IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

National Association for the
Advancement of Colored People,
et al. Plaintiffs

vs. Case No. 3:23-cv-272-HTW-LGI

Tate Reeves, in his official capacity
as Governor of the State of Mississippi;
et al. Defendants

Reply In Support of Motion to Dismiss (Doc. 19)

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Defendant, Michael K. Randolph, in his official capacity as Chief Justice of the Mississippi Supreme Court ("Chief Justice"), submits this Reply in Support of his Motion to Dismiss (Doc. 19), to wit:

I. Judicial Immunity

Section 1983 does not abrogate common law immunities that may be available to state officials including judicial immunity.[1] Pursuant to the 1996 amendments, Section 1983 prohibits injunctive relief "against a judicial officer for an act or omission taken in such officer's *judicial capacity*" (with exceptions for violation of a "declaratory decree" or the unavailability of "declaratory relief"). 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**

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

> **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.[2]

Notably, the Plaintiffs' Opposition does *not* claim that either exception applies here. There is no allegation that the Chief Justice violated a declaratory decree or that declaratory relief is unavailable. Nor is there an allegation that there is an absence of an adequate remedy at law.

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A. Judicial Act

The Fifth Circuit has stated that:

> [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, 112 S. Ct. 286, 116 L. Ed. 2d 9 (1991). The Plaintiffs' argument is centered on the first circumstance.

[2] 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. Bright*, 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).

Their central argument is unavailing since the appointments *in futuro* are "judicial acts."[3] According to the Fifth Circuit:

> [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." *Davis*, 565 F. 3d at 221-22 (quoting *Mireles*, 502 U.S. at 13). 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." *Id*. at 222.

Daves v. Dallas County, Texas, 22 F. 4th 522, 539 (5th Cir. 2022).

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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*, 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 stated 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).[4] The Fifth Circuit continued when it held: "Exceptions 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).

[3] *Note: What Constitutes a Judicial Act for Purposes of Judicial Immunity?* 53 *Fordham L. Rev. 1503 (1985).*
[4] Citing *Malina v. Gonzales,* 994 F.2d 1121, 1124 (5th Cir. 1993).

Importantly, the four 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 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*, 22 F. 4th at 539 (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).

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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).

B. 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.

A civil action was brought by a former detainee against the special 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 in cases of his recusal. *Kemp,* 324 Fed. Appx. at 409. The Northern District of Mississippi granted summary judgment to both judges on grounds of judicial immunity and the Fifth Circuit affirmed that ruling. The Fifth Circuit discussed the four-factor standard and determined that the subject "**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." *Id.* at 412. According to the Fifth Circuit, "[t]hese instances of challenged conduct are normally performed by judges, occurred in or near a courtroom, concerned the case against [the plaintiff] pending in Leflore County's youth court, and arose directly out of visits to [the judges] in their official capacities as judge and special judge." *Kemp*, 324 Fed. Appx. at 410 n.1, 412-13(emphasis added).

"[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. . . ." *Davis*, 565 F. 3d at 226.

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"[T]he act of creating guidance for setting bail is 'inextricably linked' to the subsequent setting of bail and is a judicial act." *Daves*, 22 F. 4th at 540 (quoting *Davis*, 565 F. 3d at 226).

The act of appointing counsel "is clearly a judicial act." *Pleasant v. Sinz*, 2016 U.S. Dist. Lexis 119566 (E.D. Tex. August 5, 2016).

"[A] judge acts in his adjudicatory capacity in appointing a temporary guardian." *Bauer v. Texas*, 341 F. 3d 352, 361 (5th Cir. 2003).

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" *Roth v. King*, 449 F. 3d 1272, 1286-87 (D.C. Cir. 2006).

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The appointment of a receiver is a judicial act. *Dupree v. Bivona,* 2009 U.S. App. Lexis 612 (2d Cir. 2009) *cert. denied,* 2009 U.S. Lexis 4406 (2009).

C. Normal Judicial Function and Comity

Appointments generally, and the appointment of judges specifically, are a "normal judicial function." *Daves*, 22 F. 4th at 539 (quoting *Davis*, 565 F. 3d at 222). Powerfully, 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. Those appointments of judges were recognized by the Fifth Circuit as judicial acts.

Pursuant to *Vinson v. Prather*, 879 So. 2d 1053 (Miss. Ct. App. 2004), the Chancellor held that the **appointment of a special judge** under Mississippi Code

Section 9-1-105 **is a "judicial act"** entitled to judicial immunity; and that the judicial **appointments contemplated by H.B. 1020** are **"[s]imilarly" judicial acts to which judicial immunity applies**. (Doc. 23-1)(emphasis added). The judgments entered by the Hinds County Chancery Court illustrate the parameters of a judicial immunity analysis under Mississippi law. The appointments contemplated by H.B. 1020 are defined under state law, (specifically, the judgment of the Chancery Court,) as a "judicial act" subject to immunity. (Doc. 23-1). As the Chancery Court found, under *Vinson v. Prather*, appointments by the Chief Justice are judicial in nature and are afforded immunity from civil claims. (Doc. 23-1).

The scope of this Court's authority is defined by Article III of the United States Constitution and the various acts of Congress. Likewise, as a Mississippi judicial officer, the scope of the Chief Justice's authority is defined by the Mississippi Constitution and the acts passed by the Mississippi legislature. To that end, the Chancery Court judgments should be given deference and comity to the extent that they define and interpret judicial immunity under the Mississippi Constitution.[5]

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In arguing otherwise, the cases cited by the Plaintiffs dealing with actual appointment and reappointment decisions regarding judges are distinguishable.

[5] The State Court entered its order granting the Chief Justice's motion to dismiss. (Doc. 23-1) The order made findings that the appointment of judges under H.B. 1020 and Miss. Code Ann. Section 9-1-105 were "judicial acts." Accordingly, the Chancellor dismissed the Chief Justice on the basis of judicial immunity. The Court relief on *Vinson v. Prather,* which articulated Mississippi law on the issue. *Vinson v. Prather,* 897 So.2d 1053 (Miss. App. Ct. 2004). The *Prather* Court held that "an appointment (of a special judge) pursuant to . . . section 9-1-105 (is) a judicial act." The Chancellor likewise held: "(T)his Court finds that the appointment of temporary circuit court judges under H.B. 1020 will constitute judicial acts." (Doc. 23-1 at 4.) The Chancellor found that a suit against the Chief Justice for declaratory and injunctive relief is barred by judicial immunity. *Id.* at 4-5.

(Doc. 25, at 9-10). For one, those cases are 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 as 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 Justice exercises his judicial discretion. The Chief Justice would "utilize his education, training and experience in the law to decide" upon a judicial appointment.

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There is no debate that internal employment decisions have been deemed "administrative." *Forrester v. White*, 484 U.S. 219 (1988) (state circuit judge's decision to demote and discharge probation officer deemed an administrative act to which judicial immunity was inapplicable).

The H.B. 1020 prospective appointments, however, are not internal employment decisions. The Chief Justice must exercise his experience, education, training and discretion in making appointments, clearly judicial acts. The appointed judges will have the same autonomy enjoyed by comparable judges throughout the state. The claims raised in the cases cited by the Plaintiffs are case-specific and brought by the aggrieved party who was not appointed or reappointed (in some cases against the defendant- judge in his individual capacity). *See Lewis v. Blackburn*, 555 F. Supp. 713 (W.D. N.C. 1983); *Richardson v. Koshiba*, 693 F. 2d

911 (9th Cir. 1982). As such, the Plaintiffs greatly overstate their case that "[f]ederal courts *regularly* deny judicial immunity for appointments *like those at issue here* that are for extended terms and are not 'intimately connected to a judge's adjudicatory role' in presiding over a specific pending case." (Doc. 25, at 8) (citation omitted)(emphasis added). The line cite that Plaintiffs utilize is decidedly distinguishable. In other words, an insufficient argument to overcome this factor being "broadly construed in favor of immunity." *Kemp*, 324 Fed. Appx. at 412 (citing *Davis*, 565 F. 3d at 221-23).

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

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Insofar as these factors are relevant, both favor the Chief Justice. 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 Justice would be made in his official capacity at 450 North High Street, the seat of the Mississippi Supreme Court, thus "in or near a courtroom . . . ." *Id*. And the fact that the Chief Justice has been made a party to this action only in his official capacity makes clear that any challenged act derives directly from that role.

E. Controversy Involving a Pending Case

The challenged act need not be limited to a single case. *Daves*, 22 F. 4th at 539 (citing *Davis*, 565 F. 3d at 223). In *Davis*, the Fifth Circuit stated that "selecting applicants for inclusion on a rotating list of attorneys eligible for court appointments" was "inextricably linked to and cannot be separated from the act of appointing counsel in a particular case . . . ." *Davis*, 565 F. 3d at 226. And 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.

F. Judicial Immunity Applies in this Civil Action

The four-factor standard is to be "broadly construed in favor of immunity." *Kemp*, 324 Fed. Appx. at 412 (citing *Davis*, 565 F. 3d at 221-23). And "[i]mmunity may be applied even if one or more of these factors is not met." *Morrison*, 704 Fed. Appx. at 373 (citing *Malina*, 994 F. 2d at 1124). Based upon the aforementioned analysis, the subject appointments are judicial acts. Because no declaratory decree has been violated and the Plaintiffs have not alleged that declaratory relief is unavailable, the Chief Justice is entitled to dismissal on grounds of judicial immunity.

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II. Case or Controversy and Real Party in Interest

Regardless of the judicial immunity analysis, the Plaintiffs conflate that issue with the "case or controversy" and real-party-in-interest issues (*e.g.*, "the acts at issue are outside of the Chief Justice's adjudicatory capacity, defeating judicial immunity and thus making him an adverse litigant"). (Doc. 25, at 4). This is significant because even if the Chief Justice is not judicially immune he is still entitled to dismissal on "case or controversy" and real-party-in-interest grounds. *See, e.g., Pulliam v. Allen*, 466 U.S. 522, 538 n.18, (citations omitted) (limitations on the availability of injunctive relief against a judge"); *In re Justices of Supreme Court of Puerto Rico*, 695 F. 2d 17, 24 (1st Cir. 1982) (citing *Consumers Union*, 446 U.S. 719, 736 n.15 (1980)) ("The Supreme Court has recognized that the **mere existence**

of enforcement power does not create a **justiciable controversy under Article III** with enforcement officials"); *Consumers Union*, 446 U.S. at 734 n.12 ("legislators sued for enacting a state bar code might also succeed in obtaining dismissals at the outset on grounds other than legislative immunity, such as the lack of a case or controversy").

Plaintiffs fail to establish that the Chief Justice is an adverse litigant. This case begs the question, what precisely is the Chief Justice expected to Defend? Now, the Plaintiffs insist that the Chief Justice is a "necessary party" because he is "the key actor in this dispute" as he alone has "the appointment task" to "effectuate" the challenged "scheme." (Doc. 25, at 2, 5, 13).

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This is an overstatement not only because the Chief Justice has no interest beyond fidelity to the rule of law, but also because he has no enforcement authority. The Plaintiffs acknowledge that the Chief Justice did not "creat[e] or endorse[e] this [challenged] scheme…." (Doc. 25, at 13). As stated 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(emphasis added).

Plaintiffs also maintain that they cannot obtain their requested "relief" unless the Chief Justice is a party to the action. (Doc. 25, at 6). 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." *Supreme Court of Puerto Rico*, 695 F. 2d at 21(emphasis added).

The Chief Justice is a true neutral in this case. At no time has the Chief Justice defended the statute. In fact, the Chief Justice has retained private counsel because the State is required to defend the constitutionality of H.B. 1020. Moreover, "it is ordinarily presumed that judges will comply with a declaration of a statute's unconstitutionality without further compulsion." *Id.* at 23 (citations omitted).

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) quoting *Ex Parte Young*, 209 U.S. at 157. The Court in *Scott* analyzed the three guideposts that determine the enforcement "connection" a state officer must possess to be subjected to suit. 28 F.4th at 672. "First, an official must have more than 'the general duty to see that the laws of the state are implemented.'" *Id.* (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.* (quoting *Tex. Democratic Party v. Abbott*, 978 F. 3d 168, 179, (5th Cir. 2020)).

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The Plaintiffs have not demonstrated the Chief Justice's willingness to perform any unconstitutional act. Any allegation related to the Chief Justice's

willingness to enforce H.B. 1020 is pure speculation of something he may do *in futuro*. "Third, **'enforcement' means 'compulsion or constraint**.'" *Scott*, 28 F. 4th at 672. (quoting *City of Austin*, 943 F.3d at 1000; and, quoting *K.P. v. LeBlanc*, 627 F.3d 115, 124 (5th Cir. 2010))(emphasis added).

Under the third guidepost, "[I]f the official does not compel or constrain anyone to obey the challenged law, enjoining that official could not stop any ongoing constitutional violation." *Id*. citing *Air Evac EMS, Inc. v. Tex., Dep't of Ins., Div. of Workers' Comp.*, 851 F.3d 507, 520 (5th Cir. 2017).

In *Scott*, Plaintiffs had challenged Texas voting laws, namely a house bill that eliminated Texas's "straight-ticket" voting practices. *Id.* at 670. In bringing suit, the plaintiffs named the Texas Secretary of State, 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.

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Similarly, if the Chief Justice does not compel or constrain anyone to obey the challenged law (H.B. 1020), then, the Chief Justice has no means to enforce any appointment. While H.B. 1020 may grant the Chief Justice authority to make appointments, nothing in H.B. 1020 grants the Chief Justice 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 Justice from making judicial appointments pursuant to H.B. 1020, which they allege is unconstitutional. But the Chief Justice lacks the authority to compel or constrain appointments. If H.B. 1020 is ultimately found unconstitutional, Plaintiffs' argument presupposes that the Chief Justice would nonetheless make unconstitutional appointments in violation of his duties and his Oath of Office as Chief Justice. This is an improper presumption. The Chief Justice is clearly not a necessary party for a determination of H.B. 1020's constitutionality.

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III. Grounds for Dismissal and Conclusion

Case law seeking damages is not distinguishable for our purposes here. The 11th Circuit held that a state circuit court judge had absolute immunity from claims for damages, declaratory relief, and injunctive relief because the judge had subject matter jurisdiction over appellant's divorce proceedings. The Court expressly stated that declaratory and injunctive relief was also improper, "**because there was no suggestion that the judge violated a declaratory decree** …." (necessary element under the amended § 1983 for the imposition of injunction against a Judge). *Tarver v. Reynolds*, 808 F. App'x 752, 753 (11th Cir. 2020).

That is true because the immunity analysis is the same for determining what is a "judicial act." In *Holloway v. Walker,* the Fifth Circuit reversed the

district court ruling that a judge was not immune. Outrageously, the judge had appointed a receiver on the plaintiff's oil company and conducted meetings regarding the plaintiff's business. Even with allegations of abuse for acts not conducted at the courthouse, the Fifth Circuit held that the defendant judge was entitled to immunity. *Holloway v. Walker*, 765 F.2d 517, 521-22 (5th Cir. 1985).

For all of the reasons set out in Defendant's Motion to Dismiss (Doc. 19) and in this Reply in Support thereof, the Chief Justice's Motion to Dismiss should be granted.

Respectfully submitted, this, the 19th day of May, 2023.

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Respectfully submitted,

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

/s/ Mark A. Nelson
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Certificate of Service

I, Mark A. Nelson, hereby certify that on this the 19th day of May, 2023, I electronically filed the foregoing with Clerk of the Court using the ECF system which will provide notice to all counsel of record.

/s/ Mark A. Nelson

Mark A. Nelson

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