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

DAN BISHOP, **Plaintiff,** **v.** **AMY L. FUNDERBURK, et al.,** **Defendants.**	**Civil Action No. 3:21-cv-679** **MOTION FOR MANDAMUS OR PRELIMINARY INJUNCTION**

Pursuant to the All Writs Act, 28 U.S.C. § 1651 and alternatively Rule 65 of the Federal Rules of Civil Procedure, Plaintiff Dan Bishop moves for a writ of mandamus or preliminary injunction restraining Defendants from denying prompt public access to court records revealing votes of the justices and judges on the Election Suspension Orders, as such term is defined in the Verified Complaint. The motion is predicated upon the Verified Complaint, and the grounds are set forth in an accompanying Memorandum of Support.

This 22nd day of December, 2021.

/s/J. Daniel Bishop
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DAN BISHOP, **Plaintiff,** **v.** **AMY L. FUNDERBURK, et al.,** **Defendants.**	**Civil Action No. 3:21-cv-679** **MEMORANDUM IN SUPPORT OF MOTION FOR MANDAMUS OR PRELIMINARY INJUNCTION**

Following the lead of the United States Supreme Court recognizing a qualified First Amendment right of public access to records and proceedings of criminal courts, circuit courts across the country, including in the Fourth Circuit, have extended the principle to civil courts. Applied here, these authorities require this Court to mandamus or preliminarily enjoin the persons with administrative control of the appropriate records of the North Carolina Supreme Court and Court of Appeals to disclose the votes of their respective judges on orders issued the week of December 6, 2021, stopping, restarting, and then stopping again candidate filing for North Carolina's 2022 elections and changing the primary election date. To serve its First Amendment purpose, mandamus or preliminary injunctive relief must issue promptly.

FACTS

Plaintiff is the Congressman for the Ninth District of North Carolina and intends to seek reelection in 2022. After Plaintiff dispatched his notice of candidacy for filing with the State Board of Elections in Raleigh on the statutory opening day of

candidate filing, December 6, he learned from news reports that the North Carolina Court of Appeals had issued an order suspending filing for candidates for Congress and the state legislature. Before day's end, that order had been countermanded by the en banc Court of Appeals, and filing resumed. Then, on December 8, the North Carolina Supreme Court issued a "preliminary injunction" again suspending candidate filing — this time, for all races. The Supreme Court's order also delayed the primary date from March 8 to May 17.

None of these three appellate orders was signed by or disclosed the votes in concurrence or dissent of the issuing judges. As is universally the case in the United States, the North Carolina appellate courts have a well-established tradition of publishing opinions that disclose the individual votes of the sitting justices and judges. However, those courts also follow an unwritten practice of refusing public access to the votes on unpublished orders. Yet, they have not and cannot articulate any compelling, countervailing governmental interest warranting such refusal.

Bishop made demands on the clerks and chief judges of both appellate courts for some court record that would disclose the judges' votes. The clerk of the Supreme Court responded that she lacks access to such records, implying that they are to be found among chambers records in the custody of the justices. Chief Justice Newby and Associate Justice Barringer of the Supreme Court and Chief Judge Stroud and Clerk Soar of the Court of Appeals have ignored the demands.

While the Supreme Court has maintained silence, the Court of Appeals, in a statement published December 10, suggested that it conceals the identities of judges

assigned on a monthly rotating basis to its "petitions panel" to prevent "judge-shopping." But the same statement revealed that the December panel that signed the first order suspending candidate filing on December 6 was changed on December 10. Accordingly, disclosure of those judges' votes on orders logically cannot precipitate judge-shopping by other prospective petitioners.

ARGUMENT

I. THE FIRST AMENDMENT RIGHT OF PUBLIC ACCESS APPLIES TO CIVIL PROCEEDINGS AND RECORDS

In *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 65 L. Ed. 2d 973, 100 S. Ct. 2814 (1980), and its progeny, the Supreme Court recognized that the First Amendment grants both the public and the press a qualified right of access to criminal trials, *see id.* at 580, to the examination of jurors during voir dire, *see Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 78 L. Ed. 2d 629, 104 S. Ct. 819 (1984) ("Press-Enterprise I"), and to preliminary hearings, *see Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 92 L. Ed. 2d 1, 106 S. Ct. 2735 (1986) ("Press-Enterprise II").

The circuits have concurred in holding that this constitutional right also applies to civil proceedings. The Fourth Circuit so held in *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249 (4th Cir. 1988). Observing that a presumption of access to judicial records exists under common law, *Nixon v. Warner Comms., Inc.*, 435 U.S. 589, 597, 55 L. Ed. 2d 570, 98 S. Ct. 1306 (1978), and a "more rigorous" First Amendment right to criminal court proceedings and records, the court held that "the more rigorous First Amendment standard should also apply to" civil case documents.

846 F.2d at 253. The court further observed that whereas the common law presumption permits the court to weigh "the interests advanced by the parties in light of the public interests and the duty of the courts," "[u]nder the First Amendment, on the other hand, the denial of access must be necessitated by a compelling government interest and narrowly tailored to serve that interest." *Id*. (internal quotes omitted). "[T]here must be a showing … that the denial serves an important governmental interest and that there is no less restrictive way to serve that governmental interests." *Id.*

The First Amendment right of access has since been extended to an ever-broadening range of procedural postures and civil court documents. *Id.* (documents attached to a filed summary judgment motion); *Courthouse News Serv. v. Schaefer*, 2 F.4th 318, 328 (4th Cir. 2021) (filed civil complaints); *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1074 (3d Cir. 1984) (preliminary injunction motion and hearing transcript) ; *United States v. Valenti*, 987 F.2d 708, 714 (11th Cir. 1993) (bench conference transcripts); *In re Providence Journal Co.*, 293 F.3d 1, 10-13 (1st Cir. 2002) (submitted memoranda of law); *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 96 (2d Cir. 2004) (civil and criminal docket sheets); *N.Y. Civil Liberties Union v. N.Y.C. Transit Auth.*, 684 F.3d 286, 305 (2d Cir. 2011) (administrative civil infraction hearings); *In re Cont'l Ill. Sec. Litig.*, 732 F.2d 1302, 1308 (7th Cir. 1984) (litigation committee reports in shareholder derivative suits); *Co. Doe v. Pub. Citizen*, 749 F.3d 246, 271 (4th Cir. 2014) (right of access violated by order sealing entire record and allowing corporation to litigate anonymously).

II. VOTES OF THE APPELLATE JUDGES ARE TRADITIONALLY ACCESSIBLE AND AT THE VERY CORE OF THE PURPOSE SERVED BY THE RIGHT OF PUBLIC ACCESS.

To evaluate the applicability of the First Amendment right, the courts apply an "experience and logic" test. *Courthouse News Serv.*, 2 F.4th at 326. "The First Amendment provides a right of access to a judicial proceeding or record that "has 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." *Id.* Here, the votes of individual appellate judges in North Carolina have traditionally been published and thereby open to the press and public. In addition, Article I, Section 18 of the North Carolina Constitution guarantees a qualified public right of access to civil actions, *Virmani v. Presbyterian Health Servs. Corp.*, 350 N.C. 449, 475-76, 515 S.E.2d 675, 693 (1999), and North Carolina statutory law provides generally for public access to records in all court proceedings, N.C. Gen. Stat. § 7A-109(a), and is supplemented by a far-reaching general public records statute, *id.* §§132-1, et seq. All of this speaks to broad traditional access.

As to the positive role played by public access, the Fourth Circuit has observed generally that "openness of the judicial process … affords citizens a form of legal education and hopefully promotes confidence in the fair administration of justice. And access allows the public to participate in and serve as a check upon the judicial process — an essential component of our structural self-government." *Courthouse News Serv.*, 2 F.4th at 327. This is self-evidently as true of appellate courts as of trial courts and especially true of those in North Carolina given that, except for vacancy appointments, all appellate judges are elected by the people. Complete information

about the performance of appellate judges must be available to the people in order to inform the people's vote.

Moreover, of all the types of information to which the right of access applies, the actions of the court itself are at the core:

> The public has an interest in learning not only the evidence and records filed … but also the district court's decision ruling … and the grounds supporting its decision. Without access to judicial opinions, public oversight of the courts, including the processes and the outcomes they produce, would be impossible. *See Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 492, 95 S. Ct. 1029, 43 L. Ed. 2d 328 (1975) ("[O]fficial records and documents open to the public are the basic data of governmental operations."); *Mueller v. Raemisch*, 740 F.3d 1128, 1135-36 (7th Cir. 2014) ("Secrecy makes it difficult for the public (including the bar) to understand the grounds and motivations of a decision, why the case was brought (and fought), and what exactly was at stake in it."); *United States v. Mentzos*, 462 F.3d 830, 843 n.4 (8th Cir. 2006) (denying motion to file opinion under seal because "decisions of the court are a matter of public record"); *Union Oil Co. of Cal. v. Leavell*, 220 F.3d 562, 568 (7th Cir. 2000) ("[I]t should go without saying that the judge's opinions and orders belong in the public domain."); *United States v. Amodeo*, 71 F.3d 1044, 1048 (2d Cir. 1995) (observing that public monitoring of the courts "is not possible without access to … documents that are used in the performance of Article III functions"). Indeed, it would be anomalous to conclude that the *First Amendment* right of access applies to materials that formed the basis of the district court's decision … but not the court's opinion itself.

Co. Doe, 749 F.3d at 267-68. It should likewise go without saying that the votes of North Carolina's appellate judges stopping election processes belong in the public domain.

III. PRESERVATION OF THE RIGHT REQUIRES TIMELY ACCESS.

Timeliness of access is also essential:

> The public's interest in monitoring the work of the courts is subverted when a court delays making a determination on a sealing request while allowing litigation to proceed to judgment in secret. Indeed, this Court has rejected pleas by litigants that the public right of access can be

> accommodated "by releasing the information after [the] trial has concluded, when all danger of prejudice will be past," reasoning that "the value of openness … is threatened whenever immediate access to ongoing proceedings is denied, whatever provision is made for later public disclosure." *In re Application & Affidavit for a Search Warrant*, 923 F.2d 324, 331 (4th Cir. 1991) (quoting *In re Charlotte Observer,* 882 F.2d 850, 856 (4th Cir. 1989)) (internal quotation marks omitted). … "Each passing day may constitute a separate and cognizable infringement of the *First Amendment*." *Grove Fresh Distribs., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994) (brackets omitted) (quoting *Neb. Press Ass'n v. Stuart*, 423 U.S. 1327, 1329, 96 S. Ct. 251, 46 L. Ed. 2d 237 (Blackmun, Circuit Justice, 1975)). A district court therefore must make on-the-record findings required by *In re Knight Publishing* and act on a sealing request as expeditiously as possible.

Id. at 272-73 (nine-month delay held error); *see also Roman Catholic Diocese v. Cuomo*, 141 S. Ct. 63, 67 (2020) (""the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."") (quoting *Elrod v. Burns*, 427 U.S. 347, 343 (1976)).

This year, the Fourth Circuit followed the Ninth Circuit in imposing a same-day timeliness standard for access to newly filed civil complaints. *Courthouse News Serv.*, 2 F.4th at 329 (4th Cir. 2021) (affirming declaratory judgment); *see also Courthouse News Serv. v. Planet*, 750 F.3d 776, 790-91 (9th Cir. 2014) (holding district court erred by denying preliminary injunction on abstention grounds); *Courthouse News Serv. v. Gabel*, 2021 U.S. Dist. LEXIS 224271 at *48 (D.Vt. Nov. 19, 2021) (permanently enjoining denial of contemporaneous access to newly filed civil complaints); *Courthouse News Serv. v. N.M. Admin. Office of the Courts*, 2021 U.S. Dist. LEXIS 194935 (D.N.M. Oct. 8, 2021) (preliminarily enjoining denial of five-hour access to newly filed civil complaints). Bishop is likewise entitled to relief that affords

access as immediately as possible to the judges' votes that are driving the interruption of North Carolina's elections process.

IV. THE FEDERAL COURT MUST ACT VIA MANDAMUS OR PRELIMINARY INJUNCTION.

As the authorities already cited demonstrate, when the deprivation of the First Amendment right of access is by a state court, federal courts must enforce it. The Supreme Court's holdings in *Press-Enterprise I* and *II* were directed to state courts of California. 464 U.S. at 504-05; 478 U.S. at 13. The *Courthouse News Service* case mandates all issued to state courts, including the Fourth Circuit's. 2 F.4th at 322 (affirming declaratory judgment against clerks of Circuit Courts of Virginia). These courts have repeatedly explained why federal courts cannot abstain from enforcement of First Amendment rights in such cases. *See, e.g., id.* at 324-25 (rejecting *Younger v. Harris*, *O'Shea v. Littleton, and Rizzo v. Goode* abstention theories); *see also Courthouse News Serv.*, 750 F.3d at 787-92 ("We disfavor abstention in First Amendment cases …." and "We decline to leave [the plaintiff and public] twisting in the wind while the state courts address a different question entirely ….")

In addition, Bishop is a proper plaintiff: "The media's rights of access are 'co-extensive with and do not exceed those rights of members of the public in general.'" *Courthouse News Serv.*, 2 F.4th at 326 n.5 (*quoting In re Greensboro News Co.*, 727 F.2d 1320, 1322 (4th Cir. 1984)); *see also Co. Doe*, 749 F.3d at 263 (accord). The fact that the injury from deprivation of this right "may be widely shared" does not preclude standing. Injury is sufficiently concrete "though shared by a large segment of the citizenry" when a plaintiff "(1) alleged a right of disclosure; (2) petitioned for

access to the concealed information; and (3) were denied the material that they claim the right to obtain." *Co. Doe*, 749 F.3d at 263-64. These requirements are fully met on the face of the verified complaint.

Although the Fourth Circuit has stated that "mandamus … is the preferred method of review for orders restricting access to criminal proceedings," *In re United States v. Appelbaum*, 707 F.3d 283, 288 (4th Cir. 2013) (brackets omitted), that "dicta" is "not binding," *United States v. Doe*, 962 F.3d 139, 144 (4th Cir. 2020), and may not be apt for the district court context, which may treat a denial of access claim as one for preliminary injunctive relief, *Ctr. For Const'l Rights v. Lind*, 954 F. Supp. 2d 389, 395-96 (D. Md. 2013).

This court does have jurisdiction of an action in the nature of mandamus under the All Writs Act. 28 U.S.C. § 1361. It also can take jurisdiction to remedy the deprivation of the First Amendment right of access under 28 U.S.C. § 1343 or federal question jurisdiction under 28 U.S.C. § 1331, based on the claim created by 42 U.S.C. § 1983. Bishop easily meets the tests for relief either by mandamus or preliminary injunction.

For mandamus, the applicant must show:

> (1) he has a clear and indisputable right to the relief sought; (2) the responding party has a clear duty to do the specific act requested; (3) the act requested is an official act or duty; (4) there are no other adequate means to attain the relief he desires; and (5) the issuance of the writ will effect right and justice in the circumstances.

United States ex rel. Rahman v. Oncology Assocs., P.C., 198 F.3d 502, 511 (4th Cir. 1999). Analyzed under Rule 65 for a preliminary injunction, the showing is (1) "likely to succeed on the merits," (2) "likely to suffer irreparable harm in the absence of

preliminary relief," (3) that the "balance of equities tips in [plaintiff's] favor," and (4) that "an injunction is in the public interest." *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008).

Whichever test is applied, the recognition that judicial acts are at the core of the First Amendment right of access leaves essentially no doubt that, absent a compelling interest to be articulated by Defendants, Bishop's entitlement is clear and the judges' votes must be disclosed. The enormous public interest attendant upon the matter and the utterly minimal impact on the Defendants of producing the votes on the three orders at issue also weigh decisively in favor of prompt relief. The Court should issue its writ of mandamus or preliminary injunction without delay.

This 22nd day of December, 2021.

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