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## INTRODUCTION

As the Justices explained in their opening brief, the Illinois Supreme Court and the Illinois public have a surpassing interest in both the reality of and the appearance of an impartial judiciary. Moreover, the Illinois Constitution grants the Illinois Supreme Court substantial authority to manage the affairs of Illinois courts (Ill. Const., art. VI, § 16), including by assigning retired judges to temporary recall assignments (*id.*, § 15(a)). In this case, the Illinois Supreme Court sought to address at least a dozen vacancies on the extraordinarily “high-volume” (Dkt. 18 at 19) Cook County Circuit Court bench (Dkt. 1-3). For decades, the Illinois Supreme Court has recognized its temporary recall assignments as be discretionary responses to exigent circumstances and has issued—and vacated—these assignments as it has seen fit. Dkt. 15-1. The Court has *not* viewed judges serving in these temporary assignments as exclusively subject to traditional removal protocol for appointed associate judges or elected judges, including legislative impeachment and the provisions of the Illinois Constitution establishing the jurisdiction of the Judicial Inquiry Board and Courts Commission (Ill. Const., art. VI, § 15(b)-(j)). *See, e.g.*, Dkt. 15-1.

Judge Brown’s response confirms the problem at the center of this case. He asks a federal district court to review and set aside the Illinois Supreme Court’s order vacating its prior order issuing a temporary recall assignment. That request does not affect only one retired judge. It would place a federal court in the position of supervising how Illinois’ highest court manages temporary judicial assignments under the Illinois Constitution. Principles of federalism and comity do not permit that result.

The Justices also explained that their actions in vacating Judge Brown’s appointment were judicial acts; thus, they are entitled to judicial immunity, and Section 1983’s prohibition on injunctive relief against judges applies. In response, Judge Brown argues that the Justices acted in the clear absence of jurisdiction, but, again, the Court’s history demonstrates that this is not so.

Judge Brown further argues that the Justices' actions were administrative rather than judicial, but he ignores abundant caselaw demonstrating that such actions are entitled to judicial immunity.

Turning to the merits of Judge Brown's claim, Judge Brown's due process claim fails because he did not have a property interest in his temporary recall assignment. Contrary to his argument, Judge Brown's subjective expectation that he had such an interest does not save his claim. The Justices also explained that Judge Brown cannot state a First Amendment claim because Illinois's irrefutable interest in judicial independence and impartiality outweighs his First Amendment interest in his speech. In response, Judge Brown attempts to downplay the impact of his statements, but the evidence attached to his own Complaint forecloses that argument. He also attempts to undermine the State's compelling interest, but the requirements of judicial independence and impartiality are enshrined in the Fourteenth Amendment to the United States Constitution. Moreover, contrary to Judge Brown's argument, the facts of this case are already beyond dispute, and his First Amendment claim can be resolved at this stage of the litigation.

Finally, the Justices are entitled to qualified immunity. Once a defendant asserts qualified immunity, it is the plaintiff's burden to point to existing precedent that placed the question beyond debate. Plaintiff utterly fails to meet this well-established burden, and his claims for damages must be dismissed accordingly. For the reasons set forth below and in the Justices' opening brief, the Justices of the Illinois Supreme Court respectfully request that this Court dismiss Judge Brown's complaint with prejudice.<sup>1</sup>

## ARGUMENT

### **I. Fundamental Principles of Federalism and Comity Require that the Court Abstain.**

Judge Brown asks a federal court to review and effectively countermand an order of the

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<sup>1</sup> Pursuant to this Court's March 26, 2026, order (Dkt. 13), the Justices state that they do not intend to present a witness at the Court's May 6, 2026, hearing on Judge Brown's motion for a preliminary injunction.

Illinois Supreme Court and its interpretation of Illinois law. This Court should abstain from exercising jurisdiction over this matter because an order from a federal court would violate principles of federalism and comity. Dkt. 15 at 9-10 (citing, e.g., *J.B. v Woodard*, 997 F.3d 714, 723 (7th Cir. 2021); *Courthouse News Serv. v. Brown*, 908 F.3d 1063 (7th Cir. 2018)). In response, Judge Brown argues that “[t]raditional abstention doctrines do not apply,” specifically addressing *Younger* abstention (Dkt. 18 at 20)—but the Justices have not asserted that *Younger* or other traditional abstention doctrines apply here. *See generally* Dkt. 15 at 9-10. Rather, well-established Seventh Circuit case law holds that, even where traditional abstention doctrines are not a precise fit, federal courts may “decline to exercise jurisdiction where denying a federal forum would clearly serve an important countervailing interest, including regard for federal-state relations.” *Id.* at 10 (quoting *J.B.*, 997 F.3d at 723). Accordingly, whether *Younger* abstention (Dkt. 18 at 20) might apply is not at issue here.

Turning to, in his words, “the Seventh Circuit’s expansive abstention doctrines,” Judge Brown next argues that “principles of federalism and comity are not implicated here,” and attempts to distinguish the facts of seminal Seventh Circuit abstention cases from the instant case. *Id.* at 20-23 (discussing *J.B.*, 997 F.3d 714; *Courthouse News Serv.*, 908 F.3d 1063; and *SKS & Assocs. v. Dart*, 619 F.3d 674 (7th Cir. 2010)). But again, Judge Brown misses the point—it is not the particular facts of those cases that determine the outcome, but this Court’s obligation to refrain from interfering with state sovereignty. As the Seventh Circuit has explained, “the abstention inquiry is flexible and requires a practical judgment informed by principles of comity, federalism, and sound judicial administration.” *Driftless Area Land Conservancy v. Valcq*, 16 F.4th 508, 527 (7th Cir. 2021).

Judge Brown’s response makes abundantly clear what he avoids admitting with respect to

abstention—he seeks an order from this Court directing the Illinois Supreme Court to conform to *his* reading of the Illinois Constitution, along with damages against the Illinois Supreme Court Justices based on their purported misapplication of the Illinois Constitution. *See* Dkt. 18 at 3-10 (arguing extensively that the Justices violated Article IV, Section 15(b)–(e) of the Illinois Constitution when they vacated his recall assignment without referral to the Judicial Inquiry Board); *id.* at 10 (same, and that, for this reason, judicial immunity does not apply); *id.* at 10-12 (arguing that because the Justices’ purported application of the Judicial Code of Conduct to his speech was *ultra vires*—or, in excess of their authority under the Illinois Constitution—he should prevail on his First Amendment claim); *id.* at 16-17 (arguing that because Illinois Constitution prescribes disciplinary process, he should prevail on his due process claim). As explained in their opening brief and below, the Justices (and the Illinois Supreme Court throughout its history) wholly disagree with Judge Brown’s reading of the Illinois Constitution in this respect. For abstention purposes, it is clear that Judge Brown’s claims hinge in large part—if not entirely—on a disagreement over Illinois law.

In the related context of Eleventh Amendment immunity,<sup>2</sup> the United States Supreme Court has held that “it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law.” *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 106 (1984) (superseded by statute on other grounds); *see also id.* (“Because of the problems of federalism inherent in making one sovereign appear against its will in the courts of the other, a restriction upon the exercise of the federal judicial power has long been considered to be appropriate in a case such as this.”) (cleaned up) (Marshall, J.,

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<sup>2</sup> *See, e.g., Driftless*, 16 F.4th at 524 (“At bottom, these concerns rest on federalism principles. State sovereign immunity is, of course, rooted in the anchoring structure of our system of federalism. So too...is abstention doctrine.”).

concurring in result).

Here, Judge Brown challenges an order of the Illinois Supreme Court that vacated that Court's prior order issuing him a temporary recall assignment to fill vacancies in the Cook County Circuit Court bench. Dkt. 1; *id.*, Exs. 5, 8. As explained in the Justices' opening brief and below, the Illinois Supreme Court has consistently interpreted Illinois law as fundamentally distinguishing temporary recall assignments (*see* Ill. Const., art. VI, § 15(a)) from associate judge appointments (*id.* § 8), or elections (*id.* § 12(a))—and as allowing it to vacate such assignments without disciplinary process. *See* Dkt. 15 at 3-4; Dkt. 15-1; *infra* § II.A. And “it is difficult to think of a greater intrusion on state sovereignty” (*Pennhurst*, 465 U.S. at 106) than an order from this Court instructing the Illinois Supreme Court on the application of Illinois law. *See also J.B.*, 997 F.3d at 723 (“The adjudication of Edwin's due process claims threaten[s] interference with and disruption of local family law proceedings—a robust area of law traditionally reserved for state and local government—to such a degree as to all but compel the federal judiciary to stand down.”); *Courthouse News Serv.*, 908 F.3d at 1074 (holding that it was “not appropriate for the federal courts” to “supervise. . . state court operations”); and *SKS*, 619 F.3d at 682 (“We are asked to dictate to a state court how it must handle its case adjudication. . . . The vital consideration of the proper respect for state adjudicative functions would be subverted if we were to entertain these claims.”).

Judge Brown seeks to reassure this Court that the relief he seeks is “narrow” because it concerns “a single case.” Dkt. 18 at 19. But the Seventh Circuit has repeatedly upheld abstention based on federalism and comity in cases brought by plaintiffs seeking relief only for themselves. *See, e.g., J.B.*, 997 F.3d 714 (Plaintiff father alleged that a state court order violated his family's First and Fourteenth Amendment rights); *Driftless*, 16 F.4th at 528 (“Federalism concerns loom

large here. This case implicates Wisconsin's sovereign interest in the proper functioning of its administrative law and procedure and the role of the state courts in reviewing the decisions of administrative agencies.”<sup>3</sup> Judge Brown’s characterization of this matter obscures the fundamental gravity of what he seeks—federal intrusion into the orders of and conclusions of state law made by Illinois’ highest court. This Court should decline Plaintiff’s invitation and abstain from exercising jurisdiction over this matter.

## **II. Judicial Immunity Bars Any Damages Claims Against the Justices.**

### **A. The Justices acted within the scope of their authority.**

The Justices acted within the scope of their authority and are therefore entitled to judicial immunity. Judge Brown argues that the Justices acted in “clear absence of all jurisdiction” when they vacated his recall appointment because, he argues, the power to discipline judges, with the exception of legislative impeachment, is “solely vested” in the Illinois Courts Commission, and

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<sup>3</sup> See also, e.g., *Taylor v. Cowger*, No. 25-2508, 2026 U.S. App. LEXIS 5115, at \*3 (7th Cir. Feb. 18, 2026) (“To the extent there is any difference between vacating the order and enjoining it, federal courts would still lack jurisdiction to grant such a request out of federalism concerns.”); *Martin v. Raoul*, No. 24-1915, 2025 U.S. App. LEXIS 22637, at \*3-4 (7th Cir. Sep. 3, 2025) (upholding abstention in family court dispute over college contribution claim); *Bausch v. Frost*, No. 23-2418, 2024 U.S. App. LEXIS 2276, at \*2-3 (7th Cir. Jan. 31, 2024) (“But by confirming that her state-court case is still ongoing, she must lose on abstention grounds. *Woodard* holds that the comity, equity, and federalism principles underlying the abstention doctrines require federal courts to abstain from federal cases that would interfere with ongoing state-court domestic proceedings.”); *Huiras v. Cafferty*, No. 22-3081, 2023 U.S. App. LEXIS 19527, at \*5-6 (7th Cir. July 28, 2023) (Plaintiff’s unsupported worry of bad faith in the state’s judiciary impermissibly reflects a lack of respect for the state’s ability to resolve his claim, and thus our adjudication of his claim on the merits would contradict our longstanding reluctance to meddle in state-court proceedings.”); *Karri v. Garland*, No. 22-2363, 2023 U.S. App. LEXIS 11630, at \*5 (7th Cir. May 11, 2023) (“Karri argues that she seeks not to intervene in the state domestic-court case, but to spur an investigation into fraud and corruption by state officials. But the injunctive relief she seeks would intrude into an ongoing state domestic-court proceeding[.] . . . and in such circumstances federal courts must stay on the sidelines.”); *Doe v. Lindell*, No. 22-1666, 2023 U.S. App. LEXIS 988, at \*10-11 (7th Cir. Jan. 17, 2023) (“As in *J.B.*, a federal ruling here would inappropriately insert the federal courts into an ongoing state family-court proceeding.”).

not the Illinois Supreme Court.<sup>4</sup> Dkt. 18 at 6. Judge Brown is incorrect.

With respect to the absence-of-jurisdiction exception to judicial immunity, the United States Supreme Court has distinguished between judicial actions taken in “excess of authority” and those taken with a “clear absence of all jurisdiction over the subject-matter,” finding that only in the latter case is immunity unavailable. *Stump v. Sparkman*, 435 U.S. 349, 356-57 (1978). Moreover, “the scope of the judge’s jurisdiction must be construed broadly where the issue is the immunity of the judge.” *Id.* at 356.

In *Stump*, the Supreme Court acknowledged that the relevant “statutory grant of general jurisdiction to the Indiana circuit courts does not itemize types of cases those courts may hear and hence does not expressly mention” the specific petitions at issue in that case—parents’ petitions for sterilization of minors in their parents’ custody. *Id.* at 358. “But in [the Court’s] view, it is more significant that there was no Indiana statute and no case law . . . prohibiting” a court from hearing such petitions, and the “statutory authority for the sterilization of *institutionalized* persons...does not warrant the inference that a court of general jurisdiction has no power” to hear the former. *Id.* (emphasis added).

Moreover, “the informality with which [Judge Stump] proceeded [did not] render[] his action nonjudicial.” *Id.* at 362. Even where the “record does not show that any process issued or that any appearance was made[, and] no entry was placed by the Clerk in the file, on a docket, or in a judgment roll,” judicial actions are immune because “the Court took cognizance of [a] petition and passed an order which is validated by the signature of the presiding officer.” *Id.* at 361.

In support of his argument that there was a “clear” absence of jurisdiction, Judge Brown

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<sup>4</sup> Judge Brown incorrectly contends that the Justices “argue that adjudicating judicial discipline for retired judges is merely an ‘administrative’ duty.” Dkt. 18 at 7 (citing Dkt. 15 at 3, 11-12). But the Justices did not and do not concede that their actions were “merely...administrative.” See Dkt. 15 at 3, 11-12; *infra* § II.B.

points to the Illinois Supreme Court’s statement in *People ex rel. Harrod v. Illinois Courts Commission* that “[w]ith respect to the judicial disciplinary system’s investigative, prosecutorial, and adjudicative functions, the Committee and [1970 Illinois constitutional] convention delegates expressly indicated that [the Illinois Supreme Court] was to have no involvement.” Dkt. 18 at 3-5 (quoting 69 Ill. 2d 445, 446 (Ill. 1977)). But, taken out of context, this *dictum* is a potentially misleading overstatement. Article VI, Section 15(e) of the Illinois Constitution mandates that the Commission be *primarily* composed of members of the Illinois bench, including a Supreme Court Justice. Ill. Const., art. VI, § 15(e).<sup>5</sup> Illinois Supreme Court Justice Overstreet currently serves as the Chairperson of the Commission.<sup>6</sup> And *Harrod* itself found that the Illinois Supreme Court had *mandamus* authority over the Commission, over the stringent objection of the Illinois Judicial Inquiry Board. 69 Ill. 2d at 461-62 (“The mere fact that the Commission is a constitutionally created office does not prevent this court from issuing an original writ of *mandamus* against it.”); *see also id.* at 458 (“It is the function and duty of [the Illinois Supreme Court] to act as the final arbiter of the Constitution.”).

More fundamentally, however, the Illinois Supreme Court’s ability to vacate temporary recall assignments does *not* implicate “the judicial disciplinary system.” *Id.* at 446. As the Justices explained in their opening brief, the Illinois Supreme Court’s history demonstrates that that Illinois Supreme Court’s interpretation of Illinois law has been consistent. Specifically, the Illinois Supreme Court has the power to vacate temporary recall assignments without reference to the two-

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<sup>5</sup> See Ill. Const., art. VI, § 15(e) (“An Independent Courts Commission is created consisting of one Supreme Court Judge selected by that Court as a member and one as an alternate, two Appellate Court Judges selected by that Court as members and three as alternates, two Circuit Judges selected by the Supreme Court as members and three as alternates, and two citizens selected by the Governor as members and two as alternates.”).

<sup>6</sup> See Illinois Courts Commission, “Meet the Commissioners,” *available at* <https://www.illinoiscourts.commission.gov/about/meet-the-commissioners/> (last accessed Apr. 22, 2026).

step disciplinary process conducted by the Judicial Inquiry Board and the Courts Commission, because temporary recall appointments are fundamentally distinct from judicial appointments and elections.<sup>7</sup> *See* Dkt. 15 at 3-4, 10-13.

Traditionally, there are three ways to become a judge: (1) election by the people (Ill. Const., art. VI, § 12); (2) appointment by the Supreme Court subject to a subsequent election (*id.* § 12(c)); and (3) appointment by the Circuit Court bench as an Associate Judge (*id.* § 8). But retired judges providing “judicial service” in temporary recall assignments pursuant to Supreme Court Order are a special category. *Id.* § 15(a) (“Any retired Judge or Associate Judge, with his or her consent, may be assigned by the Supreme Court to judicial service.”). The Supreme Court’s authority to issue such orders is a function of the “[g]eneral administrative and supervisory authority over all courts [that] is vested in the Supreme Court and shall be exercised by the Chief Justice in accordance with its rules.” *Id.* § 16.

In this instance, the Illinois Supreme Court exercised its Section 15 and 16 powers to provide assistance during a period of time when there were a number of temporarily vacant judicial seats in the Circuit Court of Cook County. *See* Dkt. 1-3. The order recalling Judge Brown to the bench further underscores the special circumstances of that assignment, specifying that “the Supreme Court [] determined that the public necessity [] requires” the assignment. Dkt. 1-5.

In their opening brief, the Justices offered several Illinois Supreme Court orders vacating recall assignments *without reference* to the Courts Commission or other disciplinary process.

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<sup>7</sup> As Judge Brown accurately describes, Justices Solifsborg and Klingbiel were Justices of the Illinois Supreme Court when they were convicted by the Illinois Supreme Court of the appearance of impropriety and “positive acts of impropriety.” Dkt. 18 at 3. Accordingly, both justices were elected under the predecessor to Section 12(a), and thus would have been subject to discipline by the Courts Commission if they had committed those improprieties after the Illinois Constitution was amended. Likewise, Judge Harrod was elected to office as Circuit Judge of Woodford County in the Eleventh Judicial Circuit. *See In re Circuit Judge Samuel G. Harrod, III*, 1 Ill. Cts. Com. 172, 174 (Jun. 23, 1980).

These orders illustrate the fundamental distinction between recall assignments and traditional judicial appointments and elections, as well as the Illinois Supreme Court's historical understanding of its inherent power to manage the former, including by vacating recall orders. Dkt. 15-1. Judge Brown's attempts to distinguish these instances (Dkt. 18 at 8) do not undermine the Justices' argument.

For example, Judge Brown is correct that retired Cook County Circuit Court Associate Judge Lavorci initially left the bench because he "failed to win election or retention," but Judge Brown is *incorrect* that this fact made Judge Lavorci "ineligible for recall." Dkt. 18 at 8. Indeed, after Judge Lavorci failed to win retention in 1983 by a vote of Cook County Circuit Court judges, the Illinois Supreme Court *did* issue him a recall assignment on June 25, 1991, and he began the assignment on July 1, 1991. *See* Dkt. 18 at 8, nt. 5 (citing "Justices Return 2nd Ousted Judge to Bench," *Chicago Tribune* (July 3, 1991) (attached hereto as Exhibit 2), which was critical of the decision to recall Judge Lavorci in the first place); *see also* Dkt. 15-1 at 3. Then the Illinois Supreme Court vacated the assignment on July 9, 1991. Dkt. 15-1 at 2. No disciplinary hearing was held. Plaintiff claims that the Illinois Supreme Court "clarified" in a news article that Judge Lavorci was "ineligible" for recall (Dkt. 18 at 8, nt. 5), but neither article includes any such statement by the Illinois Supreme Court. *See id.* (citing "Court won't return some to the bench," *Chicago Tribune* (Jul. 15, 1993) (attached hereto as Exhibit 3)); *see also* Ex. 2.

It is not clear why Judge Brown finds it relevant that the Illinois Supreme Court vacated its order recalling Judges Mahon, Garoon, and Nelligan before they took the bench (Dkt. 18 at 8), as this fact just illustrates the Illinois Supreme Court's power to vacate such orders at its discretion. Similarly, the fact that Judge Connor's recall assignment was an initially "until further order of the Court" and then modified to end on a date certain clearly illustrates the Court's understanding that

such judges serve according to the exigency of circumstances and at the Justices' discretion. *See* Dkt. 15-1; *see also* Exhibit 4, Further Orders of the Illinois Supreme Court.

A seminal order of the Courts Commission regarding its jurisdiction further underscores this point. *See In re Dempsey*, No. 86 CC 1, 2 Ill. Cts. Com. 100 (Jan. 28, 1987) (attached hereto as Exhibit 5). In *Dempsey*, the Courts Commission found that it did not have jurisdiction over the Judicial Inquiry Board's charges of "willful misconduct in office" (*id.* at 105) against a judge who retired during the pendency of the Board's investigation because the Courts Commission "may exercise its exclusive jurisdiction only with respect to active, sitting judges." *Id.* at 106; *see, generally, id.* at 104-08. In so finding, the Courts Commission recognized the Supreme Court's special Section 15(a) authority to assign the judge to judicial service as a retired judge, even after he resigned to avoid discipline. *Id.* at 105 ("Under the Illinois Constitution, the Illinois Supreme Court has *jurisdiction* to assign him to judicial service as a retired judge.") (emphasis added). Although the Commission did *not* have jurisdiction over the matter, it "strongly suggest[ed] to the Supreme Court of Illinois that it not recall the [judge] and assign him to any available judicial position." *Id.* at 108. The Courts Commission therefore implicitly acknowledged both the limits of its own jurisdiction and the breadth of the Illinois Supreme Court's power over temporary recall assignments.

There are other distinctions between discipline and recall assignments that illustrate the Justices' discretion in making (and vacating) recall assignments. First, the Illinois Constitution sets terms of office for Supreme Court and Appellate Justices, Circuit Court Judges, and Associate Judges at ten, six, and four years, respectively. Ill. Const., art. VI, § 11. In contrast, recall assignments are issued for terms that the Justices deem suitable for the exigency of their circumstances, whether "until further order of the court" (*see* Dkt. 15-1 at 12; Ex. 4 at 1, 3-5, 8) or

for shorter, finite periods (*see* Dkt. 15-1 at 3, 5, 7, 9, 11; Ex. 4 at 2, 6, 9).

Second, there are residency requirements for appointed and elected judges which limit where these judges may reside in Illinois. (*See* Ill. Const., art. VI, §§ 7(b), 8, 11; Judicial Vacancies Act, 705 ILCS 40/2(d); and Circuit Court Act, 705 ILCS 35/0.01 *et seq.*). But judges serving in temporary recall assignments—including Judge Brown—need not. *See, e.g.*, Dkt. 1-3 (“Retired Circuit or Appellate Court Judges from any County of the State of Illinois may apply” for recall assignments in the Cook County Circuit Court).

Finally, vesting exclusive jurisdiction in the Courts Commission over the decision to vacate temporary recall assignments would be wholly impracticable, given the often short time frame of those assignments and the duration of the Judicial Inquiry Board’s investigative process and the Courts Commission’s subsequent disciplinary proceedings. *See Exhibit 6*, Exemplary Records of Courts Commission Proceedings.

**B. The Illinois Supreme Court’s order vacating its prior order was a judicial act.**

As the Justices explained in their opening brief, the Illinois Supreme Court’s order vacating its prior assignment order is a judicial act. Dkt. 15 at 10-12. The Third Circuit has held the same, addressing similar circumstances for purposes of *Rooker-Feldman* abstention. *See id.* (discussing *Guarino v. Larsen*, 11 F.3d 1151, 1159 (3d Cir. 1993)). Moreover, cases in this district and elsewhere underscore that Chief Judges’ and Justices’ duties relating to the oversight and administration of courts—here, exercises of the Illinois Supreme Court’s Section 16 powers, *supra*—are judicial acts for purposes of judicial immunity. *See* Dkt. 15 at 10-12 (citing *Primm v. Cty. of DuPage*, No. 92 C 3726, 1993 WL 338762, at \*6 (N.D. Ill. Sept. 2, 1993); *Payne v. County of Cook*, No. 15 C 3154, 2016 WL 1086527 (N.D. Ill. March 21, 2016); *Davis v. Tarrant Cty.*, 565 F.3d 214, 226 (5th Cir. 2009)). Even the processing of routine name-change petitions is a judicial

act. Dkt. 15 at 12 nt. 5 (citing *Ortiz v. Foxx*, 596 F. Supp. 3d 1100, 1109 (N.D. Ill. 2022)).

In arguing that the Illinois Supreme Court’s order was an administrative act and therefore not entitled to judicial immunity, Judge Brown primarily merely restates his previous arguments that the Justices acted in the clear absence of all jurisdiction. Dkt. 18 at 8-9. As discussed above, this is incorrect. *Supra*, § II.A. Judge Brown does not address any of the above-cited caselaw supporting the judicial nature of the Court’s order. *Id.* Instead, he briefly references *Kowalski v. Boliker* for the principle that, in his words, “[p]romulgating and enforcing rules of professional conduct are non-judicial actions.” *Id.* at 9 (citing 893 F.3d 987, 998 (7th Cir. 2018)). For this principle (which was not at issue in *Kowalski*),<sup>8</sup> the Seventh Circuit cited *Forrester v. White*, which held that “propounding the [Bar] Code was not an act of adjudication but one of rulemaking” and that “judges acting to *enforce* the Bar Code would be treated like prosecutors.” *Forrester v. White*, 484 U.S. 219, 228-29 (1988) (emphasis added).<sup>9</sup>

But Judge Brown is not suing the Justices for promulgating the Code of Judicial Conduct, nor did they enforce the Code against him; whether his conduct arguably violated the Code of Judicial Conduct is beside the point. As explained above, the Justices’ order vacating their prior recall order was *not* discipline but an exercise of the Justices’ authority under the Illinois Constitution to manage Illinois courts, akin to the Presiding Judge’s judicial actions in *Kowalski*.

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<sup>8</sup> In *Kowalski*, a judge intervened in a domestic relations matter pending before another judge and involving her “BFF” (*id.* at 992) by issuing *ex parte* communications through a personal attorney to the judge presiding over the matter, urging to him find against her friend’s spouse (*id.* at 992-94). This was not protected by judicial immunity. *Id.* at 997-99. By contrast, the Presiding Judge of the Domestic Relations Division *was* protected by judicial immunity when she responded, copying all parties, to the plaintiff’s *ex parte* letters to her and directed a motion to another judge for resolution, because “a chief judge acts [within her] jurisdiction when overseeing or directing the business of the court” and because “[h]er communiqué also served as an official notice from the court, akin to an order or docket entry, to all parties interested in the case.” *Id.* at 999.

<sup>9</sup> *Forrester* was decided prior to Congress’s 1996 amendments to Section 1983, barring injunctive relief against judges in their official capacities.

See 893 F.3d at 999 (holding that “a chief judge acts [within her] jurisdiction when overseeing or directing the business of the court”). The Justices’ actions were clearly judicial and they are thus entitled to judicial immunity.

**III. Section 1983’s Prohibition Against Injunctive Relief Applies Because the Justices Were Acting in Their Judicial Capacity.**

Moreover, as the Justices explained, Section 1983 bars suits for injunctive relief against “a judicial officer for an act or omission taken in such officer's judicial capacity.” Dkt. 15 at 13 (citing 42 U.S.C. § 1983). In his response, Judge Brown relies upon his prior arguments, primarily that “[i]n Illinois, judges do not adjudicate alleged violations of the Illinois Code of Judicial Conduct.” Dkt. 18 at 10. But as discussed above, the Justices did not impose discipline or adjudicate a violation of the Illinois Code of Judicial Conduct. Regardless of whether Judge Brown’s actions violated the Code, the Justices acted within their judicial authority to vacate their prior order issuing him a temporary recall assignment. See, e.g., *In re Dempsey*, 2 Ill. Cts. Com. at 105, 108. For these reasons and those set forth in the Justices’ opening brief, Section 1983 bars Judge Brown’s claims for injunctive relief.

**IV. Judge Brown Has Not Stated a Viable Due Process or First Amendment Claim.**

**A. Judge Brown’s due process claim fails because he does not have a property interest in his temporary recall assignment.**

As the Justices explained in their opening brief, Judge Brown does not have a “protectable property interest in continued employment” (*Cole v. Milwaukee Area Tech. College Dist.*, 634 F.3d 901, 904 (7th Cir. 2011)), and his due process claim fails accordingly. Dkt. 15 at 13-15. Regardless of his subjective expectations (Dkt. 18 at 17 (citing Dkt. 1-5)), his temporary recall assignment was “a matter solely within the discretion of this Court,” and, as such, could “be revoked for any reason at [its] discretion.” Dkt. 15 at 14-15 (quoting *Guarino*, 11 F.3d at 1155). Many temporary employment contracts, by their nature, include “a fixed [] term.” Dkt. 18 at 17.

But they do not create a protectable property interest unless they “provide for termination only for cause or otherwise evince mutually explicit understandings of continued employment.” *Cole*, 634 F.3d at 904 (no protectible property interest in an employment contract containing a fixed term).

Judge Brown’s cited cases do not support his argument. In *East St. Louis Fed’n. of Teachers, Local 1220 v. East St. Louis School District No. 189 Financial Oversight Panel*, the Illinois Supreme Court explained that, although the elected official plaintiffs “have no property or liberty right to their offices secured by the federal due process clause...[s]tatutes providing that an elected officer shall serve for a certain number of years and shall be removed only upon certain events are akin to circumstances that create property rights in public employment.” 687 N.E.2d 1050, 1061 (Ill. 1997). The Court found that 105 ILCS 5/10-10 fixed the elected officials’ terms and therefore created a property interest in their offices for the given length of time. *Id.* at 1060. Likewise, in *Casana v. City of Loves Park*, the Seventh Circuit found that the civil service protections of the Illinois Municipal Code set forth the *only* circumstances under which the plaintiff municipal employee could be discharged, that no statutory exception applied, and therefore that she held a protectable property interest in her employment. 574 F.3d 420, 426 (7th Cir. 2009).<sup>10</sup>

Here, as described above, there are *no* statutes or constitutional provisions setting term lengths for temporary recall assignments. The term lengths for judges in Article VI, Section 10 of the Illinois Constitution do not apply to such assignments, and Judge Brown does not argue that they do. And Judge Brown cannot point to any provision requiring that he be “removed only upon certain events.” *East St. Louis Fed’n.*, 687 N.E.2d at 1061. The provisions of the Illinois

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<sup>10</sup> The relevant section of the Municipal Code provides that “[e]xcept as hereinafter provided in this Section, no officer or employee in the classified civil service of any municipality who is appointed under the rules and after examination, may be removed or discharged, or suspended for a period of more than 30 days, except for cause upon written charges and after an opportunity to be heard in his own defense.” 65 ILCS 5/10-1-18(a).

Constitution establishing the Judicial Inquiry Board and Courts Commission, to which Judge Brown points, do not apply to his Section 15(a) temporary recall assignment, which is fundamentally different than Section 8 or 12 appointments or elections. *See, e.g., Dempsey*, 2 Ill. Cts. Com. at 105, 108. Indeed, Judge Brown was not “removed” from office at all—the Supreme Court simply vacated its prior order issuing his assignment.

Most importantly, here, as in *Casana*, the “determination” of whether Judge Brown had a constitutionally protected property interest “is grounded in Illinois law.” 574 F.3d at 424. And the Illinois Supreme Court’s historical orders consistently treating temporary recall assignments as discretionary and not requiring the Courts Commission’s disciplinary procedures clearly demonstrate that Illinois law provides no protectable interest in continued employment in such assignments. *See* Dkt. 15-1; *see also* Ex. 4. Thus, Judge Brown cannot state a due process claim because he lacked a protectable property interest in his temporary recall assignment.

**B. Judge Brown’s First Amendment claim fails the *Connick-Pickering* test.**

As the Justices explained in their opening brief, the *Connick-Pickering* test applies to Judge Brown’s First Amendment claim. That claim fails because the State’s irrefutable interest in an independent and impartial judiciary outweighs his First Amendment interest in his statements.

*1. The Pickering test is appropriate to this case.*

The *Pickering v. Board of Education* test, which balances a government employer’s interest against its employee’s, is appropriate here. *See* 391 U.S. 563 (1968). Judge Brown conceded this point in his motion for a preliminary injunction. Dkt. 7 at 6 (“The Seventh Circuit applies the two-part *Connick-Pickering* test to determine whether a public employee’s speech is protected by the First Amendment.”) (citing *Coady v. Steil*, 187 F.3d 727, 731 (7th Cir. 1999)).<sup>11</sup> Judge Brown

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<sup>11</sup> The Justices do not argue that Judge Brown’s statements did not “constitute[e] speech on a matter of public concern” under *Connick v. Myers*, 461 U.S. 138, 146 (1983); *see also* Dkt. 15 at 15-20.

confirms this point when he asserts in response that “his speech must be balanced against the government’s interest.” Dkt. 18 at 12. At the same time, however, Judge Brown appears to argue that the broader *Reed* test for viewpoint discrimination should apply because he was not serving as a judge when he made the statements and “spoke in his capacity as a private citizen.” Dkt. 18 at 10; *see also id.* at 10-11 (“Defendants must provide a compelling governmental interest and show that the action is narrowly tailored to serve that interest.”) (citing *Reed v. Town of Gilbert*, 576 U.S 155, 171 (2015)).

But it is abundantly clear that *Pickering* applies to speech made in a government employee’s capacity *as a private citizen*, and Judge Brown’s invocation of *Reed* is therefore inapposite. *See Pickering*, 391 U.S. at 568 (“The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.”); *see also Hicks v. Illinois Dept. of Corrections*, 109 F.4th 895, 899, 901 (7th Cir. 2024) (Where employee took “deliberate steps linking himself and his speech to the Department, as evidenced by [*inter alia*] his decision to include his occupation” in his statements, *Pickering* balancing was appropriate.).

Moreover, *Pickering* applies to a government’s employment actions, even where the speech at issue was made pre-employment. *See Bonds v. Milwaukee County*, 207 F.3d 969, 976 (7th Cir. 2000) (applying *Pickering* to government’s employment action regarding employee’s pre-employment speech); *Macrae v. Mattos*, 106 F.4th 122, 134 (1st Cir. 2024) (accord).<sup>12</sup> As the First

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<sup>12</sup> *See also Riel v. City of Santa Monica*, No. CV 14-04692, 2014 U.S. Dist. LEXIS 207663, at \*9 (C.D. Cal. Sep. 22, 2014) (accord); *Cleavenger v. Univ. of Or.*, No. CV 13-1908, 2015 U.S. Dist. LEXIS 102972 (D. Or. Aug. 6, 2015) (applying similar framework balancing government interest to pre-employment speech by government employee).

Circuit explained in *Macrae*, “[w]e see no reason ... why the government's interest in the efficient provision of public services would simply evaporate into thin air just because the speech in question occurred prior to the start of employment and the employer did not learn of the purported disruptive speech until after the employee began working for it.” 106 F.4th at 134. Accordingly, this Court should apply the *Pickering* test and weigh the Illinois Supreme Court’s interest in an independent and impartial judiciary against Judge Brown’s interest in his statements.

2. *Illinois’ interest in an independent and impartial judiciary outweighs Judge Brown’s interest in his statements.*

Applying the appropriate *Pickering* test, it is clear that Illinois’ compelling interest in an independent and impartial judiciary outweighs Judge Brown’s interest in his statements. *See Siefert v. Alexander*, 608 F.3d 974, 979-80 (7th Cir. 2010) (“We think it beyond doubt that states have a compelling interest in developing, and indeed are required by the Fourteenth Amendment to develop, these independent-minded and faithful jurists.”).<sup>13</sup>

- a. Judge Brown’s comments clearly would have created serious problems maintaining harmony in the courts of Cook County and impeded his ability to perform his judicial duties.

As the Justices explained in their opening brief, the first and second *Pickering* factors weigh in favor of the government’s interest because Judge Brown’s comments would cause a reasonable court observer, litigant, or attorney to question his impartiality and independence and impede his ability to perform his judicial duties, including his obligation to remain—and appear—impartial and independent. Dkt. 15 at 18. Indeed, attorney-members of local bar associations

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<sup>13</sup> Judge Brown references and attaches several articles published by Appellate Judge Ocasio. Dkt. 18 at 11; *id.*, Exs. 1-6. It is not entirely clear how Judge Ocasio’s statements factor in to Judge Brown’s First Amendment analysis, but if he intends to argue that the Justices’ apparent permissiveness towards Judge Ocasio’s statements somehow undermines the government’s asserted interest in an impartial and independent judiciary, that argument could not stand, given the wealth of authority establishing that interest, *infra*. In any event, Judge Ocasio is an elected judge subject to the jurisdiction of the Judicial Inquiry Board and Courts Commission for any disciplinary matters. Ill. Const., art. VI, § 12(a); *id.* § 15(c), (e).

expressed exactly this concern. *See, e.g.*, Dkt 1-6 (“Judge Brown’s statements...damage the public trust that our esteemed judiciary so preciously uphold.”). Moreover, Judge Brown’s comments likely would have required him to recuse himself from an unmanageable number of cases (Dkt. 15 at 19 (discussing Ill. Code Jud’l Conduct, Rule 2.11)), an issue Judge Brown does not address in his response.

In response, Judge Brown argues that a “prediction of disruption must be supported with evidence, not mere speculation.” Dkt. 18 at 14 (citing *Gazarkiewicz v. Town of Kingsford Heights*, 359 F.3d 933, 944 (7th Cir. 2004)). But this statement wholly misstates *Gazarkiewicz*’s holding:

Of course, the defendants are not required to produce actual evidence of disruption to prevail. The Supreme Court has instructed that we give “substantial weight to government employers’ reasonable predictions of disruption,” and that we are to look at the facts “as the employer *reasonably* found them to be,” and not as the employee claims they occurred.

359 F.3d at 944 (quoting *Waters v. Churchill*, 511 U.S. 661, 673, 677 (1994)). The Seventh Circuit clarified that to be “reasonable,” the employer’s prediction of disruption “must be supported with an evidentiary foundation and be more than mere speculation.” *Id.* And in *Harnishfeger v. United States*, cited by Judge Brown with respect to qualified immunity, the Seventh Circuit held that “the public employer’s side of the *Pickering* balance must be supported with evidence of actual disruption, *or at least* the articulation of a reasonable belief in future disruption plus evidence of its reasonableness at the time.” 943 F.3d 1105, 1120 (7th Cir. 2019) (emphasis added).<sup>14</sup>

Here, there is already an ample evidentiary foundation supporting the Justices’ reasonable conclusion that disruption was highly likely (if it had not occurred already), in light of the obvious inflammatory nature of Judge Brown’s comments (*see* Dkt. 1-2) and the strenuous objections of

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<sup>14</sup> There, the Court denied qualified immunity to the government employer because it had not “articulat[ed] a belief in a future disruption” nor shown a “rational connection between” (*id.* at 1121) the employee’s “phone-sex memoir” (*id.* at 1118) condemning child sex abuse and her responsibilities as an AmeriCorps volunteer (*id.* at 1110). *See id.* at 1118 (“In sum, the defendants’ side of the *Pickering* balance is empty.”).

local bar associations (*see* Dkt. 1-5 at 3 (“The CCBA lacks confidence that Judge Brown can satisfy [the] requirements” of its Judicial Evaluation Guidelines and the Illinois Code of Judicial Conduct.); Dkt. 1-7 at 2 (“Judge Brown lacks the temperament, judgment, independence, competence, impartiality and respect for the rule of law necessary for those who serve in the judiciary.”). These were clear and unequivocal expressions of the perceptions of important stakeholders. *See* Dkt. 18 at 14 (citing *Jungels v. Pierce*, 825 F.2d 1127 (7th Cir. 1987)). And Judge Brown’s assertion that he presided over his courtroom for six weeks “without complaint” (*id.*) is patently undermined by the vociferous and near-immediate bar association complaints that the Justices received. Dkt. 1-5, 1-7.<sup>15</sup> The expressed lack of public confidence in Judge Brown would not only create serious problems in maintaining harmony in the Circuit Court of Cook County (*Greer v. Amesqua*, 212 F.3d 358, 371 (7th Cir. 2000)) but also seriously impede Judge Brown’s ability to perform his judicial duties, including maintaining and *appearing to maintain* impartiality and independence (*id.* at 372).

- b. The “time, place, and manner” of Judge Brown’s speech support the government’s interest and establish that they were not made by a “member of the general public.”

As the Justices further explained, Judge Brown’s invocation of his former office lent the “weight” of that office to his statements for “rhetorical effect,” carrying all the gravity of the Illinois judiciary’s obligation and reputation as independent, impartial adjudicators of serious public disputes. Dkt. 15 at 19. Moreover, he made these statements less than three months before his recall appointment began. *Id.*; *see also* Dkt. 1-2. A reasonable observer would be wholly justified in believing that Judge Brown, upon assuming the bench, still held those inflammatory

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<sup>15</sup> The Justices did not argue that a majority of Cook County residents would appear before Judge Brown, as he claims. Dkt. 18 at 15. Rather, they argued that Judge Brown’s comments insulted groups that constitute “a broad swath of the population of Cook County,” and that members of those groups would “inevitably appear before him in court.” Dkt. 15 at 18. The bar associations’ letters agree. *See* Dkt. 1-5, 1-7.

beliefs he had so recently espoused. And the “publicity and sensationalism” of his comments further supports the government’s interest. Dkt. 15 at 18 (quoting *Greer*, 212 F.3d at 372). Judge Brown does not address the recency of his statements to his recall assignment or their “publicity and sensationalism.” *See generally*, Dkt. 18. The “time, place, and manner” of his speech therefore supports the government’s irrefutable interest. *See Greer*, 212 F.3d at 372. Moreover, it establishes his statements cannot be viewed to have been made by a “member of the general public” (*id.* at 371), a factor that Judge Brown does not address.

In his response, Judge Brown argues that the “time, place, and manner” of his speech weigh in favor of his personal First Amendment interest because some aspects of his article identified him as a *retired* judge. Dkt. 18 at 13-14. However, Judge Brown avoids acknowledging that his article *began* his identification as “The Honorable Judge James R. Brown,” without indicating that he was not speaking *as a judge*. Dkt. 1-2 at 1.

*Coady* is distinguishable in this respect. *See* 187 F.3d at 732. There, the Seventh Circuit found that the fact that the plaintiff firefighter was off-duty weighed in his favor. *Id.* First, there is no indication that the firefighter invoked his status as such in making the political endorsement—the mere fact that the endorsement was displayed on his vehicle while parked at the fire station (*id.*) did not establish this. Second, even if he had, firefighters are *not* judges—while they play an essential public safety function, their personal opinions do not implicate the judiciary’s surpassing need for impartiality and independence. *Siefert*, 608 F.3d at 979-80. In contrast, Judge Brown’s article called his impartiality and independence into question. *See* Dkt. 1-2 at 1. Indeed, the Seventh Circuit stated that if the firefighter’s employer had policies regulating political speech by off-duty firefighters, it “would be able to put forth more compelling arguments as to why the government’s interest in delivering public services efficiently outweighs the plaintiff’s First

Amendment rights.” *Coady*, 187 F.3d at 732, n.4.<sup>16</sup>

Here, the interest of the Illinois government and members of the public in an impartial and independent judiciary, as well as the State’s policies aiming to maintain both the appearance of and the reality of that impartiality, are beyond dispute. *See, e.g., Seifert*, 608 F.3d at 979-80; *Concrete Pipe & Prods. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 617-18 (1993) (“the Fourteenth Amendment not only requires “a neutral and detached adjudicator” but requires that “[j]ustice . . . must satisfy the appearance of justice.”) (internal quotations omitted); Ill. Code Jud’l Conduct, Preamble and Scope (“An independent, fair, and impartial judiciary is indispensable to our system of justice.... Inherent in the Rules contained in the Code of Judicial Conduct [] are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to maintain and enhance confidence in the legal system.”); *id.*, Rule 1.2 (“A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary and shall avoid impropriety and the appearance of impropriety.”). The “manner” of Judge Brown’s speech clearly implicated that interest, and the Illinois Supreme Court was justified in its response, once he assumed the bench. Thus, the “time, place, and manner” of Judge Brown’s speech weigh in the Justices’ favor and establish that he did not make his statements as a “member of the general public.”

3. *This Court can resolve Judge Brown’s First Amendment claim at this stage.*

Judge Brown argues that his First Amendment claim cannot be resolved on the pleadings (Dkt. 18 at 15), but there is nothing “speculative” (*id.*) about the Justices’ assertion of the

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<sup>16</sup> *See also id.* (citing *Horstkoetter v. Dept. of Public Safety*, 159 F.3d 1265, 1273-74 (10th Cir. 1998) (Highway patrol policy and state statute prohibiting state troopers from displaying political yard signs at their homes was constitutional because it proclaimed that police protection would be available to all citizens, “free from political overtones.”).

government's interest. It cannot be overstated (and Judge Brown does not appear to contest) that the State's interest in an impartial and independent judiciary extends beyond judges' *actual* impartiality and independence and into the public's *perception* of judges' impartiality and independence. *See, e.g., Seifert*, 608 F.3d at 979-80; *Concrete Pipe & Prods.* 508 U.S. at 617-18; Ill. Code Jud'1 Conduct, Preamble and Scope; *id.*, Rule 1.2, *supra*. Unlike cases where the government's asserted interest turns on truly evidentiary questions (*see, e.g., Gustafson v. Jones*, 117 F.3d 1015, 1019 (7th Cir. 1997)), the interest here is beyond evidentiary dispute.

Moreover, Judge Brown has *already* submitted evidence demonstrating that his statements significantly impaired public's perception of his impartiality and independence. *See* Dkt. 1-5, 1-7; *see also Williamson v. Curran*, 714 F.3d 432, 436 (7th Cir. 2013) (On a motion to dismiss, “[a] court may consider, in addition to the allegations set forth in the complaint itself, documents that are attached to the complaint, documents that are central to the complaint and are referred to in it, and information that is properly subject to judicial notice.”). Even if the bar association's letters were not enough to demonstrate to this Court that the public's confidence in Judge Brown was impaired, the Illinois Supreme Court was entitled to act upon *its* reasonable predictions in this respect. *Gazarkiewicz*, 359 F.3d at 944. And Judge Brown does not explain what evidence he *could* present to dispute the existence of the serious concerns by area attorneys that he has already put at issue here. Accordingly, this case presents the “rare” opportunity (*Gustafson*, 117 F.3d at 1019) to resolve a *Pickering* balancing question at a motion to dismiss and avoid “the problems of federalism inherent in making one sovereign”—here, the Justices of Illinois' highest court—“appear against its will in the courts of the other” (*Pennhurst*, 465 U.S. at 106). For all of these reasons, Judge Brown's First Amendment claim cannot stand and should be dismissed.

**C. The Justices Are Entitled to Qualified Immunity.**

As set forth in the Justices' opening brief, they are entitled to qualified immunity from Judge Brown's damages claims because, for all of the reasons stated above, they did not violate any clearly established right. *See* Dkt. 15 at 20-21. Judge Brown's arguments regarding qualified immunity essentially restate his arguments on the merits, which are otherwise addressed above. *See* Dkt. 18 at 17-19.

"In this circuit, once a defendant claims qualified immunity, the burden is on the plaintiff to show that the right claimed to have been violated was clearly established." *Cibulka v. City of Madison*, 992 F.3d 633, 640 (7th Cir. 2021) (quotation omitted). "Clearly established" means that existing precedent must have placed the question beyond debate, *see Rivas-Villegas v. Cortesluna*, 595 U.S. 1, 5–6 (2021), in that it is "sufficiently clear that every reasonable official would have understood that what he is doing violates that right," *Mullenix v. Luna*, 577 U.S. 7, 11-12 (2015) (cleaned up); *see also id.* (the "dispositive question is whether the violative nature of particular conduct is clearly established."); *Weiland v. Loomis*, 938 F.3d 917, 919 (7th Cir. 2019) ("Over and over, the Supreme Court has held that a right is 'clearly established' only if it has been 'defined with specificity.'"). Here, Plaintiff has utterly failed to meet this "well established burden." *Cibulka*, 992 F.3d at 640. Plaintiff has not identified any case with similar facts that would have put the Justices on notice that they lacked discretion to vacate a recall assignment, even though the Illinois Supreme Court has recognized and exercised this discretion for decades. Thus, the Justices are entitled to qualified immunity from Judge Brown's claim for damages.

**CONCLUSION**

WHEREFORE, for the foregoing reasons as well as those in their opening brief, the Justices respectfully request this Honorable Court dismiss Judge Brown's complaint with prejudice.

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