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

Civil Action No. 3:21-cv-679

DAN BISHOP, **Plaintiff,** **v.** **AMY L. FUNDERBURK, et al.,** **Defendants.**	**SUPREME COURT DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION OR WRIT OF MANDAMUS**

NOW COME Supreme Court Defendants to submit their response opposing Plaintiff's motion for a preliminary injunction or writ of mandamus to restrain these Defendants from allegedly denying Plaintiff "access to court records revealing votes of the justices and judges on the Election Suspension Orders[.]" DE 2 at 1.

INTRODUCTION

Plaintiff alleges that the First Amendment to the U.S. 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 the votes of each individual Judge or Justice on certain orders issued by those courts. This motion should only be entertained if the Court denies Defendants' motion to dismiss and Defendants' rights to assert immunity from suit have been fully exhausted and finally determined.

Supreme Court Defendants filed a motion to dismiss contemporaneous to this response opposing Plaintiff's motion for mandamus or preliminary injunction. In their memorandum of law supporting their motion, they argue that Plaintiff's Complaint must be dismissed on the basis of

lack of jurisdiction under the Eleventh Amendment, abstention pursuant to *O'Shea v. Littleton*, 414 U.S. 488 (1974) and *Younger v. Harris*, 401 U.S. 37 (1971), and absolute judicial, or alternatively qualified immunity. DE 14, 15. Before considering any preliminary injunction motion, this Court should address whether it has jurisdiction to issue the requested equitable relief against the Supreme Court Defendants. For reasons explained in their memorandum, this Court either lacks jurisdiction to hear Plaintiff's claims or should abstain its jurisdiction and therefore decline to reach the merits of Plaintiff's motion for injunctive and mandamus relief. No further analysis on Plaintiff's pending motion is necessary, and no evidentiary hearing is required under these circumstances.

To the extent the Court considers the request for equitable relief on the merits, it should nevertheless be denied. Plaintiff has failed to show that he is likely to succeed in proving that disclosure of the individual votes of state Judges and Justices 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.

STATEMENT OF THE FACTS

The Supreme Court Defendants rely on and incorporate by reference the statement of the facts as recited in the memorandum of law in support of their motion to dismiss. DE 15 at 3-6.

LEGAL STANDARD

Plaintiff seeks a preliminary injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure or a writ of mandamus requiring the Supreme Court Defendants to disclose the individual votes of its Justices, DE 12 at 18, including specific disclosure of how the individual Justices of the Supreme Court voted when considering the petitions before it and issuing the

December 8 order.[1] This is, in practical terms, essentially the full relief sought by Plaintiff.

"The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). "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.'" *Mt. Valley Pipeline, LLC v. W. Pocahontas Props. Ltd. P'ship*, 918 F.3d 353, 366 (4th Cir. 2019) (citing *Winter v. NRDC, Inc.*, 555 U.S. 7 at 22, 24 (2008)). The test for the issuance of a traditional preliminary injunction turns on the balance of the four factors enumerated in *Winter*: likelihood of success on the merits; irreparable harm in the absence of an injunction; equities to the parties; and, the public interest. Plaintiff has 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." *The Real Truth About Obama, Inc.* v. *F.E.C.*, 575 F.3d 342, 346 (4th Cir. 2010), *vacated on other grounds*, 559 U.S. 1089 (2010). This burden requires more than simply showing that "grave or serious questions are presented." *Id*. at 347.

The granting of the injunctive relief requested by Plaintiff here would require the Supreme Court Defendants to disclose judicial votes on the order that currently is published anonymously in the manner consistent with the existing Court's practices. Plaintiff's request, therefore, seeks to change status quo ante, not preserve it. Yet, "[t]he traditional office of a preliminary injunction is to protect the status quo and to prevent irreparable harm during the pendency of a lawsuit ultimately to preserve the court's ability to render a meaningful judgment on the merits." *In re Microsoft Corp. Antitrust Litig.*, 333 F.3d 517, 525 (4th Cir. 2003) (citing *Omega World Travel,*

[1] The two requested remedies are mutually exclusive. Presumably, Plaintiff here seeks mandamus or injunctive relief in the alternative. *See Burgess v. Wilbur*, 50 F.2d 502, 503 (D.C. Cir. 1931).

Inc. v. Trans World Airlines, 111 F.3d 14, 16 (4th Cir. 1997)). Where, as here, the injunction sought is mandatory rather than prohibitory, an even more exacting standard applies. *Id.* ("Our application of this exacting standard of review is even more searching when the preliminary injunctive relief … is mandatory rather than prohibitory in nature."); s*ee also Taylor v. Freeman*, 34 F.3d 266, 270 n.2 (4th Cir. 1994) ("Mandatory preliminary injunctive relief in any circumstance is disfavored, and warranted only in the most extraordinary circumstances"). So, to be successful here, Plaintiff must establish that "a mandatory preliminary injunction must be necessary both to protect against irreparable harm" and "to preserve the court's ability to enter ultimate relief on the merits of the same kind." *In re Microsoft Corp. Antitrust Litig.*, 333 F.3d at 526.

Alternatively, Plaintiff requests this Court to issue a writ of mandamus pursuant to the All Writs Act, 28 U.S.C. § 1651. "[T]he writ of mandamus is a remedy to compel any person, corporation, public functionary, or tribunal, to perform some duty required by law, where the party seeking relief has no other legal remedy, and the duty sought to be enforced is clear and indisputable." *Bd. of Comm'rs v. Aspinwall*, 65 U.S. 376, 383 (1861). In the first instance, Plaintiff must show that a federal court has an independent basis for subject matter jurisdiction for a writ of mandamus to be issued. *Allied Chemical 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. United States Dist. Ct.*, 542 U.S. 367, 380–381 (2004).

For reasons enumerated below, Plaintiff fails to meet basic criteria required under either test for the extraordinary relief he requests from this Court.

ARGUMENT

I. THE COURT MUST DENY PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION BECAUSE PLAINTIFF CANNOT ESTABLISH ANY OF THE FOUR *WINTER* FACTORS.

As an initial matter, this Court is not authorized to grant Plaintiff any injunctive relief against the Supreme Court Defendants pursuant to 42 U.S.C. § 1983. As explained in these Defendants' memorandum of law in support of their motion to dismiss, DE 15 at 10, as amended in 1996 by the Federal Courts Improvement Act, section 1983 explicitly prohibits injunctive relief against judicial officers. The statute now states that, "in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable." Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, § 309(c), 110 Stat. 3847, 3853 (codified as amended at 42 U.S.C. § 1983 (2000)). Neither statutory limitation applies in this case, and Plaintiff's memorandum in support of his motion, DE 2-1, says nothing to the contrary.

Therefore, because this Court lacks subject matter jurisdiction to hear Plaintiff's claims and because all Supreme Court Defendants were judicial officers acting in judicial capacities with respect to the December 8 order, no injunctive relief can be granted against them as a principle. *See also Whole Woman's Health v. Jackson*, 211 L. Ed. 2d 316, 326, 334, 142 S. Ct. 522 (2021); *Roth v. King*, 449 F.3d 1272, 1286-87 (D.C. Cir. 2006). The Court should deny Plaintiff's request for injunctive relief on that basis alone. *Posin v. Sheehan*, Civil Action No. 5:11CV96, 2011 U.S. Dist. LEXIS 79876, at *13 (N.D.W. Va. July 22, 2011) (concluding that "this Court need not decide the plaintiff's motion for a preliminary injunction because it does not have subject matter jurisdiction[.]")

Additionally, however, Plaintiff fails to satisfy each and every *Winter* factor.

A. Plaintiff Has Not Shown that His Right of Access Under the First Amendment Claim Is Likely to Succeed on the Merits.

Plaintiff had not shown that he is likely to succeed on his First Amendment claims. Plaintiff's Complaint is based on his misapprehension of the law that the First Amendment's right of access to court records also includes a mandate that the North Carolina Supreme Court change its historical practice and disclose in all of its orders on petitions, writs, and non-dispositive orders, such as the December 8 order, the individual votes of each Justice.

"[T]he First Amendment provides a right of access only to *particular* judicial records and documents[.]" *United States v. Appelbaum (In re United States)*, 707 F.3d 283, 290 (4th Cir. 2013) (emphasis in original). 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. *Appelbaum*, 707 F.3d 283, 290-291 (4th Cir. 2013) (citing *Goetz*, 886 F.2d at 63-64). After meeting these criteria to establish the existence of his qualified First Amendment claim, Plaintiff also must show that this qualified First Amendment right is not defeated by countervailing considerations. Plaintiff cannot establish any of the three necessary elements to a First Amendment right of access claim.

First, Plaintiff fails to show that any document currently exists which reflects the individual votes of the Justices aside from the December 8 order signed by Justice Barringer "For the Court." Instead, Plaintiff construes Defendant Funderburk's statements that she "does not have" the votes of the Justices and that she is only the custodian of records in the Clerk's office, DE 12-1 at 6 ¶ 29, to create an inference that other records exist. DE 12-1 at 8 ¶ 39. Plaintiff also appears to interpret Chief Justice Newby's and Justice Barringer's silence in response to his written request

for disclosure of an additional document reflecting the individual votes of the Justices as an admission that such record indeed exists. DE 12-1 at 7-8 ¶¶ 30, 35, 37. Thus, it is clear that Plaintiff only speculates that a document actually exists which shows that votes were taken and that reflects the individual votes of Justices on the December 8 order. DE 12-1 at 8 ¶ 39. Since Plaintiff has not shown that an actual court document exists to which a First Amendment right of access can attach, Plaintiff fails to meet the first prong of this test.

Second, assuming arguendo that some type of documentary record exists detailing the Supreme Court's deliberative process and the individual votes of the Justices issuing the Court's December 8 order, this record is not a "judicial record" to which there is a First Amendment right of access. The Fourth Circuit Court of Appeals has held that "judicial records" are documents 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 (4th Cir. 2013). Considering this definition, the only "judicial record" to which Plaintiff has a right of access to under the First Amendment is the December 8 order signed by Justice Barringer "For the Court." DE 12-1 at 5 ¶ 25; DE 12-3. That order has been made public immediately upon its issuance and was already shared with Plaintiff. DE 12-5.

Additionally, *if* any of the individual Supreme Court Justices keep notes, diaries, logs or other documents which reflect their individual deliberations, or those of their colleagues, these documents are protected by judicial privilege and are not "judicial records" under the First Amendment. It would invade the judicial deliberative process, and would necessarily result in harm to the judiciary, if any of Justices' personal notes or internal documents showing the deliberative process of the Supreme Court as a whole prior to issuing a final decision on an issue were defined as a "judicial record" under the First Amendment. The United States Supreme Court

and many other courts, including ones in this Circuit have expressly recognized the existence of judicial deliberative privilege. *See e.g. United States v. Morgan*, 313 U.S. 409, 422 (1941) (mental processes of judge cannot be subjected to scrutiny because it would be destructive of judicial responsibility); *State ex rel. Kaufman v. Zakaib*, 207 W. Va. 662, 670, 535 S.E.2d 727 (2000); *Nixon v. Sirica*, 487 F.2d 700, 740-742 (D.C. Cir. 1973) (MacKinnon, J., concurring) (source of judicial privilege "rooted in history and gains added force from the constitutional separation of powers"); *In re Enforcement of a Subpoena*, 463 Mass. 162 (Sup. Ct. Mass, Aug. 9, 2012) (recognizing a judicial deliberative privilege that guards against intrusions into judges' mental impressions and thought processes in reaching a judicial decision as necessary to protect the finality, integrity, and quality of judicial decisions); *Thomas v. Page*, 361 Ill. App. 3d 484, 491, 837 N.E.2d 483, 297 (Ill. Dec. 400 (2005); *In re Cohen's Estate*, 105 Misc. 724, 174 N.Y.S. 427, 428 (N.Y. Surrogate's Ct. 1919); *Leber v. Stretton*, 2007 PA Super 172, 928 A.2d 262, 270 (Pa. Super. 2007).

The recognition of this judicial deliberative privilege is age-old and universal. As one of the courts had noted "[t]o the extent that '[e]xpress authorities sustaining [a judicial privilege] are minimal,' it is 'undoubtedly because its existence and validity has been so universally recognized.'" *In re Enf't of a Subpoena*, 463 Mass. at 173, 972 N.E.2d at 1032 (citing, e.g., Sorenson, Jr., *Are Law Clerks Fair Game? Invading Judicial Confidentiality*, 43 Val. U. L. Rev. 1, 66-67 (2008); Catz, *Judicial Privilege*, 22 Ga. L. Rev. 89, 115 (1987)). Plaintiff here failed to cite to any case "rejecting the existence of a privilege for a judge's mental processes or intra-court deliberative communications." *Id.*

Lastly, the First Amendment provides a right of access to a certain judicial proceeding or record: (1) that "'ha[s] historically been open to the press and general public;' and (2) where

'public access plays a significant positive role in the functioning of the particular process in question.'" *Courthouse News Serv. v. Schaefer*, 2 F.4th 318, 326 (4th Cir. 2021) (citing *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8-10 (1986)). This analysis is known as the "experience and logic" test. *Id.* Only if both prongs – experience and logic – indicate that a judicial record has been publicly available in the past and should be available publicly in the future, will the judicial record or proceeding have a qualified First Amendment right attach to it. *Id.*

Plaintiff fails to satisfy the experience prong of the test. First, Plaintiff concedes that "both appellate courts also regularly issue other, unpublished orders that do not disclose on their face the votes of individual justices and judges[,]" and that the Supreme Court's December 8 order belongs to that category of orders. DE 12 at 9 ¶ 45. That admission of the existing appellate "custom or practice," DE 12 at 11 ¶ 52, to issue non-merits and emergency orders without judicial votes disclosures, is fatal to the Plaintiff's First Amendment claim as it undermines the argument that North Carolina courts have traditionally disclosed votes on such orders.

Moreover, Plaintiff wholly fails to provide any facts to show that the North Carolina Supreme Court has historically provided the public access to the individual views and votes of Justices when that Court sits to consider a pending petition, such as the one before it when it issued its December 8 order. In fact, the opposite is true. The Supreme Court rules on hundreds of emergency, petitions and non-merits applications each year.[2] A review of orders issued by the North Carolina Supreme Court from 2003 until present shows that the Supreme Court has not revealed the individual votes of Justices on petitions, writs, and non-dispositive motions. *See* Shields Decl., Exhibits 1-3. As seen from the four corners of these orders, the historical practice

[2] *See, e.g.*, North Carolina Judicial Branch, Supreme Court – Petitions Rulings and Supreme Court – Orders, at https://appellate.nccourts.org/petitions.php and https://appellate.nccourts/orders.php.

of the North Carolina Supreme Court has been to sit in conference and then issue a written order "[b]y order of the Court in Conference" under the signature of the Court's Junior Associate Justice signing "For the Court." There is no indication on any of these orders of the individual Justices' views or votes on the matter before them.

And that nondisclosure practice in non-merits orders is not unique to North Carolina. The United States Supreme Court maintains a vigorous non-merits docket, and frequently issues orders with respect to those matters without disclosing how any individual United States Supreme Court Justice voted. See "The 'Shadow Docket': The Supreme Court's Non-Merits Orders." (Aug. 27, 2021). Congressional Research Service, Legal Sidebar. https://crsreports.congress.gov/product/pdf/LSB/LSB10637 (accessed Jan. 19, 2022). Plaintiff, therefore, has not established the first prong of the "experience and logic" test and no First Amendment right of access has attached.

Since, Plaintiff has not established the experience prong, it is not necessary to address whether Plaintiff established the "logic" prong of the test. However, even a brief consideration of the logic prong indicates that Plaintiff cannot satisfy this prong either. "The logic prong asks whether public access plays a significant role in the process in question." *Appelbaum*, 707 F.3d at 292. Anonymous rulings on emergency and preliminary petitions, for example, are different in character from the merits opinions. *See, e.g., Lunding v. N.Y. Tax Appeals Tribunal*, 522 U.S. 287, 307 (1998) ("Although we have noted that '[o]ur summary dismissals are ... to be taken as rulings on the merits in the sense that they rejected the specific challenges presented ... and left undisturbed the judgment appealed from,' we have also explained that they do not 'have the same precedential value ... as does an opinion of this Court after briefing and oral argument on the merits.'" (quoting *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S.

463, 477 n.20 (1979)) (alterations in original)). Given the generally non-precedential nature of these rulings, the need for public disclosure of votes is lessened. Additionally, the need to quickly and efficiently address emergency applications for relief without creating an expectation in litigants about how each Justice may vote on the case after considering full merits, following complete briefing and oral argument, is yet another reason that plainly justifies the practice of issuing such preliminary orders without individual votes disclosures. In sum, Plaintiff asserts no facts to show that he will be able to succeed on establishing that the First Amendment right attaches to disclosure of judicial votes on non-merits and emergency orders under the logic prong of the applicable test.

Since Plaintiff has not shown that he has a First Amendment right of access to any record which may exist that reflects how each individual Justice voted on the December 8 order, Plaintiff cannot establish that he is likely to succeed on the merits on his claim against the Supreme Court Defendants. This Court, therefore, must deny Plaintiff's motion for preliminary injunction.

B. Plaintiff Cannot Satisfy the More Exacting Standard for Mandatory Injunctions or Prove Irreparable Harm or that the Equities to the Parties or the Public Interest Are Served such that the Court Should Issue a Preliminary Injunction.

Additionally, Plaintiff fails to carry his burden in showing irreparable harm, that the equities to the parties weigh in his favor, or that the public interest will be served by the grant of an injunction.

1. Plaintiff has not shown irreparable harm and has not satisfied a more exacting standard that applies to requests for mandatory injunctions.

A plaintiff must make a clear showing that he or she will likely be irreparably harmed absent preliminary relief. *The 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.* The showing

of irreparable injury is mandatory even if the plaintiff has already demonstrated a strong showing on the probability of success on the merits. *Id*. Moreover, the Court must give "particular regard" to the "public consequences" of any relief granted. *Id*.

Plaintiff fails to show that he is harmed in the absence of disclosure of a record showing the individual votes of the Justices in issuing the Court's December 8 order. While Plaintiff may desire to know details of the Court's deliberative process that led to its order delaying the State's 2022 primary elections, disclosure of this information does not change the substance or effect of the December 8 order. Additionally, unable to show any harm whatsoever, he cannot demonstrate irreparable harm. There can be no irreparable harm because if Plaintiff were to succeed on the merits in his claims against the Supreme Court Defendants in this action, then Plaintiff would receive the ultimate relief he seeks in this litigation after trial or other judgment on the merits.

More importantly, the Supreme Court Defendants stand to be irreparably harmed should this Court issue a preliminary injunction prior to determining if Plaintiff has a right of access to the requested records under the First Amendment. As detailed by the Supreme Court Defendants in the memorandum in support of their motion to dismiss, DE 15 at 12-20, if this Court were to issue the injunction, it would force the Supreme Court to change a long-standing, internal court process without first making a determination that Plaintiff, and the public at large, has a constitutional right of access to the record.

Additionally, an order forcing the vote disclosure cannot be undone later; it would interfere with the status quo and, indeed, give this Plaintiff the ultimate relief he seeks in his action. Quite simply, this Court would be unable to turn back time and fix the irreparable harm it would cause to the North Carolina Supreme Court if it were to issue a preliminary injunction to be later followed by the judgment on the merits in favor of the Supreme Court Defendants. Under these facts, the

grant of the requested preliminary relief would defeat, rather than preserve, "the court's ability to render a meaningful judgment on the merits." *In re Microsoft Corp. Antitrust Litig.*, 333 F.3d at 525. Under the more exacting standard that is applicable to Plaintiff's request for mandatory injunction, that criteria alone defeats his motion.

2. The equities to the parties weigh against a preliminary injunction.

As discussed immediately above, the resulting irreparable harm to the Supreme Court outweighs any of the harms that Plaintiff alleges he suffers from not knowing the views of each individual Justice regarding the December 8 order. "The 'balance of hardships' reached by comparing the relevant harms to the plaintiff and defendant is the most important determination, dictating, for example, how strong a likelihood of success showing the plaintiff must make." *Hughes Network Sys. v. Interdigital Commc'ns Corp.*, 17 F.3d 691, 693 (4th Cir. 1994) (citing *Rum Creek Coal Sales, Inc. v. Caperton*, 926 F.2d 353, 359 (4th Cir. 1991)). Here, the equities tip strongly in the Supreme Court Defendants' favor and weigh against issuing a preliminary injunction.

3. Plaintiff has not shown that public interest is served by the grant of an injunction.

Plaintiff does not show how the public interest is served in any way by disclosing the internal processes by which the Court's decisions are made with respect to the emergency matters and petitions, or individual votes of the Justices at this early juncture of his lawsuit. In fact, the public interest is served by the Supreme Court adhering to its historical practices of issuing orders on behalf of the Court as it always has when it rules on petitions in cases that deal with hot-button political matters and in cases that do not. "Confidentiality in the inner workings of the court is appropriate in order to foster frank and open discussions between judges and clerks, and thus, the judicial deliberative privilege promotes more effective decisionmaking." 81 Am Jur 2d Witnesses

§ 490. This absolute confidentiality afforded to judicial deliberations "is designed to benefit the public, not the individual judges and their staffs." *Id*. (citing *In re Enforcement of Subpoena*, cited *supra*). Public interest is therefore served by preserving confidentiality of the deliberative process and judicial votes implicated here. Additionally, granting the preliminary injunction would add a layer of public uncertainty about the state judicial system's processes and procedures, thereby eroding public confidence in the integrity of the state's highest appellate court. Public interest weighs in favor of denial.

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

This Court must also deny Plaintiff's petition for writ of mandamus pursuant to 28 U.S.C. § 1651,[3] because this Court does not have jurisdiction to issue such a writ against state judicial officials and because Plaintiff fails to establish that he has a clear, indisputable right to the requested relief.

The authority of federal courts to issue extraordinary writs derives from the "all writs statute," 28 U.S.C. § 1651, which provides "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions." *Id*. The traditional use of the writ of mandamus in aid of appellate jurisdiction, both at common law and in the federal courts, has been to confine an *inferior court* to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so. *Johnston v. Allen*, 2009 U.S. Dist. LEXIS 129572, *4 (M.D.N.C. Jan. 22, 2009) (emphasis added); citing *In re American Medical Systems, Inc.*, 75 F.3d 1069, 1077 (6th Cir. 1996).

The Fourth Circuit Court of Appeals in *Banks v. Hornak*, 698 Fed. Appx. 731 (4th Cir.

[3] Plaintiff also cites to 28 U.S.C. § 1361 as authority for mandamus relief. DE 2-1 at 6.

2017), clarified that, since Rule 81(b) of the Federal Rules of Civil Procedure abolished the common law writ of mandamus, federal district courts are precluded from issuing writs of mandamus pursuant to 28 U.S.C. § 1651. *Id.* at 737. Therefore, following the Fourth Circuit's holding in *Banks,* this court does not have jurisdiction under 28 U.S.C. § 1651 to issue the writ Plaintiff seeks against the Supreme Court Defendants.

Plaintiff also cites to 28 U.S.C. § 1361 as authority for the district court to issue a writ of mandamus to the Supreme Court Defendants in his supporting memorandum. However, pursuant to 28 U.S.C. § 1361, a district court can only grant mandamus relief against "an employee or official of the United States" and not a state official. *Geter v. Kelly*, No. 7:21-cv-00290-JMC-MGB, 2021 U.S. Dist. LEXIS 84632, *7 (D.S.C. April 12, 2021). "The federal courts have no general power to compel action by state officials." *Davis v. Lansing*, 851 F.2d 72, 74 (2nd Cir. 1988); *see also Gurley v. Superior Court of Mecklenburg Cty.*, 411 F.2d 586, 587-88 (4th Cir. 1969) (holding that "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"). The Supreme Court Defendants are plainly state constitutional officers of the judicial branch of North Carolina's government. N.C. Const. art. IV, § 6(1); N.C. Gen. Stat. §§ 7A-10(a), -11 (2021). 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) (unpublished) (quoting *Gurley*). Thus, this Court does not have jurisdiction to issue a writ of mandamus against them pursuant to 28 U.S.C. § 1361 either.

Even if this Court had jurisdiction to issue a writ of mandamus, Plaintiff has failed to establish the baseline requirement for the issuance of this extraordinary writ: that he has a clear and indisputable right to the relief that he requests. *See In re Braxton*, 258 F.3d 250, 261 (4th Cir. 2001) (citations omitted) (stating that a petitioner must show that "he has a clear and indisputable

right to the relief sought"). Because Plaintiff fails to show that this Court has jurisdiction over this matter and that he is likely to succeed on the merits of his First Amendment claim, this Court must deny Plaintiff's petition for writ of mandamus under 28 U.S.C. § 1361 or 28 U.S.C. § 1651 for those reasons as well.

CONCLUSION

For these reasons, this Court should either decline to entertain Plaintiff's motion for mandamus or preliminary injunction for lack of federal jurisdiction or deny the same.

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

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CERTIFICATE OF SERVICE

I hereby certify that on January 31, 2022, a copy of the foregoing SUPREME COURT DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION and ATTACHMENTS (Declaration with Exhibits 1-3) were 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.

This 31st day of January, 2022.

/s/ Olga E. Vysotskaya de Brito
Olga E. Vysotskaya de Brito
Special Deputy Attorney General

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

Civil Action No. 3:21-cv-679

DAN BISHOP, **Plaintiff,** **v.** **AMY L. FUNDERBURK, et al.,** **Defendants.**	**DECLARATION OF KATHRYN H. SHIELDS**

DECLARATION OF KATHRYN H. SHIELDS IN SUPPORT OF SUPREME COURT DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION OR WRIT OF MANDAMUS

Kathryn H. Shields hereby declares as follows under penalty of perjury:

1. I am a Special Deputy Attorney General at the North Carolina Attorney General's Office and counsel for the Supreme Court Defendants in this case. I submit this Declaration in support of the authenticity of the exhibits attached to the Supreme Court Defendants' Response in Opposition to Plaintiff's Motion for Preliminary Injunction or Writ of Mandamus.

2. The Supreme Court Defendants' response references a sample of orders entered by the North Carolina Supreme Court between February 27, 2003 and September 25, 2020.

3. On January 28, 2022, I downloaded the materials contained in Exhibit 1 from a publicly available online source, specifically https://appellate.nccourts/orders.php. Those materials represent a small sample of the North Carolina Supreme Court orders, each signed "For the Court" by Junior Associate Justices of the Supreme Court at the time of the entry, including:

- Order in File 2P01, signed by Justice Bob Edmunds on February 1, 2001.

- Order in File 2P01, signed by Justice G.K. Butterfield on July 19, 2001.
- Order in File 1P03, signed by Justice Edward Brady on February 27, 2003.
- Order in 87P05, signed by Justice Paul Newby on January 26, 2006.
- Order in File 13P09, signed by Justice Robin Hudson on February 5, 2009.
- Order in File 1P11, signed by Justice Barbara Jackson on February 3, 2011.
- Order in File 1P16, signed by Justice Samuel Ervin on January 28, 2016.
- Order in File 313P16, signed by Justice Michael Morgan on January 26, 2017.
- Order in File 259P18, signed by Justice Anita Earls on January 30, 2019.
- Order in File 59P19, signed by Justice Mark Davis on February 26, 2020.

These exhibits are true and accurate copies of the downloaded materials and contain true and accurate representations of those materials as they appeared online at the time of downloading.

4. Exhibit 2 contains an order entered by the North Carolina Supreme Court in *North Carolina State Board of Education v. The State of North Carolina, et al.*, No. 110PA16, in which Olga E. Vysotskaya de Brito, counsel for the Supreme Court Defendants in the instant case, was counsel of record for Defendant the State of North Carolina. Exhibit 2 is a true and accurate copy of the order Ms. Vysotskaya de Brito received from the North Carolina Supreme Court in the underlying case.

5. Exhibit 3 contains an order entered by the North Carolina Supreme Court in *North Carolina Bowling Proprietors Association, Inc. v. Cooper*, No. 314PA20, in which Olga E. Vysotskaya de Brito, counsel for the Supreme Court Defendants in the instant case, was counsel of record for Defendant Governor Roy Cooper. Exhibit 3 is a true and accurate copy of the order Ms. Vysotskaya de Brito received from the North Carolina Supreme Court in the underlying case.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this the 31st day of January, 2022.

/s/ Kathryn H. Shields
Kathryn H. Shields
Special Deputy Attorney General
Counsel for Supreme Court Defendants

Exhibit 1

Supreme Court of North Carolina
CHRISTIE SPEIR CAMERON, Clerk
Fax: (919) 831-5720
Web: http://www.nccourts.org
Justice Building, 2 E. Morgan Street
Raleigh, NC 27601
(919) 831-5700
Mailing Address:
P. O Box 2170
Raleigh, NC 27602

From Rutherford
(74CR2403)

1 February 2001

Mr. Joseph Marion Head, Jr.
2500 Regency Parkway
Suite 108
Cary, NC 27518

RE: State v Joseph Marion Head, Jr. - 2P01-1

Dear Mr. Head:

Motion by Defendant Pro Se for a New Trial for Forced Self Representation and Denial of Effective Self Representation has been filed and the following order entered:

"Motion Dismissed by order of the Court in conference this the 1st day of February 2001."

s/ Edmunds, J.
For the Court

Christie Speir Cameron
Clerk, Supreme Court of North Carolina

s/ Carol Barnhill Templeton
Assistant Clerk, Supreme Court Of North Carolina

Copy to:
Mr. Ralph A. White, Appellate Court Reporter
West Publishing
Lexis-Nexis
Mr. William N. Farrell, Jr., Senior Deputy Attorney General, For State
Mr. Jeff Hunt, District Attorney
Mr. Keith H. Melton, Clerk of Superior Court

Supreme Court of North Carolina
CHRISTIE SPEIR CAMERON, Clerk
Fax: (919) 831-5720
Web: http://www.nccourts.org
Justice Building, 2 E. Morgan Street
Raleigh, NC 27601
(919) 831-5700
Mailing Address:
P. O Box 2170
Raleigh, NC 27602

From Rutherford
(74CR2403)

19 July 2001

Mr. Joseph Marion Head, Jr.
2500 Regency Parkway
Suite 108
Cary, NC 27518

RE: State v Joseph Marion Head, Jr. - 2P01-1

Dear Mr. Head:

Motion by Defendant Pro Se for Appropriate Relief of One Zillion Dollars Tax Free has been filed and the following order entered:

"Motion Denied by order of the Court in conference this the 19th day of July 2001."

s/ Butterfield, J.
For the Court

Christie Speir Cameron
Clerk, Supreme Court of North Carolina

s/ Carol Barnhill Templeton
Assistant Clerk, Supreme Court Of North Carolina

Copy to:
West Publishing
Lexis-Nexis
Mr. Ralph A. White, Appellate Court Reporter
Mr. William N. Farrell, Jr., Senior Deputy Attorney General, For State
Mr. Jeff Hunt, District Attorney
Mr. Keith H. Melton, Clerk of Superior Court

Supreme Court of North Carolina

STATE OF NORTH CAROLINA
v
DANNY LEE WIKE

From Gaston
(00CRS56887)
From N.C. Court of Appeals
(02-287)

O R D E R

Upon consideration of the petition filed by Defendant in this matter for discretionary review of the decision of the North Carolina Court of Appeals pursuant to G.S. 7A-31, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

"Denied by order of the Court in conference, this the 27th day of February 2003."

s/ Brady, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 3rd day of March 2003.

Christie Speir Cameron
Clerk, Supreme Court of North Carolina

s/ Carol Barnhill Templeton
Assistant Clerk, Supreme Court Of North Carolina

Copy to:
North Carolina Court of Appeals
Mr. Ralph A. White, Appellate Court Reporter
Mr. David Childers, For Wike
Mr. Chris Z. Sinha, Assistant Attorney General, For State
Mr. Michael K. Lands, District Attorney
Ms. Betty B. Jenkins, Clerk of Superior Court
West Publishing Company
Lexis-Nexis
LOIS Law

Supreme Court of North Carolina

STATE OF NORTH CAROLINA
v
JONATHAN E. ROGERS

From Buncombe
(96CRS9824)

ORDER

Upon consideration of the petition filed by Defendant on the 4th day of February 2005 in this matter for a writ of certiorari to review the order of the Superior Court, Buncombe County, the following order was entered and is hereby certified to the Superior Court of that County:

"Dismissed by order of the Court in conference, this the 26th day of January 2006."

s/ Newby, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 1st day of February 2006.

Christie Speir Cameron
Clerk, Supreme Court of North Carolina

s/ Shaula A. Brannan
Assistant Clerk, Supreme Court Of North Carolina

Copy to:
Mr. Ralph A. White, Appellate Reporter (By E-Mail)
Mr. Jonathan E. Rogers, Pro Se, For Jonathan E. Rogers
Mr. William P. Hart, Special Deputy Attorney General, For State of NC (by E-Mail)
Mr. Ronald L. Moore, District Attorney
Mr. Robert H. Christy, Jr., Clerk of Superior Court
West Publishing Company (By E-mail)
Lexis-Nexis (By E-mail)
LOIS Law (By E-mail)

Supreme Court of North Carolina

STATE OF NORTH CAROLINA
v
LERANDELL TERRANCE SIMMONS

From Cumberland
(05CRS67217)
From N.C. Court of Appeals
(08-65)

ORDER

Upon consideration of the petition filed on the 6th day of January 2009 by Defendant in this matter for discretionary review of the decision of the North Carolina Court of Appeals pursuant to G.S. 7A-31, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

"Denied by order of the Court in conference, this the 5th day of February 2009."

s/ Hudson, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 10th day of February 2009.

Christie Speir Cameron
Clerk, Supreme Court of North Carolina

s/ Shaula A. Brannan
Assistant Clerk, Supreme Court Of North Carolina

Copy to:
North Carolina Court of Appeals
Mr. Ralph A. White, Appellate Reporter (By E-Mail)
Ms. Ann B. Petersen, Attorney at Law, For Simmons (by E-Mail)
Mr. Ronald M. Marquette, Special Deputy Attorney General, For State of NC (by E-Mail)
Mr. James R. Glover, Attorney at Law
Mr. Edward W. Grannis, Jr., District Attorney
Ms. Linda Priest, Clerk of Superior Court
West Publishing Company (By E-mail)
Lexis-Nexis (By E-mail)
LOIS Law (By E-mail)

Supreme Court of North Carolina

STATE OF NORTH CAROLINA

v

LACY LEE WILLIAMS, JR.

From N.C. Court of Appeals
(P10-411)
From Rowan
(96CRS186-190)

ORDER

Upon consideration of the petition filed by Defendant on the 3rd of January 2011 in this matter for a writ of mandamus, the following order was entered and is hereby certified to the Superior Court, Rowan County:

"Denied by order of the Court in conference, this the 3rd of February 2011."

s/ Jackson, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 7th day of February 2011.

Christie Speir Cameron
Clerk, Supreme Court of North Carolina

M. C. Hackney
Assistant Clerk, Supreme Court Of North Carolina

Copy to:
North Carolina Court of Appeals
Mr. Lacy Lee Williams, Jr., For Williams, Jr., Lacy Lee
Ms. Latoya B. Powell, Assistant Attorney General, For State of North Carolina - (By Email)
Mr. William D. Kenerly, District Attorney
Hon. Jeffrey R. Barger, Clerk
Mr. Ralph A. White, Appellate Court Reporter (By Email)
West Publishing - (By Email)
Lexis-Nexis - (By Email)
LOIS Law - (By Email)

Supreme Court of North Carolina

STATE OF NORTH CAROLINA

v

RONALD FARROW

From N.C. Court of Appeals
(15-583)
From New Hanover
(11CRS50804)

O R D E R

Upon consideration of the petition filed on the 31st of December 2015 by Defendant in this matter for discretionary review of the decision of the North Carolina Court of Appeals pursuant to G.S. 7A-31, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

"Denied by order of the Court in conference, this the 28th of January 2016."

s/ Ervin, J.
For the Court

Upon consideration of the petition filed by Defendant on the 31st of December 2015 in this matter for a writ of certiorari to review the order of the Superior Court, New Hanover County, the following order was entered and is hereby certified to the Superior Court of that County:

"Denied by order of the Court in conference, this the 28th of January 2016."

s/ Ervin, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 2nd day of February 2016.

Christie Speir Cameron Roeder
Clerk, Supreme Court of North Carolina

M. C. Hackney
Assistant Clerk, Supreme Court Of North Carolina

Copy to:
North Carolina Court of Appeals
Mr. Bruce T. Cunningham, Jr., Attorney at Law, For Farrow, Ronald - (By Email)
Mr. Richard L. Harrison, Special Deputy Attorney General, For State of North Carolina - (By Email)
Mr. Ben R. David, District Attorney
Hon. Jan Kennedy, Clerk
West Publishing - (By Email)
Lexis-Nexis - (By Email)

Supreme Court of North Carolina

STATE OF NORTH CAROLINA

v

LAWRENCE HENRY DAWSON

From N.C. Court of Appeals
(15-1399)
From Scotland
(12CRS50540 12CRS909)

O R D E R

Upon consideration of the petition filed on the 23rd of August 2016 by Defendant in this matter for discretionary review of the decision of the North Carolina Court of Appeals pursuant to G.S. 7A-31, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

"Denied by order of the Court in conference, this the 26th of January 2017."

s/ Morgan, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 31st day of January 2017.

J. Bryan Boyd
Clerk, Supreme Court of North Carolina

M. C. Hackney
Assistant Clerk, Supreme Court Of North Carolina

Copy to:
North Carolina Court of Appeals
Ms. Anne Bleyman, Attorney at Law, For Dawson, Lawrence Henry - (By Email)
Mr. David Boone, Assistant Attorney General, For State of North Carolina - (By Email)
Ms. Kristy M. Newton, District Attorney
Hon. W. Phillip McRae, Clerk
West Publishing - (By Email)
Lexis-Nexis - (By Email)

Supreme Court of North Carolina

AISHA D. FLOOD, Administrator of the Estate of Maurice A. Harden

v

JONATHAN HENRY CREWS, Individually, and JONATHAN HENRY CREWS, in his capacity as a member of Raleigh Police Department, and CITY OF RALEIGH

From N.C. Court of Appeals
(17-740)
From Wake
(15CVS7473)

O R D E R

Upon consideration of the petition filed on the 20th of August 2018 by Plaintiff in this matter for discretionary review of the decision of the North Carolina Court of Appeals pursuant to G.S. 7A-31, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

"Denied by order of the Court in conference, this the 30th of January 2019."

s/ Earls, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 4th day of February 2019.

Amy L. Funderburk
Clerk, Supreme Court of North Carolina

M. C. Hackney
Assistant Clerk, Supreme Court Of North Carolina

Copy to:
North Carolina Court of Appeals
Mr. George Ligon, Jr., Attorney at Law, For Flood, Aisha D. (Administrator) - (By Email)
Mr. Mohammed Shyllon, Attorney at Law, For Flood, Aisha D. (Administrator) - (By Email)
Ms. Dorothy K. Leapley, Deputy City Attorney, For City of Raleigh, et al - (By Email)
Mr. Andrew Seymour, Attorney at Law, For City of Raleigh, et al - (By Email)
Mr. Thomas A. McCormick, Jr., City Attorney, For City of Raleigh
West Publishing - (By Email)
Lexis-Nexis - (By Email)

Supreme Court of North Carolina

STATE OF NORTH CAROLINA

v

FLORA RIANO GONZALEZ

From N.C. Court of Appeals
(18-228)
From Forsyth
(16CRS3823 16CRS50851)

O R D E R

Upon consideration of the petition filed on the 15th of February 2019 by Defendant in this matter for discretionary review of the decision of the North Carolina Court of Appeals pursuant to G.S. 7A-31, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

"Denied by order of the Court in conference, this the 26th of February 2020."

s/ Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 2nd day of March 2020.

Amy L. Funderburk
Clerk, Supreme Court of North Carolina

M. C. Hackney
Assistant Clerk, Supreme Court Of North Carolina

Copy to:
North Carolina Court of Appeals
Ms. Katherine Jane Allen, Assistant Appellate Defender - (By Email)
Mr. Glenn Gerding, Appellate Defender - (By Email)
Ms. Anne M. Middleton, Special Deputy Attorney General - (By Email)
Mr. James R. O'Neill, District Attorney
Hon. Renita Thompkins Linville, Clerk

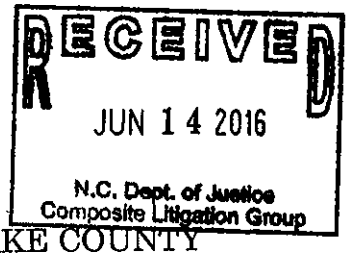
Exhibit 2

No. 110P16-2

TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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



NORTH CAROLINA STATE BOARD OF EDUCATION	)	
v.	)	WAKE COUNTY
THE STATE OF NORTH CAROLINA and THE NORTH CAROLINA RULES REVIEW COMMISSION	)	

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

ORDER

Defendants' Petitions for Writ of Certiorari are allowed for the limited purpose of vacating the order entered by the Court of Appeals on 2 March 2016 allowing Plaintiff-Appellee State Board of Education's Motion to Dismiss on the grounds that the Order entered by Judge Paul G. Gessner in this case on 2 July 2015 did not "hold[] that an act of the General Assembly is facially invalid on the basis that the act violates the North Carolina Constitution or federal," N.C.G.S. § 7A-27(a1), and remanding this case to the Court of Appeals for consideration of defendants' challenges to the validity of the trial court's order on the merits. In light of that determination, Defendant's Petitions for Discretionary Review are dismissed and Defendant North Carolina Rules Review Commission's Notice of Appeal is dismissed *ex mero motu*.

By order of the Court in Conference, this 9th day of June, 2016.

For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the __ day of June, 2016.

J. BRYAN BOYD
Clerk, Supreme Court of North Carolina

M.C. Hackney
Assistant Clerk, Supreme Court of North Carolina

Copy to:
North Carolina Court of Appeals
Mr. Christopher G. Browning, Jr., Attorney at Law, For The North Carolina Rules Review Commission -
Mr. Amar Majmundar, Special Deputy Attorney General, For The State of North Carolina
Ms. Olga Vysotskaya de Brito, Assistant Attorney General, For The State of North Carolina
Hon. Robert F. Orr, Attorney at Law, For North Carolina State Board of Education
Mr. Andrew H. Erteschik, Attorney at Law, For North Carolina State Board of Education
West Publishing
Lexis-Nexis

No. 314PA20 TENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

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

NORTH CAROLINA BOWLING PROPRIETORS ASSOCIATION, INC.	)	
v.	)	From Wake County
ROY A. COOPER, III, in his official capacity as the Governor of North Carolina	)	

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

ORDER

Plaintiff has filed a lawsuit questioning the authority of defendant Governor Roy Cooper to enforce section 8(A) of Executive Order 141 against plaintiff, the North Carolina Bowling Proprietors Association, and its 75 member entertainment facilities. *See* Exec. Order 141, § 8(A) (May 20, 2020). The trial court entered an interlocutory order granting a preliminary injunction on 7 July 2020 (preliminary injunction order). Defendant sought a stay of the order and its review, and this Court allowed both the stay and review. Defendant recently issued an executive order that superseded and replaced the provisions of Executive Order 141 challenged in this case. *See* Exec. Order 163, § 6(8) (Sept. 1, 2020). Executive Order 163 allows bowling centers to resume operations under certain specified safety protocols. *See id.* § 6(8)(b)(i)–(xi). Since the challenged restriction in Executive Order 141 is no longer in effect against plaintiff, we dismiss this appeal as moot, vacate the 7 July 2020 preliminary injunction order, and remand to Superior Court, Wake County.

By order of the Court in Conference, this the 25th day of September, 2020.

Mark Davis

For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 25 day of September, 2020.

AMY L. FUNDERBURK
Clerk of the Supreme Court of North Carolina

~~Assistant~~ Clerk