IN THE SUPREME COURT OF MISSISSIPPI

NO. 2023-TS-00584

Ann Saunders; Sabreen Sharrief; and Dorothy Triplett,

Appellants

v.

State of Mississippi; State of Mississippi *ex rel.* Tate Reeves, in his capacity as Governor of the State of Mississippi; State of Mississippi *ex rel.* Lynn Fitch, in her capacity as Attorney General of the State of Mississippi; Honorable Michael K. Randolph, in his official capacity As Chief Justice of the Mississippi Supreme Court; Zack Wallace, in his official capacity as Circuit Clerk of the Circuit Court of Hinds County, Mississippi; and Greg Snowden, in his official capacity as Director of the Administrative Office of Courts, and

Intervenor

State of Mississippi *ex rel.* Attorney General Lynn Fitch

Appellees

ON APPEAL FROM THE CHANCERY COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

Brief of Appellee, Michael K. Randolph, In His Official Capacity as the Chief Justice the Mississippi Supreme Court

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Ann Saunders, et al. **Appellants**

v.

State of Mississippi, et al. **Appellees**

Certificate of Interested Persons

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this Court may evaluate possible disqualification or recusal.

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Dorothy Triplett, Appellant

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RESPECTFULLY SUBMITTED, this the 14th day of June, 2023.

/s/ Mark A. Nelson

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Statement of Issues

1. The civil action against the Chief Justice Michael K. Randolph in his official capacity as Chief Justice of the Mississippi Supreme Court ("the Chief") is barred by the ancient doctrine of judicial immunity.

2. The Plaintiffs failed to state a cause of action against the Chief pursuant to Mississippi Rule of Civil Procedure 12(b)(6), as the Chief lacks a justiciable interest in the outcome of the litigation. *See* Miss. R. Civ. P. 12(b)(6).

3. Because the Plaintiffs failed to articulate a cause of action against the Chief, the Chancery Court of Hinds County lacked jurisdiction over the Chief pursuant to Mississippi Rule of Civil Procedure 12(b)(1). *See* Miss. R. Civ. P. 12(b)(1).

4. The Chief lacks even a remote sense of adverseness to the rights and interests of the Plaintiffs. For that reason, the Chief was not a necessary or proper party to the litigation pursuant to Miss. R. Civ. P. 19. Accordingly, the Chancery Court properly dismissed him from the action.

5. The public policy concerns raised by the litigation demand the Chief's dismissal from the litigation.

Statement of the Case

The plaintiffs commenced this civil action on April 24, 2023. R. 20. The complaint alleges that Miss. Code Ann. § 9-1-105, originally passed in 1989, as well as the newly enacted H.B. 1020 were both unconstitutional

under the Mississippi Constitution. Plaintiffs assert Michael K. Randolph in his official capacity as Chief of the Mississippi Supreme Court ("Chief") was named in the case because the Legislature provided in H.B. 1020 a power of appointment. *See* e.g., R. at 21, 25, 29. Plaintiffs assert no claims of a Federal constitutional violation.

Three days before this action was filed, a civil action was also filed in Federal Court against the Chief and others, claiming that H.B. 1020 violates the United States Constitution.[1] That action against the Chief was dismissed by U.S. District Judge Henry T. Wingate on June 1, 2023. The District Court wrote a well-reasoned opinion finding that the Federal civil action against the Chief was barred by judicial immunity. "Chief Justice Randolph must be dismissed from this litigation, which will still continue with the remaining parties." *Addendum A*, at 11. "This doctrine of Judicial Immunity shelters judges from lawsuits, whether declaratory or injunctive. When the judge, within his jurisdiction, performs a 'judicial act', or is about to perform a judicial act." *Id.*

In this matter, the plaintiffs sought to enjoin the Chief from making appointments under either Miss. Code Ann. § 9-1-105 or H.B. 1020. Exhibits A through D to the complaint were four (4) Orders Appointing Special Judges pursuant to Miss. Code Ann. § 9-1-105(2). R. 41-43. Those Orders are **not for a term**, **but Orders to preside over specific cases**. *Id.* 44-

[1] *NAACP v. Reeves,* 2023 U.S. Dist. Lexis 95336 (S.D. Miss. June 1, 2023)(Wingate, D.J.) attached as *Addendum* A.

62. Those Orders were entered in response to the world-wide pandemic and unprecedented backlog of cases. Those Orders were each styled "In Re Judicial Appointment Related to Coronavirus," and appointed Judge Frank G. Vollor, Judge Betty W. Sanders, Judge Stephen B. Simpson, and Judge Andrew K. Howorth." *Id.* Each Order had attached to it a list of cases for the appointed Judges to preside over. *Id.*

On April 26, 2023, the plaintiffs filed a Motion for Preliminary Injunction and Supporting Memorandum. R. 77-135. The plaintiffs alleged, *inter alia*, that an injunction was necessary to enjoin the Chief from making appointments pursuant to § 9-1-105 and H.B. 1020. R. 82 and 101.

The Chief filed his Motion to Dismiss on May 1, 2023, based on the long-recognized common law of judicial immunity and averred that the trial court lacked jurisdiction over the Chief. R. 148-52. The Chief's Motion argued that the Chief was prohibited from commenting on the merits of the constitutional claims:

> This motion is limited, and nothing herein should be construed as any comment on the merit, *vel non,* of any claims or defenses in this case. The Chief's ethical obligations also limit his ability to respond to the complaint and to raise substantive defenses if judicial immunity is not recognized *instanter*.

Id. at 149. The Chief also asserted that he was "prohibited by judicial ethics from commenting on pending or impending cases and from making any statement that could be construed as an advisory opinion. These

prohibitions are critical for ensuring fair and just operation of the judiciary and even more critical for ensuring public trust in that system." *Id.* at 151.

The State of Mississippi, *ex rel,* Attorney General Lynn Fitch intervened to defend the constitutionality of Miss. Code Ann. § 9-1-105 and H.B. 1020. R. 159-60. Later the plaintiffs sought to amend their complaint to add additional parties. *Id*. 172-97.

The Chief opposed the motion to amend the complaint as his Motion to Dismiss had yet to be ruled upon and he was still a party, in name only, to the civil action. The trial judge urged the plaintiffs to omit the Chief as a party in their amended complaint. R. 717-18. The trial court recognized that the Chief had no interest in the outcome of the case. R 709-10. The trial court observed an injunction against the State, binds the officials of the State and there was no reason to have the Chief as a party to the amended complaint. *Id.* See Miss. R. Civ. P. 65(c). The Chief again raised judicial immunity as a bar to the civil action and plaintiffs' claims. R. 286-295.

The plaintiffs' Response to the Chief's Motion to Dismiss acknowledged that the Chief would follow the law and stated that the Chief did not do anything wrong. R. 280-85 and 747-48. Plaintiffs then argued that judicial immunity did not apply to suits for declaratory and prospective injunctive relief. *Id*. The Chief argued that there was no controversy as to the office of the Chief and that public policy favored immunity. R. 455-63.

The Chief filed a Reply in support of his motion to dismiss on May 9, 2023. *Id*.

The trial court entered a "Preliminary Injunction Temporarily Restraining Effectuation of Provisions of House Bill 1020." R. 296-99. The Chancellor held that the restraining order was "necessary to allow full briefing and consideration of the plaintiff's motion for preliminary injunction." The trial court stated that it was "unable to determine the likelihood of success on the merits without a full hearing." The court's order provided that a "temporary stay of effectuation of House Bill 1020" was necessary for the court to render "a meaningful decision on the merits." *Id.* The trial court did not issue a restraining order of the Chief but instead restrained the "effectuation of House Bill 1020." *Id.* at 299.

The court entered its Order granting the Chief's Motion to Dismiss on May 11, 2023. R. 589 and 594. The court held that judicial immunity applied, and the Chief was, therefore, immune from suit. *Id*. at 591-92. Pursuant to the memorandum, the court entered its final judgment dismissing the claims with prejudice. *Id*. at 594-95.

Summary of the Argument

For hundreds of years, the doctrine of judicial immunity has shielded judges from civil liability for damages, injunctions, or from declaratory judgment, when the judge performs a "judicial act." Mississippi law is clear, judicial appointments qualify as "judicial acts" and are thereby shielded by

judicial immunity. Plaintiffs have wholly failed to assert a cognizable claim against the Chief under Mississippi law. Because appointments by the Chief under either of the challenged statutes are within the jurisdiction of the Chief conveyed to him by the legislature, he is immune from this suit.

Under Mississippi law, the Chief is not in any sense adverse to the rights or interests of the plaintiffs. Concerning the constitutionality *vel non*, of H.B. 1020 or Miss. Code Ann. § 9-1-105, the Chief is a noncombatant. He has no business being a forced participant in this litigation. The Chief's Oath of Office and the Code of Judicial Conduct prohibit him from commenting on the propriety or constitutionality of the challenged statutes. The doctrine of judicial immunity compels the conclusion that the plaintiffs' fight is not and cannot be against the Chief. There is no basis in fact or law to support a conclusion that the Chief is, or could be, a necessary party.

As set forth herein, allowing injunctive and declaratory relief, in the manner sought by the plaintiffs, against members of the courts of Mississippi would be intrusive and would have far reaching and devastating impact on the dispensation of justice across our State. Forcing the Chief to be a participant in this litigation is an affront to the entire judicial system. Mississippi law does not permit this civil action against the Chief. For these reasons, the Judgment of the Hinds County Chancery Court should be affirmed.

Argument

A. Standard of review.

The standard of review for a trial court's grant or denial of a motion to dismiss is *de novo*. *Long v. Vitkauskas,* 228 So.3d 302, 304 (Miss. 2017). *See also Trigg v. Farese,* 266 So.3d 611, 617 (Miss. 2018). "A motion to dismiss for failure to state a claim upon which relief can be granted challenges the legal sufficiency of the complaint, and raises a question of law." *Favre Prop. Mgmt. v. Cinque Bambini*, 863 So.2d 1037, 1042 (Miss. Ct. App. 2004).

B. Introduction.

As a putative, adversarial party to these proceedings, the Chief is severely hampered in his ability to respond to the spurious claims of the plaintiffs-appellants. No statement by the Chief should be construed as an advisory opinion. The Chief's participation herein is with fervent disagreement and over the strongest objection to his inclusion as a party in the first place. Accordingly, the Chief's filings should not be construed as an admission, denial, stipulation, or acquiescence by the Chief. Nor should anything contained herein be construed as any comment on the merit, *vel non*, of any claims or defenses relating to the constitutionality of section 9-1-105 and H.B. 1020. It is the judicial branch of government of the State of Mississippi that the Chief Justice seeks to protect and preserve.

The Chief's Oath of Office[2] and the Code of Judicial Conduct[3] prevent him from making comments on the efficacy or constitutionality of section 105 and H.B. 1020. Moreover, the Defendant State of Mississippi *ex rel.* Attorney General Lynn Fitch filed her Motion to Intervene in this action on April 26, 2023. (R. 136-139). The Motion to Intervene was granted on May 2, 2023. (R. 159-160). Accordingly, the "Mississippi officials with executive responsibility for defending the challenged" laws are parties to the litigation and are well-positioned to ""represen[t] the interests of the state." *Chancery Clerk of Chickasaw County v. Wallace*, 646 F. 2d 151; 160 (5th Cir. 1981).

The following legal principles supported dismissal of the Chief: (1) The civil action against the Chief is barred by the centuries-old doctrine of judicial immunity, depriving the Chancery Court of jurisdiction; (2) The plaintiffs failed to state a cause of action against the Chief pursuant to Mississippi Rule of Civil Procedure 12(b)(6), as the Chief lacks a justiciable

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[2] On January 4, 2021, Chief Randolph took the following Oath of Office:

I . . . solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all duties incumbent upon me as the Chief of the Supreme Court of Mississippi, Supreme Court District 2, Position 3, according to the best of my ability and understanding, agreeably to the Constitution of the United States and the Constitution and laws of the State of Mississippi. So help me God.

See Miss. Const. Art. 6, § 155.

[3] *See* Miss. Code Jud. Conduct Canon 3B(9) ("A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing").

interest in the outcome of the litigation. *See* Miss. R. Civ. P. 12(b)(6); (3) Because the plaintiffs failed to articulate a cause of action against the Chief, the Chancery Court of Hinds County lacked jurisdiction over the Chief pursuant to Mississippi Rule of Civil Procedure 12(b)(1). *See* Miss. R. Civ. P. 12(b)(1); (4) The Chief is in no sense adverse to the rights and interests of the Plaintiffs. For that reason, the Chief was not a necessary or proper party to the litigation pursuant to Miss. R. Civ. P. 19; (5) And lastly, the public policy concerns raised by the litigation, demand the Chief's dismissal from the litigation.

Judicial appointments require the exercise of sound judicial discretion and reasoning in making the appointments. Appointees are subject to vetting and scrutiny. That is, if a legislative act required the Chief to appoint a specific judge or person to the Trial Court, such a mandate would deprive the Chief of his judicial authority.

Allowing injunctive and declaratory relief, in the manner sought by the plaintiffs, against members of the courts of Mississippi would be intrusive and would have far reaching and devastating impact on the dispensation of justice across our State. Such a prescription in this instance would not only be improper, it would turn the "just, speedy, and inexpensive determination of every action" on its head. Miss. R. Civ. P. 1. The relief sought is contrary to Mississippi law. Forcing the Chief to be a participant in litigation is an affront to the entire judicial system. Mississippi law does

not permit this civil action against the Chief. *See Vinson v. Prather*, 879 So. 2d 1053, 1057 (Miss. Ct. App. 2004); *Bauer v. Texas*, 341 F. 3d 352, 357 (5th Cir. 2003).

C. Judicial Immunity Bars Plaintiffs' Claims against the Chief.

Mississippi has recognized the doctrine of judicial immunity for more than a century. *Weill v. Bailey*, 227 So. 3d 931, 935 (¶18) (Miss. 2017); *Wheeler v. Stewart*, 798 So. 2d 386, 392 (¶14) (Miss. 2001). Judicial immunity serves the "best interests of the people and public order," ensuring that a "judge should have the power to make decisions without having to worry about being held liable for his actions...." *Weill,* 227 So. 3d at 935; *Loyacono v. Ellis,* 571 So. 2d 237, 238 (Miss. 1990). Judicial immunity applies to the Chief because he has jurisdiction to perform the challenged appointments. *Loyacono*, 571 So. 2d at 238. See also *Addendum A*, at 11 ("Chief Justice Randolph has jurisdiction to appoint four (4) special temporary circuit judges by way of H.B. 1020 – a "legislative grant" of Jurisdiction.")

It is well settled in Mississippi that appointment of judges is a "judicial act" entitled to judicial immunity. In *Vinson v. Prather*, the Mississippi Court of Appeals held that appointments are "judicial acts." *Vinson v. Prather, 879 So.2d 1053, 1057 (Miss. Ct. App. 2004).* In that case, the plaintiffs challenged the appointment of a special chancellor made by then Chief Justice Prather under Miss. Code Ann. § 9-1-105(1). The

plaintiffs argued that their claims against the Chief were not protected by judicial immunity because the appointment was "non-adjudicative." *Vinson*, 879 So. 2d at 1057. The Court held that **"an appointment pursuant to Mississippi Code Annotated Section 9-1-105 [is] a judicial act,"** and affirmed dismissal of the case on the grounds of judicial immunity. *Id*. (emphasis added). *Vinson* answers the question of judicial immunity with respect to appointments.

The doctrine of judicial immunity ensures that a judge has "the power to make decisions without having to worry about being held liable for his actions." *Weill*, 227 So. 3d at 935 (quoting *Loyacono*, 571 So. 2d at 238). *See Stump v. Sparkman*, 435 U.S. at 349 (1978). Within its analysis of judicial immunity, the *Vinson* Court characterized the "act itself" (*i.e.*, "an appointment [of a Judge] pursuant to [Section] 9-1-105") to be "a **judicial** act" and that the plaintiffs' "attempt to label the appointment as administrative or non-adjudicative is without merit." *Vinson*, 879 So. 2d at 1054, 1057. (emphasis added).

To be clear, plaintiffs' suit was not brought under 42 U.S.C. § 1983, and federal case law regarding the same is purely persuasive. However, plaintiffs' arguments rely heavily on § 1983 cases and other federal court rulings. *See* Appellants Brief at 39-40. As discussed, even under a § 1983 analysis, the plaintiffs' claims are unavailing and the Chief is nonetheless immune from suit. *See Addendum* A. As passed by the United States

Congress, 42 U.S.C. § 1983 sets forth the following, to wit, "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." 42 U.S.C. § 1983 (emphasis added). *See also Roth v. King*, 449 F. 3d 1272, 1286-87 (D.C. Cir. 2006) (absent applicability of the "statutory limitation[s]" provided in the 1996 amendment to Section 1983, **judicial officers acting in a judicial capacity "are immune from suits for injunctive relief" thereunder**) (emphasis added). [4] The principles underlying this Federal doctrine are no less true in this case.

The plaintiffs sought injunctive relief against the Chief based on allegations that both Miss. Code Ann. § 9-1-105 and H.B. 1020 are unconstitutional. The Chief has not violated any declaratory order or injunction.

An analysis of Federal law led to dismissal of the Federal civil action against the Chief on the basis that his actions under H.B. 1020, if

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[4] The Ninth Circuit held: "In 1996, **Congress amended** 42 U.S.C. § 1983 to limit the **circumstances in which injunctive relief may be granted against judges**. As a statutory matter, Congress **expanded the scope of judicial immunity** by providing 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 (FCIA), Pub. L. No. 104-317, § 309(c), 110 Stat. 3847, 3853 (codified at 42 U.S.C. § 1983). **Section 1983 (as amended by the FCIA) therefore provides judicial officers immunity from injunctive relief even when the common law would not**." *Moore v. Urquhart,* 899 F.3d 1094, 1104 (9th Cir. 2018)(emphasis added).

undertaken, would be "judicial acts." *Addendum A,* at 11. Citing *Vinson v. Prather,* District Judge Wingate specifically held that appointment of judges under H.B. 1020 would be a "judicial act." *Id.* at 10-11. As cited, Judge Wingate's Opinion specifically noted that H.B. 1020 was a "legislative grant" of Jurisdiction for the Chief to make appointments. *Id*. Judge Wingate held:

> [I]f later, this court finds H.B. 1020 to be unconstitutional, and unenforceable, that ruling, by necessity would nullify the Chief Justice's power to appoint any judges under H.B. 1020.
>
> [T]his doctrine of Judicial Immunity shelters judges from lawsuits, **whether declaratory or injunctive**, when the judge, within his jurisdiction, performs a "judicial act", or is about to perform a judicial act.
>
> Chief Justice Randolph **must be dismissed** from his litigation, which still will continue with the remaining parties to address the constitutionality of H.B. 1020 as a whole.
>
> If this court determines that H.B. 1020 is unconstitutional, the appointment power that Chief Justice Randolph would possess to appoint four (4) special temporary circuit judges would become a nullity.

Addendum A at 11 (emphasis added). Although the Federal action invoked 42 U.S.C. § 1983 and the Federal Constitution, the same conclusion is dictated by Mississippi law.

Judicial immunity **applies to prospective injunctions**. *See Roth,* 449 F. 3d at 1281-83. *Roth* involved claims against the Superior Court Judges in the District Court of the District of Columbia. The District Court held that judicial immunity only applied to claims for damages. The Circuit

Court reversed, finding that **prospective injunctive relief was barred** since the Judges had judicial immunity for their actions in appointing counsel. *Id.* at 1287. The Circuit Court of Appeals held:

> The District Court erred in holding that appellees might be able to obtain injunctive relief, 42 U.S.C. **§1983, as amended in 1996** … **explicitly immunizes judicial officers against suits for injunctive relief**. The statute 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.

Roth, 449 F.3d at 1287, (citing, Federal Courts Improvement Act of 1996, codified at 42 U.S.C. §1983). Plaintiffs continue to insist that judicial immunity does not bar prospective injunctive relief. Appellants' Brief at 38-40. Despite relying on outdated Federal § 1983 cases and the text of § 1983, as amended, the plaintiffs fail to address the *Roth* opinion entirely. *See* Appellants' Brief, Table of Cases at iii.

Since the appointment of judges is a "judicial act" under Mississippi law and no allegations are made that the Chief lacked or lacks jurisdiction the plaintiffs' claims are barred. Further, Federal law compels the same conclusion as no declaratory decree has been violated. The Chief is entitled to dismissal on grounds of judicial immunity. *Vinson v. Prather, 879 So.2d at 1057. See also Weill v. Bailey*, 227 So. 3d 931, 935-36 (Miss. 2017); *Stump v. Sparkman*, 435 U.S. 349, 355-56 (1978).

Section 1983 does not abrogate common law immunities that may be available to state officials including judicial immunity.[5] In *Thompson v. City of Millbrook, Ala.,* the District Court held:

> Judicial **immunity extends** its protection to **requests for declaratory and injunctive relief** as well. To receive declaratory or injunctive relief against a judicial officer under Section 1983, the **judicial officer must have violated a declaratory decree or declaratory relief must otherwise be unavailable**. In addition, there must be an **absence of an adequate remedy at law**. Therefore, to the extent Thompson requests declaratory or injunctive relief against Judge Bright, such relief is improper because there is no allegation that Judge Bright violated a declaratory decree, and Thompson's right to appeal the underlying convictions afforded him an adequate remedy at law.

Thompson v. City of Millbrook, Ala.[6] Notably, Appellants do *not* claim that either exception applies here. There is no allegation that the Chief violated a declaratory decree or that declaratory relief is unavailable. Nor is there any allegation that there is an absence of an adequate remedy at law.

D. Appointments by the Chief are Judicial Acts.

The plaintiffs missed the mark when they argued that immunity does not apply since the appointments by the Chief are not judicial in nature, negating application of judicial immunity. The definition of judicial acts in

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[5] *Perez v. Gamez,* 2013 U.S.Dist.166032 (M.D.Pa. November 22, 2013)(appointment of interpreter is judicial act).

[6] No. 2:22-cv-143-WHA-CWB, 2022 U.S. Dist. LEXIS 137139, at *3 (M.D. Ala. Aug. 2, 2022) adopted 2022 U.S. Dist. Lexis 153884 (D.D. Ala., Aug. 26, 2022)(emphasis added)(internal quotations removed); quoting *Tarver v. Reynolds*, 808 F. App'x 752, 754 (11th Cir. 2020); *Bolin v. Story*, 225 F.3d 1234, 1242 (11th Cir. 2000)); *Sibley v. Lando*, 437 F.3d 1067, 1074 (11th Cir. 2005) (per curiam).

Mississippi is much more straight-forward, "If a judge had jurisdiction over the subject matter before him at the time he took action, he will be judicially immune." *Jackson v. Mullins*, 341 So, 3d 1041, 1047 ¶17 (Miss. Ct. App. 2022) (Lawrence, J., for the unanimous Court).

Under well-established Mississippi law, judicial immunity bars the claim in this case. The Chief is immune because he acted within his jurisdiction in appointing judges under § 9-1-105. If H.B. 1020 is ultimately determined to be constitutional, the Chief would be within his jurisdiction to appoint judges in accordance with a validly passed law of the State of Mississippi. *See Newsome v. Shoemake*, 234 So. 3d 1251, ¶35-38 (Miss. 2017) (Kitchens, J. for unanimous court); *Addendum A* at 11 (Chief Justice Randolph has jurisdiction to make appointments as H.B. 1020 was a "legislative grant" of Jurisdiction). In *Newsome,* the plaintiff sued two chancellors for alleged corrupt acts in the handling of a conservatorship. This Court unanimously held:

> And even if the Court accepts as true the plaintiff's allegation that [the judge] . . . acted corruptly in his handling of the conservatorship, under the Court's precedent, he is immune from civil liability.

Id. at ¶38. Since "the case at bar **does not allege** that [the Judge] . . . **lacked jurisdiction** of the matter of the conservatorship" **the claims are barred**. *Id.* at ¶36-38.

In *Pryer v. Gardner*, the Mississippi Supreme Court held that a complaint against a judge under the Mississippi Public Records Act was

barred by judicial immunity. The Court held that since the Judge had jurisdiction to rule, judicial immunity insulated the Judge from the civil action. *Pryer v. Gardner*, 247 So. 3d 1245, 1250-52 (Miss. 2016) (Kitchens, PJ, for the unanimous Court). Likewise, the Chief is immune in this case since the plaintiffs make no allegation that the actions will be or have been outside the jurisdiction of the Chief. The Court in *Pryer* held:

> It is a judge's duty to decide all cases **within his jurisdiction** that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. **Imposing such a burden on judges would contribute not to principled and fearless decision making but to intimidation**.

Pryer, 247 So. 3d at 1250-1251 (emphasis added); *quoting Pierson v. Ray*, 386 U.S. 547, 554 (1967). The Fifth Circuit has held:

> [t]here are only two circumstances under which judicial immunity may be overcome. First, a judge is not immune from liability for nonjudicial action, *i.e.*, actions not taken in the judge's judicial capacity. Second, a judge is not immune for actions, although judicial in nature, taken in the complete absence of all jurisdiction (citations omitted).

Davis v. Tarrant County, Texas, 565 F. 3d 214, 221 (5th Cir. 2009) (internal quotations removed); quoting *Mireles v. Waco*, 502 U.S. 9, 11 (1991). The plaintiffs' central argument is centered on the first circumstance. This position is unavailing since the appointments *in futuro* are "judicial acts."[7] According to the Fifth Circuit:

[7] *Note: What Constitutes a Judicial Act for Purposes of Judicial Immunity?* 53 *Fordham L. Rev. 1503 (1985).*

> [I]n determining whether the judges had engaged in a judicial act as opposed to an administrative or other category of action, we considered 'the particular act's relation to a general function normally performed by a judge.' We then mentioned four factors the circuit has used 'for determining whether a judge's actions were judicial in nature': was a 'normal judicial function' involved; did the relevant act occur in or adjacent to a court room; did the 'controversy' involve a pending case in some manner; and did the act arise 'directly out of a visit to the judge in his official capacity.'

Daves v. Dallas County, Texas, 22 F. 4th 522, 539 (5th Cir. 2022) quoting, *Davis*, 565 F. 3d at 221-22; and *Mireles*, 502 U.S. at 13. These four factors set out originally in *McAlester v. Brown*, 469 F.2d 1280 (5th Cir. 1972) and expounded by *Davis* and *Daves*, establish the Fifth Circuit's standard for determining "judicial acts" for purposes of a judge's immunity.

The application of the four factors is case-specific and does not require a mechanical consideration of each factor. *Daves*, 22 F. 4th at 539 & n. 13 citing *Davis,* 565 F. 3d at 223. The Fifth Circuit in *Davis,* identified the four-factor standard, but "used only the first one" in concluding that the subject act was "judicial." *Davis v. Tarrant County,* 565 F.3d at 223. The *Davis* court "concluded that there are factual situations in which it makes sense not to consider multiple factors." *Id*. The Fifth Circuit also held that "immunity may be applied even if one or more of these factors is not met." *Morrison v. Walker*, 704 Fed. Appx. 369, 373 (5th Cir. 2017). Significantly, "[e]xceptions to judicial immunity based on narrow factual considerations, or technical or fine distinctions, must be avoided and those which exist should be narrowly construed as reasonably possible." *Adams v. McIlhany,*

764 F.2d 294, at 297 n.1 (5th Cir. 1985). Importantly, the four *McAlester* factors, "**are broadly construed in favor of immunity**." *Kemp ex rel. Kemp v. Perkins*, 324 Fed. Appx. 409, 412 (5th Cir. 2009) (citing *Davis*, 565 F. 3d at 221-23) (emphasis added).

The third *McAlester* factor ("did the 'controversy' involve a pending case in some manner") does not require the "challenged act" to be limited to a single case. *Daves v. Dallas County, Texas*, 22 F. 4th 522, 539 (5th Cir. 2022) (citing *Davis*, 565 F. 3d at 223). For instance, "the act of selecting applicants for inclusion on a rotating list of attorneys eligible for court appointments is inextricably linked to and cannot be separated from the act of appointing counsel in a particular case, which is clearly a judicial act." *Daves*, 22 F. 4th at 539 (quoting *Davis*, 565 F. 3d at 226).

The Fifth Circuit expressed the policy goal of insuring independent judicial decision-making that requires a broad interpretation of judicial immunity. *Adams*, 764 F.2d at 294, 297. The *Adams* Court held:

> The four-part *McAlester* test should always be considered in determining whether an act is 'judicial'; however, the test factors should be broadly construed in favor of immunity, . . . and it should be born in mind that while the *McAlester* factors will often plainly indicate that immunity is available, there are situations in which **immunity must be afforded even though one or more of the *McAlester* factors fails to obtain.** … Nor are the factors to be given equal weight in all cases; rather, they should be **construed** in each case **generously** to the holder of the immunity and in the light of the policies underlying judicial immunity. Of primary importance among these policies is the need for independent and disinterested judicial decision-making; ….

Adams v. McIlhany, 764 F.2d 294, 297 (5th Cir. 1985)(emphasis added).

1. Examples of Judicial Acts Compellingly Favor Immunity in This Case.

The following cases involved acts that federal courts deemed judicial in nature and, therefore, subject to immunity.

- The appointment of interpreter is a judicial act.[8]

- Former detainee sued a specially appointed Mississippi judge who entered his detention order *and* the youth-court judge who appointed the special judge pursuant to a statutorily-authorized "general standing order" of appointment. The Northern District of Mississippi granted summary judgment to both judges on grounds of judicial immunity. The Fifth Circuit affirmed that ruling. The Fifth Circuit held "**appointment of a special judge** for a pending case" was "**clearly" a "judicial act**," and "not the type of administrative or ministerial conduct for which judicial immunity is unavailable." [9]

- "[T]he act of selecting applicants for inclusion on a rotating list of attorneys eligible for court appointments is inextricably linked to and cannot be separated from the act of appointing counsel in a particular case, which is clearly a judicial act. . . ."[10]

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[8] *Perez v. Gamez,* 2013 U.S.Dist.166032 (M.D.Pa. November 22, 2013).
[9] *Kemp,* 324 Fed. Appx. at 409, 410 n. 1, 412, 413 (emphasis added).
[10] *Davis*, 565 F. 3d at 226.

- "[T]he act of creating guidance for setting bail is 'inextricably linked' to the subsequent setting of bail and is a judicial act."[11]
- The act of appointing counsel "is clearly a judicial act."[12]
- "[A] judge acts in his adjudicatory capacity in appointing a temporary guardian."[13]
- The judge "acted in a 'judicial capacity' in selecting attorneys for inclusion on" a list of attorneys eligible for court appointments which was distinguished from "internal employment decisions made by judges [which] are not judicial acts."[14]
- The appointment of a receiver is a judicial act.[15]

2. Appointments are a Normal Judicial Function.

Appointments generally, and the appointment of judges specifically, are a "normal judicial function," *Daves v. Dallas County,* 22 F. 4th at 539 (quoting *Davis v. Tarrant County,* 565 F. 3d at 222). The Fifth Circuit determined in *Kemp* that **the act of appointing a special judge** in that case was **not "administrative or ministerial**," but "**clearly" judicial**. *Kemp*, 324 Fed. Appx. at 412 (emphasis added).

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[11] *Daves v. Dallas County,* 22 F. 4th at 540 (quoting *Davis v. Tarrant County,* 565 F. 3d at 226).
[12] *Pleasant v. Sinz,* 2016 U.S. Dist. Lexis 119566 (E.D. Tex. August 5, 2016).
[13] *Bauer v. Texas*, 341 F. 3d 352, 361 (5th Cir. 2003).
[14] *Roth v. King*, 449 F. 3d at 1286-87.
[15] *Dupree v. Bivona,* 2009 U.S. App. Lexis 612 (2d Cir. 2009) *cert. denied,* 2009 U.S. Lexis 4406 (2009).

The judgment entered by the Hinds County Chancery Court illustrates the parameters of a judicial immunity analysis under Mississippi law. The appointments contemplated by H.B. 1020 were defined under state law, by the Chancery Court, as a "judicial act" subject to immunity. As the Chancery Court found, under *Vinson v. Prather*, appointments by the Chief are judicial in nature and are afforded immunity from civil claims.

The cases cited by the plaintiffs are distinguishable. One case is framed in terms of internal employment decisions by the defendant-judge(s). *See, e.g., Watts v. Bibb County, Ga.,* 2010 U.S. Dist. Lexis 103570 (M.D. Ga., Sept. 10, 2010) (characterizing the failure to reappoint non-attorney, associate magistrate is an "adverse employment decision" (age and gender) that was "administrative" in nature). In *Watts,* the magistrate judge was "not utilizing his education, training, or experience in the law to decide whether or not to appoint or reappoint a non-lawyer associate magistrate." *Id.*

In this case, the Chief exercises his judicial discretion. The Chief would "utilize his education, training and experience in the law to decide" upon a judicial appointment. *Id*. There is no debate that internal employment decisions have been deemed "administrative" where judicial immunity was inapplicable. See *Forrester v. White*, 484 U.S. 219 (1988) (state judge's decision to demote and discharge probation officer was purely administrative). Plaintiffs' reliance on *Glassroth v. Moore*, 335 F 3d. 1282

(11th Cir. 2002) is misplaced. *See Appellants Brief* at 40 n. 21. As the Eleventh Circuit held, "At issue here is the conduct of a party, **who concedes he acted not judicially** but as the administrative head of a state government department, and in that capacity his conduct is subject to as much scrutiny as that of any head of any government department." *Moore*, 335 F. 3d at 1302, n. 6. Further, the words "judicial immunity" does not appear in the entire opinion of the Eleventh Circuit. *Id*. Accordingly, the defendant judge in *Moore* waived the defense of judicial immunity.

The appointments challenged in this matter are clearly distinct from the authority plaintiffs rely upon. In no way has the Chief waived judicial immunity. To the contrary, the Chief has aggressively asserted judicial immunity from the outset of the litigation. R. 148-52.

3. Act in or Adjacent to a Courtroom; and, Act Arising Directly Out of a Visit to the Judge in His Official Capacity

Insofar as these factors are relevant, both favor the Chief. The Fifth Circuit determined that the appointment at issue in *Kemp* "occurred in or near a courtroom . . . ." *Kemp*, 324 Fed. Appx. at 412. Similarly, any appointments by the Chief would be made in his official capacity thus "in or near a courtroom . . . ." *Id*. And the fact that the Chief was made party to this action only in his official capacity makes clear that any challenged act derives directly from his role as Chief Justice. Consideration of appointments by the Chief in his official capacity, emanate from the Mississippi Supreme Court offices at 450 High Street in Jackson, MS.

4. Controversy Involving a Pending Case.

The appointments referenced by plaintiffs as Exhibits A-D to the complaint were made for specific cases attached to the Order of appointment. The challenged act need not be limited to a single case. *Daves v. Dallas County,* 22 F. 4th at 539 (citing *Davis v. Tarrant County,* 565 F. 3d at 223). The appointment at issue in *Kemp* was based upon a "general standing order" of appointment of the particular special judge in instances where the youth-court judge decided to recuse. *Kemp*, 324 Fed. Appx. at 410 n.1. Accordingly, this *McAlester* factor strongly favors the Chief's judicial immunity.

E. Judicial Immunity Applies in this Civil Action.

The plaintiffs rely heavily on the Supreme Court decisions in *Pulliam* and *Forrester*. Appellants' Brief at 39-40. Those precedents were legislatively overruled by Congress. As the Eastern District of Louisiana said about *Pulliam* and *Forrester:*

> If … *Pulliam,* and *Forrester* remain good law then Defendants' judicial immunity argument is without merit. However, in 1996 Congress enacted the Federal Courts Improvement Act of 1996 which amended 42 U.S.C. § 1983 to provide 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.**' The Senate report indicates that the amendment '**restores the doctrine of judicial immunity to the status it occupied prior to [*Pulliam*] because *Pulliam* had departed from 400 years of common law tradition and weakened judicial immunity protections**.'

Leclerc v. Webb, 270 F. Supp. 2d 779, 792-93 (E.D. La. 2003) (emphasis added); quoting Pub. L. No. 104-317, 110 Stat. 3847 (Oct. 19, 1996) and, S. Rep. 104-366, at *36-27, 1996 U.S.C.C.A.N. 4202, 4216-14.

Plaintiffs' reliance on the 1984 U.S. Supreme Court decision in *Pulliam v. Allen* is disingenuous. On one hand, plaintiffs rely on *Pulliam* (and other cases) for the proposition that judicial immunity does not apply to claims for prospective relief. Appellants Brief at 38. On the other hand, plaintiffs argue that the 1996 amendment to § 1983 does not apply as "[t]his suit is not brought under Section 1983, and subsequent federal cases interpreting that specific statute are neither binding nor persuasive." *Id.* at 39. This untenable characterization of Federal case law that '*Pulliam* still applies but other cases do not' is absurd.

The Fifth Circuit ruled that: "**Congress abrogated *Pulliam* in 1996 when it amended section 1983**. . .." *Machetta v. Moren*, 726 Fed. Appx. 219, 220 (5th Cir. 2018) (emphasis added). The Court relied on and quoted with approval the 7th Circuit: "[T]he 1996 amendment was intended to overrule the Supreme Court's decision in (*Pulliam*)" *Id.* at 220. [16] The Plaintiffs' reliance on *Pulliam* is wrongfully mistaken, offensive to any fair-minded member of the bar, and reeks of frivolity. Federal courts in eleven

[16] *Hass v. Wisconsin*, 109 Fed. Appx. 107, 114 (7th Cir. 2004)(Plaintiff's "claims for injunctive relief against Judge Michelson are also foreclosed."). "The FICA (Federal Courts Improvement Act) therefore statutorily overruled *Pulliam's* holding regarding the availability of injunctive relief against a state judge in his official capacity." *Gemelli v. La.*, 2020 U.S. Dist. Lexis 113353, at 19 (E.D. La. 2020) (injunctive relief unavailable against judge)(citing the 2nd and 11th Circuits).

(11) different circuits have ruled that Congress nullified *Pulliam* when it passed The Federal Courts Improvement Act in 1996. Those cases are listed in the attached *Addendum* B.

Since there is no allegation that the Chief does not have jurisdiction to enter appointment orders, these claims are barred under Mississippi jurisprudence. Additionally, the *McAlester* factors to be "broadly construed in favor of immunity" all favor the application of immunity to the Chief. *Kemp*, 324 Fed. Appx. at 412. The subject appointments are judicial acts under Mississippi law of judicial immunity. Because no declaratory decree has been violated and the plaintiffs have not alleged that declaratory relief is unavailable, even Federal law demands that the Chief be dismissed.

F. Because he Lacks Enforcement Authority, There is no Controversy with Respect to the Chief.

The Chief acts here solely to protect the institution of the Supreme Court. The only assertions concerning the Chief wholly fail to implicate the requisite interest necessary to render him a defendant here. The Chief's status is purely neutral and his fidelity lies strictly with the rule of law. There is no justiciable issue to be determined between the plaintiffs and the Chief. The plaintiffs acknowledge as much: "[i]t's not the plaintiffs who have selected the Defendants in this case; it's the Legislature. It's the Legislature that put this task of appointments onto Justice Randolph." R. at 701, lines 21-25.

Plaintiffs fail to establish that the Chief is an adverse litigant. This case begs the question, what precisely was the Chief expected to litigate as a defendant? The plaintiffs insist that the Chief is a necessary party because he is "the state actor" as "he is central in the administration and implementation of (H.B.) 1020." R. at 745. This is an overstatement not only because the Chief has no interest beyond fidelity to the rule of law, but also because he has no enforcement authority.

The plaintiffs acknowledge that their grievances with H.B. 1020 did not originate with the Chief. *Id*. As held in *In re Justices of Supreme Court of Puerto Rico*:

> **[a]lmost invariably, [judges] have played no role in the statute's enactment, they have not initiated its enforcement**, and they do not even have an institutional interest in following their prior decisions (if any) concerning its constitutionality if an authoritative contrary legal determination has subsequently been made (for example, by the United States Supreme Court).

In re Justices of Supreme Court of Puerto Rico, 695 F. 2d at 21 (1st Cir. 1982) (emphasis added).

Plaintiffs also maintain that they cannot obtain their requested "relief" unless the Chief is a party to the action. Yet, "**one seeking to enjoin the enforcement of a statute on constitutional grounds ordinarily sues the enforcement official authorized to bring suit under the statute; that individual's institutional obligations require**

him to defend the statute." *In re Supreme Court of Puerto Rico*, 695 F. 2d at 21 (emphasis added).

The Fifth Circuit notes that in a constitutional challenge to a state law, the state official sued "must have some connection with the enforcement of the [challenged] act." *Texas Alliance for Retired Americans v. Scott*, 28 F. 4th 669, 672 (5th Cir. 2022). The Federal Court in *Scott* analyzed the three guideposts that determine the enforcement "connection" a state officer must possess to be subjected to suit. *Id.* at 672. "**First**, an official must have more than 'the general duty to see that the laws of the state are implemented.'" *Id.* (emphasis added) (quoting *City of Austin v. Paxton*, 943 F. 3d at 999-1000 (5th Cir. 2019); and, quoting *Morris v. Livingston*, 739 F. 3d 740, 746 (5th Cir. 2014)). "**Second**, the official must have the particular duty to enforce the statute in question and a demonstrated willingness to exercise that duty." *Id.* (emphasis added) (quoting *Tex. Democratic Party v. Abbott*, 978 F. 3d 168, 179 (5th Cir. 2020)).

The plaintiffs have not demonstrated the Chief's willingness to perform any unconstitutional act. Any allegation related to the Chief's willingness to enforce Miss. Code Ann. § 9-1-105 and H.B. 1020 is pure speculation of something plaintiffs opine he will do *in futuro*. "**Third**, **'enforcement' means 'compulsion or constraint**.'" *Scott*, 28 F. 4th at 672 (emphasis added) (quoting *City of Austin*, 943 F.3d at 1000; and, *K.P. v. LeBlanc*, 627 F.3d 115, 124 (5th Cir. 2010)).

In *Scott*, plaintiffs had challenged Texas voting laws. *Id.* at 670. The plaintiffs named the Texas Secretary of State as a defendant, alleging he was the enforcement officer of the challenged statute. *Id*. In reversing the district court's order enjoining the secretary of state, the Fifth Circuit held that the secretary of state was not charged with enforcement of the challenged statute by virtue of his office having general responsibilities related to elections. *Id*. at 673.

Similarly, the Chief cannot compel or constrain anyone to obey either Miss. Code Ann. § 9-1-105 or H.B. 1020. The Chief has no means to enforce any appointment. While H.B. 1020 may grant the Chief authority to make appointments, nothing in H.B. 1020 grants the Chief a mechanism to compel or constrain an appointed judge. The *Scott* Court ultimately posed the following hypothetical question in their holding:

> [s]uppose a court enjoined the Secretary from sending notices about H.B. 25 [the challenged law] or from making rules to facilitate the post-H.B. 25 system. [examples of the Secretary's election-related duties]. The *Ex parte Young* question is whether that injunction would constrain election officials to restore straight-ticket voting, which is what plaintiffs want. The answer is no.

Scott, 28 F. 4th at 673.

In the present matter, plaintiffs seek to enjoin the Chief from making judicial appointments, which they allege are unconstitutional. But the Chief lacks the authority to compel appointments. If the laws are ultimately declared unconstitutional, plaintiffs' argument presupposes that the Chief

would nonetheless make unconstitutional appointments in violation of his duties and his Oath of Office. This is an outrageous presumption and a blatant statement of advocacy without basis in fact or law. The Chief is clearly not a necessary party for a determination of a law's constitutionality.

The Chief is a true neutral in this case. At no point has the Chief defended the statute. In fact, the Chief retained private counsel because the State is required to defend the constitutionality of Section 105 and H.B. 1020. Moreover, "it is ordinarily presumed that judges will comply with a declaration of a statute's unconstitutionality without further compulsion." *In re Justices of Supreme Court*, 695 F.2d 17, 23 (1st Cir. 1982). (Internal citations omitted). If a court were to declare the acts unconstitutional, the Chief would comply with those rulings.

G. There Exists No Justiciable Claim Against the Chief.

The plaintiffs correctly note that the Mississippi Constitution has no case or controversy requirement as opposed to Article III of the United States Constitution. R. at 494 and 747. However, Mississippi law does not allow plaintiffs to name any defendant it pleases without a justifiable basis for doing so. "It is one of the fundamentals of judicial procedure that courts will not undertake to decide abstract questions when there is **no actual justiciable issue between the purported litigants**. It seems clear to this Court that there was **no genuine controversy** between the parties to this cause, and the court ought to have dismissed the bill of complaint on

that basis. **This Court will not entertain an appeal where there is no actual controversy**." *Swaney v. Swaney*, 962 So. 2d 105, 107-08 (Miss. Ct. App. 2007) (emphasis added); *Ladner v. Fisher*, 269 So. 2d 633, 634 (Miss. 1972), citing, *McDaniel v. Hurt*, 92 Miss. 197, 41 So. 381 (1906).

As the *Swaney* Court found, the lack of a justiciable controversy not only demands dismissal of the complaint, but it also supports the dismissal of this appeal. "This Court will not enterain an appeal where there is no actual controversy." *Ladner v. Fisher*, 269 So. 2d 633, 634 (Miss. 1972); citing *McDaniel v. Hurt*, 41 So. 381 (Miss. 1906). Further, the Mississippi Supreme Court has held "under our authorities there must be a present, existent actionable title or interest which must be completed at the time the cause of action is filed." *City of Madison v. Bryan*, 763 So. 2d 162, 165 (Miss. 2000); citing *Crawford Commercial Constrors., Inc. v. Marine Indus. Residential Insulation*, Inc., 437 So. 2d 15, 16 (Miss. 1983). Mississippi law is clear that it "is the duty of a court to adjudicate actual or real controversies existing among parties with adverse interests and conflicting claims." *Fisher*, 269 So. 2d at 634.

In *Wallace*, the Fifth Circuit addressed a "class action challenging the constitutionality of Mississippi's [statutory] procedures for the involuntary commitment of adults to state mental institutions." *Wallace,* 646 F. 2d 151, 153 (5th Cir. 1981). The Court addressed the following issue —"whether plaintiffs chose '**the real parties in interest**' in suing as the defendants'

class the chancery **judges** and clerks of the State of Mississippi," that is, "the Mississippi county **judicial officials** responsible for processing civil commitments." *Id.* (emphasis added). The Court determined that:

> [b]ecause of the judicial nature of their responsibility, the chancery clerks and judges do not have a **sufficiently 'personal stake in the outcome of the controversy as to assure that concrete adverseness** which sharpens the presentation of issues on which the court so largely depends for illumination of difficult constitutional questions.'

Wallace, 646 F. 2d at 160 (emphasis added)[17]

The Wallace Court further held "[i]t is well to note that the **Attorney General of the state has been representing the interests of the state throughout**. He has been free to present and has presented contentions and argument on behalf of the state and its officials at every step. . . ." *Wallace*, 646 F. 2d at 160-61. Likewise, the Mississippi Attorney General is a party to these proceedings *ex rel* the State of Mississippi.

As a preliminary suggestion by the Hinds County Chancellor during a status conference, ". … the lawsuit should be styled against the AG's office only, and possibly the Governor. It's not necessary to sue the Chief (Justice) or Zach (Wallace), or Mr. Snowden or other parties." R. 699. This is precisely the procedure afforded by the 5th Circuit in *Wallace*, "On remand, **plaintiffs**

[17] *Baker v. Carr*, 369 U.S. 186, 204, 82 S. Ct. 691, 703, 7 L. Ed. 2d 663 (1962). Cf. *Mendez v. Heller*, 530 F. 2d 457 (2d Cir. 1976) (state court judges and clerks joined as defendants in a suit challenging New York's durational residence requirement for divorce found to lack the requisite interest in defending the allegedly unconstitutional statutes).

will have the opportunity to correct this error by substituting as defendants the Mississippi officials with executive responsibility for defending the challenged civil commitment procedures." *Wallace*, 646 F. 2d at 160 (emphasis added).

The Chief's participation is not necessary as the dispute already involves the "Mississippi officials with executive responsibility for defending the challenged [laws]." *Id.* The Mississippi Attorney General has not only been noticed, but is a party to this action and is positioned to represent the interests of the state. *Id*. at 160. The Mississippi Attorney General is the state officer "given the sole power to bring or defend a lawsuit on behalf of a state agency, the subject matter of which is of statewide interest[,]" as well as to "argue the constitutionality of any statute when notified of a challenge thereto . . . ." Miss. Code Ann. § 7-5-1. The Fifth Circuit's holding in *Wallace* compels the conclusion that there is no controversy with respect to the Chief, an immune party. *See, e.g., Campaign for Southern Equality v. Mississippi Dep't of Human Servs.*, 175 F. Supp. 3d 691, 698 (S.D. Miss. 2016); *Contender Farms, L.L.P v. U.S. Dep't of Agric.*, 779 F. 3d 258, 264 (5th Cir. 2015).

The United States Supreme Court recently and unanimously, "agree[d] that state-court judges are not proper defendants in this lawsuit because they are 'in no sense adverse' to the parties whose cases they

decide." *Whole Women's Health v. Jackson*, 142 S. Ct. 522, 532, 211 L. Ed. 2d 316 (2021).

> The necessity for adverseness in litigation is foundational to our democracy. "Article III of the Constitution affords federal courts the power to resolve only 'actual controversies arising between adverse litigants.' …. Judges exist to resolve controversies about a law's meaning or its conformance to the Federal and State Constitutions, not to wage battle as contestants in the parties' litigation. As this Court has explained, 'no case or controversy' exists 'between a judge who adjudicates claims under a statute and a litigant who attacks the constitutionality of the statute.'"

Whole Women's Health, 142 S. Ct. at 532. (Internal quotations omitted). No "personal stake" of the Chief is plead or can be shown regarding "the outcome of the controversy" which is required to "assure" that he possesses the requisite "concrete adverseness" in the present action? *Wallace,* 646 F. 2d at 160 (quoting *Baker*, 369 U.S. at 204).

Under Mississippi law, plaintiffs must assert a "colorable interest in the subject matter of the litigation." *Hotboxxx, LLC v. City of Gulfport*, 154 So. 3d 21, 27 (Miss. 2015); *Kinney v. Catholic Diocese of Biloxi, Inc.*, 142 So. 3d 407, 413 (Miss. 2014). Plaintiffs acknowledge the Chief is not the cause of their grievances. R. at 701. Plaintiffs cannot assert how the Chief has a "colorable interest" in the outcome of the litigation. *City of Gulfport*, 154 So. 3d at 27.

H. Public Policy Dictates the Chief's Dismissal

Numerous public policy implications warrant the Chief's dismissal. The Chief is expressly prohibited from acting as an advocate or partisan.

The oath of office provides, "I will faithfully and impartially discharge and perform all duties incumbent upon me." Miss. Const. Art. 6, § 155. The Preamble to the Mississippi Code of Judicial Conduct states, "Our legal system is based on the principle that an independent, fair, and competent judiciary will interpret and apply the laws that govern us. … The judge is an arbiter of facts and law for the resolution of disputes and a highly visible symbol of government under the rule of law." Compelling the Chief to participate in any civil action risks the public perception of partiality.

As the First Circuit explained (in an Opinion by Former Supreme Court Justice, then-Circuit Judge Stephen Breyer):

> [t]o require the Justices **unnecessarily to assume the role of advocates or partisans** on these issues would tend to **undermine their role as judges**. To encourage or even force them to participate as defendants in a federal suit attacking Commonwealth laws would be to require them to **abandon their neutrality** and defend as constitutional the very laws that the plaintiffs insist are unconstitutional—**laws** as to **which their judicial responsibilities place them in a neutral posture**. Indeed a public perception of partiality might well remain even were the Justices to take no active part in the litigation. The result risks harm to the court's stance of institutional neutrality—a harm that appeal would come too late to repair. . . .
>
> *In re Justices of Supreme Court of Puerto Rico*, 695 F. 2d at 25.

Requiring judges to participate in litigation invariably interferes with the efficient administration of justice as it impairs the Chief's ability to perform the actual duties of his office. *Id*. Accordingly, these compelling public-policy considerations support the Chief's dismissal from the action.

Conclusion

Over 400 years of common law precedence establish the importance of judicial immunity. Courts across our country have uniformly affirmed the foundational principle. Mississippi law is clear, plaintiffs are barred from suing the Chief for performance of judicial acts within his jurisdiction. The plaintiffs' position requires an abrupt departure from hundreds of years of common law precedence without a scintilla of authority.

In the context of judicial immunity, there is no distinction between claims for damages and those for prospective relief. Courts have repeatedly held that Judges enjoy immunity from claims for damages, **declaratory relief, and injunctive relief** when acting within their jurisdiction. *Tarver v. Reynolds*, 808 F. App'x 752, 753 (11th Cir. 2020). Plaintiffs rely on Federal law analyzing § 1983 claims, a statute that was materially amended in 1996. Since 1996, Courts have rejected claims against judges seeking declaratory and injunctive relief when, "[t]here was no suggestion that the judge violated a declaratory decree …." *Id. See also Addendum A* at 11.

There is no basis under Mississippi or Federal law to support the plaintiffs claim for injunctive relief against the Chief. Under Mississippi law, appointment of judges by the Chief Justice are judicial acts which render him immune from suit. Because the Chief was shielded by judicial immunity, the plaintiffs cannot establish that the Hinds County Chancery

had jurisdiction over him, and dismissal was warranted pursuant to Miss. R. Civ. P. 12(b)(1).

Plaintiffs fail to allege, much less establish, how they are in any sense adverse to the Chief. Accordingly, the plaintiffs could not state a cause of action against the Chief and dismissal was proper under Miss. R. Civ. P. 12(b)(6). Because the Chief and the plaintiffs are in no way adverse and there exists no justiciable issue between the two, the Chief was not a proper party to the complaint and dismissal was proper under Miss. R. Civ. P. 19.

For all of the reasons set out in Defendant's Motion to Dismiss (R. 148-52) and in this Brief, the Judgment of the Chancery Court of Hinds County dismissing the Chief Justice should be affirmed.

Respectfully submitted, this 14th day of June, 2023.

Respectfully submitted,

Michael K. Randolph, in his
official capacity as Chief
of the Mississippi Supreme Court

/s/ Mark A. Nelson
By:_____
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Certificate of Service

I, Mark A. Nelson, hereby certify that on this the 14th day of June 2023, I electronically filed the foregoing with Clerk of the Court using the MEC system which will provide notice to all counsel of record.

The undersigned does further certify that I have this day mailed via United States Mail, postage prepaid, a true and correct copy of the above and foregoing Appellees' Brief to:

Honorable Dewayne Thomas
Chancery Court Judge, Hinds County
316 South President Street
Jackson, Mississippi 39201

/s/ Mark A. Nelson

Mark A. Nelson