20-3608

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MONTGOMERY BLAIR SIBLEY,
PLAINTIFF/APPELLANT,

VS.

FRANK PAUL GERACI JR., MARY C. LOEWENGUTH, AND CATHERINE O'HAGAN WOLFE,
DEFENDANTS.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK
CASE NO.: 20-CV-6310 EAW

INITIAL BRIEF OF THE APPELLANT

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No disclosure statement is required by Rule 26.1 as Plaintiff/Appellant Montgomery Blair Sibley ("Sibley") is a natural born Citizen.

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JURISDICTIONAL STATEMENT

Sibley claimed subject-matter jurisdiction in the District Court: (i) pursuant to 28 U.S.C. §1331 and §1343 based upon questions of federal constitutional law and (ii) under the Declaratory Judgment Act, 28 U.S.C. §§2201(a) and 2202.

Sibley claims as a basis for this Court's appellate jurisdiction 28 U.S.C. §1291 as Sibley is appealing the final decisions of the District Court. Sibley timely filed his Notice of Appeal pursuant to Rule 4 of the Federal Rules of Appellate Procedure.

This appeal is from a final order that disposed of all Sibley's claims. Notably, there are no claims of opposing parties as Judge Wolford dismissed this matter *sua sponte* before service on the Defendants was permitted.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Did Judge Wolford's *sua sponte* dismissal violate Sibley's Due Process rights?
2. Was it error for Judge Wolford to deny Sibley's Motion for Disqualification as she made herself a witness?
3. Was it error for Judge Wolford to extend the judicially-created doctrine of Absolute Judicial Immunity to erase the "good behavior" requirement of Article III, §1?

4. Was it error for Judge Wolford to apply the judicially-created doctrine of Absolute Judicial Immunity to Sibley's First Amendment Right-to-Petition *Bivens* claims?
5. Was it error for Judge Wolford's to ignore Sibley's Fifth Claim for declaratory relief regarding indigent litigants?
6. Was it error for Judge Wolford to publicly "brand" Sibley's public-interest lawsuit seeking to confirm equal access to Court for indigents as "frivolous"?

STATEMENT OF THE CASE

The nature of the case below sought relief under three separate legal theories:

- Forfeiture of the office of Defendant United States District Court Judge Frank Paul Geraci Jr. for his "misbehavior" in office in violation of Article III, §1 of the United States Constitution;
- Damages pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) against Defendants Frank Paul Geraci Jr., Mary C. Loewenguth and Catherine O'Hagan Wolfe for their denial to Sibley of access to court guaranteed by the United States Constitution; and
- A Declaratory Judgment that the Defendants' usage of the present laws, customs, practices and policies regarding *in forma pauperis* applications violates the United States Constitution.

The facts relevant to the issues submitted for review are as follows:

1. On or about **July 9, 2019**, Sibley filed with agents of Defendant Loewenguth ("Loewenguth")[1] his: (i) Complaint against New York Handgun Licencing Officer Chauncey J. Watches seeking redress for, *inter alia*, New York's *de jure* and *de facto* destruction of his "core" Second Amendment rights to possess a handgun in his home for self-defense and (ii) Motion for Leave to proceed *in forma pauperis*. That matter was assigned Case #:19-cv-06517. Defendant Geraci ("Geraci") was assigned as the Judge to Case #:19-cv-06517. (Appendix, p. 4).

2. Additionally, on **July 9, 2019,** Sibley presented to agents of Loewenguth a properly completed Summons for signature and seal in Case #:19-cv-06517. Though repeatedly requested by Sibley, Loewenguth, by and through her agents, refused to issue the necessary summons to Sibley to allow him to serve the Defendant Chauncey J. Watches in Case #:19-cv-06517. As a result, Sibley was prevented from seeking the relief he sought in Case #:19-cv-06517 as that case could not move forward until Defendant Chauncey J. Watches was served with the Summons and Complaint. (Appendix, p. 5).

3. On **August 8, 2019**, as Geraci had failed to rule upon Sibley's Motion for Leave to proceed i*n forma pauperis* for **thirty (30) days** in Case #:19-cv-06517, Sibley filed his Motion *Procedendo Ad Justicium* which requested

[1] Defendant Mary C. Loewenguth is the Clerk of Court for the United States District Court for the Western District of New York and was sued in both her personal and official capacities. (Appendix, p. 4).

that Geraci *procedendo ad justicium* upon Sibley's Motion to Proceed *in forma pauperis*. To date, Geraci has refused to rule upon either of the two aforementioned motions filed by Sibley. (Appendix, p. 5).

4. On **September 9, 2019**, seeking appellate relief from Geraci's refusal to allow Case #:19-cv-06517 to move forward by ruling upon his Motion for Leave to proceed *in forma pauperis*, Sibley filed in this Court with agents of Defendant Wolfe ("Wolfe")[2] his: (i) Petition for Writs of P*rocedendum Ad Justicium* and *Mandamus* seeking Orders directing, *inter alia*, that Geraci rule one way or the other on Sibley's Motion to Proceed *in forma pauperis* and (ii) a Motion to proceed *in forma pauperis* in this Court. That case was assigned Second Circuit Case No.: 19-2860. (Appendix, p. 5).

5. As it was apparent to Sibley that Geraci was not going to rule upon his Motion for Leave to proceed *in forma pauperis*, on **September 26, 2019**, after waiting **seventy-nine (79) days**, Sibley was finally able and did tender the filing fee of $400.00 to Loewenguth. Only then did Loewenguth, by and through her agents, issue the Summons in Case #:19-cv-06517 so that Sibley could move that case forward. (Appendix, p. 6).

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[2] Defendant Catherine O'Hagan Wolfe is the Clerk for United States Circuit Court for the Second Circuit and is sued in both her personal and official capacities. (Appendix, p. 4).

6. On **December 13, 2019**, Wolfe issued a putative Order stating ostensibly: "At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 13th day of December, two thousand and nineteen." In that putative Order Wolfe, representing that she was acting "For The Court" stated: "Petitioner Montgomery Blair Sibley's submission of a Motion to Proceed i*n Forma Pauperis* does not comply with the Court's prescribed filing requirements. Despite due notice, the defect has not been cured. IT IS HEREBY ORDERED that the said motion is stricken from the docket." (Appendix, p. 6).

7. Sibley filed the instant matter below on **May 13, 2020,** and it was assigned Case No.: 20-CV-6310. (Appendix, p. 1). One week later, on **May 20, 2020**, Sibley moved to disqualify all the judges of the U.S. District Court for the Western District of New York in Case No.: 20-CV-6310. (Appendix, p. 1). On **June 3, 2020**, the Hon. Elizabeth A. Wolford entered her Decision and Order: (i) Denying Sibley's Motion to Disqualify and (ii) *sua sponte* dismissing Sibley's Complaint with prejudice as "frivolous". (Appendix, pp. 24-37). The *sua sponte* dismissal came before: (i) Sibley was "heard" by Judge Wolford and (ii) the summons were issued or opposing parties served, hence there are no opposing parties in this appeal.

8. On **June 16, 2020**, Sibley timely filed his Motion for Reconsideration of the **June 3, 2020**, Order. **One Hundred and Twenty-two (122)** days later, on **October 13, 2020**, Judge Wolford entered her Decision and Order denying Sibley's Motion for Reconsideration. (Appendix, pp. 41-46). Sibley timely filed his Notice of Appeal on **October 19, 2020**. (Appendix, p. 47.).

SUMMARY OF THE ARGUMENTS

First, the *sua sponte* dismissal of Sibley's Complaint by itself is grounds for reversal.

Second, it was error for Judge Wolford to deny Sibley's Motion for Disqualification as she made herself a witness.

Third, judicial power does not extend to expanding the judicially-created doctrine of Judicial Immunity to erase the organic law found at Article III, §1.

Fourth, absolute judicial immunity is not available to bar Sibley's First Amendment Right-to-Petition *Bivens* claims.

Fifth, Judge Wolford's ignoring of Sibley's Fifth Claim for declaratory relief regarding indigent litigants is an abdication of her judicial obligation.

Sixth, Judge Wolford's "branding" of Sibley's public-interest lawsuit seeking to confirm equal access to Court for indigents as "frivolous" was judicial thugery that this Court cannot ignore.

THE ARGUMENTS

As an initial matter, it appears after thorough research that "[t]he standard of review applicable to *sua sponte* dismissal for failure to state a claim under the court's inherent authority is unsettled." *Hassan v. United States VA*, 137 Fed. Appx. 418, 240 (2nd Cir. 2005). Yet under the more strict standard found at 28 U.S.C. §1915(e)(2)(B), the review is *de novo*. *Accord*: *Gordon v. Suffolk Cty.*, 792 Fed. Appx. 128 (2nd Cir. 2020).("This Court reviews *de novo* the *sua sponte* dismissal of a complaint under 28 U.S.C. § 1915(e)(2)"). Hence, from Judge Wolford's *sua sponte* dismissal of Sibley's Complaint, for <u>each</u> issue the applicable standard of review in this appeal is *de novo*. *Muto v. CBS Corp*., 668 F.3d 53, 56 (2nd Cir. 2012)("We review *de novo* a district court's grant of a motion to dismiss, accepting as true all factual allegations in the complaint and drawing all reasonable inferences in favor of the plaintiffs.")

I. THE *SUA SPONTE* DISMISSAL <u>DENIED</u> TO SIBLEY HIS <u>RIGHT</u> TO BE "HEARD"

The Docket below clearly establishes the Judge Wolford *sua sponte* dismissed Sibley's Complaint <u>before</u> Sibley was allowed to be "heard". Such practice has been repeatedly condemned by this Court for over forty-five (45) years. *Accord*: *Lewis v. New York*, 547 F.2d 4, 5-6 & n.4 (2nd Cir. 1976)), *aff'd*, 476 U.S. 409 (1986)("Failure to afford an opportunity to address the court's *sua sponte* motion to dismiss is, by itself, grounds for reversal"); *Benitez v. Wolff, 9*07

F.2d 1293, 1295 (2nd Cir. 1990)(per curiam)("*Sua sponte* dismissal of a *pro se* complaint prior to service of process is a draconian device, which is warranted only when the complaint lacks an arguable basis either in law or in fact. Where a colorable claim is made out, dismissal is improper prior to service of process and the defendants' answer." (citations and internal quotation marks omitted)); *Palkovic v. Johnson*, 150 Fed. Appx. 35, 38 (2nd Cir. 2005)("We have held previously that a district court has the power to dismiss a complaint *sua sponte* for failure to state a claim upon which relief can be granted, see Fed. R. Civ. P. 12(b)(6), **only where a plaintiff has been given an 'opportunity to be heard**.'")(Emphasis added).

Here, indisputably, Sibley has <u>not</u> been give an "opportunity to be heard"[3] prior to Judge Wolford's *sua sponte* dismissal, hence reversal and remand is mandatory.

[3] While Sibley did file a Motion for Reconsideration, Judge Wolford <u>failed</u> to address the arguments raised by Sibley instead hiding behind the reconsideration standard applicable to fully briefed and argued motions to dismiss. "As explained by the Second Circuit, '[t]he standard for granting a [motion for reconsideration] is strict, and reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked – matters, in other words, that might reasonably be expected to alter the conclusion reached by the court.' . . . Here, the vast majority of the arguments raised by Plaintiff fail on their face to satisfy the standard for reconsideration." (Appendix, p. 44).

II. JUDGE WOLFORD IMPROPERLY DENIED SIBLEY'S MOTION FOR DISQUALIFICATION

First, *Nemo Judex Parte Sua*, a right reserved to Sibley under the Ninth and Tenth Amendment and repeatedly recognized under due process requirements for an impartial tribunal, prevented Judge Wolford from denying Sibley's Motion for Disqualification under 28 U.S.C. §144 as she made herself a material witness to the factual basis for the disqualification.

In the his "Verified Motion to Disqualify All Judges of United States District Court For The Western District Of New York", Sibley alleged: that:

- Defendant Frank Paul Geraci Jr. is the Chief United States District Judge for the Western District of New York. As such, Defendant Geraci, Jr. is the functional management superior of each and every member of the bench of the District Court for the Western District of New York. Upon information and belief, and after a reasonable opportunity for discovery which I hereby request, I will establish that Defendant Geraci has close personal relationships with each member of the bench of the District Court for the Western District of New York;

- As Chief Judge, Defendant Geraci has significant discretion in deploying his financial, procurement, and personnel management authorities that the Administrative Office has delegated to district courts. Such discretion impacts the quality of life of the other judges of this Court. This discretion presumably includes the ability to approve attendance so-called "judicial junkets";

- Defendant Mary C. Loewenguth is the functional subordinate of each and every member of the bench of the District Court for the Western District of New York and, upon information and belief, and after a

> reasonable opportunity for discovery which I hereby request, has close personal relationships with each member of the bench of the District Court for the Western District of New York.

[D.E. #2, pp. 3-4].

In response, and thus making herself a witness to the underlying facts relied upon by Sibley in his Motion for Disqualification, Judge Wolford stated: "Judge Geraci's administrative role as Chief Judge of this District does not give him the authority over his fellow district judges that Plaintiff imagines." (Appendix, p. 31). By stating so, Judge Wolford put a matter of fact into the record to contradict Sibley's sworn allegation to the contrary making Judge Wolford a witness who cannot be cross examined on the record. Incontrovertibly a judge before whom a cause is tried cannot likewise be a witness. *See*: 2 T*aylor on Evidence* [12th ed.] §1379, pp. 870, 871; 6 *Wigmore on Evidence* [3d ed.] §1909, p. 588; 70 *C. J., Witnesses*, §237.

Here, Judge Wolfof clearly had an interest in the "trial" of Sibley's Motion to Disqualify involving a management superior and the District Court Clerk which, if not an actual conflict, certainly gives the appearance of bias. *Accord*: *Peters v. Kiff*, 407 U.S. 493 (1972)("Moreover, even if there is no showing of actual bias in the tribunal, this Court has held that due process is denied by circumstances that create the likelihood or the appearance of bias.")

While it is true that "*Ubi non est manifesta injustitia, habentur pro bonis viris, et judicatum pro veritate*", 1 Johns. Ch N.Y. 341, 345, it would be a manifest injustice for Judge Wolford to sit in judgment of her fellow jurist and court clerk as Judge Wolford did here. As such, it was error for Judge Wolford to refuse to grant Sibley's Motion to Disqualify in this matter.

III. JUDGE WOLFORD IMPERMISSIBLY EXPANDED THE DOCTRINE OF ABSOLUTE JUDICIAL IMMUNITY

In her *sua sponte* dismissal, Judge Wolford held: "Judges are absolutely immune from suit for any actions taken within the scope of their judicial responsibilities." (Appendix, p. 33). This judicially-created doctrine as applied both to Sibley's: (i) Article III, §1, "misbehavior" forfeiture claim and (ii) *Bivens* claim against Geraci, Lowenguth and Wolfe is asinine.

A. THE ARTICLE III, §1 "GOOD BEHAVIOR" REQUIREMENT IS THE SUPREME LAW OF THE LAND

In essence, Judge Wolford held that Article III, §1, the organic law of this land, is overruled by the judicially-created doctrine of Absolute Judicial Immunity. To so hold elevates judicial fiat above organic law; an obvious non-starter. It is axiomatic that the Supremacy Clause secures its primacy vis-a-vis judicially-created doctrine by establishing a two-tiered hierarchy among the sources of law that courts must apply: the Constitution, federal statutes, and treaties

are "supreme"; all other potential rules of decision, such as judicial precedents and doctrine, are non-supreme.

As such, it was error for Judge Wolford to *sua sponte* apply the doctrine of Absolute Judicial Immunity to Sibley's Article III, §1, "misbehavior" forfeiture claim.

B. JUDICIAL IMMUNITY DOES NOT APPLY TO SIBLEY'S *BIVENS* CLAIM AGAINST GERACI

The genesis of Sibley's *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971) cause of action against Geraci (and Lowenguth and Wolfe) is grounded in the notion that:

> Accordingly, as our cases make clear, the Fourth Amendment operates as a limitation upon the exercise of federal power regardless of whether the State in whose jurisdiction that power is exercised would prohibit or penalize the identical act if engaged in by a private citizen. It guarantees to citizens of the United States the absolute right to be free from unreasonable searches and seizures carried out by virtue of federal authority. **And where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief**.

Bivens at 392, (Emphasis added). Here, Sibley claims that his Constitutionally protected right to access Court was invaded by Geraci refusal to rule upon Sibley's *in forma pauperis* petition for **seventy-nine (79) days** and hence Sibley is entitled to "remedies so as to grant the necessary relief."

Sibley claimed under the First Amendment an "absolute right" to an access court to vindicate fundamental rights regardless of his ability to pay the exorbitant filing fee required by federal courts. Since *Boddie v. Connecticut*, 401 U.S. 371, 380-81 (1971), it's the law of this land that a filing-fee cannot be a requirement to obtain court access for indigents; this is particularly true when fundamental rights are at issue. Yet now, Judge Wolford by her *sua sponte* dismissal has held that what cannot be accomplished *de jure* may nonetheless be accomplished *de facto* by simply ignoring − as Geraci did here − an indigent's attempt to access court to vindicate fundamental rights through a motion to proceed *in forma pauperis*.

Judge Wolford's holding that: "Judges are absolutely immune from suit for any actions taken within the scope of their judicial responsibilities." begs the question: Is refusal to rule upon an *in forma pauperis* petition within the "scope of their judicial responsibilities"?

Clearly, it is well settled that judges are absolutely immune from suit for any actions taken within the scope of their judicial responsibilities. *See*: *Mireles v. Waco*, 502 U.S. 9 (1991)("A judge will not be deprived of immunity because **the action** he took was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in the clear absence of all jurisdiction." (Emphasis added).

Here, Sibley complains not about an "act" or "action" of Geraci; rather, the claim is Geraci's failure to act which gives rise to Sibley's *Bivens* claim for denying him access to court. The underpinnings of the completely judicially-created doctrine of Judicial Immunity support Sibley's assertion in this regard.

Judicial Immunity is grounded upon public policy concerns. "Judicial immunity apparently originated, in medieval times, as a device for discouraging collateral attacks and thereby helping to establish appellate procedures as the standard system for correcting judicial error." *Forrester v. White*, 484 U.S. 219, 225 (1998). In this instance, those public policy grounds must be re-visited and weighed against the harm authorizing Geraci to violate Sibley's fundamental rights with impunity by ignoring Sibley's Motion to Proceed in *Forma Pauperis* for over two and a half (2 ½) months yet still enjoy absolute judicial immunity.

Accordingly in this case Public Policy considerations must prohibit the application of the judicially-created doctrine of absolute judicial immunity. The alternative result is absurd: Sibley has a First Amendment right to petition without a concomitant method to secure that right if he proceeds as an indigent. As Chief Justice Marshall declared: "[T]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that

protection." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). By granting "absolute judicial immunity" to Geraci and concomitantly denying to Sibley a remedy, Sibley's government has denied to him the "protection of the laws" to which he is entitled.

Last, Geraci is not above the law. Accord: *Seminole Tribe v. Fla*., 517 U.S. 44, f/n #2 (1996)("In any event, it is clear that the idea of the sovereign, or any part of it, being above the law in this sense has not survived in American law.") Yet to grant absolute judicial immunity to Geraci is to elevate him "above the law" for he can deny Sibley his fundamental rights and Sibley has no avenue for redress while Geraci suffers no consequence.

Stated another way, the failure of Geraci to act upon Sibley's *in forma pauperis* application was without the scope of his judicial responsibilities. Accordingly, absolute judicial immunity is not available to bar Sibley's *Bivens* First Amendment claim.

IV. ABSOLUTE JUDICIAL IMMUNITY DOES NOT BAR SIBLEY'S *BIVENS* DAMAGE CLAIMS AGAINST LOEWENGUTH AND WOLFE

Sibley readily concedes that dismissal of an action on the basis of immunity is proper only when the official is absolutely immune and not when her qualified immunity is at issue. *Imbler v. Pachtman*, 424 U.S. 409, 419, f/n# 13 (1976)("The procedural difference between the absolute and the qualified immunities is

important. An absolute immunity defeats a suit at the outset, so long as the **official's actions were within the scope of the immunity.** The fate of an official with qualified immunity depends upon the circumstances and motivations of his actions, as established by the evidence at trial.")(Emphasis added).

"The precise scope of the immunity, if any, that should be afforded to a clerk of court can only be determined on a more developed factual record. However, the courts which have considered the question have concluded that clerks are generally **entitled to qualified immunity**. . . . Where a public official has or may have a defense based on qualified immunity, **the burden is on the official to raise the defense and establish his entitlement to immunity.** *Gomez v. Toledo*, 446 U.S. 635 (1980)." *Henriksen v. Bentley*, 644 F.2d 852, 856 (10th Cir. 1981)(Emphasis added).

Finally, the refusal of a clerk to perform the ministerial act of filing a technically correct pleading has been held to render immunity unavailable to a clerk. In *Snyder v. Nolen*, 380 F.3d 279, 287 (7th Cir. 2004), the court held:

> We have not had the opportunity to address squarely the issue presently before us – whether a clerk's refusal to file a pleading qualifies for absolute immunity in the absence of explicit judicial direction. . . .[Defendant]'s duty under the law of Illinois to maintain the official record was purely ministerial; he had no authority to resolve disputes between parties or to make substantive determinations on the worth or merits of a filing. In short, Mr. Nolen is charged with having breached his duty to perform the ministerial act of accepting

> technically sufficient papers. . . At this point in the litigation, there is no claim that [Defendant] was acting at the direction of any judicial officer in returning [Plaintiff]'s papers. Accordingly, we must conclude that, on this record, there is no basis for dismissal of the action on the ground of absolute quasi-judicial immunity.

Accordingly, it was improper for Judge Wolford to *sua sponte* find that absolute judicial immunity applied to Lowenguth and Wolfe.

A. LOEWENGUTH BREACHED HER DUTY TO ISSUE THE SUMMONS

The instant Complaint alleged at ¶32 that: "Defendant Loewenguth, a federal officer who was acting under the color of federal authority as a United States District Court Clerk, violated Sibley's United States Constitution rights and thereby injured Sibley by refusing to issue to Sibley the Summons in Case #:19-cv-06517-FPG" and thereby denied Sibley access to Court without authority." (Appendix, p. 11).

Clearly, "Federal Rules of Civil Procedure, Rule 4(b) states: Issuance. On or after filing the complaint, the plaintiff may present a summons to the clerk for signature and seal. If the summons is properly completed, t**he clerk must sign, seal, and issue** it to the plaintiff for service on the defendant." (Appendix, p. 10)(Emphasis added). Here, as alleged, without any statutory, rule or judicial order authority, Loewenguth refused to issue the requested Summons to Sibley after he

had filed the Complaint.[4] Thus, as in *Snyder v. Nolen*, Judge Wolford's *sua sponte* dismissal of Sibley's claim against Loewenguth upon the doctrine of absolute judicial immunity was improper for at best, Lowenguth only had a defense of qualified immunity.

B. WOLFE BREACHED HER DUTY BY DISMISSING SIBLEY'S PETITION FOR WRITS OF *PROCEDENDUM AD JUSTICIUM* AND *MANDAMUS*

At ¶37 of the Complaint, Sibley alleged: "Second Circuit Local Rule 24.1 Motion for *In Pauperis* Status and Related Relief states: A motion for **leave to appeal** *in forma pauperis*, for appointment of counsel, or for a transcript at public expense must include (1) the affidavit prescribed by FRAP 24(a)(1) . . .". (Appendix, p. 11)(Emphasis added). Upon this Local Rule 24.1, Wolfe dismissed Sibley's Petition for Writs of *Procedendum Ad Justicium* and *Mandamus* claiming that Sibley had failed to submit the affidavit prescribed by FRAP 24(a)(1).

Yet as alleged in the Complaint, "Sibley was initiating an original proceeding under 28 U.S. Code §1651, known as the All Writs Act. Accordingly, as there is no form required to proceed *in forma pauperis* under the All Writs Act, . . ." (Appendix, p. 12). Again, as in *Snyder v. Nolen*, Wolfe was acting without any statutory, rule or judicial order authority permitting her dismissal of Sibley's All

[4] *See*: F.R.C.P., Rule 3: "Commencing an Action: A civil action is commenced by filing a complaint with the court."

Writs Petition. As such, absolute judicial immunity is not available to Wolfe and her defense of qualified immunity must await her Answer raising such a defense.

In sum, the allegations against Loewenguth and Wolfe cannot be characterized as "taken in the course of the performance of their official duties as clerks of their respective courts." (Appendix, p. 36). As such, Judge Wolford's *sua sponte* dismissal was improper and this matter must be reversed and remanded.

V. SIBLEY'S CLAIMS WERE NOT FRIVOLOUS

In her *sua sponte* dismissal of Sibley's compliant, Judge Wolford simply stated: "For the reasons set forth above, the Court denies Plaintiffs motion for disqualification (Dkt. 2) and *sua sponte* dismisses Plaintiffs Complaint (Dkt. 1) **with prejudice as frivolous**." (Appendix, p. 37)(Emphasis added).

Sibley's Complaint − as demonstrated herein − raised legitimate, if novel, claims upon indisputable facts and demonstrably-strong legal authorities. Yet in response Judge Wolford − intentionally deaf to any argument which might contravene her stampede to quash the existential threat Sibley's claims raises to her Article III hegemony − predictably branded Sibley's claims as "frivolous" and

invoked 28 U.S.C. §1915(a)[5] in a futile attempt to bar Sibley appellate review. Such branding as "frivolous" by Judge Wolford of Sibley's Complaint is a *de facto* sanctioning of Sibley that this Court must firmly rebuke.

"When deciding whether to impose Rule 11 sanctions, a court must be careful not to chill creative advocacy. **Therefore, advocating a new or novel legal theory should not normally result in sanctions, especially if the advocate has an objective glimmer of a chance of prevailing on the issue**. Courts are particularly reluctant to impose sanctions against an attorney for an argument made under a statute that has yet to be interpreted or when the area of law is unsettled." *Kosnoski v. Howley*, 33 F.3d 376(4th Cir. 1992)(Citations omitted). Hence, for this Court to refuse to remove the "frivolous" tag on Sibley's Complaint would "stifle the enthusiasm or chill the creativity that is the very lifeblood of the law." *Eastway Constr. Corp. v. City of New York*, 762 F.2d 243, 254 (2nd Cir. 1985).

As to Sibley's *Bivens* claims against Geraci, Lowenguth and Wolfe, Judge Wolford found nothing frivolous in the claims, only that her inflated definition of the defense found in the judicially-created doctrine of Absolute Judicial Immunity

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[5] Of course, the invocation of 28 U.S.C. §1915(a)(3) by Judge Wolford demonstrates not only her rabid bias against Sibley as he was not proceeding *in forma pauperis* below, but is also toothless: "We conclude, as did the Sixth Circuit, that the amendment of [FRAP] Rule 24 in 1998 has trumped, at least for now, the effect of the conflicting statutory provision in §1915(a)(3)." *Rolland v. Primesource Staffing, L.L.C.*, 497 F.3d 1077 (10th Cir. 2007).

barred Sibley's *Bivens* claims. As demonstrate *supra*, such a holding is suspect at best and in all events Sibley's *Bivens* claims were anything but "frivolous".

In regards to Sibley's claim seeking forfeiture of Geraci's judicial office, the law is clearly unsettled thus precluding a finding that Sibley's claim was "frivolous".

Citing a U.S. District Court case, *Smith v. Scalia*, 44 F. Supp. 3d 28, 43 (D.D.C. 2014), *affd*, No. 14-5 180, 2015 WL 13710107 (D.C. Cir. Jan. 14, 2015), Judge Wolford held: "Plaintiff asks the Court to remove Judge Geraci from his office, a power constitutionally reserved to Congress." (Appendix, p. 32). Such a holding is untenable upon scholarly analysis and is certainly not "frivolous".

Indeed, as demonstrated below, Judge Wolford's ruling defies logic, textual analysis and sound public policy which singular and collectively require the conclusion that the Congressional impeachment power under Article II, §4 is a concurrent, not an exclusive, power of removal of federal judicial actors. Moreover, Sibley's first-impression argument − that a judicial proceeding to remove "misbehaving" judges is reserved to the People through action of the Ninth and/or Ten Amendments − is supported by three distinct generations of renowned legal scholars.[6]

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[6] *See*: *Federal Judges-appointment, Supervision, And Removal-some Possibilities Under The Constitution*, By Burke Shartel, 28 Mich. L. Rev. 870 (1929-1930)("If the framers of the constitution really intended to grant to the houses of congress the exclusive power to remove civil officer of the United States, why did they not use language appropriate to that end?"); *Impeachment of Judges and Good Behavior" Tenure,* by Raoul Berger, The Yale Law Journal, Volume 79, Number 8, (July 1970)("I propose to demonstrate [that as] impeachment for "high crimes and misdemeanors" did not embrace removal for "misbehavior" which fell short of "high crimes and misdemeanors" some other means of removal must be available, **unless we attribute to the Framers the Dickensian design of maintaining a "misbehaving" judge in office**.") and *How To Remove a Federal Judge*, by Saikrishna Prakash And Steven D. Smith, 116 Yale L.J. 72 (October, 2006)("Put another way, if good behavior can be determined only via impeachment, some misbehaving judges will not be removable because their misbehavior will not also amount to Treason, Bribery, or other high Crimes and Misdemeanors. In sum, the standard conflation of the Constitution's good-behavior and impeachment provisions, far from being required or even authorized by the text, actually seems **quite contrary to the Constitution's text**.")(Emphasis added).

Article III Judges serve upon an expressly stated condition-subsequent: continued "good behavior" or, stated another way for convenience, lack of "misbehavior". As expressly recognized by those who have seriously considered the issue while "Treason, Bribery, or other high Crimes and Misdemeanors" are necessarily "misbehavior", **not** all "misbehavior" rises to the settled legal terms-of-art of "Treason, Bribery, or other high Crimes and Misdemeanors".

Hence, Congress was never granted the authority to remove Article III justices for "misbehavior" as Congress is limited to impeachment only upon a finding of "Treason, Bribery, or other high Crimes and Misdemeanors". As such, Judge Wolford's *conflation* of "good behavior" and "impeachment" is both unwarranted and insalubrious.

The Constitutional Framers well knew the import of using the phrase "good behavior" in Article III, §1. "Good behavior tenure existed in England as regards many officers for centuries prior to the adoption of our Constitution. The conditions to which this tenure was subject had been considered in a long line of decisions. It was recognized that one might forfeit an office held during good behavior by misconduct in office, **neglect of duties**, the acceptance of incompatible office. . .". *Shartel*, p. 88, (Emphasis added).

Indeed, it was the common law practice in England to allow private citizens to sue for forfeiture of a judge's office. "In England, the Crown was obligated

(presumably by custom) to lend its sanction to forfeiture cases when a private citizen complained of misbehavior." 4 Matthew Bacon, *A New Abridgment of the Law*, 416 (London, Worrall 3rd Ed. 1768). Additionally, "[T]here in no lack of precedent for the proposition that courts can exercise jurisdiction to declare judicial and other offices forfeit for misconduct or neglect of duty." *Shartel*, p. 83. Plainly, "There is an extensive body of evidence, stretching from England to the colonies to independent America, indicating that good-behaviour tenure was understood to **terminate upon a judicial finding of misbehavior.** . . . Most importantly for our purposes, **all agreed that misbehavior could be determined only by a judicial process**." *Prakash and Smith*, p. 107-108 (Emphasis added).

Last, as recognized by Berger, "English law provided a proceeding to forfeit the office by a writ of *scire facias*. An act 'contrary to what belongs to his office' resulted in forfeiture of the office as appears in the *Abridgments of Viner and Bacon* and in the *Digest of Cromyns*, which faithfully reflect the cases." *Berger*, p. 132.[7]

The Supreme Court has held that the jurisdiction of the "inferior courts" is set by Congress. *Accord*: *Keene Corp. v. United States*, 508 U.S. 200, 207

[7] While Rule 81(b) of the Federal Rules of Civil Procedure abolished the writ of *scire facias*, the relief it sought is still available under Rule 81(b) and hence the proceeding below was specifically authorized by the Federal Rules of Civil Procedure.

(1993)("Congress has the constitutional authority to define the jurisdiction of the lower federal courts. . ."). To that end, Congress has vested jurisdiction for the suit below in the District Court at 28 U.S.C. §1331 stating: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." Sibley maintained that his forfeiture-of-office claim against Geraci "arises under the Constitution [and] laws . . . of the United States", to wit, the "good behavior" requirement of Article III, §1.

By allowing misbehaving judges to remain in office out of the reach of Congress "grants away" and improperly creates an "incident" power which violates the very "public trust" resident in Article III judges. *Accord*: *Stone v. Mississippi*, 101 U.S. 814, 820 (1880).

Hence, there must be, to carry the law into execution if "good behavior" is not to be an impotent formula, some judicial means[8] of forfeiting the offices of Article III judges for misbehavior. Stated another way, there must be a means of termination for misbehavior. *Accord*: *Jarrolt v. Moberly*, 103 U.S. 580, 586 (1880)("A constitutional provision should not be construed so as to defeat its evident purpose, but rather so as to give it effective operation. . .").

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[8] The doctrine of separation of powers would prohibit the Legislative branch (limited by Article II, §4 solely to impeachment for "Treason, Bribery, or other high Crimes and Misdemeanors") or the Executive Branch from removing misbehaving judges.

That "means" is a judicial proceeding before a jury with all the incidents of a civil trial.[9] While this argument, though put repeatedly forward by important spectators to the legal process, is novel in an actual judicial proceeding that does not make it wrong. Clearly, the Copernican view of the universe was ultimately adopted even after millennia of astronomers believed in Ptolemaic spheres. *Compare: Plessy v. Ferguson* with *Brown vs. Board of Education.* Tradition must yield to reason.

In sum, the Article III judicial power cannot be extended by the judicially-created doctrine of Judicial Immunity – as Judge Wolford had done here – to erase the supreme organic law found at Article III, §1 which requires "good behavior".

VI. JUDGE WOLFORD FORGOT – OR INTENTIONALLY IGNORED – SIBLEY'S FIFTH CLAIM

Sibley in his Fifth Claim sought a declaratory decree that: "the Defendants' usage of the present laws, customs, practices and policies regarding *in forma*

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[9] *Accord*: Menchem, *Public Officers*, §495; *Ex parte Wood and Brundage*, 22 U. S. (9 Wheat. 603)(1824)("[T]he process to be awarded is in the nature of a *scire facias* at common law to the patentee to show cause why the patent should not repealed, with costs of suit, and upon the return of such process, duly served, the judge is to proceed to stay the cause upon the pleadings filed by the parties and the issue joined thereon. I**f the issue be an issue of fact, the trial thereof is to be by a jury**.)(Emphasis added).

pauperis applications violates the United States Constitution." (Appendix, p. 13). A more troubling accusation against a court of law is hard to imagine.

In response to Sibley's Motion for Reconsideration regarding her ignoring Sibley's Fifth claim, Judge Wolford held: "Plaintiff seeks a declaratory judgment that Defendants' actions regarding his previously filed *in forma pauperis* motions violated his constitutional rights − notably, Plaintiff does not allege that he has any pending *in forma pauperis* motions. Accordingly, Plaintiff's request for declaratory relief falls within the scope of Defendants' absolute judicial immunity."[10] (Appendix, p. 45).

Judge Wolford is both wrong and intellectually dishonest. First, clearly, judicial immunity does not extend to suits for declaratory relief, at least in this Circuit. *See*: *Heimbach v. Village of Lyons*, 597 F.2d 344, 347 (2nd Cir. 1979)("The justice is not immune, however, from suit for injunctive relief and, accordingly, should not be dismissed from this action."). Moreover, Judge Wolford's attempt to characterize Sibley's Fifth Claim as solely related to "his previously filed i*n forma pauperis* motions" misrepresents Sibley's claim that the Defendants' usage of the "present laws, customs, practices and policies regarding *in forma pauperis* **applications** violates the United States Constitution." Sibley was not only challenging the Defendants' "practices and policies" regarding his

[10] This Court is asked to take judicial notice that Sibley's *in forma pauperis* motion was never decided by Geraci in Case #:19-cv-06517.

own *in forma pauperis* application, but those of all other similarly situated litigants in the Western District of New York.

As such, even had this Court addressed Sibley's Fifth Claim, judicial immunity would not have been a bar to the action. Accordingly, Sibley's Fifth Claim is due to be revived by this Court and Sibley heard upon its merits.

CONCLUSION

WHEREFORE, Sibley respectfully requests:

- That this Court take jurisdiction of this matter;
- That the **June 3, 2020** and **October 13, 2020**, Decisions and Judgments of the District Court should be vacated and reversed, and the case should be remanded for further proceedings;
- That Sibley's Motion to Disqualify should be granted and a non-Western District of New York judge be appointed to hear this matter;
- That given the delay caused by Judge Wolford's improvident rulings, that this matter hereafter be taken up upon an expedited basis; and
- For such other and further relief that the Court deems just and equitable.

Date: October ___, 2020

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CERTIFICATE OF COMPLIANCE

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By: _____
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