex Parte Young* abandoned.

As to Plaintiff's request for declaratory judgment, the Supreme Court Defendants similarly explained why that request fails to satisfy the requirement that *Ex Parte Young* relief be prospective, or future-looking, rather than retrospective under the applicable "in the true legal sense" standard. DE 15 at 10-12. In sum, that is so because Plaintiff in his Amended Complaint seeks a declaration solely concerning the Supreme Court's December 8 order by declaring "that Bishop is entitled to access to the recorded votes on the Election Suspension Orders." DE 12 at 19. Unlike the *Schaefer* plaintiff who sought access to all future civil complaints filed in local courts that fell under the respective Circuit clerks' jurisdiction, Plaintiff here requests a declaration that he is entitled to access the alleged records of judicial votes on the December 8 order. There is nothing forward-looking in Plaintiff's "declaratory" request here. This court should deny that

request.[5]

Because *Ex Parte Young* exception does not apply to these judicial officials with respect to their actions on December 2021 orders, state sovereign immunity bars Plaintiff's claims.

II. ALTERNATIVELY, THIS COURT SHOULD ABSTAIN ITS JURISDICTION.

The Supreme Court Defendants requested this Court to consider in its abstention analysis the far-reaching impact on the pending state maps litigation and future state appellate proceedings of the relief Plaintiff requests here: a de jure determination that there is a constitutional right of access to processes and records reflecting state appellate courts' judicial votes on emergency orders. DE 15 at 12-19. Plaintiff patently recognized the overbroad reach of his request and even attempted to alleviate that overreach by amending the original Complaint's request to enjoin "denial or delay of access to votes on any matter[,]" DE 1 at 16-17 ¶ 1, and narrowing the equitable relief requested to "Election Suspension Orders[,]" DE 12 at 18 ¶¶ 2-3. The courts, of course, are not constrained in their consideration by such crafty drafting.

During abstention analysis, federal courts are called to "decline Plaintiffs' invitation to consider in isolation their (now-narrowed) request for relief, as though reaching the merits of their declaratory judgment claims would end the matter." *E.T. v. Cantil-Sakauye*, 682 F.3d 1121, 1125 (9th Cir. 2012). Instead, the courts are required to consider whether "'even the limited decree[ ]' sought here 'would inevitably set up the precise basis for future intervention condemned in *O'Shea*.'" *Id*. (citing *Luckey v. Miller*, 976 F.2d 673, 679 (11th Cir. 1992) (per curiam)); *accord*

[5] Confusingly, Plaintiff submits to the Court that "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[.]" DE 23 at 16 (emphasis in the original). As discussed *infra* on p. 9, the district court in *Schaefer* specifically denied the request for injunctive relief under those facts, and the *Hade* court issued no pronouncement at all on availability of either injunctive or declaratory relief.

Alaska Pretrial Detainees v. Johnson, 745 F. App'x 61, 62 (9th Cir. 2018) ("Even if we accept Alaska Pretrial Detainees' late attempts to narrow the injunction, the requested relief would nonetheless set up future intervention into state-court proceedings.") As argued extensively in this and the Supreme Court Defendants' opening briefs, the courts are required to look at what a lawsuit would actually accomplish, rather than be confined solely to review of the words that parties choose to employ in their pleadings.

The Supreme Court Defendants outlined the nature of their concerns about the ongoing intrusion into the judicial business of state appellate courts a favorable ruling for Plaintiff may spring into action. DE 15 at 15-16. Defendants additionally offered a glimpse into the non-exhaustive list of questions that a judgment in Plaintiff's favor would give rise to, noting that all the while Plaintiff offered no limiting principles to the "must disclose" rule he advocates for that answer any of these questions. DE 15 at 16. And in response to Defendants' concerns about intrusiveness and long-term impact of mandating state courts to disclose their judicial votes on these appellate orders, Plaintiff says only that "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 23 at 10. Plainly, any decree mandating, on constitutional grounds, the disclosure of judicial votes on the three orders in question has a domino effect, and is likely to lead to further lawsuits and requests for additional injunctions in future cases. DE 15 at 15. The impact of a judgment against Defendants would essentially be "laying the groundwork for a future request for more detailed relief which would violate the comity principles expressed in *Younger* and *O'Shea* is the precise exercise forbidden under the abstention doctrine." *Luckey*, 976 F.2d at 679. So if this Court agrees, as it should, with the Supreme Court Defendants' argument that the lawsuit has a likely impact on state courts beyond the three orders referenced in Plaintiff's Amended

Complaint, abstention on *O'Shea* grounds is appropriate.

As to the *Younger* abstention, Plaintiff's only retort is that there is no ongoing state proceeding "against [the] federal plaintiff." DE 23 at 8 (citing *Steffel v. Thompson*, 415 U.S. 452, 454 (1974)).[6] The Supreme Court Defendants addressed that prong of *Younger* in their opening brief head-on, noting in relevant part that the requirement is "satisfied where a state-court non-party has a 'substantial stake' in the state litigation." DE 15 at 19 (citing *Hicks v. Miranda*, 422 U.S. 332, 348-49 (1975)). The *Hicks* court held that the *Younger* abstention applies where while "no state criminal proceedings were pending against appellees by name[,]" yet "[a]ppellees had a substantial stake in the state proceedings, so much so that they sought federal relief" in connection with the pending state case. 422 U.S. at 348. Here, Plaintiff sought federal relief in connection with the anonymous format of the state appellate orders issued in the ongoing maps litigation. Considerations of comity and respect for state court judicial processes support abstention under these facts.

Finally, it is true, as Plaintiff submits, that the Fourth Circuit in *Schaefer* did decline to abstain from adjudicating a lawsuit that granted reporters a qualified right of access to copies of newly filed civil complaints. 2 F.4th at 324-25. But that declination is of no help here because it is based on a rationale that does not apply to the facts in this case.

The *Schaefer* court simply held that the *Younger* abstention was inapplicable in that case because "the Clerks have not pointed to any ongoing state proceeding with which this case would interfere and we know of none[.]" 2 F.4th at 324. Here, on the contrary, maps litigations was underway at the time when the Plaintiff's lawsuit commenced, and it continues its march across

[6] *Steffel* does not help Plaintiff with his argument at all, because the U.S. Supreme Court in that case considered a different abstention issue, i.e. "whether state criminal proceeding is pending at the time the federal complaint is filed" or is only threatened. 415 U.S. at 454.

various state courts up to the present time. See DE 23-1 at 8-9 (ordering that "Any emergency application for a stay pending appeal must be filed no later than 23 February 2022 at 5:00 p.m."). And similarly in contrast with *Schaefer*, where the Fourth Circuit declined to apply the *O'Shea* abstention because "the district court denied injunctive relief and [the media outlet] has not cross-appealed that denial[,]" 2 F.4th at 324, Plaintiff squarely requests this Court to enjoin appellate courts to force disclosures of judicial votes on the orders previously entered with the designation "For the Court." DE 12 at 18. For reasons explained in the opening brief, DE 15 at 14-17, the *O'Shea* principles require federal courts to apply "near-absolute restraint rule to situations where the relief sought would interfere with the day-to-day conduct" of state proceedings. *Parker v. Turner*, 626 F.2d 1, 8 (6th Cir. 1980). Dismissal is appropriate on the *Younger* and *O'Shea* grounds here as well.

III. 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.

Plaintiff agrees "that entering and determining the form of the three orders were within the judicial capacity." DE 23 at 14.[7] In his rebuttal to the Defendants' argument that the absolute

[7] Plaintiff is right to concede that point, since a wide variety of acts by judges and clerks were deemed judicial, rather than ministerial or administrative, actions for absolute immunity purposes. For judges, s*ee Eades v. Sterlinske*, 810 F.2d 723 (7th Cir.), *cert. denied*, 484 U.S. 847 (1987); *Scruggs v. Moellering*, 870 F.2d 376 (7th Cir.), *cert. denied*, 493 U.S. 956 (1989); *Dellenbach v. Letsinger*, 889 F.2d 755 (7th Cir. 1989), *cert. denied*, 494 U.S. 1085 (1990); *Rheuark v. Shaw*, 477 F. Supp. 897 (N.D. Tex. 1979), *aff'd in part, rev'd in part*, 628 F.2d 297 (5th Cir. 1980); *Patterson v. Aiken*, 628 F. Supp. 1068 (N.D. Ga. 1985), *aff'd*, 784 F.2d 403 (11th Cir. 1986); *Miller v. Bobbitt*, 779 F. Supp. 495 (D. Or. 1991); *Seto v. McMahon*, 862 F. Supp. 255 (C.D. Cal. 1994); *Sparks v. Character & Fitness Comm.*, 859 F.2d 428 (6th Cir. 1988), *cert. denied*, 489 U.S. 1011 (1989); *LaNave v. Minnesota Supreme Court*, 915 F.2d 386 (8th Cir. 1990); *McFarland v. Folsom*, 854 F. Supp. 862 (M.D. Ala. 1994); *Cohran v. State Bar*, 790 F. Supp. 1568 (N.D. Ga. 1992). For clerks, see *Fariello v. Campbell*, 860 F. Supp. 54 (E.D.N.Y. 1994); *Akins v. Deptford Township*, 813 F. Supp. 1098 (D.N.J. 1993); *Dellenbach v. Letsinger*, 889 F.2d 755 (7th Cir. 1989), *cert. denied*, 494 U.S. 1085 (1990); *Kincaid v. Vail*, 969 F.2d 594 (7th Cir. 1992); *Boyer v. County of*

judicial immunity bars the requested recovery, Plaintiff's only retort is that he couched his Complaint as requesting access to existing records, rather than as seeking to change any of these orders' formats. DE 23 at 14-17. This argument falls short, because the Court is required to consider what truly is at stake in Plaintiff's request. Plaintiff here fails to show that Defendants acted administratively in publishing the orders anonymously, and that the category of records he seeks access to – records of judicial votes on the anonymous court orders – is subject to disclosure under the First Amendment's qualified right of access. *Doe v. Pub. Citizen*, 749 F.3d 246, 266 (4th Cir. 2014) (quoting *Stone v. Univ. of Md.*, 855 F.2d 178, 180 (4th Cir. 1988)) (emphasizing that the First Amendment "secures a right of access 'only to particular judicial records and documents.'")

First, this Court is not required to put the blindfold on when it addresses this Plaintiff's challenge. This lawsuit targets more than a right of simple access to court orders. After all, the pertinent judicial records – the subject appellate orders themselves – were made public and provided to Plaintiff. DE 12-3 at 5, DE 12-5. The North Carolina Supreme Court and the Court of Appeals issued orders, which, in lieu of featuring authored opinions, bear designations "For the Court" and ""By order of the Court." DE 12-1, DE 12-2, DE 12-3. Those orders, by Plaintiff's admission, were provided to him immediately upon request. DE 12-5. The identity of the Justice signing "For the Court" was also disclosed. DE 12-5. Additionally, the Clerk of the Supreme Court confirmed that the Clerk's office had no other responsive records. DE 12-5 at 1; DE 12 at 6 ¶ 29. But Plaintiff here seeks more.

Washington, 971 F.2d 100 (8th Cir. 1992); *McKinney v. Oklahoma Dep't of Human Servs.*, 925 F.2d 363 (10th Cir. 1991); *Scott v. Dixon*, 720 F.2d 1542 (11th Cir. 1983), *cert. denied*, 469 U.S. 832 (1984); *Sindram v. Suda*, 986 F.2d 1459 (D.C. Cir. 1993) (per curiam).

In this lawsuit, Plaintiff seeks disclosure of records reflecting judicial votes, if any, that are not part of the judicial file in maps litigation, and are not publically available. He, in other words, is asking this Court to circumvent, on constitutional grounds, the appellate court's routine practice of issuing such orders in an anonymous format. For reasons explained in the Supreme Court Defendants' opening brief and their Response to Plaintiff's motion for mandamus or preliminary injunction, judicial immunity applies to the choice of the format in which such orders should issue. DE 15 at 20-23, DE 16 at 6-8. Even if any judicial notes concerning the deliberation existed, Plaintiff failed to show that he is entitled to access them on the First Amendment grounds, or that the actions of Justices, Judges and Clerks in creating these records, if any, are outside of the deliberative judicial privilege. DE 16 at 7-10. Defendants are absolutely immune from Plaintiff's claims here, even when they are couched as the constitutional right of access claims.

Second, Plaintiff cites not a single case where disclosures of judicial votes on anonymous orders were upheld on the First Amendment grounds. No such case exists. The cases Plaintiff references to counter the judicial immunity defense are inapposite and allow access only to a limited group of filed judicial records that are otherwise publicly available:

- *Schaefer* allowed access to filed public civil complaints;
- *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 86 (2d Cir. 2004) and *Collins v. Lippman*, Case No. 04-cv-3215, 2005 U.S. Dist. LEXIS 11116, 2005 WL 1367295 (E.D.N.Y Jun. 8, 2005) allowed access to public court docket sheets;
- *Bly v. Circuit Court for Howard Cty.*, Case No. 1:18-cv-1333, 2019 U.S. Dist. LEXIS 107523 (D. Md. Jun. 26, 2019) addressed court records filed in connection with public plea and sentencing hearings in a criminal case.

These cases cited by Plaintiff touch only on the issues of access to otherwise public records.

None of the cited cases stand for a proposition that a qualified constitutional right of access to judicial votes on anonymous court orders exists. None require disclosure of votes on non-merits and emergency orders under the guise of the First Amendment. Moreover, none of these cases support a sweeping implication of Plaintiff's argument, to wit: that state judicial officials could be sued in federal courts with respect to their decisions to issue non-merits orders as an institution, instead by authored opinions.[8] Those actions are driven by quintessentially judicial, deliberative choices. Plaintiff fails to establish any administrative duty the named Justices, Judges and Clerks failed to satisfy in connection with the orders in question. Fundamentally, Plaintiff fails to even identify the type of judicial record that allegedly could be provided to him without breaching the judicial privilege. Absolute judicial immunity protects these Defendants from lawsuits to disclose judicial votes under these circumstances.

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

For purposes of qualified immunity, "[t]he Supreme Court has repeatedly told courts . . . not to define clearly established law at a high level of generality. Thus, we consider whether a right is clearly established in light of the specific context of the case, not as a broad general proposition." *Adams v. Ferguson*, 884 F.3d 219, 226-27 (4th Cir. 2018) (quotation marks and citations omitted). "Once the defendant raises qualified immunity as a defense, the plaintiff bears the burden of proof on the first prong, that is, whether a constitutional violation occurred." *Bly v. Circuit Court for Howard Cty.*, Civil Action No. GLR-18-1333, 2019 U.S. Dist. LEXIS 107523, at *16 (D. Md.

[8] Additionally, following the full cycle of briefing and extended oral argument in the matter, the Supreme Court of North Carolina issued a full-fledged, authored decision with dissenting opinions in the underlying maps litigation on the merits. *Harper v. Hall*, 2022-NCSC-17, 2022 N.C. LEXIS 166 (N.C. Sup. Ct. Feb. 14, 2022). In addition to the Supreme Court's December 2021 order, the public has access to that authored opinion and Justices' reasoning on the merits.

June 26, 2019) (citing Henry v. Purnell, 501 F.3d 374, 377 (4th Cir. 2007)).

To defeat qualified immunity, Plaintiff here must allege that the existing law clearly provided for access to judicial votes on non-merits and emergency orders and that Defendants knowingly violated that law. DE 15 at 24-25. Plaintiff relies on *Co. Doe v. Pub. Citizen* to support the existence of the alleged violation. 749 F.3d 246 (4th Cir. 2014). Yet because Plaintiff uses broad generalities in arguing his entitlement to access, DE 23 at 18, he misunderstands the impact of *Co. Doe* on the outcome of the qualified immunity defense here. Contrary to Plaintiff's assertion, *Co. Doe* says nothing on the topic of the alleged right of access to judicial votes on orders issued by the state courts anonymously. Instead, that case discusses the qualified First Amendment right of access to a lower federal court's "judicial decision adjudicating a summary judgment motion." *Co. Doe v. Pub. Citizen*, 749 F.3d 246, 268 (4th Cir. 2014). Here, Plaintiff's Complaint itself establishes that Defendants easily satisfied the Fourth Circuit's standard in *Co. Doe* by giving Plaintiff access to the December 8 order. DE 12-5 at 1; DE 12 at 6 ¶ 29.

At the same time, Plaintiff's additional argument that state courts are required to give access to records showing how Justices or Judges voted on these courts' anonymous orders is not supported by any case cited in Plaintiff's Response. And the undersigned is unaware of any such authority. So even if a record reflecting judicial votes existed, Plaintiff nevertheless failed to show that the access to these records was required or that these Defendants could reasonably believe that they are violating any clearly established law by failing to provide it. Qualified immunity protects these Defendants from individual capacity lawsuits. *Allen v. Cooper*, 895 F.3d 337, 357 (4th Cir. 2018).

CONCLUSION

Important jurisdictional, immunity and abstention considerations highlight deficiencies of

Plaintiff's claims against the Supreme Court Defendants. Plaintiff failed to overcome these threshold obstacles to his lawsuit, and this Court should therefore dismiss Plaintiff's Complaint for these reasons.

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

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CERTIFICATE OF SERVICE

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

/s/Olga E. Vysotskaya de Brito

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