No. 19-

IN THE

Supreme Court of the United States

JUDGE H. STEPHENS WINTERS, JUDGE CARL V. SHARP, JUDGE BENJAMIN JONES, JUDGE J. WILSON RAMBO, AND JUDGE FREDERIC C. AMMAN,

Petitioners,

v.

STANLEY R. PALOWSKY, III, INDIVIDUALLY AND ON BEHALF OF ALTERNATIVE ENVIRONMENTAL SOLUTIONS, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. This Court is the final arbiter of the content of federal law. Louisiana has adopted the federal law of judicial immunity as its own state law and views decisions of this Court as authoritative. Does this Court have jurisdiction under 28 U.S.C. § 1257(a) to review a decision of the Louisiana Supreme Court applying the substance of federal law to determine whether state court judges are entitled to judicial immunity?

2. In *Forrester v. White*, 484 U.S. 219 (1988), this Court held that judicial immunity does not apply where a judge performs an administrative function. Appellate (and trial) courts have consistently held that this exception does not apply to acts performed in connection with pending cases. Here, a litigant alleges that he was disadvantaged in his pending case because the defendant judges aided or concealed a law clerk's destruction of court records. Does judicial immunity apply?

RULE 14(b) STATEMENT

The parties in the Louisiana Supreme Court were: Judge H. Stephens Winters, Judge Carl V. Sharp, Judge Benjamin Jones, Judge J. Wilson Rambo, Judge Frederic C. Amman, and Allyson Campbell, as respondents, and Stanley R. Palowsky, III, individually and on behalf of Alternative Environmental Solutions, Inc., as applicant-plaintiff.

The following is a list of all directly related proceedings:

- *Palowsky v. Campbell*, Nos. 2018-C-1105, 2018-C-1115 (La.) (opinion issued and judgment entered June 26, 2019; application for rehearing denied Sept. 6, 2019).

- *Palowsky v. Campbell*, No. 2016 CA 1221 (La. Ct. App.) (opinion issued and judgment entered Apr. 11, 2018; application for rehearing denied June 4, 2018).

- *Palowsky v. Campbell*, No. 2015-2179 (La. Fourth Judicial District Court, Ouachita Parish) (judgment issued Dec. 11, 2015).

There are no additional proceedings in any court that are directly related to this case.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Judge H. Stephens Winters, Judge Carl V. Sharp, Judge Benjamin Jones, Judge J. Wilson Rambo, and Judge Frederic C. Amman of the Fourth Judicial District of Louisiana (the "Judges") respectfully submit this petition for a writ of certiorari to review the judgment of the Louisiana Supreme Court.

OPINIONS BELOW

The decision of the Louisiana Supreme Court has not yet been published in the regional reporter, but is reported at 2019 WL 2896746 and is reproduced at App. 1a-31a. The decision of the Court of Appeal is reported at 249 So. 3d 945 (La. Ct. App. 2018) and is reproduced at App. 32a-99a. The transcript of the oral decision of the district court is reproduced at App. 100a-09a.

JURISDICTION

The Louisiana Supreme Court entered its judgment on June 26, 2019 (App. 1a-31a) and denied the Judges' timely application for rehearing on September 6, 2019 (App. 110a-11a). By Order dated November 26, 2019, Justice Alito granted the Judges' timely application for an extension of time to file this petition to February 3, 2020. The Judges contend that this Court has jurisdiction pursuant to 28 U.S.C. § 1257(a) to review the final decision of the Louisiana Supreme Court. Issue 1 of this petition addresses the jurisdictional issue.

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

Article III, § 2 of the United States Constitution provides in relevant part: "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority . . . ." U.S. Const. art. III, § 2.

28 U.S.C § 1257(a) provides:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

28 U.S.C. § 1331 provides: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

STATEMENT OF THE CASE

1. Plaintiff Stanley R. Palowsky, III ("Palowsky"), individually and on behalf of Alternative Environmental Solutions, Inc., initially brought suit against Allyson Campbell, a law clerk in Louisiana's Fourth Judicial District. App. 33a-34a. Later, by way of a First Supplemental, Amended, and Restated Petition for Damages (the "Amended Petition"), Palowsky added the Judges as defendants. *Id.*

The Amended Petition alleges that Palowsky was a party to a case styled *Palowsky v. Cork*, Docket No. 13-2059 (the "*Cork* case"), pending in the Fourth Judicial District. App. 73a. In the *Cork* case, Palowsky asserted claims against W. Brandon Cork, who was a 50% partner with Palowsky in Alternative Environmental Solutions, Inc. *Id.* Palowsky alleges that for many years Campbell has engaged in a practice of destroying and concealing documents filed in cases pending in the Fourth Judicial District. App. 69a-72a. He further alleges that the Judges aided or concealed Campbell's misconduct. *Id.*

According to Palowsky, he became "the most recent victim of Defendant Campbell's malicious and intentional destruction of documents and Defendant Judges' cover up of same." App. 73a. In particular, Palowsky alleged that Campbell destroyed, withheld, or concealed multiple court documents filed in the *Cork* case, all with the goal of injuring Palowsky in the litigation by giving his litigation opponent an unfair advantage. App. 74a-77a. He alleges that the Judges condoned and covered up Campbell's actions.[1] App. 77a, 82a, 86a-87a.

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1. Palowsky also alleged that Campbell engaged in a payroll fraud scheme, which the Judges allegedly tolerated and concealed.

Palowsky asserted claims against Campbell and the Judges for violation of his "constitutional rights to due process of law and access to courts . . . . " App. 88a. He expressly did not seek relief under any federal law. App. 89a. Finally, anticipating the defense of judicial immunity, the Amended Petition alleged that the Judges "were acting in an administrative capacity when they committed the acts and/or omissions set forth herein . . . ." App. 63a.

2. The Judges filed an exception of no cause of action to the Amended Petition, which is the state procedural equivalent of a motion to dismiss in federal court, asserting that they were entitled to judicial immunity.[2]

At the hearing on the exception, counsel for Palowsky argued that this Court's decision in *Forrester v. White*, 484 U.S. 219 (1988), mandated denial of the exception because the Judges were performing an administrative, rather than a judicial, function when they took the actions at issue.

In an oral decision, the trial court held that the administrative function exception to judicial immunity

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App. 64a-68a. The trial court held that Palowsky lacked standing to assert any claim based on alleged wrongful conduct other than as to the *Cork* case, and the Court of Appeal affirmed. App. 21a-23a. That ruling was not at issue in the Louisiana Supreme Court. As a result, the only issue presented here is whether the judicial immunity defense applies to Palowsky's claim against the Judges based on the alleged destruction and concealment of court documents in the *Cork* case.

2. The Judges also filed a motion to strike certain allegations of the Amended Petition as impertinent and scandalous. App. 1a-2a. That motion is not at issue here.

did not apply. Citing *Malina v. Gonzales*, 994 F.2d 510 (5th Cir. 1993), the trial court relied on the four-factor test developed by the Fifth Circuit under federal law for determining whether a judge's actions are judicial in nature. Those factors are: (1) whether the precise act complained of is a normal judicial function; (2) whether the acts occurred in the courtroom or appropriate adjunct spaces such as a judge's chambers; (3) whether the controversy centered around a case pending before the court; and (4) whether the acts arose directly out of a visit to the judge in his official capacity. App. 104a. Based on an analysis of those factors, the trial court held that the Judges were entitled to absolute judicial immunity. App. 105a. The trial court also held that Campbell was entitled to judicial immunity. App. 106a-109a.

3. On appeal, the Court of Appeal noted that Louisiana's "jurisprudence on judicial immunity mirrors the federal doctrine." App. 50a. The Court of Appeal discussed in detail this Court's judicial immunity decisions, including the distinction between judicial and administrative functions addressed in *Forrester*. App. 45a-50a.

Turning to the specifics of the Amended Petition, the Court of Appeal concluded that "[t]he allegations against the judges amount to a failure to properly supervise Ms. Campbell in the handling of cases before the court and the failure to reveal her actions once discovered." App. 57a. It then held that judicial immunity applied because "[l]ooking at the nature and function of the actions of the Judges, and not the acts themselves, the Judges' actions encompass the supervision of and working with a law clerk on cases before them." *Id.*

The Court of Appeal also held, however, that the law clerk, Campbell, was not entitled to judicial immunity. App. 55a-56a. Two judges dissented as to the denial of judicial immunity for Campbell. App. 92a-95a. A third judge dissented as to the holding that the Judges were entitled to judicial immunity. App. 96a-99a.

4. On discretionary review, the Louisiana Supreme Court reversed the Court of Appeal's judgment insofar as it dismissed Palowsky's claims against the Judges. Applying this Court's decision in *Forrester,* the majority per curiam opinion reasoned that Palowsky's allegations regarding the Judges' supervision and investigation of the law clerk's activities arose within the context of the Judges' administrative capacity, and not within their judicial or adjudicative capacities. App. 2a-3a.

Of the five Louisiana Supreme Court justices who wrote separate opinions, three dissented on the issue of judicial immunity. Chief Justice Bernette Johnson stated that the allegations against the Judges are "properly classified as acts done in their judicial capacities." App. 4a. Justices Greg Guidry and Scott Crichton concluded that the Judges' actions were taken in their judicial capacities because the actions related to the *Cork* case that was pending in the court. App. 22a-23a, 25a-26a. In addition, Justice Crichton underscored the conflict he perceived between the majority's holding and longstanding principles of judicial immunity, including those established by this Court. App. 25a. In denying rehearing, the Louisiana Supreme Court was similarly divided 4-3. App. 110a-11a.

Although the Louisiana Supreme Court was sharply divided as to whether judicial immunity applies to

the Judges' alleged actions, the opinions treated this Court's decisions as to the scope of judicial immunity as authoritative. App. 1a-31a.

REASONS FOR GRANTING THE PETITION

This case presents two distinct issues, each of which merits review. First, this Court has never "constitutionalized" judicial immunity, meaning that the Court has never held that due process requires the states to provide for judicial immunity of state judges from state law claims asserted against them. However, Louisiana and many other states have not only adopted judicial immunity as state law but also held that state law mirrors and incorporates the federal law of judicial immunity. Accordingly, Louisiana, and many other states, treat this Court's decisions regarding the scope and content of the federal law of judicial immunity as authoritative as to state law claims against judges. This case presents an important issue of first impression: whether this Court has jurisdiction to review state court decisions applying federal law as the voluntarily adopted law of the state.

Second, this Court has repeatedly recognized the importance of judicial immunity to the integrity and independence of the administration of justice. In *Forrester*, 484 U.S. 219 (1988), this Court adopted a functional approach to determining when a judge is acting in a judicial capacity, and so entitled to judicial immunity, and when a judge is acting in an administrative capacity, and so not entitled to judicial immunity. The developing law in lower courts has consistently held that judicial immunity applies to acts taken in connection with a pending case.

The decision of the Louisiana Supreme Court conflicts with these decisions by finding immunity inapplicable to the Judges' actions in the handling of cases pending before them. If left undisturbed, the Louisiana Supreme Court decision will create confusion in the law and undermine the goals of judicial immunity by calling into question what has been the developing bright line rule that judges are absolutely immune from liability for acts taken in connection with pending cases, so long as those acts are not clearly outside the judge's jurisdiction.

I. This case presents an important issue of first impression and is an ideal vehicle for this Court to confirm that it has jurisdiction to review state court decisions voluntarily adopting and applying federal law as state law.

A. This case presents an important issue of first impression regarding the scope of this Court's jurisdiction.

This Court has never determined whether it has jurisdiction to review a state court decision voluntarily adopting and applying federal law as state law. Indeed, as one commentator noted:

> In a wide variety of settings, state courts may adopt federal rules of decision voluntarily, even though they would be free to apply independent standards of state law. There is very little useful definition of the Supreme Court's jurisdiction to review state [court] judgments that in fact have been determined by voluntarily incorporated federal rules.

16B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 4031 (3d ed. 1998 & Supp. 2019). The Constitution extends the judicial power of the United States to cases "arising under the Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . ." U.S. Const. art. III, § 2. This Court's decision in *Osborn v. Bank of the United States*, 22 U.S. 738 (1824), established that this Article III judicial power sweeps extremely broadly to include any federal issue raised by a case.

At the same time, this Court has construed the statute giving the federal courts original jurisdiction over cases "arising under" federal law, 28 U.S.C. § 1331, much more narrowly, notwithstanding their use of the same "arising under" language. Thus, this Court has unanimously stated:

> Although the language of § 1331 parallels that of the "arising under" clause of Article III, this Court never has held that statutory "arising under" jurisdiction is identical to Article III "arising under" jurisdiction. Quite the contrary is true. . . . Article III "arising under" jurisdiction is broader than federal question jurisdiction under § 1331, and the Court of Appeals' heavy reliance on decisions construing that statute was misplaced.

Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 494–95 (1983). For various reasons, including this dichotomy between the broad scope of "arising under" jurisdiction under the Constitution versus the more limited scope of the federal courts' original jurisdiction,

state courts often decide issues of federal constitutional and statutory law. There has never been any doubt that this Court has jurisdiction to review those state court decisions regarding federal law issues, extending to the full extent of the Court's Constitutional "arising under" jurisdiction.

This case presents an issue that this Court has never decided, namely whether this Court has jurisdiction to review the decision of a state court where the state court has voluntarily adopted federal law as the rule of decision. The issue is an important one, as state courts often adopt federal law, including as to the critically important issue of the scope of judicial immunity. Absent the availability of review by this Court, state court decisions applying the substance of federal law could defeat the goals of uniformity and consistency and generate confusion in the law.

B. This Court should confirm that it has the power to review state court decisions applying federal law as voluntarily adopted state law.

Decisions regarding the Federal Safety Appliance Act, 49 U.S.C. § 20301 (2018) (the "FSAA"), provide a useful analogy regarding the scope of this Court's power to review state court decisions to that presented here. The FSAA does not include any express private right of action, and the federal courts have not found there to be an implied private right of action. Several states have held, however, that state law provides a remedy for violation of the federal statute. This Court has permitted the states to do so and has recognized in that regard that the states have flexibility to define the elements and nature of the

claim and defenses, such as whether to recognize a defense of contributory negligence or last clear chance. *See, e.g.*, *Crane v. Cedar Rapids & Iowa City Ry. Co.*, 395 U.S. 164 (1969); *Tipton v. Atchison, Topeka & Santa Fe Ry. Co.*, 298 U.S. 141 (1936); *Fairport, Painesville & Eastern R.R. Co. v. Meredith*, 292 U.S. 589 (1934); *Gilvary v. Cuyahoga Valley Ry. Co.*, 292 U.S. 57 (1934).

At the same time, however, this Court has jurisdiction to review state court determinations regarding the proper meaning of the Act. *St. Louis, Iron Mountain & S. Ry. Co. v. Taylor*, 210 U.S. 281 (1908). The rationale behind this rule is obvious: "in no other manner can a uniform construction of the statute laws of the United States be secured, so that they shall have the same meaning and effect in all the States of the Union." 210 U.S. at 293; *see also Moore v. Chesapeake & Ohio Ry. Co.*, 291 U.S. 205, 214–15 (1934) (stating that, although district courts lack § 1331 jurisdiction to review state law claims resting on the FSAA, the Supreme Court has jurisdiction to review such claims).

This Court's decision in *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804 (1986), confirms that Supreme Court jurisdiction extends to state law cases that incorporate federal law. In *Thompson*, consumers brought various state law claims in state court alleging that their use of certain drugs caused birth defects. Plaintiffs alleged, among other things, that the manufacturer violated the labeling requirements of the Federal Food, Drug and Cosmetic Act, and that the violation created a "rebuttable presumption of negligence" and was a proximate cause of the injuries suffered by the infants. 478 U.S. at 806. Although the parties agreed that federal law

does not provide a private cause of action for violation of that Act, the defendant removed the case to federal court on the theory that the question of federal law embedded within the state cause of action gave rise to federal question jurisdiction. *Id.* at 806.

This Court held that the mere presence of an embedded federal law question within a state law cause of action, on the specific facts of the case, was insufficient to support a determination that the claim arose under federal law for purposes of federal question jurisdiction under 28 U.S.C. § 1331. *Id.* at 813. Accordingly, the Court affirmed the decision below that the case must be remanded to state court. *Id.* at 817.

In doing so, however, this Court emphasized that the limit on the original jurisdiction of federal district courts did not negate this Court's power to exercise *its* jurisdiction to assure uniform interpretation of federal law. The Court stated: "Petitioner's concern about the uniformity of interpretation, moreover, is considerably mitigated by the fact that, even if there is no original district court jurisdiction for these kinds of action[s], this Court retains [the] power to review the decision of a federal issue in a state cause of action." *Id.* at 816; *see also Moore*, 291 U.S. at 214 ("Questions arising in actions in state courts to recover for injuries sustained by employees in intrastate commerce and relating to the scope or construction of the Federal Safety Appliance Acts are, of course, federal questions which may appropriately be reviewed [by] this Court.") (citing *Louisville & Nashville R.R. Co. v. Layton*, 243 U.S. 617, 619 (1917), *St. Louis, Iron Mountain & S. Ry. Co.*, 210 U.S. at 287.

The same reasoning underlying these decisions supports this Court's jurisdiction to review a state court decision adopting and applying federal law of judicial immunity as state law. Federal district courts do not have jurisdiction to hear a case merely because the defendant asserts a defense of judicial immunity. Cases asserting only state law claims must be heard in state court, even if the defendant asserts a judicial immunity defense as to which the state courts have adopted federal law. But this Court has the power to review a state court decision as to the embedded issue of federal law.

Recognizing this Court's jurisdiction over state court decisions involving the application of federal law regarding judicial immunity is essential to protecting the uniform development of the immunity doctrine, which goes to the very core of the independence of the judiciary. As discussed in Section II below, a decision giving an unduly narrow interpretation to the doctrine undermines the critical goals it serves. On the other hand, an overly expansive reading of the doctrine can immunize judicial officials from liability for non-judicial acts or other conduct clearly outside their jurisdiction for which they properly are subject to liability. Erroneous decisions regarding the scope of judicial immunity serve as precedents that can lead other courts astray and create confusion in the law. That is especially so when the erroneous decisions come from a high-level appellate court, such as the Louisiana Supreme Court.

This Court's many decisions defining the scope of the federal law of judicial immunity reflect the importance of the doctrine, the need for careful definition of its scope, and the necessity of uniformity of the law. *E.g.*,

Forrester, 484 U.S. 219 (1988) (adopting a functional approach to determining the scope of judicial immunity and distinguishing between judicial and administrative functions); *Mireles v. Waco*, 502 U.S. 9 (1991) (judicial immunity applied to judge who allegedly ordered police to use excessive force in bringing an attorney to the judge's courtroom); *Pulliam v. Allen*, 466 U.S. 522 (1984) (judicial immunity does not bar equitable relief)[3]; *Stump v. Sparkman*, 435 U.S. 349 (1978) (holding that immunity applies to "judicial acts" that do not fall clearly outside the judge's subject matter jurisdiction); *Pierson v. Ray*, 386 U.S. 547 (1967) (holding that judges acting within their jurisdiction are immune from liability under the civil rights statutes even if the actions violated the plaintiff's federal statutory or constitutional rights); *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335–36 (1871) (adopting the common law rule of absolute judicial immunity for judges seated in all courts of general jurisdiction and distinguishing between judicial acts committed "in excess of [a judge's] jurisdiction" and those committed in "clear absence of all jurisdiction").

Decisions of state courts as to the scope of judicial immunity under federal law must be subject to review for the same reasons that other decisions of state courts

3. The result in *Pulliam* was substantially changed by the Federal Court Improvements Act of 1996, § 309. That Act amended 42 U.S.C. § 1983 to preclude injunctive relief against a judicial officer unless a declaratory decree is violated or declaratory relief is unavailable and precludes awards of attorneys' fees and costs against judges for acts taken in their judicial capacity, unless the conduct is "clearly in excess" of the judge's jurisdiction. Federal Court Improvements Act of 1996, Pub. L. No. 104-317, § 309, 110 Stat. 3847, 3853.

regarding federal law issues are subject to review. The importance of judicial immunity, combined with the need for clear rules and uniformity, demand that this Court have the power to review decisions of state courts that have adopted federal law as the controlling state law for decision. If a state decision unambiguously treats federal case law as merely persuasive, but not authoritative, then there is no need for this Court to review state decisions regarding judicial immunity, as such decisions do not create confusion in federal law or risk misleading other courts regarding the scope of federal law.

On the other hand, when state courts voluntarily adopt federal law as the law of the state, or treat federal and state law as identical, then review by this Court of those decisions must be available. Otherwise, state courts will have the power to issue decisions purporting to decide the content of federal law with no power in this Court to correct any errors. Permitting such a system would be a recipe for widespread confusion and inconsistency as to the content of federal law.

Here, Louisiana has determined that its state law of judicial immunity mirrors that of the federal law of judicial immunity. The opinions in the Louisiana Supreme Court decision below accordingly treated this Court's decisions as authoritative and controlling, as did the lower state courts. Most notably, the Louisiana Supreme Court interpreted and based its decision on the meaning of this Court's decision in *Forrester* regarding which functions are judicial and which are administrative. And, as discussed below, it did so in a way that departs from and conflicts with the decisions of other appellate (and trial) courts.

Louisiana is far from alone in treating decisions of this Court on the scope of judicial immunity as authoritative and binding. Indeed, without being comprehensive, each of the following state court decisions applying the judicial immunity doctrine has relied on this Court's decision in *Forrester*, with many treating it as controlling: *City of Bayou La Batre v. Robinson*, 785 So. 2d 1128, 1132 (Ala. 2000) (quoting *Mireles*, 502 U.S. at 11, 12); *Lythgoe v. Guinn*, 884 P.2d 1085, 1086–87 (Alaska 1994); *Howard v. Drapkin*, 271 Cal. Rptr. 893, 907 (Cal. Ct. App. 1990) ("It is the *function* of adjudication of an issue, the decision[-]making function, which requires and is the basis for judicial immunity. The decision of the United States Supreme Court in [*Forrester*] is controlling on that point[.]"); *Churchill v. Univ. of Colo. at Boulder*, 285 P.3d 986, 1001–02 (Colo. 2012); *Anonymous v. Conn. Bar Examining Comm.*, CV94-0534160-S, 1995 WL 506660, at *2–4 (Conn. Aug. 17, 1995); *District of Columbia v. Pizzulli*, 917 A.2d 620, 627–28 (D.C. 2007); *Withers v. Schroeder*, 819 S.E.2d 394, 396–98 (Ga. 2018); *Thornton v. Pietrzak*, 102 N.E.3d 1139, 1143–44 (Ind. Ct. App. 2019) ("In determining whether a person is entitled to the benefit of judicial immunity, we use the functional approach established by the United States Supreme Court and look to the nature of the function performed, not the identity of the person who performed it.") (quoting *D.L. v. Huck*, 978 N.E.2d 429, 433 (Ind. Ct. App. 2012)); *Jarvis v. Drake*, 830 P.2d 23, 25–27 (Kan. 1992); *Yanero v. Davis*, 65 S.W.3d 510, 518–19 (Ky. 2001); *Keller-Bee v. State*, 138 A.3d 1253, 1257, 1258 (Md. 2016) ("[T]he State relies on the settled proposition that it is 'the nature of the function performed, not the identity of the actor who performed it,' that drives the immunity analysis.") (quoting *Forrester*, 484 U.S. at 229) (emphasis omitted); *Cotton v. Banks*, 872

N.W.2d 1, 9–13 (Mich. Ct. App. 2015); *Clark v. Dussault*, 878 P.2d 479, 492–93 (Mont. 1994) ("Accordingly, the functional approach to absolute immunity questions is firmly rooted in the cases decided by the U.S. Supreme Court and, in my view, is binding precedent on this Court."); *Billups v. Scott*, 571 N.W.2d 603, 605 (Neb. 1997); *Harrison v. Roitman*, 362 P.3d 1138, 1140 (Nev. 2015); *Moore v. Cleveland*, No. 100069, 2014 WL 1327910, at *3 (Ohio Ct. App. Apr. 3, 2014); *Allen v. Zigler*, 41 P.3d 1060, 1061 (Okla. Civ. App. 2001); *Langella v. Cercone*, 34 A.3d 835, 838–40 (Pa. Super. Ct. 2011); *Marullo v. N.T.R. Ltd.*, No. KC 93-969, 1996 WL 937018, at *3 (R.I. Super. Ct. Dec. 4, 1996); *Hansen v. Kjellsen*, 638 N.W.2d 548, 549–50 (S.D. 2002); *Cashion v. State*, No. 01A01-9903-BC-00174, 1999 WL 722634, at *4–5 (Tenn. Ct. App. 1999); *Blue Cross Blue Shield of Tex. v. Juneau*, 114 S.W.3d 126, 132–33 (Tex. App. 2003); *Parker v. Dodgion*, 971 P.2d 496 (Utah 1998); *Taggart v. State*, 822 P.2d 243, 250–51 (Wash. 1992) (en banc); *Paige K.B. by Peterson v. Molepske*, 580 N.W.2d 289, 292 (Wis. 1998) ("Drawing from the reasoning of the United States Supreme Court, Wisconsin courts apply a functional analysis to determine whether such absolute immunity attaches to a particular defendant: 'immunity is justified and defined by the *functions* it protects and serves, not by the person to whom it attaches.'") (quoting *Ford v. Kenosha Cty.*, 466 N.W.2d 646, 650 (Wis. 1991)).

The sheer number of state court cases across the country applying this Court's decisions regarding the scope of judicial immunity as authoritative makes apparent the need for review by this Court. The distinction here between state court decisions subject to review and those not subject to review can be readily defined similarly to the test adopted by the Court in its cases regarding independent and adequate state grounds. Thus, where a

state court unambiguously bases its decision on state law only, there is no need for review by this Court. However, where a state court decision:

> fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.

Michigan v. Long, 463 U.S. 1032, 1040–41 (1983).

This approach in no way infringes on the independence or autonomy of the states. Absent a decision by this Court that states must provide at least as broad a judicial immunity as does federal law, states are free to depart from this Court's determinations as to the scope of the immunity. However, when a state voluntarily adopts federal law as controlling, its decisions are subject to review by this Court. As Justice Scalia explained, where a state court reaches a decision because it believes that federal law requires it to do so, "review by this Court, far from *undermining* state autonomy, is the only possible way to *vindicate* it." *Kansas v. Carr*, 136 S. Ct. 633, 641 (2016).

In short, this case presents an important issue regarding the scope of this Court's jurisdiction under 28 U.S.C. § 1257(a) that has never been addressed. Unless the Court is inclined to change its decision thus far not

to constitutionalize the law of judicial immunity,[4] there is no requirement that state courts adopt the federal law of judicial immunity. However, where, as here, a state decides to adopt federal law as its own, then this Court is authorized by 28 U.S.C. § 1257(a) to review state decisions as to the scope, content, and meaning of that federal law.

II. The decision below raises important questions regarding the scope of the administrative function exception to judicial immunity, cannot be reconciled with this Court's precedents, and conflicts with decisions of other appellate (and trial) courts.

A. The scope and purpose of judicial immunity.

Judges have long been entitled to absolute immunity from civil liability for damages based on their judicial acts, unless taken in the clear absence of jurisdiction. The most compelling rationale for judicial immunity is that it is essential to the independence of the judiciary. As this Court has explained, "it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequence to himself." *Mireles*, 502 U.S. at 10.

Precisely because the purpose of immunity is to protect judges from having to defend their judicial acts,

4. This case would provide an appropriate vehicle for consideration of whether to constitutionalize the law of judicial immunity were the Court inclined to do so, since the decision below cannot be reconciled with the principles of judicial immunity articulated by this Court.

the immunity from civil liability extends even to allegedly malicious or dishonest acts. This principle "is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences." *Pierson v. Ray*, 386 U.S. 547, 554 (1967) (quoting *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347 (1871)).

In *Forrester v. White*, 484 U.S. 219 (1988), this Court addressed the distinction between acts performed by a judge in the judge's judicial capacity and non-judicial acts performed by a person who happens to be a judge. The Court explained that "immunity is justified and defined by the *functions* it protects and serves, not by the person to whom it attaches." 484 U.S. at 227. Applying this test, the Court held that the defendant judge was performing an administrative function when he demoted and discharged a probation officer. *Id.* at 229. The Court emphasized that the acts in question, while important to the administrative functioning of the court system, were not themselves part of the adjudicative process. *Id.*

Subsequently, in *Mireles v. Waco*, 502 U.S. 9 (1991), the Court made clear that the concept of what is a "judicial act" extends broadly, including acts that go beyond deciding cases and including malicious acts that could never be proper. In that case, the Court summarily reversed a decision holding that a judge who allegedly ordered police officers to use excessive force to bring attorneys into the courtroom was not acting in his judicial capacity. 502 U.S. at 11. Citing *Stump*, 435 U.S. 349, the Court emphasized again that the inquiry is whether the function being performed is one that is normally

performed by a judge. *Id.* at 13. The "relevant inquiry is the 'nature' and 'function' of the act, not the 'act itself.'" *Id.* It likewise did not matter that the order was carried out by police officers, not the judge, because it is the nature of the function performed and not the identity of the person who performs it that controls. *Id.*

B. The decision below conflicts with decisions of this Court.

The sharply divided decision of the Louisiana Supreme Court below cannot be reconciled with this Court's decisions; it sets a dangerous precedent that unduly narrows the concept of what constitutes a judicial act. As Justice Guidry explained in his dissenting opinion:

> The majority's determination that the law clerk's actions in a case assigned to the law clerk's judge are "administrative" ignores the broad scope of judicial immunity and creates a slippery slope by which courts will have to parse every action or inaction in the cases assigned to them to determine whether such action (or inaction) is judicial, administrative, or something else.

App. 22a. Justice Guidry likewise recognized that the facts of this case are easily distinguishable from those in *Forrester.* App. 23a.

The decision below conflicts with *Forrester*, *Stump*, and this Court's other decisions because it erroneously focused on the particular act alleged, without recognizing that what is controlling is that that act was taken in

the performance of a judicial function. Specifically, the majority below concluded that the Judges' alleged aiding and concealing of the law clerk's alleged destruction of briefs, pleadings, and other court documents were "administrative" because they were part of the Judges' duty to supervise the law clerk. App. 2a. But this ignores that the alleged failure to "supervise" the law clerk related directly to the law clerk's actions in assisting the court in deciding a pending case. Palowsky's claim is that he was harmed by the way in which court pleadings in his pending case were handled. All of the Judges' and law clerk's alleged acts took place as part and parcel of the process of handling and deciding pending cases. Palowsky alleged that the document destruction was intended to aid some litigants and harm others in how pending cases were handled and decided, and he sought recovery because the handling of his case made him a victim. App. 76a-77a.

The alleged acts by the Judges surely would be reprehensible if the allegations were true (which is disputed). Those alleged acts took place, however, in the context of the Judges' handling of cases pending in court; the function being performed was a judicial one and judicial immunity therefore applies. Indeed, Palowsky asserts as his core claim (and the sole claim he has standing to assert) that documents filed in his case were destroyed or concealed and that the outcome of his case was prejudiced as a result. *Id.* In short, Palowsky is complaining about actions the Judges took in connection with processing and deciding his case, *i.e.*, in doing what judges do.

As noted above, the central point of judicial immunity is to protect judicial independence by preventing judges

from having to answer allegations that they acted wrongfully, no matter how egregious the alleged conduct. So long as the act was a judicial one not taken in the clear absence of jurisdiction, immunity applies. *E.g.*, *Mireles*, 502 U.S. at 11–12; *Stump*, 435 U.S. at 356–57. The decision below departs from these principles and, as Justice Crichton aptly wrote in his dissent, "risks eroding the independence of the judiciary and could adversely affect the public interest, including the paramount interest of protection of the public and the impartial administration of justice." App. 25a.

C. The decision below conflicts with decisions of other appellate (and trial) courts.

The decision below also conflicts with decisions of other appellate (and trial) courts in at least two respects. As an initial matter, other courts have recognized that judges working with law clerks in handling cases is part and parcel of the judicial process, as is a judge considering whether a law clerk did something inappropriate in working with the judge in handling a case. *E.g.*, *Little v. Hammond*, 744 F. App'x 748 (3d Cir. 2018) (judge and law clerk immune from § 1983 suit alleging conspiracy, illegal actions, and other wrongdoing relating to plaintiff's criminal and child custody proceedings); *Jackson v. Pfau*, 523 F. App'x 736 (2d Cir. 2013) (judges, law clerk, and other judicial officers immune from § 1983 suit as their actions were "judicial in nature or closely related to the judicial process"); *Jackson v. Houck*, 181 F. App'x 372 (4th Cir. 2006) (judge and law clerk were entitled to absolute judicial immunity from civil rights suit); *Bradley v. United States*, 84 F. App'x 492 (6th Cir. 2003) (judges, law clerk, and court clerk were entitled to judicial immunity in civil

rights suit alleging conspiracy to deprive plaintiff prisoner of right of access to courts, where defendants were acting "in their judicial and quasi-judicial duties"); *Mitchell v. McBryde*, 944 F. 2d 229 (5th Cir. 1991) (judge and law clerk immune from suit alleging they had maliciously conspired to set aside a default judgment the plaintiffs previously obtained); *Daniel v. Safir*, 135 F. Supp. 2d 367 (E.D.N.Y. 2001) (judge and law clerks immune from suit for acts relating to issuance of decisions in plaintiff's pending case); *Fariello v. Campbell*, 860 F. Supp. 54 (E.D.N.Y. 1994) (judge, law clerks, court clerk, and hearing examiner immune from § 1983 suit because they were performing judicial functions with respect to plaintiff's child custody and child support proceedings); *DeFerro v. Coco*, 719 F. Supp. 379 (E.D. Pa. 1989) (judges, law clerk, and court clerk were immune from civil rights suit alleging plaintiff was denied access to courts and court records).

Moreover, before the decision below, the law had been developing to the effect that there is a bright line rule that acts taken in connection with a judge's handling of a pending case are judicial in nature and that the administrative function exception to judicial immunity therefore does not apply. Thus, for example, in a case involving allegations similar to those here, the Seventh Circuit held that a judge ordering a clerk and court reporter to alter a trial transcript and record constituted a "judicial act" for which the judge was entitled to immunity. *Eades v. Sterlinske*, 810 F.2d 723, 735–26 (7th Cir. 1987) (decided pre-*Forrester* but looking to the function being performed to determine what constitutes a "judicial act").

Similarly, in *Rodriguez v. Weprin*, 116 F.3d 62, 66–67 (2d Cir. 1997), the Second Circuit applied *Forrester* in

holding that judicial immunity applied to a court clerk who allegedly denied plaintiff access to records for appeal and delayed scheduling the appeal. Other courts also consistently hold that acts taken in connection with a pending case are judicial acts. *E.g.*, *Nystedt v. Nigro*, 700 F.3d 25, 31–32 (1st Cir. 2012) (finding special master's transmittal of invoices a judicial act); *In re Castillo*, 297 F.3d 940, 952 (9th Cir. 2002) (finding bankruptcy trustee's failure to give notice a "judicial function"); *Doyle v. Camelot Care Ctrs., Inc.*, 305 F.3d 603, 622–23 (7th Cir. 2002) (finding a judicial act when ALJs failed to provide prompt administrative hearings); *Gallas v. Supreme Court of Pa.*, 211 F.3d 760, 770 (3d Cir. 2000) (finding judge's order releasing petition for protection from abuse to news organization a judicial act); *Thompson v. Duke*, 882 F.2d 1180, 1185 (7th Cir. 1989) (finding delay in scheduling a parole hearing a judicial act); *Johnson v. Kegans*, 870 F.2d 992, 997 (5th Cir. 1989) (finding judge's letter to parole board advocating for denial of parole for inmate he sentenced a judicial act); *Martinez v. Winner*, 771 F.2d. 424, 434 (10th Cir. 1985) (finding case assignment a judicial act); *Kinney v. Clerk of Cal. Court of Appeal Fourth Appellate Dist.*, No.: SACV 16-02197-CJC(KESx), 2017 WL 7735868, at *1 (C.D. Cal. Jan. 4, 2017) (finding a judicial act when judge failed to assign appellate number); *Thomas v. Wilkins*, 61 F. Supp. 3d 13, 17–19 (D.D.C. 2014) (finding judge's refusal to file documents and destruction of documents in a case before him judicial acts); *Saum v. Savage*, No. 2:13–CV–00872, 2014 WL 3105010, at *3–4 (S.D. Ohio July 7, 2014) (finding clerk of court's failure to cancel warrant a judicial act); *Perez v. Gamez*, No. 1:13–CV–01552, 2013 WL 6147935, at *7 (M.D. Penn. Nov. 22, 2013) (finding judge's failure to provide an interpreter a judicial act); *Mink v. Arizona*, No. CV09–2582 PHX DGC,

2010 WL 2690633, at *1–2 (D. Ariz. July 6, 2010) (finding suspension of driver's license and all acts leading up to suspension judicial acts); *Book v. Tobin*, No. 3:04cv442, 2005 U.S. Dist. LEXIS 17275, at *6–9 (D. Conn. Aug. 16, 2005) (finding judge's failure to endorse notice of appeal and provide transcripts to plaintiff judicial acts).

In short, before this case, the law since *Forrester* has been developing toward a consensus that there is a bright line rule that acts taken in connection with a pending case are judicial acts. The decision of the Louisiana Supreme Court in this case calls that developing consensus into serious doubt and creates confusion in the law. That decision also departs from the fundamental principles of judicial immunity established by this Court.

CONCLUSION

This case presents two important issues, both of which merit review. First, the Court has never addressed whether it has the authority to review a decision of a state court where the state has voluntarily adopted federal law as its state law. This Court should settle this important question.

Second, the decision below departs substantially from the law articulated by this Court and conflicts with decisions of other appellate (and trial) courts regarding the critically important topic of judicial immunity. Since *Forrester*, a consensus has been developing that there is a bright line rule that acts taken in connection with a pending case are judicial acts protected by judicial immunity. The decision below departs from the developing consensus and, unless corrected, will create confusion in the law.

Accordingly, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 3, 2020

APPENDIX

APPENDIX A — OPINION OF THE SUPREME COURT OF LOUISIANA, DATED JUNE 26, 2019

SUPREME COURT OF LOUISIANA

No. 2018-C-1105, No. 2018-C-1115

STANLEY R. PALOWSKY, III, INDIVIDUALLY, AND ON BEHALF OF ALTERNATIVE ENVIRONMENTAL SOLUTIONS, INC.

v.

ALLYSON CAMPBELL, *et al.*

June 26, 2019, Decided

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL, FIRST CIRCUIT, PARISH OF OUACHITA

PER CURIAM*

Plaintiffs filed the instant suit against certain judges of the Fourth Judicial District Court as well as a law clerk employed by that court. Essentially, plaintiffs allege the law clerk "spoliated, concealed, removed, destroyed, shredded, withheld, and/or improperly 'handled' court documents" in earlier litigation involving plaintiffs, and that the judges either aided or concealed these actions. The judges and law clerk filed motions to strike certain allegations from plaintiff's petition and also filed

* Retired Judge Michael Kirby appointed Justice ad hoc, sitting for Clark, J., recused.

exceptions of no cause of action. The district court granted the motions to strike and granted the exceptions of no cause of action. On appeal, a divided en banc panel of the court of appeal reversed the motions to strike in part. The court also reversed the granting of the exception of no cause of action as to the law clerk, but affirmed the granting of the exception of no cause of action as to the judges, finding they were entitled to absolute judicial immunity. *Palowsky v. Campbell*, 2016-1221 (La. App. 1 Cir. 4/11/18), 249 So.3d 945. We granted and consolidated applications for certiorari filed by the law clerk and judges. *Palowsky v. Campbell*, 2018-1105 c/w 2018-C-1115 (La. 12/3/18), So.3d, 2018 La. LEXIS 3314.

Considering the highly unusual and specific facts of this case, the court of appeal erred in finding the judges were entitled to absolute judicial immunity. Accepting the facts as alleged in the petition as true for purposes of the exception of no cause of action, we find plaintiff's allegations regarding the judges' supervision and investigation of the law clerk's activities arise in the context of the judges' administrative functions, rather than in the course of their judicial or adjudicative capacities. In *Forrester v. White*, 484 U.S. 219, 229, 108 S. Ct. 538, 98 L. Ed. 2d 555 (1988), the United States Supreme Court held that a judge's exercise of administrative functions, such as "supervising court employees and overseeing the efficient operation of a court—may have been quite important in providing the necessary conditions of a sound adjudicative system," but such administrative decisions "were not themselves judicial or adjudicative." Therefore, accepting on the well-pleaded allegations of plaintiff's petition, absolute judicial

immunity would not apply, and plaintiff is able to state a cause of action against the judges.

In reaching this conclusion, we emphasize that we express no opinion on whether plaintiff can prove these allegations. Moreover, our opinion today should not be read as undermining or eroding the strong principles of absolute judicial immunity which are firmly established in our jurisprudence. Rather, we merely hold that under the narrow and specific parameters of plaintiff's petition, plaintiff has alleged sufficient facts to state a cause of action against the judges.

Accordingly, we reverse the judgment of the court of appeal insofar as it dismissed plaintiff's claims against the judges with prejudice. In all other respects, we find no error in the court of appeal's judgment and therefore affirm the remaining portions of that judgment.

DECREE

For the reasons assigned, the judgment of the court of appeal is reversed insofar as it dismisses plaintiff's claims against the defendant judges with prejudice. The exception of no cause of action filed by these defendants is hereby denied. In all other respects, the judgment of the court of appeal is affirmed. The case is remanded to the district court for further proceedings.

JOHNSON, Chief Justice, concurs in part, dissents in part, and assigns reasons.

While I agree with the majority that the law clerk employee is not entitled to immunity, I respectfully dissent on the issue of judicial immunity. A judge has immunity from civil liability when sued for actions taken pursuant to his or her judicial authority. While this immunity is not absolute since our jurisprudence recognizes that a judge is not immune from liability for non-judicial acts, namely the administrative acts needed to operate a court, the allegations against these judges are properly classified as acts done in their judicial capacities. As such, I find the judges are not subject to civil liability for their actions, but the plaintiff would have recourse to seek review of the judges' actions in the underlying case from the court of appeal and this court, or by filing a complaint with the Judiciary Commission regarding the judges' actions.

WEIMER, J., concurring.

I concur with the majority's finding that neither the law clerk nor the judges at her court are immune from this lawsuit alleging the law clerk purposely destroyed and hid documents relevant to the plaintiff's prior litigation. I write separately because I find that a requirement in earlier cases for a plaintiff to plead "malice or corruption" no longer has a place in the law of judicial immunity. Instead of requiring a plaintiff to enter the murky realm of ascertaining and pleading a judge's motivation, the jurisprudence has evolved such that the function of the judge's behavior is the touchstone for immunity. If the challenged behavior stems from a judicial function, the judge is immune from suit. If the challenged behavior is outside a judicial function, immunity does not apply.

Judicial immunity has long been a jurisprudential construct in Louisiana. This court, in *Berry v. Bass*, 157 LA. 81, 102 So. 76, 81 (La. 1924), reviewed the prior case law and stated that when judges "have exercised their functions in good faith, without malice or corruption, they should not be held liable for errors of judgment." Over the years, the significance of allegations of malice and corruption slightly changed. For example, in *Moore v. Taylor*, 541 So.2d 378, 381 (La.App. 2 Cir. 1989), the court suggested allegations of malice and corruption have their place within a two-part test: (1) the plaintiff must show the judge acted outside his judicial capacity and (2) even if the judge "has technically acted outside his jurisdiction and contrary to law, he will remain protected unless his actions were based on malice or corruption."

Appendix A

While the jurisprudential doctrine of judicial immunity in Louisiana initially drew solely from our state's cases (*see, e.g. Berry*, 102 So. at 79-81 (collecting cases)), by the time *Moore* was decided, it was recognized that "[t]he Louisiana jurisprudence on judicial immunity mirrors the federal doctrine." *Moore*, 541 So.2d at 381. Nearly contemporaneous with *Moore*, the U.S. Supreme Court in *Forrester v. White*, 484 U.S. 219, 228-29, 108 S. Ct. 538, 98 L. Ed. 2d 555 (1988), ruled that administrative decisions are outside the scope of judicial immunity. Furthermore, shortly after *Moore*, the United States Supreme Court grappled again with the extent of judicial immunity. *See Mireles v. Waco*, 502 U.S. 9, 112 S. Ct. 286, 116 L. Ed. 2d 9 (1991).

In *Mireles*, the Court examined the significance of "bad faith or malice", which is phraseology substantially the same as the requirement that had evolved in Louisiana cases to prove a judge had acted with "malice or corruption." *See Moore*, 541 So.2d at 381. The *Mireles* Court ruled that "judicial immunity is not overcome by allegations of bad faith or malice." *Mireles*, 502 U.S. at 11. The Court explained that "the existence of" bad faith or malice "ordinarily cannot be resolved without engaging in discovery and eventual trial." *Id.* The Supreme Court recognized that avoiding the necessity for judges to explain their actions and decisions in discovery in all but the most narrow set of cases is a major purpose of judicial immunity. *See Id.* at 11 ("Like other forms of official immunity, judicial immunity is an immunity from suit, not just from ultimate assessment of damages."). Our own jurisprudence contains a similar recognition of

the importance of freeing judges from litigation, as long ago this court ruled: "On the highest grounds of necessity and public policy judges cannot be held liable for acts done by them in their judicial capacity" and this court logically connected judges with other "executive officers of the court" who "cannot be sued for acts which they do in obedience to the orders of the court appointing them." *Killeen v. Boland, Gschwind Co.*, 157 La. 566, 102 So. 672, 675 (1924) (on reh'g).

Again recalling in modern times that our state courts have taken cues from the federal jurisprudence, I believe the time has arrived to put to words what the majority of this court now tacitly recognizes from this case: requiring a plaintiff to plead "malice or corruption" to overcome judicial immunity is an archaic requirement inconsistent with the goals of judicial immunity. Instead of requiring a plaintiff to enter the murky realm of pleading and later embarking on extensive discovery to prove a judge's motivation, the jurisprudence has evolved such that the function of—not the motivation for—a judge's behavior has become the touchstone for immunity. *See Forrester*, 484 U.S. at 227 ("immunity is justified and defined by the *functions* it protects and serves."). On one hand, the jurisprudence dictates that if the challenged act/omission stems from a judicial function, the judge is immune from suit. On the other hand, if the challenged act/omission is outside a judicial function, immunity does not apply. *See Id.* (explaining "immunity is appropriate" for judicial acts, but not for "acts that simply happen to have been done by judges.").

Appendix A

The Supreme Court has developed a two-factor test for determining whether an act relates to a judicial function. "[T]he factors determining whether an act by a judge is a 'judicial' one relate to the nature of the act itself, *i.e.*, whether it is a function normally performed by a judge, and to the expectations of the parties, *i.e.*, whether they dealt with the judge in his judicial capacity." *Stump v. Sparkman*, 435 U.S. 349, 362, 98 S. Ct. 1099, 55 L. Ed. 2d 331 (1978).

The allegations here are most unusual; therefore, these factors should be regarded as guideposts to assist in analysis. I find the district court's striking from Mr. Palowsky's petition various allegations relating to payroll fraud by the law clerk to be consistent with the *Stump* guideposts. A cause of action in favor of Mr. Palowsky for payroll fraud is simply non-existent; Mr. Palowsky alleges no harm came to him personally from the alleged payroll fraud. A cause of action for the provisions of his petition that have not been struck is extremely limited, if it exists at all. The allegations that the clerk thwarted Mr. Palowsky's litigation by sabotaging the presentation of pleadings to judges are allegations that narrowly avoid immunity, in my view, as being outside a judicial function. Indeed, there is much to commend in my learned colleague's dissent, which finds the connection between the clerk's alleged misdeeds and injury to Mr. Palowsky's other litigation is a connection that justifies judicial immunity. However, I find the allegations of misdeeds to be such that accepting them as true, as we must for present purposes, the clerk essentially severed a connection between herself and a judicial function. The alleged destruction and concealment

of documents essentially would have precluded judicial work. If a court is a metaphorical temple of justice, the allegations here are essentially that the clerk's alleged destruction and concealment of documents closed the door to one litigant, allowing only the prayers of the other litigant to reach the decision makers inside.

While the *Stump* guideposts are placed such that another case involving a law clerk could certainly be decided differently, the allegations here that the law clerk essentially precluded the trial court from engaging in some of its most basic judicial functions, like evaluating pleadings, are such that do not justify judicial immunity.

For similar reasons, I find that the district court judges are not immune from certain allegations outside their judicial function. Specifically, as identified by one of my learned colleagues on the appellate court, "the alleged failure to 'supervise' [the law clerk] in this context is more akin to an administrative responsibility." *Palowsky v. Campbell*, 16-1221, p. 2 (La.App. 1 Cir. 4/11/18), 249 So.3d 945, 984 (Crain, J., agreeing in part and dissenting in part). Also, and with the caveat that all allegations must be accepted as true for purposes of evaluating an exception of no cause of action, the petition contains allegations that the judges essentially conspired to cover up the law clerk's destruction of public records, which facilitated the records not being considered. These allegations "arguably satisfy the essential elements of a crime, namely injuring public records, then concealing it." *See* La. R.S. 14:132; *see also* La. R.S. 14:25. The doctrine of judicial immunity does not shield judicial actors from civil liability for criminal acts

committed outside the judicial function. *See Mireles*, 502 U.S. at 9-10 n.1.

To my learned colleague's observations, I add the following. Daily, judges, often assisted by law clerks, address issues from litigants who perceive they have been wronged, have actually been wronged, have been accused of wrongs, or have actually committed wrongs. The judicial system tasks judges, often aided by law clerks, with resolving these matters and making the right decisions. This goal is often elusive, given the many competing considerations that must be balanced on the scales of justice. In order to function, the judicial system must shield judges and law clerks from being targeted with monetary liability for their actions within their judicial duties by those who are dissatisfied with a decision. *See Forrester*, 484 U.S. at 225 (citing *Bradley v. Fisher*, 80 U.S. 335, 13 Wall. 335, 348, 20 L. Ed. 646 (1872)) ("judicial immunity ... protect[s] judicial independence by insulating judges from vexatious actions prosecuted by disgruntled litigants."). While monetary liability is excluded for the exercise of judicial functions, the judicial system provides litigants other safeguards, such as appellate review for what may be regarded as errors or "mistakes," or a referral to the disciplinary systems for judges and attorneys who commit misconduct. *See Forrester*, 484 U.S. at 227; *see also* La. Const. art. V, § 25(C); La. Sup. Ct. Rule XIX. Thus, judges and law clerks are not above the law, but are rightfully accountable within the civil justice system-just as any other person-when acting outside their judicial function.

Consistent with these principles, I would find that the plaintiff has pleaded a cause of action against the judges with particularity. Just as fraud must be pleaded with particularity "for ... exceptional cases where the full circumstances are needed to afford adequate notice to the opposing litigant," (Revision Comment to La. C.C.P. art. 856), in order to demonstrate why the civil justice system should be employed against a judge or law clerk, the particularity requirement must apply. As this case demonstrates by the recusal of an entire circuit court, it is no routine matter for the civil justice system to adjudicate monetary claims against its judges or law clerks. Therefore, the particularity requirement rightly imposes a responsibility on a claimant to facially justify whatever extraordinary measures may be necessary. Relatedly, La. C.C.P. art. 863 imposes protections, in the form of sanctions, against a claimant submitting spurious pleadings.

It must be well-noted that the allegations in this case are just that, allegations. By law, no evidence may be introduced when evaluating an exception of no cause of action. *See* La. C.C.P. art. 931 ("No evidence may be introduced at any time to support or controvert the objection that the petition fails to state a cause of action."). Therefore, we are required by law to accept these allegations as true at this preliminary stage of the proceeding. *See City of New Orleans v. Bd. of Comm'rs of Orleans Levee Dist.*, 93-0690, p. 28 (La. 7/5/94); 640 So.2d 237, 253 ("In deciding the exception of no cause of action, the court must presume all factual allegations of the petition to be true and all reasonable inferences are

made in favor of the non-moving party."). Proof, however, of these allegations is a far different matter, and the party making the allegations will not benefit from any presumption of truth. Rather, the party making the allegations will bear the burden of proving the allegations are true as this matter proceeds.

Guidry, J., dissents and assigns reasons.

I respectfully dissent from the court's per curiam opinion holding that the alleged actions and omissions of the defendant judges and law clerk are administrative rather than judicial and finding that neither the judges nor the law clerk are entitled to judicial immunity. Despite numerous allegations contained in Mr. Palowsky's petition and amended petition filed in the present action, Mr. Palowsky has legal standing to pursue only the claims against these defendants that relate to their actions and/or inactions in the separate *Palowsky v. Cork* case. Because those alleged actions/inactions relate to another case pending before the court, they are decidedly judicial in nature. As such, these defendants are entitled to judicial immunity from civil liability.

BACKGROUND

Plaintiff, Stanley Palowsky, is also the plaintiff in a separate case pending before the Fourth Judicial District Court, *Palowsky v. Cork*, No. 13-2059 ("*Cork*"), in which Mr. Palowsky is suing his business partner.[1] Palowsky's present lawsuit asserts claims for damages as a result

1. In the original Petition for Damages filed in the present case, Mr. Palowsky explains that he appears both individually and as a 50% shareholder and director of Alternative Environmental Solutions, Inc. ("AESI"). AESI is also named a "nominal defendant" in this case, but Mr. Palowsky states that "it would be a vain and useless act for him to demand that AESI bring the present action as the other 50-percent shareholder of AESI is W. Brandon Cork, who ... has been sued by Palowsky in a related action."

of Fourth Judicial District Court law clerk Allyson Campbell's alleged destruction of documents in the *Cork* case. The original petition alleged that Campbell:

> maliciously and intentionally harmed Palowsky and willfully violated his constitutionally protected rights to both due process and access to courts [when] she spoliated, concealed, removed, destroyed, shredded, withheld, and/or improperly 'handled' court documents such as memoranda of law, orders, pleadings, sealed court documents, and chamber copies of pleadings filed with the clerk and hand-delivered to the judge's office.

Palowsky further alleged Campbell "maliciously withheld and concealed documents and pleadings in the trial court as well as from the record that was sent to the Second Circuit Court of Appeal" and that her actions amount to fraud, abuse of process, and a violation of La. R.S. 14:132 (the criminal statute addressing the destruction or alteration of public records), as well as intentional infliction of emotional distress.[2]

In a supplemental and amended petition, Palowsky named as additional defendants Chief Judge H. Stephens

2. Mr. Palowsky also alleged Ms. Campbell had a history of payroll fraud, as she was repeatedly absent from work and posted several pictures on Facebook indicating she did her job in restaurants or bars, often while drinking alcohol; that she had a history of destroying documents in other litigants' cases; and that 52 writ applications, which had been missing for more than a year, were discovered in Ms. Campbell's office, but she was never reprimanded.

Winters and Judges Carl Sharp, Benjamin Jones, J. Wilson Rambo, and Frederic Amman, asserting that the judges were involved in an investigation into a criminal complaint against the Court for payroll fraud involving Campbell. The amended petition states that "Defendant Judges all owe an administrative duty to properly audit, investigate, and report suspected payroll fraud;" that the judges "actively schemed to cover up same;" and that the judges failed to supervise the law clerk. Mr. Palowsky further alleged that Judges Amman, Sharp, and Rambo committed payroll fraud in certifying her timesheets and records for payroll and in covering up the scheme, and that they violated multiple Canons of the Code of Judicial Conduct. As a result, Mr. Palowsky claims he is entitled to be compensated for any and all damages that he and his company have suffered.

Ms. Campbell and defendant judges filed separate exceptions of no cause of action. The trial court granted Ms. Campbell's and the judges' exceptions, agreeing that Mr. Palowsky's claims for civil damages were barred by the doctrine of absolute judicial immunity.

Mr. Palowsky appealed. A majority of the First Circuit,[3] *en banc*, upheld the trial court's ruling as to the defendant judges but reversed the trial court's ruling as to the law clerk, finding that she was not entitled to judicial immunity and overruling her exception of no cause of action.

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3. Ordinarily this matter would have been appealed to the Second Circuit Court of Appeal, but the judges of the Second Circuit recused themselves. This Court transferred Mr. Palowsky's appeal to the First Circuit Court of Appeal for review.

Mr. Palowsky and Ms. Campbell filed writ applications in this court seeking review of the court of appeal's ruling. This court granted both writ applications and heard oral argument to determine whether the doctrine of judicial immunity applies to bar Mr. Palowsky's claims against Ms. Campbell and/or the defendant judges.

APPLICABLE LAW

Judicial Immunity

The United States Supreme Court consistently has recognized a judge's absolute immunity from civil liability when he or she is sued for actions taken pursuant to his or her judicial power and authority. "Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction." *Pierson v. Ray*, 386 U.S. 547, 553-54, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967) (citing *Bradley v. Fisher*, 80 U.S. 335, 13 Wall. 335, 20 L.Ed. 646 (1872)). Two exceptions exist when applying the doctrine of judicial immunity, however:

> First, a judge is not immune from liability for nonjudicial actions, *i.e.*, actions not taken in the judge's judicial capacity. *Forrester v. White*, 484 U.S., at 227-229, 108 S.Ct., at 544-545; *Stump v. Sparkman*, 435 U.S., at 360, 98 S.Ct., at 1106. Second, a judge is not immune for actions, though judicial in nature, taken in the complete absence of all jurisdiction. *Id.*, at 356-357, 98 S.Ct., at 1104-1105; *Bradley v. Fisher*, 13 Wall., at 351.

Mireles v. Waco, 502 U.S. 9, 11-12, 112 S.Ct. 286, 116 L.Ed.2d 9 (1991). More succinctly, administrative decisions, even those necessary for the functioning of the court, have not been regarded as judicial acts. *Forrester*, 484 U.S. at 228.

On the other hand, when judicial acts performed within a judge's jurisdiction are committed "with malice," courts have granted immunity. The Supreme Court in *Pierson* stated:

> This immunity applies even when the judge is accused of acting maliciously and corruptly, and it 'is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences.' [Citations omitted.]

386 U.S. at 554. *See also Mitchell v. McBryde*, 944 F.2d 229, 230 (5th Cir. 1991); *Dellenbach v. Letsinger*, 889 F.2d 755, 759 (7th Cir. 1989); *Harlow v. Fitzgerald*, 457 U.S. 800, 815-19, 102 S.Ct. 2727, 2736-39, 73 L.Ed.2d 396 (1982) (allegations of malice are insufficient to overcome qualified immunity).

Louisiana has likewise recognized that judges acting within the scope of their subject matter jurisdiction cannot be held liable for acts done in their judicial capacities. *Killeen v. Boland, Gschwind Co.*, 157 La. 566, 574, 102 So. 672 (1924); *see also Knapper v. Connick*, 96-0434, p. 5 (La.

10/15/96), 681 So.2d 944, 947 ("[W]e have harmonized our own state immunity rules with federal immunity principles in the past."). To that end, this court has defined the broad nature of absolute judicial immunity as attaching "to *all acts* within a judge's jurisdiction, even if those acts can be shown to have been performed with malice, in order to insure that all judges will be free to fulfill their responsibilities without the threat of civil prosecution by disgruntled litigants." *Knapper*, 681 So.2d at 946 (emphasis added). "[I]f only the particular act in question were to be scrutinized, then any mistake of a judge in excess of his authority would become a 'nonjudicial' act, because an improper or erroneous act cannot be said to be normally performed by a judge. If judicial immunity means anything, it means that a judge 'will not be deprived of immunity because the action he took was in error ... or was in excess of his authority.'" *Mireles*, 502 U.S. at 12-13 (quoting *Stump v. Sparkman*, 435 U.S. 349, 362, 98 S.Ct. 1099, 1108, 55 L.Ed.2d 331 (1978)).

Absolute immunity is not limited strictly to judges, however. "The concern for the integrity of the judicial process underlying the absolute immunity of judges also is reflected in the extension of absolute immunity to 'certain others who perform functions closely associated with the judicial process.'" *Oliva v. Heller*, 839 F.2d 37, 39 (2nd Cir. 1988) (quoting *Cleavinger v. Saxner*, 474 U.S. 193, 200, 106 S.Ct. 496, 500, 88 L.Ed.2d 507 (1985)). To determine who is covered by an extension of judicial immunity, the Supreme Court follows a functional approach, looking not to the title of the person performing the action but to the nature of the responsibilities being performed. *Oliva*, 839 F.2d at 39.

Appendix A

Courts have recognized absolute immunity on behalf of a law clerk when the law clerk's actions are substantially intertwined with those of a judge who is acting in a judicial capacity and with proper jurisdiction. The *Oliva* court, affirming the district court's finding of judicial immunity for both the law clerk and the judge, agreed that the duties of a law clerk are closely intertwined with the work of the judge:

> [T]he work of judges' law clerks is entirely [judicial in nature]. Law clerks are closely connected with the court's decision-making process. Law clerks are "sounding boards for tentative opinions and legal researchers who seek the authorities that affect decisions. Clerks are privy to the judge's thoughts in a way that neither parties to the lawsuit nor his most intimate family members may be." *Hall v. Small Business Administration*, 695 F.2d 175, 179 (5th Cir. 1983). Moreover, the work done by law clerks is supervised, approved, and adopted by the judges who initially authorized it. A judicial opinion is not that of the law clerk, but of the judge. Law clerks are simply extensions of the judges at whose pleasure they serve.

Oliva, 839 F.2d at 40 (quoting *Oliva v. Heller*, 670 F.Supp. 523, 526 (S.D.N.Y. 1987)).

In *Mitchell v. McBryde*, 944 F.2d at 230, the Fifth Circuit Court of Appeals found absolute judicial immunity from a suit alleging a judge had maliciously conspired with

his law clerk to set aside a default judgment that plaintiffs had obtained in a prior lawsuit. Citing *Oliva, supra*, the *Mitchell* court agreed that judicial immunity, as applied to the judge, extended to the law clerk as well. *See also Little v. Hammond*, 744 Fed.Appx. 748, 750 (3rd Cir. 2018) (judge and law clerk both entitled to judicial immunity from litigant's 1983 action alleging conspiracy related to his criminal and child custody proceedings); *Jackson v. Houck*, 181 Fed.Appx. 372, 373 (4th Cir. 2006) (affirming district court's dismissal of plaintiff's suit after finding judge and law clerk were entitled to absolute judicial immunity from civil rights suit); *Bradley v. U.S.*, 84 Fed. Appx. 492, 493 (6th Cir. 2003) (judges, law clerk, and court clerk were entitled to judicial immunity in prisoner's civil rights suit alleging they violated his right of access to courts, as they were acting "in their judicial and quasi-judicial duties").

No Cause of Action and Standing

The peremptory exception of no cause of action is designed to test the legal sufficiency of a petition by determining whether a party is afforded a remedy in law based on the facts alleged in the pleading. La. C.C.P. arts. 681 and 927; *Foti v. Holliday*, 09-0093, p.5 (La. 10/30/09), 27 So.3d 813, 817. All well-pleaded allegations of fact are accepted as true, and all doubts are resolved in favor of sufficiency of the petition. La. C.C.P. art. 865; *Kuebler v. Martin*, 578 So.2d 113, 114 (La. 1991). The burden of demonstrating that a petition fails to state a cause of action is upon the mover. *Ramey v. DeCaire*, 03-1299, p. 7 (La. 3/19/04), 869 So.2d 114, 119.

Appendix A

The sufficiency of a petition subject to an exception of no cause of action is a question of law. *Fink v. Bryant*, 01-0987, p. 4 (La. 11/28/01), 801 So.2d 346, 349. A *de novo* standard is applied to the review of legal questions, wherein this court renders a judgment based on the record without deference to the legal conclusions of the lower courts. *Cleco Evangeline, LLC v. Louisiana Tax Comm'n*, 01-2162, p. 3 (La. 4/3/02), 813 So.2d 351, 353.

A trial or appellate court may raise issues of standing on its own motion. La. C.C.P. art. 927(B); *Turner v. Busby*, 03-3444, p. 4 (La. 9/9/04), 883 So.2d 412, 415-16. "The predicate requirement of standing is satisfied if [the litigant] has an interest at stake in litigation which can be legally protected." *In re: Melancon*, 05-1702, p. 9 (La. 7/10/06), 935 So.2d 661, 668. "The standing inquiry requires careful examination of whether a particular litigant is entitled to an adjudication of the particular claim it has asserted." *In re Matter Under Investigation*, 07-1853, p. 10 (La. 7/1/09), 15 So.3d 972, 981 (citing *Melancon*, 935 So.2d at 668). When the facts alleged provide a remedy to someone, but the litigant who seeks relief is not the person in whose favor the law extends the remedy, that litigant is without standing. *Melancon*, 935 So.2d at 668.

ANALYSIS

Mr. Palowsky alleged that the law clerk "spoliated, concealed, removed, destroyed, shredded, withheld, and/or improperly 'handled' court documents" in the *Cork* litigation and that the judges covered up these actions. Although his petition includes additional allegations

unrelated to *Cork*, Mr. Palowsky has standing in the present case only with regard to the allegations related to the *Cork* litigation. Stated differently, he has no standing to assert claims against these defendants for alleged payroll fraud, nor for any other claims separate from the *Cork* litigation, because he cannot demonstrate that he has a particular interest outside of the *Cork* litigation. "A plaintiff must have a real and actual interest in the action he asserts, LSA-C.C.P. art. 681. Without a showing of some special interest ... separate and distinct from the interest of the public at large, plaintiff will not be permitted to proceed." *League of Women Voters v. City of New Orleans*, 381 So.2d 441, 447 (La. 1980).

The claims against the law clerk and judges for which Mr. Palowsky has standing arise from his alleged damages sustained from their handling of the *Cork* litigation. The very allegations that he asserts against the law clerk—destruction of court filings—arise as a result of the judicial functions being performed in conjunction with that lawsuit. Mr. Palowsky's additional allegations, such as payroll fraud, are concerns of the public at large but do not state a claim that is particular to Mr. Palowsky.

The majority's determination that the law clerk's actions in a case assigned to the law clerk's judge are "administrative" ignores the broad scope of judicial immunity and creates a slippery slope by which courts will have to parse every action or inaction in the cases assigned to them to determine whether such action (or inaction) is judicial, administrative, or something else. "[T]he opening of any inroads weakening judicial immunity could have the

gravest consequences to our system of justice." *McAlester v. Brown*, 469 F.2d 1280, 1283 (5th Cir. 1972).

Similarly, to the extent Mr. Palowsky has standing to assert allegations that the judges failed to supervise the law clerk, the alleged lack of supervision falls within the judges' judicial capacity. It is not necessary to determine whether the additional allegations of misconduct asserted against these defendants, but unrelated to *Cork*, are judicial or administrative, as Mr. Palowsky has no standing to pursue these claims.

Furthermore, I find the present facts distinguishable from the facts in *Forrester*, a case in which the U.S. Supreme Court held that a judge who allegedly demoted a probation officer on the basis of her sex was not entitled to judicial immunity, as the judge was acting in an administrative capacity rather than a judicial capacity. 484 U.S. at 229. In stark contrast to the employment claim asserted in *Forrester*, the claims for which Mr. Palowsky has standing are grounded in the defendants' judicial functions.

My views regarding the broad scope of judicial immunity and its application to these facts in no way indicates that I wish to turn a blind eye to Mr. Palowsky's allegations. Every litigant in any court of law is entitled to justice dispensed by a fair and impartial judiciary. If these defendants failed Mr. Palowsky in that regard, they may be subjected to other discipline, including potential criminal charges for destruction of public records. But I cannot say that the allegations for which Mr. Palowsky

has standing, as ill-considered and distasteful as they may be, justify the erosion of judicial immunity, which has been recognized by state and federal courts for more than a century.

Accordingly, I would reverse the portion of the court of appeal's decision that overruled Ms. Campbell's exception of no cause of action based on judicial immunity and affirm the court of appeal's ruling sustaining the judges' exception of no cause of action. Under these facts, these defendants are absolutely immune from suit.

Crichton, J., dissents and assigns reasons.

I agree with the majority's conclusion that the alleged actions at issue are outrageous. However, in my view, the per curiam conflicts with the established principle of judicial immunity, which is based in over 150 years of federal and state jurisprudence and is foundational to the rule of law. It also risks eroding the independence of the judiciary and could adversely affect the public interest, including the paramount interest of protection of the public and the impartial administration of justice. *See, e.g., Knapper v. Connick*, 96-0434, p.3 (La. 10/15/96), 681 So. 2d 944, 946 ("Absolute immunity attaches to all acts within a judge's jurisdiction, even if those acts can be shown to have been performed with malice, in order to insure that all judges will be free to fulfill their responsibilities without the threat of civil prosecution by disgruntled litigants."); *Pierson v. Ray*, 386 U.S. 547, 554, 87 S. Ct. 1213, 18 L. Ed. 2d 288 (1967) ("[A judge] should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation."); *Bradley v. Fisher*, 80 U.S. 335, 347, 20 L. Ed. 646 (1871) (explaining that the public is "deeply invested" in the principle of judicial immunity, "which indeed exists for their benefit, and was established in order to secure the independence of the judges, and prevent them being harassed by vexatious actions").[1] I

1. Indeed, in my view, it can be no other way. Judicial immunity is "immunity from suit, not just from ultimate assessment of

therefore dissent, for the reasons assigned by Justice Guidry.

I write separately from Justice Guidry solely to note that judicial immunity is absolutely not a "get out of jail free" card for any of the parties herein, nor should this dissent be construed to condone the disturbing allegations against the rogue law clerk and the judges. Proper application of the immunity doctrine here would immunize the clerk and judges only from *civil liability*, *i.e.*, payment of monetary damages to the plaintiffs, and leaves open other remedies against them. In addition to losing her job, assuming, *arguendo*, that the relevant time limitations for prosecution have not elapsed, the law clerk's actions may meet the elements of a violation of criminal law, the consequences of which could include a fine and/or imprisonment for a felony crime. *See* R.S. 14:132 (Injuring Public Records). The judges could also be subject to prosecution for their role in this sordid affair. *See* R.S. 14:25 (Accessory After the Fact). Additionally, the judges may be subject to discipline by the appropriate authorities for violation of the judicial canons, which could include suspension without pay or even removal from

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damages." *Mireles v. Waco*, 502 U.S. 9, 11, 112 S. Ct. 286, 116 L. Ed. 2d 9 (1991). This immunity therefore prevents judges from being hauled into court as defendants, which could subject the entirety of their decision-making processes to virtually unlimited discovery. *See Rehberg v. Paulk*, 566 U.S. 356, 370, 132 S. Ct. 1497, 182 L. Ed. 2d 593 ("Judges, on mere allegations of conspiracy or prior agreement, could be hauled into court and made to defend their judicial acts, the precise result judicial immunity was designed to avoid.") (quoting *Dykes v. Hosemann*, 776 F.2d 942, 946 (11th Cir. 1985)).

office. *See, e.g.*, Canons 2, 3. And, of course, they may face consequences at the ballot box. *See Randall v. Brigham*, 74 U.S. 523, 19 L. Ed. 285 (1868) ("If faithless, if corrupt, if dishonest, if partial, if oppressive or arbitrary, they may be called to account by impeachment, and removed from office. . . . But responsible they are not to private parties in civil actions for their judicial acts, however injurious may be those acts, and however much they may deserve condemnation. . . ."); *Bradley v. Fisher*, 80 U.S. 335, 354, 20 L. Ed. 646 (1871) ("[F]or malice or corruption in their action whilst exercising their judicial functions within the general scope of their jurisdiction, the judges of these courts can only be reached by public prosecution in the form of impeachment, or in such other form as may be specially prescribed.").

The defendants may therefore still face significant repercussions for their disgraceful conduct. However, in my view, those repercussions cannot include civil liability. In finding otherwise, I believe the per curiam is an aberration that could result in the erosion of the principle of immunity, which is intended to protect the public interest and the independence of the judiciary.

Kirby, J., ad hoc, concurs and assigns reasons.

I fully concur with the rationale and holding of the majority per curiam. As stated therein, at this stage of these proceedings, this result is required by the decision of the United States Supreme Court in *Forrester v. White* 484 U.S. 219, 108 S.Ct. 538, 98 L.Ed.2d 555 (1988). In her opinion for a unanimous court, Justice O'Connor recognized the inherent difficulty in distinguishing between "truly judicial acts" entitled to immunity and those "that simply happen to have been done by judges" for which immunity is not appropriate. The vexation comes from the fact, also noted by Justice O'Connor, that the court has never precisely defined the acts entitled to judicial immunity, deferring instead to a "functional" analysis where the nature of the function performed, not the identity of the actor, governs the immunity analysis.

It is worth noting that Canon 3 of the Louisiana Code of Judicial Conduct, clearly recognizes the dichotomy between adjudicative and administrative duties. Specifically, Canon 3 (B) captioned "*Administrative Responsibilities*" provides:

> (1) A judge shall diligently discharge the judge's administrative responsibilities without bias or prejudice and maintain professional competence in judicial administration, ...
>
> (2) A judge shall require staff, court officials and others subject to the judge's direction and control to observe the standards of fidelity

> and diligence that apply to the judge and to refrain from manifesting bias or prejudice in the performance of their official duties.
>
> (3) * * *
>
> (4) A judge shall not make unnecessary appointments. A judge should exercise the power of appointment impartially and on the basis of merit. A judge should avoid appointments which tend to create the appearance of impropriety. A judge shall not approve the compensation of appointees beyond the fair value of services rendered . . ..

In my view the well pleaded facts of the petition at issue here merely present the reverse factual scenario confronting the *Forrester, supra*, court. There, a judge was sued for allegedly wrongfully discharging an employee. Here the gravamen of the complaint is that the defendants *did not* terminate an employee who was performing her duties improperly.[1] Admittedly, La. R. S. 13:700 authorizes

1. For example: Paragraphs 9 and 10 of the petition allege the law clerk is not a licensed attorney, implicating Canon 3 (B) (2), relative to requiring staff to maintain professional competence, Canon 3 (B) (4) relative to judges exercising the power of appointment impartially based upon merit and not approving compensation beyond the fair value of services rendered. Paragraph 28 alleges that the law clerk has a history of committing payroll fraud and destroying or concealing documents, implicating Canon 3 (B) (2) relative to requiring staff to refrain from manifesting bias or prejudice in the performance of their official duties and Cannon 3 (B) (4) relative

each judge of the Fourth Judicial District Court to hire a law clerk "to perform such research duties" as the judge may assign. However, none of plaintiff's allegations against the law clerk pertain to her statutorily authorized duties. Plaintiff's litany of her alleged past malefactions is not to assert a claim for damages resulting from them, but rather to demonstrate the length of time over which the alleged excesses occurred thereby suggesting her employers, who simply happen to have been judges, failed to properly supervise their employee.

Insofar as the law clerk herself is concerned, she is only entitled to immunity when acting at the direction of a judge or pursuant to an established rule of court. *Oliva v.*

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to a judge making appointments that create the appearance of impropriety. Paragraphs 32 through 35 and 38, alleging the clerk's newspaper article, "A modern guide to handle your scandal," the complaint made to the judges who initiated an investigation and verified the facts but took no disciplinary or remedial action, implicating Canon 3 (B) (1) relative to maintaining professional competence in judicial administration, Canon 3 (B) (2) relative to requiring staff to observe standards of fidelity and diligence and to refrain from manifesting bias or prejudice in the performance of their official duties and Canon 3 (B) (4) regarding appointments that create the appearance of impropriety. Paragraphs 45, 46, 48 and 50 alleging the clerk's spoliated, destroyed and withheld records which certain defendants actively worked to cover up, again implicating Canon 3 (A) (1) regarding judges discharging their administrative responsibilities without bias or prejudice, Canon 3 (B) (2) regarding requiring staff to observe standards of fidelity and competence applicable to judges and to refrain from manifesting bias or prejudice in the performance of their duties and Canon 3 (B) (4) regarding judges avoiding appointments that create the appearance of impropriety.

Heller, 839 Fed 2d 37 (2d Cir. 1988) only grants a law clerk immunity when assisting a judge with his judicial functions: "Accordingly, we hold that the defendant, who was clearly assisting the judge in carrying out judicial functions was covered by the doctrine of absolute immunity." *Oliva, supra*, at 40. See also *Johnson v. Parish of Jefferson*, 2009 U.S. Dist. LEXIS 51863, 2009 WL 1808718: "Court employees *who act under the explicit instructions of a judge* 'acts as the arm of the judge and comes with [sic] his absolute immunity,' even if the employees act 'in bad faith or with malice.'" *Williams v. Wood*, 612 F.2d 982, 985 (5th Cir.1980). *Mitchell v. McBryde*, 944 F.2d 229, 230-31 (5th Cir.1991). [Emphasis added.] Likewise, *Guccione v. Parish of Jefferson*, 382 Fed. Appx. 357, 2010 WL 2465039 (2010) teaches:

> The remaining defendants in this lawsuit are the employees of the Louisiana Fifth Circuit Court of Appeal who acted pursuant to the procedures allegedly implemented by the judges. The district court determined correctly that because they were only acting at the express direction of the judges, to assist them in carrying out their judicial functions, those defendants are likewise entitled to absolute judicial immunity with respect to Guccione's claim for monetary damages. *See Mitchell v. McBryde*, 944 F.2d 229, 230-31 (5th Cir. 1991).

A careful review of the pleadings reveals no allegation that the law clerk's complained of actions were done pursuant to established court policy or at the direction of a judge in aid of judicial functions. Therefore, she is not entitled to immunity.

APPENDIX B — OPINION OF THE COURT OF APPEAL OF LOUISIANA, FIRST CIRCUIT, DATED APRIL 11, 2018

COURT OF APPEAL OF LOUISIANA
FIRST CIRCUIT

249 So.3d 945

2016 CA 1221

STANLEY R. PALOWSKY, III, INDIVIDUALLY, AND ON BEHALF OF ALTERNATIVE ENVIRONMENTAL SOLUTIONS, INC.

v.

ALLYSON CAMPBELL, *et al.*

April 11, 2018, Decided

Judgment Rendered: April 11, 2018
Rehearing Denied: June 4, 2018

On Appeal from the Fourth Judicial District Court, In and for the Parish of Ouachita, State of Louisiana, No. 15-2179. Honorable Jerome J. Barbera, III, Ad Hoc, Judge Presiding.

BEFORE: WHIPPLE, C.J., GUIDRY, PETITIGREW, McDONALD, McCLENDON, WELCH, HIGGINBOTHAM, CRAIN, THERIOT, HOLDRIDGE, CHUTZ, AND PENZATO, JJ.

Appendix B

OPINION

McCLENDON, J.

The plaintiff appeals a trial court's judgment striking forty-six paragraphs and three subparagraphs from his eighty-eight paragraph petition for damages. He also appeals the two trial court's judgments that granted the defendants' peremptory exceptions raising the objection of no cause of action, based on absolute immunity. For the reasons that follow, we reverse in part and affirm in part the judgment regarding the motion to strike. We affirm the judgment that found no cause of action against the defendant judges and reverse the judgment that found no cause of action against the defendant law clerk.

FACTUAL AND PROCEDURAL HISTORY

On July 22, 2015, the plaintiff, Stanley R. Palowsky, III, individually and on behalf of Alternative Environmental Solutions, Inc., filed a Petition for Damages against the defendant, Allyson Campbell, a law clerk for the Fourth Judicial District Court (Fourth JDC), asserting that Ms. Campbell maliciously and intentionally harmed Mr. Palowsky "when she spoliated, concealed, removed, destroyed, shredded, withheld, and/or improperly 'handled' court documents" in the matter entitled *Palowsky v. Cork*, Docket No. 13-2059, of the Fourth JDC. Thereafter, on July 31, 2015, Mr. Palowsky filed a First Supplemental, Amended, and Restated Petition for Damages, adding as defendants, Chief Judge H. Stephens Winters, Judge Carl V. Sharp, Judge J. Wilson Rambo, and Judge Frederic C.

Amman, current Fourth JDC judges, and retired Judge Benjamin Jones, the current Fourth JDC administrator[1] (the Judges), asserting that they aided and abetted Ms. Campbell "by allowing her free rein to do as she pleased and then conspiring to conceal [Ms.] Campbell's acts." Subsequently, all the judges of the Fourth JDC recused themselves from the matter, and the Louisiana Supreme Court appointed retired Judge Jerome J. Barbera, III, as judge ad hoc to preside over the case.

In response to Mr. Palowsky's pleadings, Ms. Campbell and the Judges each filed a motion to strike specific paragraphs of Mr. Palowsky's petition and various exceptions, including the peremptory exception raising the objection of no cause of action based on judicial immunity.[2] On November 5, 2015, the trial court held a hearing on

1. The petition alleges that the destruction of documents occurred in 2014, at which time Judge Jones was a duly-elected judge of the Fourth JDC. The petition further asserts that after March 2015, Judge Jones has been employed as the judicial administrator for the Fourth JDC and acts as a "supernumerary" judge.

2. Additionally, Ms. Campbell and the Judges filed motions to stay discovery until their motions to strike and exceptions could be addressed. Following a hearing on the motions to stay discovery, the trial court granted the motion and stayed discovery pending the disposition of the motions to strike and exceptions. Mr. Palowsky filed an application for supervisory writs with the Court of Appeal, Second Circuit, which application was denied. Mr. Palowsky then sought a writ of certiorari with the Louisiana Supreme Court. The supreme court granted Mr. Palowsky's writ application and, on November 3, 2015, issued a per curiam order directing the trial court to hear the exceptions of no cause of action and the motions to strike, but defer the hearing on the remaining exceptions.

the motions to strike and the exceptions of no cause of action. The trial court first addressed the motions to strike and ordered that forty-six paragraphs and three subparagraphs of Mr. Palowsky's eighty-eight paragraph amended petition be stricken, finding them to be immaterial.[3] After granting the motions to strike, the trial court addressed the exceptions of no cause of action based on the remaining paragraphs of Mr. Palowsky's amended petition. The trial court determined that the Judges and Ms. Campbell were entitled to absolute immunity for their alleged actions and granted the exceptions.

On December 11, 2015, the trial court signed a judgment regarding the motions to strike filed by Ms. Campbell and by the Judges. On that same date, the trial court also signed a judgment granting the exception of no cause of action in favor of Ms. Campbell and a judgment granting the exception of no cause of action in favor of the Judges, dismissing Mr. Palowsky's case against them with prejudice.

Mr. Palowsky filed an appeal of the three judgments with the Court of Appeal, Second Circuit, and seven of the judges of that court recused themselves. Therefore, on September 7, 2016, the Louisiana Supreme Court ordered the transfer of the appeal of the matter to the Court of Appeal, First Circuit.

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3. A copy of the First Supplemental, Amended, and Restated Petition for Damages is attached hereto as "Attachment A."

Appendix B

ASSIGNMENTS OF ERROR

In his appeal, Mr. Palowsky has assigned the following as error:

A. The trial court erred by finding that forty-six paragraphs and three subparagraphs in Mr. Palowsky's amended petition were immaterial and granting the defendants' motions to strike same.

B. The trial court erred by finding that the Judges had absolute immunity from liability for their actions and thereby granting their exception of no cause of action.

C. The trial court erred by finding that Ms. Campbell had absolute immunity from liability for her actions and thereby granting her exception of no cause of action.

D. The trial court erred in refusing to give Mr. Palowsky the opportunity to amend his petition to state a cause of action.

THE MOTIONS TO STRIKE

Louisiana Code of Civil Procedure Article 964 provides:

> The court on motion of a party or on its own motion may at any time and after a

> hearing order stricken from any pleading any insufficient demand or defense or any redundant, immaterial, impertinent, or scandalous matter.

The granting of a motion to strike pursuant to Louisiana Code of Civil Procedure article 964 rests in the sound discretion of the trial court and is reviewed under the abuse of discretion standard. *Pitre v. Opelousas Gen. Hosp.*, 530 So.2d 1151, 1162 (La. 1988). *See also Detillier v. Borne*, 15-129 (La.App. 5 Cir. 9/23/15), 176 So.3d 669, 671. Motions to strike are viewed with disfavor and are infrequently granted. They are disfavored because striking a portion of a pleading is a drastic remedy, and because they are often sought by the movant simply as a dilatory tactic. However, a motion to strike is proper if it can be shown that the allegations being challenged are so unrelated to a plaintiff's claims as to be unworthy of any consideration and that their presence in the pleading would be prejudicial to the moving party. *Carr v. Abel*, 10-835 (La.App. 5 Cir. 3/29/11), 64 So.3d 292, 296, *writ denied*, 11-0860 (La. 6/3/11), 63 So.3d 1016. *See also Smith v. Gautreau*, 348 So.2d 720, 722 (La.App. 1 Cir. 1977). A motion to strike is a means of clearing up the pleadings, not a means of eliminating causes of action or substantive allegations. *Hicks v. Steve R. Reich, Inc.*, 38,424 (La.App. 2 Cir. 5/12/04), 873 So. 2d 849, 852; *Hazelwood Farm, Inc. v. Liberty Oil and Gas Corp.*, 01-0345 (La.App. 3 Cir. 6/20/01), 790 So.2d 93, 98.

Because the source of Article 964 is found in Rule 12(f) of the Federal Rules of Civil Procedure, we look to federal jurisprudence to assist us in analyzing Article

964.[4]*Smith*, 348 So.2d at 722. The terms "redundant, immaterial, impertinent, or scandalous matter" have been defined in at least one federal case, *Marceaux v. Lafayette Consol. Government*, 6:12-01532, 2012 U.S. Dist. LEXIS 150922 (W.D. La. 10/18/12) (unpublished), wherein the court stated:

> Redundant matter consists of allegations that constitute a needless repetition of other averments in the pleading. Immaterial matter is that which has no essential or important relationship to the claim for relief or the defenses being pleaded. Immateriality is established by showing that the challenged allegations "can have no possible bearing upon the subject matter of the litigation." Impertinent matter consists of statements that do not pertain, and are not necessary, to the issues in question; while scandalous matter is that which improperly casts a derogatory light on someone, most typically on a party to the action. "The granting of a motion to strike scandalous matter is aimed, in part, at avoiding prejudice to a party by preventing a jury from seeing the offensive matter or giving the allegations any other unnecessary notoriety inasmuch as, once filed, pleadings generally are public documents and become generally available."

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4. Federal Rule of Civil Procedure 12(f) provides, in pertinent part: "The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter."

Id. (footnotes with citations omitted); *see also Bayou Fleet Partnership, LLC v. St. Charles Parish*, 10-1557, 2011 U.S. Dist. LEXIS 73867 (E.D. La. 7/8/11) (unpublished).

In this matter, Mr. Palowsky alleged that he is the fifty-percent shareholder and director of Alternative Environmental Solutions, Inc. (AESI). Mr. Palowsky also asserted that he filed suit against W. Brandon Cork, the other fifty-percent shareholder of AESI, for damages Mr. Palowsky suffered as a result of Mr. Cork's theft, fraud, racketeering, and breach of fiduciary duty.

In his original petition against only Ms. Campbell, Mr. Palowsky alleged that Ms. Campbell acted outside the course and scope of her employment to maliciously and intentionally harm Mr. Palowsky by allegedly destroying or withholding certain court filings. Mr. Palowsky's First Supplemental, Amended, and Restated Petition for Damages again stated that Ms. Campbell was acting outside the course and scope of her employment duties and added the Judges as defendants for allegedly "aiding and abetting [Ms.] Campbell by allowing her free rein to do as she pleased and then conspiring to conceal [Ms.] Campbell's acts." He did not allege any participation on the part of the Judges in the alleged destruction or withholding of court documents.

Ms. Campbell filed her motion to strike on August 10, 2015, and the Judges filed their motion on August 25, 2015,[5] in which the Judges and Ms. Campbell asserted

5. Ms. Campbell and the Judges also filed, as part of their motions to strike, requests for contempt and for sanctions. However, the sanctions and contempt requests have been stayed pending resolution of this appeal.

that most of Mr. Palowsky's allegations of "fact" in his amended petition were included for no other purpose than to embarrass, harass, and unnecessarily criticize the defendants. The trial court, in its oral reasons, discussed the issues of immateriality and prejudice necessary for a motion to strike pursuant to LSA-C.C.P. art. 964. As to prejudice, the court stated:

> [C]ertainly the allegations that have been made about the previous events that go back even the 2010 [event] involving Ms. Campbell and then the other events that are alleged in the petition, the amended petition, about the actions and inactions of the judges certainly all of the information provided is prejudicial because it — it shows these parties to suggest to the reader that these parties are acting contrary to the ethics and responsibilities of their job and these allegations point to the reader that they've committed crime, and that they have acted badly, and that something should happen to them as a result of their activity. So there's no doubt that the allegations are prejudicial because anyone who would read that if they were convinced of the truth of it would form conclusions both about Ms. Campbell and the judges about their fitness and their ethics and their responsibility. Anyone who would read those allegations would certainly have questions about those things. So I don't think there's any doubt that the allegations that are at issue in the case are prejudicial.

Thereafter, the trial court addressed the second factor of "whether or not these allegations have any bearing on the subject matter of the litigation," which it framed as follows:

> What this [amended] petition says is that Allyson Campbell, a law clerk to the judges of this district, an employee of the court, caused harm to the plaintiff by her actions in concealing, destroying, removing, withholding, and improperly handling, and I'm not quoting that verbatim, in improperly handling pleadings and court documents pertaining to civil litigation filed in this district by the plaintiff against a former business associate. So that's how I would sum up the cause of action by the plaintiff against Ms. Campbell. The petition also says that the named defendant judges are liable to the plaintiff for damages as a result of their aiding and abetting Ms. Campbell and conspiring to conceal her actions. So that's my summary of what this lawsuit is about.

The trial court then addressed the materiality of the allegations, finding a difference between materiality and admissible evidence at the trial of the matter, and stated:

> [I]n looking at the other allegations of the petition that the defendants seek to strike it is evident to me that many of them are immaterial to the cause of action. ... The question is, is whether or not they are material to the cause of

> action. And I made a determination that most of the [paragraphs] that are complained of are not material.

The court concluded that the following paragraphs of Mr. Palowsky's petition contained allegations that were immaterial to his lawsuit:

> The court will strike Articles 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 26, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 42, paragraph A of 52, and paragraph C of 52, paragraph E of 52, 58, 59, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 79, 80, 81, and 82.

The paragraphs stricken included allegations of payroll irregularities and investigations, as well as assertions of payroll fraud by Ms. Campbell and a conspiracy to cover up the fraud by the Judges. More specifically, the petition asserted the existence of an investigation by the Louisiana Legislative Auditor into possible payroll fraud regarding some Fourth JDC employees being paid for hours that were not worked. Other paragraphs stricken as immaterial regarded the destruction or concealment of documents in other cases by Ms. Campbell and the subsequent knowledge by the Judges. Additionally, paragraphs detailing Ms. Campbell's personal life and work habits were deleted by the trial court. Mr. Palowsky asserted that Ms. Campbell boasted in a local bar that she had shredded or withheld a court document in another case and that she had a weekly "society" column entitled, "A modern guide to handle your scandal," in which she

made comments, such as, "I represent to you all the sins you have never had the courage to commit," and, "It's not cheating if it's in your favor."

While many of the stricken allegations in Mr. Palowsky's amended petition have nothing to do with his present lawsuit, some of the stricken paragraphs arguably show a prior history of concealment or destruction of court documents by Ms. Campbell. Particularly, Paragraphs 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 40, and 52C refer to the alleged destruction or concealment of court documents by Ms. Campbell in a case handled by another attorney in the Fourth JDC and the Judges' subsequent knowledge of same. Upon careful review of these allegations, and finding that they could have some bearing on the subject matter of the litigation, in that they allege a pattern of behavior by Ms. Campbell of destroying court documents, we cannot find that these paragraphs are immaterial to this matter. Therefore, we find that the trial court abused its discretion in striking Paragraphs 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 40, and 52C. Additionally, we find an abuse of discretion in striking Paragraphs 58, 61, 63, 68, 69, 71, 80, and 81 as they also refer to Ms. Campbell's pattern of behavior or willingness to act in such a manner.

Therefore, we reverse in part the December 11, 2015 judgment of the trial court insofar as it granted the motions to strike by the Judges and by Ms. Campbell with regard to Paragraphs 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 40, 52C, 58, 61, 63, 68, 69, 71, 80, and 81 of Mr. Palowsky's amended petition, finding those paragraphs material to the instant matter. We find no abuse of discretion by the

trial court in striking as immaterial Paragraphs 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 26, 39, 42, 52A, 52E, 59, 62, 64, 65, 66, 67, 70, 79, and 82.

NO CAUSE OF ACTION

As used in the context of the peremptory exception, a "cause of action" refers to the operative facts which give rise to the plaintiff's right to judicially assert the action against the defendant. *Scheffler v. Adams and Reese, LLP*, 06-1774 (La. 2/22/07), 950 So.2d 641, 646; *Ramey v. DeCaire*, 03-1299 (La. 3/19/04), 869 So.2d 114, 118. The purpose of the peremptory exception raising the objection of no cause of action is to test the legal sufficiency of the petition by determining whether the law affords a remedy on the facts alleged in the petition. *Scheffler*, 950 So.2d at 646; *Ramey*, 869 So.2d at 118. No evidence may be introduced to support or controvert the exception of no cause of action. LSA-C.C.P. art. 931. The exception is triable on the face of the pleadings, and, for purposes of resolving the issues raised by the exception, the well-pleaded facts in the petition must be accepted as true. *Scheffler*, 950 So.2d at 646; *Fink v. Bryant*, 01-0987 (La. 11/28/01), 801 So.2d 346, 349. The issue at the trial of the exception is whether, on the face of the petition, the plaintiff is legally entitled to the relief sought. *Scheffler*, 950 So.2d at 646; *Ramey*, 869 So.2d at 118.

Louisiana retains a system of fact pleading, and mere conclusions of the plaintiff unsupported by facts will not set forth a cause or right of action. *Scheffler*, 950 So.2d at 646-47; *Montalvo v. Sondes*, 93-2813 (La. 5/23/94), 637

So.2d 127, 131. The burden of demonstrating that a petition fails to state a cause of action is upon the mover. *Scheffler*, 950 So.2d at 647; *Ramey*, 869 So.2d at 119. Because the exception of no cause of action raises a question of law and the trial court's decision is based solely on the sufficiency of the petition, review of the trial court's ruling on an exception of no cause of action is *de novo*. *Scheffler*, 950 So.2d at 647; *Fink*, 801 So.2d at 349. The pertinent inquiry is whether, in the light most favorable to the plaintiff, and with every doubt resolved in the plaintiff's favor, the petition states any valid cause of action for relief. *Scheffler*, 950 So.2d at 647; *Ramey*, 869 So.2d at 119.

The doctrine of judicial immunity developed at common law as a shield intended to protect judges from civil suits for damages for actions taken in their judicial capacity. *Pierson v. Ray*, 386 U.S. 547, 554, 87 S. Ct. 1213, 1217, 18 L. Ed. 2d 288, 294 (1967). The doctrine can be traced back to the successful efforts of the King's Bench to ensure the supremacy of the common-law courts. *Pulliam v. Allen*, 466 U.S. 522, 530, 104 S.Ct. 1970, 1974-75, 80 L.Ed.2d 565, 571 (1984). The fundamental policy principle underlying the doctrine of judicial immunity was reiterated by the United States Supreme Court in *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347, 20 L.Ed. 646, 649 (1871), where the Court held that "it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself." *See also Estate of Sherman v. Almeida*, 747 A.2d 470, 473-74 (R.I. 2000). The Supreme Court more recently observed

that "[f]ew doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction." *Cleavinger v. Saxner*, 474 U.S. 193, 199, 106 S.Ct. 496, 499-500, 88 L.Ed.2d 507 (1985) (quoting *Pierson v. Ray*, 386 U.S. at 553-54, 87 S. Ct. at 1217).

Accordingly, a long line of Supreme Court cases acknowledge that, generally, a judge is immune from a suit for money damages. *Mireles v. Waco*, 502 U.S. 9, 9-10, 112 S. Ct. 286, 287, 116 L. Ed. 2d 9 (1991) (citations omitted). Courts have consistently held that judicial immunity is an immunity from suit, not just the ultimate assessment of damages. *Mireles*, 502 U.S. at 11, 112 S. Ct. at 288 (citing *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985)). In *Pierson*, the Supreme Court stated that judicial immunity applies even when the judge is accused of acting maliciously and corruptly, and it is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences. *Pierson*, 386 U.S. at 554, 87 S. Ct. at 1218. It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision making but to intimidation. *Id.*; *see also Oliva v. Heller*, 839 F.2d 37, 39 (2nd Cir. 1988).

Appendix B

The Supreme Court again explained the purposes served by judicial immunity in *Forrester v. White*, 484 U.S. 219, 226-27, 108 S. Ct. 538, 544, 98 L. Ed. 2d 555 (1988), stating that the nature of the adjudicative function requires a judge frequently to disappoint some of the most intense and ungovernable desires that people can have. If judges were personally liable for erroneous decisions, the resulting avalanche of suits, most of them frivolous but vexatious, would provide powerful incentives for judges to avoid rendering decisions likely to provoke such suits. The resulting timidity would be hard to detect or control, and it would manifestly detract from independent and impartial adjudication. *Id.*

There are only two circumstances under which judicial immunity may be overcome. First, a judge is not immune from liability for nonjudicial actions, *i.e.*, actions not taken in the judge's judicial capacity. Second, a judge is not immune for actions, though judicial in nature, taken in the complete absence of all jurisdiction. *Mireles*, 502 U.S. at 11-12, 112 S. Ct. at 288. Allegations of bad faith or malice are not sufficient to overcome judicial immunity. *Mireles*, 502 U.S. at 11, 112 S. Ct. at 288. *See also Kemp ex rel. Kemp v. Perkins*, 324 Fed.Appx. 409, 411 (5th Cir. 2009) (unpublished).

"[W]hether an act by a judge is a 'judicial' one relate[s] to the nature of the act itself, *i.e.*, whether it is a function normally performed by a judge, and to the expectations of the parties, *i.e.*, whether they dealt with the judge in his [or her] judicial capacity." *Mireles*, 502 U.S. at 12, 112 S. Ct. at 288 (quoting *Stump v. Sparkman*, 435 U.S. 349, 362,

98 S.Ct. 1099, 1107, 55 L.Ed.2d 331 (1978)). The relevant inquiry is the nature and function of the act, not the act itself. In other words, a court should look to the particular act's relation to a general function normally performed by a judge. *Mireles*, 502 U.S. at 13, 112 S. Ct. at 288. The United States Fifth Circuit has adopted a four-factor test for determining whether a judge's actions are judicial in nature: (1) whether the precise act complained of is a normal judicial function; (2) whether the acts occurred in the courtroom or appropriate adjunct spaces such as the judge's chambers; (3) whether the controversy centered around a case pending before the court; and (4) whether the acts arose directly out of a visit to the judge in his official capacity. *Ballard v. Wall*, 413 F.3d 510, 515 (5th Cir. 2005) (citing *Malina v. Gonzales*, 994 F.2d 1121, 1124 (5th Cir.1993)); *McAlester v. Brown*, 469 F.2d 1280, 1282 (5th Cir. 1972). These factors are broadly construed in favor of immunity. *Ballard*, 413 F.3d at 515; *Malina*, 994 F.2d at 1124. *See also Davis v. Tarrant County, Tex.*, 565 F.3d 214, 222-23 (5th Cir. 2009). Further, in some situations, immunity is to be afforded even though one or more of the four factors is not met. *Malina*, 994 F.2d at 1124.

"When applied to the paradigmatic judicial acts involved in resolving disputes between parties who have invoked the jurisdiction of a court, the doctrine of absolute judicial immunity has not been particularly controversial," but "attempting to draw the line between truly judicial acts, for which immunity is appropriate, and acts that simply happen to have been done by judges" has proven to be a more difficult task. *Forrester*, 484 U.S. at 227, 108 S. Ct. at 544. Immunity is justified and defined by

the functions it protects and serves, not by the person to whom it attaches. *Id.* The Supreme Court has forcefully indicated that the limits of judicial immunity are not to be set by subtle legalistic distinctions; rather, a broad functional approach is required: "Judges have absolute immunity not because of their particular location within the Government but because of the special nature of their responsibilities." *Butz v. Economou*, 438 U.S. 478, 511, 98 S.Ct. 2894, 2913, 57 L.Ed.2d 895 (1978); *Holloway v. Walker*, 765 F.2d 517, 524 (5th Cir. 1985).

In determining whether a judge is entitled to absolute immunity for a particular act, a court must also draw a "distinction between judicial acts and the administrative, legislative, or executive functions that judges may on occasion be assigned by law to perform." *Forrester*, 484 U.S. at 227, 108 S. Ct. at 544. *See also Huminski v. Corsones*, 396 F.3d 53, 75 (2nd Cir. 2005). Although administrative decisions "may be essential to the very functioning of the courts," such decisions have not been regarded as judicial acts. *Forrester*, 484 U.S. at 228, 108 S. Ct. at 544; *Davis*, 565 F.3d at 222.

Additionally, judicial immunity does not extend to acts committed with a clear absence of all jurisdiction. However, the term "jurisdiction" is to be broadly construed to effectuate the policies of guaranteeing a disinterested and independent judicial decision-making process. *Stump*, 435 U.S. at 356-57, 98 S. Ct. at 1105; *Holloway*, 765 F.2d at 523. Where a judge does not clearly lack all subject-matter jurisdiction, he does not clearly lack all jurisdiction, and "the same principle of exemption

from liability which obtains for errors committed in the ordinary prosecution of a suit where there is jurisdiction of both subject and person, applies in cases of this kind, and for the same reasons." *Bradley*, 80 U.S. at 352; *Holloway*, 765 F.2d at 523.

Louisiana jurisprudence on judicial immunity mirrors the federal doctrine. *Viator v. Miller*, 04-1199 (La.App. 3 Cir. 4/27/05), 900 So.2d 1135, 1140; *McCoy v. City of Monroe*, 32,521 (La.App. 2 Cir. 12/8/99), 747 So.2d 1234, 1241, *writ denied*, 00-1280 (La. 3/30/01), 788 So. 2d 441. Judges may not be cast for damages for their errors unless they have acted outside of their judicial capacity. It has long been held on the grounds of necessity and public policy that judges acting within the scope of their subject matter jurisdictions cannot be held liable for acts done in their judicial capacities. *Knapper v. Connick*, 96-0434 (La. 10/15/96), 681 So.2d 944, 946; *Haley v. Leary*, 09-1626 (La. App. 4 Cir. 8/4/10), 69 So. 3d 430, 432-33, *writ denied*, 10-2265 (La. 12/17/10), 51 So. 3d 14, *cert. denied*, 565 U.S. 820, 132 S.Ct. 104, 181 L.Ed.2d 32. The immunity is extended because of the function it protects rather than the title of the person who claims it. Absolute immunity attaches to all acts within a judge's jurisdiction, even if those acts can be shown to have been performed with malice, in order to insure that all judges will be free to fulfill their responsibilities without the threat of civil prosecution by disgruntled litigants. *Knapper*, 681 So.2d at 946; *Haley*, 69 So. 3d at 433.

With regard to law clerks, a law clerk is probably the one participant in the judicial process whose duties

and responsibilities are most intimately connected with the judge's own exercise of the judicial function. *Oliva*, 839 F.2d at 40. A judicial opinion is not that of the law clerk, but of the judge. However, law clerks are closely connected with the court's decision-making process and are sounding boards for the judge's tentative opinions and legal researchers who seek the authorities that affect those decisions. Clerks are privy to the judge's thoughts in a way that neither parties to the lawsuit nor his most intimate family members may be. Moreover, the work done by law clerks is supervised, approved, and adopted by the judges who initially authorized it. Law clerks are essentially extensions of the judges at whose pleasure they serve. Therefore, a law clerk who is clearly assisting the judge in carrying out judicial functions is covered by the doctrine of absolute immunity. *Id. See also Mitchell v. McBryde*, 944 F.2d 229, 230 (5th Cir. 1991). Essentially, the immunity granted to the law clerk is derivative of the immunity afforded the judge and flows from that judicial immunity.

In this matter, after granting the motions to strike, the trial court considered the exceptions of no cause of action filed by Ms. Campbell and by the Judges. The Judges and Ms. Campbell maintain that the trial court correctly granted the exceptions after finding that they were entitled to absolute immunity. In granting the exception of no cause of action filed by the Judges, the trial court stated:

> There is no question in my mind that supervision and control of a law clerk employed by a district

> court is something that would be within the jurisdiction of a district court judge. ... The judge has to decide what cases to give to the clerk. The judge has to decide what he wants the clerk to do with regard to those cases. That clerk might have other duties, but all of the duties of the clerk of course are what the judge decides they should be or not be. So there's no doubt that with regard to the actions of the judges in this case in their contact with and in their relationship as the employer of Ms. Campbell that their actions are within their jurisdiction. That other factor is whether the actions are judicial in nature is what is — seems to be the most [contentious] in this case.

The court then discussed the four factors used to determine if acts are judicial in nature, stating:

> I've already stated in reference to the jurisdiction issue about whether or who is involved in the assignment of work and supervision of law clerks and certainly that is a normal judicial function, the supervision, management, assignment, and control of a law clerk is certainly a normal judicial function. There's no one else to perform that function. There's no one else that should perform that function. So number one is clearly satisfied. Number two, is whether the acts occurred in the courtroom or appropriate adjunct spaces. ... [I]f there's a complaint that a judge failed to supervise or conspired in

supervision or in concealing wrongful acts of a law clerk the question is not whether the judge's actions take him or her out of immunity because you don't examine the act itself. You examine the nature and function of it, and that is the contact between the judge and the law clerk which is a judicial function. So that's where the inquiry with regard to immunity ends. It's not with attempting to separate a particular act out; it's the nature and function of the act which in this case is the allegation that the judges in their role of supervision failed to act properly. Number three, whether this controversy centered around a case pending before the court? Well, there's no doubt about that. That's exactly what the petition is about. That all of this was done to the prejudice of Mr. Palowsky in the case of *Palowsky versus Cork*. That's what the case is about. So that factor is met. The fourth factor, whether the acts arose directly out of a visit to the judge in his official capacity? Those — that particular factor of course addresses issues or situations where a judge may have made a ruling in the courtroom that someone was aggrieved by. Circumstances don't always permit the application of that, and as *Malina* says in some situations and I'm quoting from the *Malina* case; immunity is to be afforded even though one or more of the *McAlester* factors is not met, and certainly that is the case here. *Malina* also reminds us that the concept of immunity is to be broadly

> construed in favor of granting immunity. The allegations of the petition against the judges clearly fall inside these factors, and the judges in this case are granted absolute immunity in the law for their alleged acts of wrongdoing.

Then, in discussing whether Ms. Campbell was entitled to immunity, the trial court stated:

> The question of whether a law clerk should be granted immunity is generally tied to the judge being granted immunity because they generally occur at the same time. ... And what the courts say is that it doesn't make any sense to grant immunity to the judge and then leave the law clerk exposed to liability for being part of the same judicial process. ... I recognize the difference in the facts of this case from the facts of most cases that you read about immunity of law clerks. As I said generally the judge gets sued, and when the judge gets sued you know the disgruntled litigant sues everybody that was involved in the process that he's disgruntled about. The difference in this case is that the lawsuit starts off against Ms. Campbell alleging that she committed wrongful acts with regard to Mr. Palowsky's case against Mr. Cork. The petition never alleges that Ms. Campbell took those actions at the direction of the judge, the judge assigned to the case or any other judge. Never says that. And then the amending petition adds the

> judges as conspirators and enablers. So it's in a factual basis chronologically it's not what you see in most of the other cases. But there is no distinction in the way that the actions of Ms. Campbell — there is no distinction in the application of immunity to the facts of this case, as alleged. There is no reason why I would be directed in another direction to apply the law of immunity to Ms. Campbell in this case because of the chronology of what the plaintiff says happened or didn't happen. Her actions, alleged actions, regarding mishandling and destroying documents in the plaintiff's lawsuit are nonetheless actions involving a pending case in the judicial process. So she under the law is entitled to absolute immunity as directed by the cases and by the body of jurisprudence that governs this concept.

Upon our *de novo* review, after carefully considering the applicable law and jurisprudence, in light of the underlying purpose of the judicial immunity doctrine, we conclude that Mr. Palowsky has stated a cause of action against Ms. Campbell. As previously stated, a law clerk's actions in assisting a judge to carry out judicial functions are covered by the doctrine of absolute immunity. The review, handling, and consideration of the record are all part of the judicial process. However, that immunity cannot extend to the independent act by a law clerk of intentionally destroying documents or withholding documents from the judge or jury without the judge's knowledge. The intentional destruction or concealment

of court documents that was not at the direction or instruction of a judge, as alleged herein, is not part of the adjudicative process. Rather, it is the antithesis of the judicial function. Mr. Palowsky asserts that Ms. Campbell was "uncontrollable for years" and acting independently outside the scope of her judicial functions as an employee of the court. As alleged, Ms. Campbell was neither assisting the Judges in carrying out judicial functions nor acting at the direction of any judge and was acting in the clear absence of all jurisdiction. *See Oliva*, 839 F.2d at 40. Therefore, we conclude that Mr. Palowsky has stated a cause of action against Ms. Campbell insofar as he has asserted the intentional concealment or destruction of documents from the court outside of any directive from a judge, and we reverse the December 11, 2015 judgment that sustained Ms. Campbell's exception of no cause of action to the extent that it finds Ms. Campbell absolutely immune for the intentional destruction of court documents.

As to the Judges, we conclude that they have absolute judicial immunity from Mr. Palowsky's lawsuit. The allegations directed to the Judges in Mr. Palowsky's First Supplemental, Amended, and Restated Petition for Damages do not deprive them of judicial immunity. This immunity applies, "however erroneous the act may have been, and however injurious in its consequences it may have proved to the plaintiff." *Cleavinger*, 474 U.S. at 199-200, 106 S. Ct. at 500 (quoting *Bradley*, 80 U.S. at 347). *See also Mitchell*, 944 F.2d at 230. Indeed, where a court has some subject-matter jurisdiction, there is sufficient jurisdiction for immunity purposes. *Kemp ex rel. Kemp*, 324 Fed.Appx. at 412. There is a meaningful distinction

between judicial acts which occur in excess of jurisdiction, which receive judicial immunity, and those which take place wholly lacking jurisdiction, which do not. *Id.* at 412-13. As to the allegations against the Judges, even were they acting in excess of jurisdiction, they were not acting in the clear absence of jurisdiction. The Supreme Court has explained that "[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.'" *Stump*, 435 U.S. at 356-57, 98 S. Ct. at 1105 (quoting *Bradley*, 80 U.S. at 351).

Moreover, the actions or inactions of the Judges, in allegedly conspiring to conceal the actions of Ms. Campbell, would have been taken in their judicial capacity in working and interacting with Ms. Campbell within the parameters of the judicial process. There are no allegations of participation by the Judges in the destruction of documents and only allegations of knowledge by the Judges of the destruction of documents after the fact. The allegations against the Judges amount to a failure to properly supervise Ms. Campbell in the handling of cases before the court and the failure to reveal her actions once discovered. Looking at the nature and function of the actions of the Judges, and not the acts themselves, the Judges' actions encompass the supervision of and working with a law clerk on cases before them.[6] Accordingly,

6. Even though judges may have judicial immunity, this does not preclude litigants from seeking other remedies. *See Mireles*, 502 U.S. at 10 n.1, 112 S. Ct. at 287 n.1 (where the Court recognized that a judge is not absolutely immune from criminal liability, from

we cannot find error and affirm the December 11, 2015 judgment of the trial court that sustained the Judges' exception of no cause of action and dismissed all claims against the Judges with prejudice.[7]

CONCLUSION

For the above and foregoing reasons, we reverse in part the December 11, 2015 judgment of the trial court insofar as it granted the motions to strike by the Judges and by Ms. Campbell with regard to Paragraphs 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 40, 52C, 58, 61, 63, 68, 69, 71, 80, and 81 of Mr. Palowsky's amended petition. We affirm the judgment striking Paragraphs 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 26, 39, 42, 52A, 52E, 59, 62, 64, 65, 66, 67, 70, 79, and 82. We also affirm the December 11, 2015 judgment of the trial court that sustained the Judges' peremptory exception raising the objection of no cause of action and dismissed all claims against the Judges with prejudice. Lastly, we reverse the December 11, 2015 judgment that sustained Ms. Campbell's peremptory exception raising the objection of no cause of action to the extent that it finds Ms. Campbell absolutely immune for the intentional destruction of court documents. Costs of this appeal shall be shared one-half by the plaintiff,

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a suit for prospective injunctive relief, or from a suit for attorney fees authorized by statute).

7. Further, because we conclude that the Judges are absolutely immune from suit herein, we pretermit discussion of Mr. Palowsky's fourth assignment of error wherein he contends that the trial court erred in refusing to give him the opportunity to amend his petition to state a cause of action.

Appendix B

Stanley R. Palowsky, III, individually and on behalf of Alternative Environmental Solutions, Inc., and one-half by the defendant, Allyson Campbell, and the defendants, Chief Judge H. Stephens Winters, Judge Carl V. Sharp, Judge J. Wilson Rambo, Judge Frederic C. Amman, and Judge Benjamin Jones.

DECEMBER 11, 2015 JUDGMENT ON MOTIONS TO STRIKE REVERSED IN PART AND AFFIRMED IN PART; DECEMBER 11, 2015 JUDGMENT DISMISSING DEFENDANT JUDGES AFFIRMED; DECEMBER 11, 2015 JUDGMENT DISMISSING DEFENDANT CAMPBELL REVERSED.

Appendix B

ATTACHMENT A

STATE OF LOUISIANA
PARISH OF OUACHITA
FOURTH DISTRICT COURT

NO. 15-2179

STANLEY R. PALOWSKY, III, Individually, and on behalf of ALTERNATIVE ENVIRONMENTAL SOLUTIONS, INC.

VERSUS

ALLYSON CAMPBELL

FILED: July 31, 2015

FIRST SUPPLEMENTAL, AMENDED, AND RESTATED PETITION FOR DAMAGES

NOW INTO COURT, through undersigned counsel, comes Plaintiff, Stanley R. Palowsky, III, who appears herein individually and as a 50-percent shareholder and director of Alternative Environmental Solutions, Inc. ("AESI"), a Louisiana corporation, and who submits his First Supplemental, Amended, and Restated Petition for Damages, without leave of Court as the originally-named defendant has not yet filed responsive pleadings, as follows:

Appendix B

1.

Made defendants herein are the following individuals:

A. Allyson Campbell, an individual of the full age of majority and a resident and domiciliary of the Parish of Ouachita, State of Louisiana;

B. Chief Judge H. Stephens Winters, an individual of the full age of majority and a resident and domiciliary of the Parish of Ouachita, State of Louisianan;

C. Judge Carl V. Sharp, an individual of the full age of majority and a resident and domiciliary of the Parish of Ouachita, State of Louisiana;

D. Judge Benjamin Jones, an individual of the full age of majority and a resident and domiciliary of the Parish of Ouachita, State of Louisiana;

E. Judge J. Wilson Rambo, an individual of the full age of majority and a resident and domiciliary of the Parish of Ouachita, State of Louisiana; and

F. Judge Frederic C. Amman, an individual of the full age of majority and a resident and domiciliary of the Parish of Ouachita, State of Louisiana.

2.

Pursuant to Louisiana Code of Civil Procedure article 615, made nominal defendant herein is AESI. Palowsky

states that it would be a vain and useless act for him to demand that AESI bring the present action as the other 50-percent shareholder of AESI is W. Brandon Cork, who, as discussed below, has been sued by Palowsky in a related action.

3.

At all pertinent times, Defendant Campbell was acting under color of law but outside the course and scope of her employment duties as a non-attorney law clerk for the Fourth Judicial District Court ("Fourth JDC").

4.

At all pertinent times through December 2014, Defendant Jones was employed as a duly-elected judge of the Fourth JDC sworn to uphold the laws and Constitution of this State and abide by the Code of Judicial Conduct. Since March 2015, he has been employed as the Judicial Administrator of the Fourth JDC, a position for which he receives state monies in addition to his retirement funds to perform administrative tasks and act as a "supernumerary" judge.

5.

At all pertinent times, Defendants Winters, Sharp, Rambo, and Amman were employed as duly-elected judges.of the Fourth JDC sworn to uphold the laws and Constitution of this State and abide by the Code of Judicial Conduct.

6.

Defendants Winters, Sharp, Jones, Rambo, and Amman (collectively referred to as "Defendant Judges") were acting under color of law but were acting in an administrative capacity when they committed the acts and/or omissions set forth herein; therefore, they are not entitled to judicial immunity from liability arising from same.

7.

As set forth below, Defendant Campbell is liable to Palowsky for the damages he has suffered as the result of her fraud, conspiracy to commit fraud, abuse of process, destruction or concealment of public records, intentional infliction of emotional distress, and violation of his rights under the Louisiana Constitution to due process and access to courts. Defendant Judges are liable *in solido* to Palowsky for damages he has suffered as the result of their aiding and abetting Campbell by allowing her free rein to do as she pleased and then conspiring to conceal Campbell's acts which compounded the adverse effects of her acts on Palowsky.

8.

Palowsky submits first, though, that his allegations against Defendants must be viewed in light of other actions they have taken in recent years.

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Campbell's History of Payroll Fraud and Defendant Judges' Complicit Cover-Up of Same

9.

Defendant Campbell is the highest paid law clerk in the Fourth JDC even though she is the only Fourth JDC law clerk who is not a licensed attorney and even though there is at least one law clerk who has been employed there longer than she has been.

10.

Upon information and belief, Campbell has not been to a continuing legal education course since graduating from law school in Alabama 15 years ago. Instead, she apparently receives continuous on-the-job training from different judges.

11.

On March 3, 2015, *The News-Star* reported that the Louisiana Legislative Auditor had issued a report indicating that some Fourth JDC employees might have been paid for hours which were not worked. In other words, payroll fraud had probably been committed.

12.

Defendant Campbell was apparently the only subject of the Auditor's report on suspected payroll fraud.

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13.

Upon information and belief, unlike all other law clerks employed by the Fourth JDC, Campbell reportedly did not electronically enter the time she spent at work until after May 2014, a month she "unexpectedly" had off without pay. Furthermore, her office reportedly went vacant for days, if not weeks, at a time.

14.

Moreover, Campbell has posted several pictures on her Facebook page which were viewable by the public[1] and which indicated that she not only did her job in restaurants and/or bars, but also that she drank alcohol while doing so, For example, she captioned one picture, which was obviously taken in a restaurant and which showed food and alcoholic beverages, "Seafood nachos at the office." She then posted a picture from the same restaurant of her half-eaten meal and two empty glasses and commented, "Too many house hooker drinks."

15.

Notably, Defendants Amman, Sharp, and Rambo, along with Judge B. Scott Leehy, certified Campbell's time sheets and records for state payroll.

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1. Campbell has subsequently either removed the photographs from her Facebook account or changed her privacy settings so that the general public cannot view her pictures.

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16.

Defendant Judges all owe an administrative duty to properly audit, investigate, and report suspected payroll fraud.

17.

As Chief Judge, Defendant Winters' present administrative duties and responsibilities include the proper auditing, investigating, and reporting of any suspected payroll fraud.

18.

Nonetheless, Defendant Judges have not only allowed Campbell to commit payroll fraud, but they have also actively schemed to cover up same.

19.

As just one example, Defendant Winters filed suit number 15-0770 on March 20, 2015, against Hanna Media Inc., d/b/a/ *The Ouachita Citizen* newspaper, after it filed a criminal complaint against the Court over public records requests dealing with the Court's internal investigations of possible payroll fraud involving Campbell as well as her felonious destruction of court documents, which is discussed below.

20.

In that suit, the Court argued that Campbell's right to privacy with regard to her employment file was stronger than the public's right to know if its tax funds were being used to pay someone who was committing, or allegedly committing, payroll fraud. Campbell intervened in that suit and, thereby, became a party to the litigation.

21.

Even though the Legislative Auditor had reported that some court employees might have been paid for hours which they did not work, and even though Campbell had posted pictures on her Facebook page which indicated that she was eating and drinking alcohol at her "office," *i.e.*, restaurants or bars, Defendant Winters, on behalf of the Court, stridently protected Campbell's privacy "rights" and deprived the public of the opportunity to learn whether they were paying her to "work" while she was out of the office eating and drinking alcohol.

22.

Additionally, in that same litigation, a draft judgment which was unsigned, undated, and unfiled in the suit record was somehow received and circulated by and between Campbell, a party litigant, and Defendant Jones more than *one week in advance* of any signed and dated judgment or reasons for judgment being made available to the public or to the defendant therein.

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23.

In an interview with *The Ouachita Citizen*, Judge Jones admitted the impropriety of having an unsigned and undated draft of a judgment before same is released to all parties in the litigation, but he refused to state from whom he obtained such document and, more disturbingly, when it was obtained.

24.

Upon information, Defendant Campbell had two deputy clerks of court aiding and abetting her document destruction, removal, and/or mishandling.

25.

Palowsky avers that Defendants Jones and Campbell were clandestinely working to improperly obtain *ex parté* the judgment of the *ad hoc* judge assigned to hear Defendant Winters' lawsuit, if not to actually help influence and/or draft the judgment.

26.

Given these facts, Palowsky submits that not only were Defendant Judges complicit in Defendant Campbell's payroll fraud, but they also schemed and conspired with her to conceal the fraud from the tax-paying public.

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Campbell's History of Destruction, Mishandling, and/or Concealment of Documents and Defendant Judges' Complicit Cover-Up of Same

27.

Defendant Judges all owe an administrative duty to properly audit, investigate, and report suspected document destruction, concealment, and/or mishandling. As Chief Judge, Defendant Winters' present administrative duties and responsibilities include, the proper auditing, investigating, and reporting of any suspected document destruction, concealment, and/or mishandling.

28.

In addition to having a history of committing payroll fraud, Campbell also has a history of destroying and/or concealing court documents, and Defendant Judges have covered this up to protect Campbell.

29.

For example, in 2012, Monroe attorney Cody Rials complained to Defendant Sharp that Campbell had withheld and/or shredded his court document in a case that was pending before said judge.

30.

Upon information and belief, the investigation of Campbell's suspected felonious conduct was assigned

to Defendant Sharp, who, upon information and belief, interviewed an eyewitness who confirmed that he observed Campbell bragging in a local bar that she had destroyed Rials' court document. Nevertheless, Sharp, who found the eyewitness to be credible, refused to investigate further, and he shut the investigation down.

31.

Thus, in 2012, Defendant Sharp covered up Campbell's destruction of Rials' document and remained silent as to same.

32.

In 2014, when Defendant Campbell wrote "A modern guide to handle your scandal," one of her weekly "society" columns in *The News-Star*, Rials believed that Campbell was goading him and gloating over the fact that she had gotten away with destroying his document. As a result, he wrote to court personnel to again complain about Campbell's actions.

33.

Upon information and belief, Rials was then ordered to reduce his complaint of such felonious conduct to writing, which he did. The Court then appointed Defendant Jones to investigate, which is a purely administrative task, Rials' complaint of Campbell's felonious misconduct.

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34.

It is believed that during the investigation, Defendants Sharp and Jones interviewed an unbiased disinterested witness who personally saw and heard Campbell sitting in a bar boasting about shredding Rials' document so that Sharp could not review it.

35.

Once the eyewitness, a local attorney, was interviewed and found credible, the "investigation" was closed and the cover up began yet again.

36.

No official Fourth JDC records of the investigation are believed to have survived Defendant Jones' retirement at the end of 2014. In fact, Defendants Winters and Jones advised *The Ouachita Citizen* that there were no discipline records involving Campbell which the Court could provide in response to the newspaper's request for public records in March 2015.

37.

Further, during the trial of the Court's suit against *The Ouachita Citizen*, counsel for the Court argued to the *ad hoc* judge that there was no "eyewitness" testimony to Campbell's alleged felonious destruction of court documents.

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38.

Perhaps more importantly, although the Court admitted that it had Rials' written complaint, it argued that Campbell's destruction of court documents was a mere "personnel matter," and that Campbell's privacy rights outweighed the tax-paying public's right to know whether a Court employee was destroying documents.

39.

Additionally, upon information and belief, when the Clerk of Court could not locate *52* writ applications which had been "missing" for over a year, it was discovered that Campbell, who was clerking for Defendant Sharp at the time, had used the applications as an end table in her office. Nonetheless, it does not appear that she was over reprimanded, much less punished, for same.

40.

Thus, Palowsky submits that not only were Defendant Judges complicit in Defendant Campbell's felonious destruction of documents, but they also schemed and conspired with her to cover up same from the tax-paying public and from litigants and their counsel. Defendant Judges' affirmative acts to cover up Campbell's felonious conduct amounts to misprision of a felony.

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Defendants' Actions in *Palowsky v. Cork*

41.

At all times pertinent to his causes of action against Defendants, Palowsky and AESI, derivatively, have been plaintiffs in the matter of *Palowsky v. Cork et al*, Docket No. 13-2059 of the Fourth JDC.

42.

After the missing 52 writ applications were found in Campbell's office, she was reassigned to Defendant Amman, who is her close friend and personal confidant, and Defendant Rambo, who was presiding over Palowsky's suit against Cork at the time.

43.

This re-assignment led to Palowsky's becoming the most recent victim of Defendant Campbell's malicious and intentional destruction of documents and Defendant Judges' cover up of same.

44.

In *Palowsky v. Cork*, Plaintiff filed suit against W. Brandon Cork, the other 50-percent shareholder of AESI, for damages he suffered as a result of Cork's theft, fraud, racketeering, and breach of fiduciary duty, the latter of which Cork testified was done, at least in part, at the direction of his counsel therein.[2]

2. In his deposition, Cork swore under oath in the presence of his counsel, Thomas M. Hayes, III, and Brandon Creekbaum, that

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45.

Upon information and belief, Defendant Campbell maliciously and intentionally harmed Palowsky and willfully violated his constitutionally-protected rights to both due process[3] and access to courts[4] in *Palowsky v. Cork* when she spoliated, concealed, removed, destroyed, shredded, withheld, and/or improperly "handled" court documents such as memoranda of law, orders, pleadings, sealed court documents, and chamber copies of pleadings filed with the clerk and hand-delivered to Defendant Rambo's office.

46.

Upon information and belief, Defendant Campbell maliciously withheld and concealed documents and pleadings in the trial court as well as from the record that was sent to the Second Circuit Court of Appeal for its review of an application for supervisory writs filed by Cork. Said documents include the following:

A. Plaintiff AESI's Opposition to W. Brandon Cork's Motion to Strike Answer filed January 13, 2014. Notably, Defendant Rambo stated at the beginning of the hearing on the motion to strike that he had this pleading, yet it has remained "missing" from the record.

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he was under the "direction" of said counsel when he competed with ABSI without telling Palowsky.

3. La. Const. Art. 1 § 2.

4. La. Const. Art. 1 § 22.

B. Plaintiff's Memorandum in Support of his Motion to Clarify Protective Order filed March 14, 2014. While the motion itself is included in the record, the supporting memorandum (with attached exhibits) was not in the record or in an envelope of sealed exhibits sent to the Second Circuit.

C. AESI's Reply Memorandum to Clarify Language in Protective Order to Allow Proper Reporting of Crimes, Tax Fraud, Racketeering, and Conspiracy filed June 24, 2014, with attached correspondence among counsel for the respective parties.

D. AESI's Original Opposition to Writ Application of W. Brandon Cork filed on or about July 15, 2014. For some reason, this pleading was missing from the Second Circuit's record, which was prepared by the trial court, though Cork's application filed June 18, 2014, was included in the envelope of sealed documents filed with the appellate court.

E. Third Amending and Supplemental Petition of Plaintiff, Stanley R. Palowsky, and Third Party Demand of Defendant, Alternative Environmental Solutions, Inc., with attached order requesting leave to file same filed on August 13, 2014.[5] Although this pleading itself

5. In this pleading, Palowsky and ARSI added Cork's counsel as defendants for their participation in Cork's racketeering activities. The trial court never actually granted leave to file said pleading, so Palowsky and AESI were forced to file a separate suit, docket number 14-2412, against Cork's counsel. That suit has now been consolidated with Palowsky's original suit against Cork.

was missing from the record sent to the Second Circuit, Cork's memorandum in opposition to same was not.

F. Palowsky's and AESI's Memorandum in Support of Motion to Recuse Judge Rambo as well as exhibits attached to same. This pleading is discussed more specifically below.[6]

47.

Notably, such actions should constitute a violation of La. R.S. 14:132, the criminal statute which addresses the destruction or alteration of public records and sets forth the punishment for same.

48.

As set forth above, such actions by Campbell of repeatedly and maliciously withholding and concealing "missing" court documents were part of a proven pattern of misconduct outside the course and scope of her duties as a law clerk but under color of law.

49.

Palowsky avers that Campbell undertook these acts with malice and with the intention not only to cause him loss and to injure and inconvenience him, but also to obtain

6. The trial court's record was reviewed again on July 22, 2015, and the pleadings listed herein are still missing from the record.

unjust advantages for his opponent(s) and their counsel. At the very least, these actions constitute fraud per Louisiana Civil Code article 1953.

50.

Campbell's supervising judges at the time, Defendants Amman and Rambo, did not just sit back quietly and let Campbell commit such acts, they actively worked and schemed to cover up her actions.

51.

Additionally, Defendants Rambo, Jones, Sharp, and Winters have repeatedly denied that any documents were missing from the record of *Palowsky v. Cork* but Palowsky has proven otherwise.

52.

Plaintiff was forced to file a motion to recuse Defendant Rambo in his suit against Cork after the following significant events involving Campbell, Defendant Rambo's law clerk at the time, occurred:

A. Campbell published and declared in the Sunday edition of the Monroe newspaper *The News-Star* her bias, favoritism, and praise for Cork's counsel Thomas M. Hayes, III, when she wrote in her weekly "society" column that he, as well as Judge D. Milton Moore, III, of the Second Circuit Court of Appeal, had the "IT" factor, "a somewhat

undefinable quality that makes you and everyone else around stand taller when they enter the room, listen a little more closely, encourage you to take fashion or life risks, make each occasion a little more fun, and generally inspire you to aim to achieve that 'IT' factor for yourself."

B. Many of Palowsky's filings went missing from the record and/or were withheld from Judge Rambo in status conferences and hearings as noted above.

C. Palowsky learned that Campbell had been investigated in 2012 by Defendant Sharp and again in 2014 by Defendants Sharp and Jones for destruction of Cody Rials' court document as stated above. Even though Campbell's conduct had been corroborated by an eyewitness interviewed by Defendant Sharp who stated that Campbell boasted in a local bar that she had, indeed, shredded or withheld a court document in order to cause loss, injury, or inconvenience to attorney Rials, Defendant Judges refused to do anything to control, much less punish, Campbell. This showed Palowsky that Campbell had aptly demonstrated that she was beyond supervision, let alone discipline, and furthermore that Defendant Judges were covering up her actions.

D. In 2014, Defendant Jones was appointed to investigate complaints that Campbell was improperly "handling" Palowsky's filings.

Defendant Jones concluded that the missing documents resulted from nothing more than delays caused by a new "filing process" in the Clerk's office. Nevertheless, the Clerk of Court advised counsel for Palowsky that the new "filing process" referenced by Defendant Jones did not exist.

E. Also in 2014, Campbell published the above-mentioned column entitled "A modern guide to handle your scandal" declaring that "half the fun is getting there, and the other half is in the fix. . . ." She went on to advise her readers as follows:

> [F]or the more adventurous among us, keep the crowd guessing. Send it out — lies, half truths, gorilla dust, whatever you've got. . . . [Y]ou are on the receiving end of one of the highest forms of flattery, as we always say "you're no one until someone is out to get you." That special somebody cared enough to try and blacken your reputation and went and turned you into a household name? Bravo. You're doing something right.

53.

After having so many of his pleadings vanish, after learning that Defendants Jones and Sharp had covered up Campbell's destruction of documents in another case, and

after reading in black and white that Defendant Rambo's law clerk publicly and proudly advocated lying as a way to deal with a "scandal," Palowsky realized that he could not have Campbell or Defendant Rambo, for whom she worked and who allowed her to publish such "advice," handle his case if he wanted it done fairly.

54.

Palowsky filed the motion to recuse Defendant Rambo to escape recurring abuses of process, bias, prejudice, and the problem of his pleadings frequently disappearing. In compliance with this Court's local rules, Palowsky contemporaneously filed a supporting memorandum with the Clerk of Court detailing the facts and circumstances, including Campbell's actions, which justified his recusal request. Moreover, counsel hand delivered a copy of same to Judge Rambo's chambers.

55.

Shortly after the recusal motion and memorandum were filed, Defendant Rambo held a status conference wherein he expressed his extreme displeasure to Plaintiff's counsel that Plaintiff had filed a motion to recuse *without a supporting memorandum*. Counsel for AESI and Palowsky advised Defendant Rambo that was exactly why they were asking him to recuse himself, *i.e.*, because their filings were obviously being intercepted before he could read them.

56.

Obviously Defendant Campbell had, once again, acted outside the course and scope of her employment to intentionally harm Palowsky by withholding and/or concealing court documents and wrongfully thwarting his constitutional rights to due process and access to courts.

57.

After Palowsky and AESI suffered harm which was intentionally and maliciously inflicted upon them in Defendant Rambo's court for more than two years by Campbell in her efforts to damage them and to assist their opponents and their counsel, Defendant Rambo, while denying bias, recused himself without a hearing. Palowsky's case was then assigned to Defendant Sharp.

58.

Palowsky then filed a motion to recuse the Fourth JDC judges *en banc* on the basis that Campbell and the Court had become inextricably intertwined in litigation when Defendant Winters, on behalf of all the judges, filed suit against *The Ouachita Citizen* to protect Defendant Campbell's alleged privacy rights as discussed in paragraphs 18 through 26 above.

59.

Palowsky's motion to recuse has recently been set for hearing in front of Defendant Sharp on August 20, 2015;

however, he has informed all counsel in writing that he is not going to allow any testimony to be submitted during that hearing. Such refusal to hear evidentiary testimony is a clear violation of Palowsky's rights of due process and meaningful access to courts and is being done for the sole purpose of continuing the cover up.

60.

Palowsky avers that Defendant Judges' actions have been undertaken to cover up Campbell's misdeeds and felonious acts and to prevent any testimony or evidence of same from becoming part of the record in his litigation.

61.

Palowsky submits that his allegations against Campbell and Defendant Judges must be viewed in light of other actions she has taken during her employment and the judges' concealing of same all as set forth above in paragraphs 9 through 40.

62.

Palowsky also submits that his allegations must be considered in light of Defendant Campbell's personal philosophies on life which she has smugly published in her weekly "society" column during his litigation and which might lead one to believe that she is, to put it mildly, narcissistic and incapable of submitting to any authority.

63.

For example, on May 31, 2015, she wrote, "You will always be fond of me. I represent to you all the sins you have never had the courage to commit," a quote which she attributed to Oscar Wilde before he was imprisoned.

64.

On February 15, 2015, she quoted Oscar Wilde again when she said that "to love oneself is the beginning of a lifelong romance."

65.

On April 5, 2015, she told her readers as follows: "I say live life to the fullest, follow no one's rules except your own (and law enforcement, of course) and continue to excel at your own personal spectacular talents."

66.

On April 12, 2015, she ended her column by quoting Henry Rollins: "In winter, I plot and plan. In spring, I move."

67.

On June 14, 2015, Campbell again cited Oscar Wilde and stated, "Consistency is the last refuge of the unimaginative." She then described how she "concocted . . . a faux rom-com worthy 'don't leave me' airport scene,"

and she professed, "goodness, I love attention." She then closed her column with W. David Johansen's words "I am doing exactly what I want to do, and I am having fun doing it."

68.

Oh June 21, 2015, Campbell wrote, "Escape the ordinary. Almost anything is possible if you have enough time and enough nerve."

69.

On July 12, 2015, she penned, "It's not cheating if it's in our favor."

70.

In another blatant display of narcissism, when Campbell's alleged improprieties and the litigation between the Court and *The Ouachita Citizen* were reported on by *The Acadiana Advocate*, Campbell posted a comment on the paper's online site and stated as follows: "Dear advocate [sic]: first of all my name is spelled Allyson, not Allison." She then went on to explain the role of an *ad hoc* judge.

71.

Palowsky notes that by allowing Campbell to write her weekly "society" column in which she has published articles which clearly show her admiration for Palowsky's

opponent's attorney Hayes, by failing to properly supervise her, and by allowing, either directly or indirectly, her to withhold court documents in order to delay proceedings and harm Palowsky, Defendants Rambo, Amman, Winters, Jones, and Sharp have violated multiple Canons of the Code of Judicial Conduct

72.

For example, Canon 3(A)(3) requires that a judge have his staff be "patient, dignified, and courteous" to litigants and lawyers.

73.

Canon 3(A)(4) states that a judge shall not permit his staff to "manifest bias or prejudice" through "conduct or words."

74.

Canon 3(A)(8) prohibits a judge and his personnel from "mak[ing] any public comment that might reasonably be expected to affect [a pending proceeding's] outcome or impair its fairness . . . ."

75.

Canon 3(B)(2) states that a "judge shall require staff, court officials and others subject to the judge's direction and control to observe the standards of fidelity and diligence that apply to the judge and to refrain from

manifesting bias or prejudice in the performance of their official duties."

76.

Palowsky notes that Article V, § 25(C) of the Louisiana Constitution provides in pertinent part as follows:

> On recommendation of the judiciary commission, the supreme court may censure, suspend with or without salary, remove from office, or retire involuntarily a judge for willful misconduct relating to his official duty, willful and persistent failure to perform his duty, persistent and public conduct prejudicial to the administration of justice that brings the judicial office into disrepute, conduct while in office which would constitute a felony, or conviction of a felony.

77.

Regardless of Defendant Campbell's writings in her society column, Palowsky states that her actions of improperly handling pleadings and filings appear to be not only habitual, but also, at the very least, to be tacitly approved by Defendant Judges as she has apparently never even been reprimanded, much less disciplined, for same by any of them.

78.

It is more likely, though, that Campbell's actions have been purposely concealed by Defendant Judges in a scheme to maliciously defraud and harm Palowsky and deprive him of his constitutional rights to due process and access to courts.

Recusal of All Judges of This Court

79.

Palowsky avers that all the judges of the Fourth JDC should recuse themselves from this matter since Defendants are employees of the Court.

80.

Moreover, as discussed above, this Court, through Defendant Judges, has an apparent history of protecting Campbell even though several attorneys in different cases, including *Palowsky v. Cork*, have complained about her suspected felonious destruction of documents and even though she has reportedly been investigated for public payroll fraud.

81.

Not only has this Court allowed Campbell to do as she pleases at the courthouse without recourse, but as noted above, it chose to sue a local newspaper to protect her employment records from being made public, and therein,

it denied that there were any eyewitnesses to Campbell's destruction of documents even though Defendants Jones and Sharp reportedly interviewed an eyewitness who personally heard Campbell bragging about same.

82.

The above facts and circumstances require that the Fourth JDC be recused *en banc* and an *ad hoc* judge be appointed to hear and decide the instant lawsuit.

Requests for Relief

83.

To date, Plaintiff has endured more than two years of needless delay, court costs, attorney fees, embarrassment, mental stress, and inconvenience (as referred to in Civil Code article 1953) and has, likewise, been denied his constitutional rights to due process of law and access to courts as a result of Campbell's pattern of malicious and intentional misconduct and Defendant Judges' complicity in same.

84.

Campbell's wrongdoings have been reported time and again by different attorneys in different cases and investigated time and again by Defendant Judges but have nevertheless been allowed to continue. It is now painfully apparent that not only has Campbell been unsupervised and uncontrollable for years, but Defendant Judges

have actively schemed to allow her conduct to continue unabatedly.

85.

Palowsky avers that Campbell's and Defendant Judges' actions constitute fraud, conspiracy to commit fraud, abuse of process, destruction or concealment of public records, misprision of felonies, intentional infliction of emotional distress, and violation of his rights under the Louisiana Constitution to due process and access to courts.

86.

Palowsky therefore states that he, individually and on behalf of AESI, is entitled to be compensated for any and all damages that he and AESI have suffered as the result of Defendants' fraud, conspiracy to commit fraud, abuse of process, destruction or concealment of public records, misprision of felonies, intentional infliction of emotional distress, and violation of his Louisiana constitutional rights to due process and access to courts.

87.

At this time, Plaintiff seeks no relief under any federal law.

88.

Palowsky hereby requests a trial by jury on all his claims, including without limitation, his intentional tort claim.

WHEREFORE, Plaintiff, Stanley R. Palowsky, III, individually and on behalf of AESI, prays that after due proceedings are had, there be judgment rendered herein in favor of Plaintiff and against Defendants, Allyson Campbell, Judge H. Stephens Winters, Judge Carl V. Sharp, Judge Benjamin Jones, Judge J. Wilson Rambo, and Judge Frederic C. Amman, for all sums as are fair and just under the circumstances, together with reasonable attorney fees and court costs.

Plaintiff further prays for all orders and decrees necessary and proper under the premises and for full, general, and equitable relief.

Respectfully submitted,

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WHIPPLE, C.J., concurring in part and dissenting in part.

Under the facts of this case, to the extent that the majority opinion finds that the judges herein are granted absolute immunity for their alleged acts of wrongdoing and affirms the trial court's judgment maintaining the judges' peremptory exception of no cause of action, I agree with the majority. I also concur in the majority opinion insofar as it affirms in part and reverses in part the trial court's judgment on the motions to strike by the judges and Ms. Campbell. I disagree, however, with the portion of the majority's opinion that reverses the trial court's judgment maintaining the peremptory exception of no cause of action urged by Ms. Campbell.

As the U.S. Supreme Court has recognized, few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction. *Pierson v. Ray*, 386 U.S. 547, 553-554, 87 S.Ct. 1213, 1217, 18 L.Ed2d 288 (1967). Such immunity applies however erroneous the act may have been, and however injurious in its consequences it may have proved to the plaintiff. *Bradley v. Fisher*, 80 U.S. 335, 13 Wall. 335, 347, 20 L.Ed. 646 (1871). Judges are immune from damage claims arising out of acts performed in the exercise of their judicial functions, even when the judge is accused of acting maliciously. *Mitchell v. McBryde*, 944 F.2d 229, 230 (5th Cir. 1991). Moreover, the judge is absolutely immune for all judicial acts not performed in clear absence of all jurisdiction, however erroneous the act and however

evil the motive. *Mitchell v. McBryde*, 944 F.2d at 230. 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. *Dellenbach v. Letsinger*, 889 F.2d 755, 759 (7th Cir. 1989). The concern for the integrity of the judicial process underlying the absolute immunity of judges also is reflected in the extension of absolute immunity to "certain others who perform functions closely associated with the judicial process." *Oliva v. Heller*, 839 F.2d 37, 39 (2nd Cir. 1988), *quoting Cleavinger v. Saxner*, 474 U.S. 193, 200, 106 S.Ct 496, 500, 88 L.Ed.2d 507 (1985).

Thus, applying this analysis, courts have granted absolute immunity to court clerks where they were performing discretionary acts of a judicial nature. *Oliva v. Heller*, 839 F.2d at 39. In contrast to *court* clerks, who frequently perform ministerial functions, a *law* clerk generally performs discretionary acts of a judicial nature. Indeed, a law clerk is probably the one participant in the judicial process whose duties and responsibilities are most intimately connected with the judge's own exercise of the judicial function. *Oliva v. Heller*, 839 F.2d at 40. For purposes of absolute judicial immunity, judges and their law clerks are as one. *Oliva v. Heller*, 839 F.2d at 40. Accordingly, when assisting the judge in carrying out judicial functions, the judge's law clerk is likewise entitled to absolute immunity. *Mitchell v. McBryde*, 944 F.2d at 230.

Applying these precepts to the instant case, the petitions herein allege that Ms. Campbell caused harm to plaintiff by maliciously and intentionally destroying, concealing, removing, withholding, and/or improperly handling court documents pertaining to civil litigation filed by plaintiff The petitions further allege that the judges caused harm to plaintiff by concealing and/or covering up Ms. Campbell's misdeeds, failing to properly supervise, investigate, or reprimand Ms. Campbell, and in allowing Ms. Campbell to withhold court documents in order to delay proceedings.

In rendering judgment, the trial court determined that there was no distinction in the application of immunity to both Ms. Campbell and the judges, finding that "[t]he question of whether a law clerk should be granted immunity is generally tied to the judge being granted immunity because they generally occur at the same time." With reference to the application of absolute judicial immunity to Ms. Campbell, the trial court held that "[h]er actions, alleged actions, regarding mishandling and destroying documents in the plaintiff's lawsuit are nonetheless actions involving a pending case in the judicial process [such that] under the law [she] is entitled to absolute immunity as directed by the cases and the body of jurisprudence that governs this concept." I am constrained to agree.

In my view, the handling of evidence is incidental to the discharging of a judge's duties. Moreover, as the jurisprudence demonstrates, even if such handling (or mishandling) was performed with malice or wrongful

intent resulting in the destruction of evidence, a law clerk is entitled to the same absolute immunity for civil liability afforded judges. *See Mitchell v. McBryde*, 944 F.2d at 230; *Dellenbach v. Letsinger*, 889 F.2d at 759, For these reasons, I respectfully disagree with the portion of the majority's opinion that reverses the trial court's judgment, which had maintained Ms. Campbell's peremptory exception of no cause of action.

Appendix B

HOLDRIDGE, J., concurring in part and dissenting in part

For the reasons stated by Chief Judge Whipple, I concur in part and dissent in part. I further add that even taking into consideration all of the allegations that were stricken by this court, the defendants are still entitled to absolute immunity. In this case, the only damages that could be caused to the plaintiffs by any of the defendants would be in connection to the plaintiffs' lawsuit in the Fourth Judicial District Court. As to any court proceedings, it is without question that both the judge and the law clerk have absolute immunity. However, in accordance with Louisiana Code of Civil Procedure article 934, I would allow the plaintiffs an opportunity to amend their petition, as to Ms. Campbell only, to allege any facts whereby the plaintiffs were damaged by any action of Ms. Campbell that were not related to judicial proceedings.

CRAIN, J., agreeing in part and dissenting in part.

I agree with the majority decision to reinstate the stricken paragraphs of the pleadings and finding the law clerk does not enjoy judicial immunity for her nonjudicial acts. From the remainder of the majority opinion, I dissent. I recognize that all of the allegations made in the petition, which are disturbing and injurious to the esteem and dignity of the judiciary, may be unprovable or provably false.[1] However, the procedural posture in which this matter is presented, an exception of no cause of action, requires that I make my decision accepting the well-pleaded facts in the petition as true. *See McCarthy v. Evolution Petroleum Corp.*, 14-2607 (La. 10/14/15), 180 So. 3d 252, 257 (La. 10/14/15).

Judicial immunity is of the highest order of importance in maintaining an independent judiciary, free of threats or intimidation. But it is a judge-created doctrine policed by judges. And while there are safeguards in the judicial process that reduce the need for private damage actions against judicial actors, when judicial actors perform non-judicial acts, they are not protected by this otherwise sweeping immunity doctrine. *Cf. Mireles v. Waco*, 502 U.S. 9, 11-12, 112 S.Ct. 286, 288, 116 L.Ed.2d 9 (1991). Whether an act is judicial or non-judicial is determined by "the nature of the act itself, i.e., whether it is a function normally performed by a judge, and to the expectations

1. The gravity of these allegations cannot be overemphasized, as one making them falsely is subject to being held accountable for doing so. *See, e.g.*, La. Code Civ. Pro. art. 863; Supreme Court Rules — Rule 19, §6.

of the parties, i.e., whether they dealt with the judge in his judicial capacity." *Stump v. Sparkman*, 435 U.S. 349, 362, 98 S. Ct. 1099, 1107, 55 L.Ed.2d 331 (1978). "[T]he relevant inquiry is the 'nature' and 'function' of the act, not the 'act itself.'" *Mireles*, 502 U.S. at 13, 112 S. Ct. at 288.

The petition alleges the law clerk "spoliated, concealed, removed, destroyed, shredded, withheld, and/or improperly 'handled' court documents." The nature of these acts relate to maintenance of court records. The duty to maintain records in cases involves many non-judicial actors, and can only be considered a ministerial, not judicial, act. *See Ex parte Commonwealth of Virginia*, 100 U.S. 339, 348, 25 L.Ed. 676 (1879) (reasoning that jury selection was a ministerial rather than judicial function, even though performed by a judge, since the duty might as well have been committed by a private person). The allegations do not relate to the exercise of discretion in connection with an adjudicatory function. Consequently, I agree with the majority that the facts alleged in the petition, accepted as true to decide the exception of no cause of action, bring the cause of action against the law clerk outside the scope of judicial immunity.

As to the judges, the petition alleges they "aid[ed] and abet[ted] [the law clerk] by allowing her free rein to do as she pleased and then conspire[ed] to conceal [the law clerk's] acts." For the same reasons the law clerk is not immunized for her non-judicial acts related to maintaining court records, the judges are not immunized for allegedly aiding, abetting, then concealing those acts. Failing to supervise a law clerk relative to a non-judicial act is not a

judicial act for purposes of immunity.[2] Rather, the alleged failure to "supervise" in this context is more akin to an administrative responsibility, which is not within the scope of absolute judicial immunity. *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 436, 113 S. Ct. 2167, 2172, 124 L.Ed.2d 391 (1993). Thus, I likewise find the judges not immune from suit based on these allegations, accepted as true to decide the exception of no cause of action, and dissent from the majority's decision to the contrary.

Finally, the facts alleged in the petition, which, again, must be accepted as true for purposes of the exception, arguably satisfy the essential elements of a crime, namely injuring public records, then concealing it. *See* La. R.S. 14:132; *see also* La. R.S. 14:25. The doctrine of judicial immunity does not shield judicial actors from civil liability for criminal acts. *See Mireles*, 502 U.S. at 9-10, n.1, 112 S. Ct. at 287, n.1. Many decisions in Louisiana recognize actions based on malice or corruption are outside the scope of judicial immunity. *E.g., McCoy v. City of Monroe*, 32,521 (La. App. 2 Cir. 12/8/99), 747 So. 2d 1234, 1241, *writ denied*, 00-1280 (La. 3/30/01), 788 So. 2d 441; *Moore v. Taylor*, 541 So. 2d 378, 381 (La. App. 2 Cir. 1989); *Cleveland v. State*, 380 So. 2d 105 (La. App. 1 Cir. 1979); *Conques v. Hardy*, 337 So. 2d 627 (La. App. 3d Cir. 1976); *Berry v. Bass*, 157 La. 81, 102 So. 76 (1924); *State ex rel. Duffard v. Whitaker*, 45 La. Ann. 1299, 14 So. 66 (1893).

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2. Even if supervising the law clerk in this case was considered a judicial act, reason dictates that only the presiding judge actually supervising the law clerk has immunity. Here, all the judges are draped with immunity, even those not presiding over the case and directly supervising the law clerk.

While later cases suggest judicial immunity extends even to judicial acts performed with malice, those cases do not immunize judicial actors from criminal conduct grounded in malice or corruption. *See Martin v. Joan Malbrough & Associates*, 13-0864, 2014 La. App. Unpub. LEXIS 72, 2014 WL 651535, p.1 (La. App. 1 Cir. 2/18/14). Extending the doctrine of judicial immunity to include civil liability for alleged criminal conduct, as in this case, risks undermining the public's trust in the judiciary, which I cannot countenance.

APPENDIX C — TRANSCRIPT OF HEARING OF THE STATE OF LOUISIANA, PARISH OF OUACHITA, OF THE FOURTH JUDICIAL DISTRICT, DATED NOVEMBER 5, 2015

STATE OF LOUISIANA

PARISH OF OUACHITA
FOURTH JUDICIAL DISTRICT

STANLEY R. PALOWSKY, III INDIVIDUALLY
AND ON BEHALF OF ALTERNATIVE
ENVIRONMENTAL SOLUTIONS, INC.

VERSUS

NUMBER 2015-2179
ALLYSON CAMPBELL

JUDGE JEROME J. BARBERA, III
AD HOC

BE IT KNOWN AND REMEMBERED that upon the hearing of the MOTION FOR NO CAUSE OF ACTION and MOTION TO STRIKE in the above styled and numbered case in the Fourth District Court, Parish of Ouachita, State of Louisiana, on the 5th day of November, A.D., 2015, before Honorable Jerome J. Barbera, III, Judge Ad Hoc, at Monroe, Louisiana, the following proceedings were had, to wit:

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[pg. 16] 9:27 -- 2798.1(B) and point -- small one and small two. Absolutely does not apply to this case. So Your Honor,

they've never distinguished *Forrester versus White.* We think it's the controlling case, and we would ask the court to deny the motion.

BY THE COURT:

Any rebuttal?

BY MR. GUICE:

Your Honor, we've briefed *Forrester.* The court has read it.

BY THE COURT:

All right. I'll first address the Exception of No Cause of Action filed by the judges. The court will sustain the Exception of No Cause of Action filed by the judges. The petition against the judges is dismissed with prejudice for the following reasons: The petition in this case and I've recited this once before, but I'm going to do it again on this exception. The petition in this case alleges that Allyson Campbell, a law clerk to judges of this district and an employee of the court, caused harm to the plaintiff by her actions in concealing, destroying, removing, withholding and improperly handling pleadings and court documents pertaining to civil litigation filed in this district by the plaintiff against a former business associate. The petition further alleges that the named defendant judges are liable to the plaintiff for damages as a result of their aiding and abetting Ms. Campbell and conspiring to conceal her actions. These comments that I have just made

about the petition is my summary of what this case is about. I understand that lay people have difficulty grasping the concept of judicial immunity. It seems to be something that is foreign to a discussion of what's right or wrong or what's good or bad. When you say that an elected official is immune from liability, civil liability, immune from civil liability because of something that he or she did or didn't do it provokes concern, it provokes probably some other emotions because it doesn't seem that it is fair to the litigant. Judicial immunity though has reasons that are deeply rooted in our judicial [pg. 17] system where judges should not have to answer to a litigant for a decision that he or she has made. There are appellant courts that serve that function. There are other agencies and bodies that react and apply other laws to the conduct of judges both in and out of the courtroom. The issue of judicial immunity though has been a part of our law for a long, long time. The Louisiana courts have often in fact more often than not cited Federal cases in support of decisions because of the lack of much jurisprudence in the Louisiana court system. So it's an important concept that's part of our judicial process. It is deeply rooted in our law, and it is the law of the land. Judicial immunity it's the law ofthe land with regard to actions of judges when their actions are considered to be within the guidelines for a determination of whether the immunity should be applied or not. According to the case law a judge is absolutely immune from the claims of a litigant when number one, the complained of action is judicial in nature, and number two, the act is within the judge's jurisdiction. And that second requirement has greater meaning than what lawyers generally ascribe to the term jurisdiction.

Appendix C

We generally talk about jurisdiction as being maybe geographical and maybe being monetary in some cases and in some cases it has to do with the constitution says is what this judge does and doesn't do and what this judge does and doesn't do. It's the definition of the scope of responsibility and authority that a judge has, but in the context of judicial immunity the judge's jurisdiction can go beyond that and as applied to this case of course it does. There's nothing in the constitution about law clerks that I'm aware of. There's nothing in the constitution about what a law clerk should do or not do. There's nothing in the constitution about what judges are required to do with regard to their law clerks. There is no question in my mind that supervision and control of a law clerk employed by a district court is something that would be withi n the jurisdiction of a district court judge. Who else in a district court would be expected to supervise, [pg. 18] control, instruct, assign work to a law clerk? It would have to be the district judge. The judge has to decide what cases to give to the clerk. The judge has to decide what he wants the clerk to do with regard to those cases. That clerk might have other duties, but all of the duties of the clerk of course are what the judge decides they should be or not be. So there's no doubt that with regard to the actions of the judges in this case in their contact with and in their relationship as the employer of Ms. Campbell that their actions are within their jurisdiction. The other factor is whether the actions are judicial in nature is what is -- seems to be the most contention in this case. So to determine whether the act is judicial in nature we refer to the four factors that come from the jurisprudence, from the Federal cases. I've looked at many of the cases that

were cited. We have a Louisiana case *Haley versus Leary* which is a 2010 Fourth Circuit case, and I also read with great interest for a lot of reasons because I know Judge Gonzales the case of *Malina versus Gonzales* which is a Federal case involving a district court judge from East Baton Rouge who took some actions with regard to a motorist that ended up in court. So let's look at *Malina* on the four factors. The four factors to determine whether actions are judicial in nature or whether the precise act complained of is a normal judicial function, whether the acts occurred in the courtroom or appropriate adjunct spaces such as the judge's chambers, whether the controversy centered around a case pending before the court, and whether the acts arose directly out of a visit to the judge in his official capacity. I've already stated in reference to the jurisdiction issue about whether or who is involved in the assignment of work and supervision of law clerks and certainly that is a normal judicial function, the supervision, management, assignment, and control of a law clerk is certainly a normal judicial function. There's no one else to perform that function. There's no one else that should perform that function. So number one is clearly satisfied. Number two, is whether the acts occurred in the courtroom or appropriate adjunct spaces. [pg. 19] Well, certainly there's no allegation that -- and of course the accusation that someone failed to supervise is not something that would be allotted to a particular space or geographic idea, and we're reminded with regard to actions in the *Malina versus Gonzales* case that the question about the act is not the act itself. It's the nature and function of the act. So if there's a complaint that a judge failed to supervise or conspired in supervision or in

concealing wrongful acts of a law clerk the question is not whether the judge's actions take him or her out of immunity because you don't examine the act itself. You examine the nature and function of it, and that is the contact between the judge and the law clerk which is a judicial function. So that's where the inquiry with regard to immunity ends. It's not with attempting to separate a particular act out; it's the nature and function of the act which in this case is the allegation that the judges in their role of supervision failed to act properly. Number three, whether this controversy centered around a case pending before the court? Well, there's no doubt about that. That's exactly what the petition is about. That all of this was done to the prejudice of Mr. Palowsky in the case of *Palowsky versus Cork.* That's what the case is about. So that factor is met. The fourth factor, whether the acts arose directly out of a visit to the judge in his official capacity? Those -- that particular factor of course addresses issues or situations where a judge may have made a ruli ng m the courtroom that someone was aggrieved by. Circumstances don't always permit the application of that, and as *Malina* says in some situations and I'm quoting from the *Malina* case; immunity is to be afforded even though one or more of the *McAlester* factors is not met, and certainly that is the case here. *Malina* also reminds us that the concept of immunity is to be broadly construed in favor of granting immunity. The allegations of the petition against the judges clearly fall inside these factors, and the judges in this case are granted absolute immunity in the law for their alleged acts of wrongdoing. *Malina* also tells us as many other cases do that judicial [pg. 20] immunity is not overcome by allegations of bad faith or even malice. It is

the judge's actions alone not their intent that is considered in determining whether to grant immunity. Mr. Guice, prepare a judgment in accordance with the court's ruling.

BY MR. GUICE:

Thank you, Your Honor.

BY THE COURT:

All right. On the Exception of No Cause of Action by Ms. Campbell the court will sustain the Exception of No Cause of Action filed by Allyson Campbell and the petition against Ms. Campbell is dismissed for the following reasons. This was a new area for me so I was educated in the consideration of whether to dismiss this case against Ms. Campbell as a law clerk. The case law in this area has developed over the years and the decisions are very clear and leave no doubt as to the intent of the courts that have considered these cases. The question of whether a law clerk should be granted immunity is generally tied to the judge being granted immunity because they generally occur at the same time. Generally the cases involve a suit against a judge and a clerk. The case cited by the plaintiff-- And I'm trying to find my note on it. *Williams versus Wood,* the U.S. Fifth Circuit case. It was a suit against a deputy clerk of court. The plaintiff I believe referred to that case as a suit against a law clerk, but the case -- the defendant was not a law clerk. He was a deputy clerk of court where there was a finding that he was not entitled to immunity, but that case has no application to this case because he's not a law clerk. He was a clerk of court or a deputy clerk.

Appendix C

The U.S. Supreme Court state in the 1978 case *Butz versus Economou,* E-C-O-N-0-M-O-U; Butz is B-U-T-Z; where the Supreme Coourt proclaims that officials whose responsibilities are functionally comparable to those of a judge are also absolutely immune from liability. And in preparing for this hearing today I looked at several cases but in particular three Federal cases, *Oliva,* O-L-I-V-A *versus* [pg. 21] *Heller,* H-E-L-L-E-R, 839 F.2d Pg. 37, 1988 U.S. Second Circuit Court of Appeals case, *Mitchell versus McBryde, McBryde* is M-C-B-R-Y-D-E, 944 F.2d 229, 1991 U.S. Fifth Circuit, and last *Moore versus Brewster,* B-R-E-W-S-T-E-R, 96 F.3d Pg. 1240, U.S. Ninth Circuit case. In *Moore versus Brewster* a litigant was unhappy because he had obtained a monetary award in a civil case. There was a bond posted to secure the judgment pending appeal, but when the time came to collect on the bond because of some other activity that the plaintiff had been involved in including an arbitration proceeding with one of the parties that he had the judgment against where he received an unfavorable result the judge took his bond money and applied it to some other claims against him and he ended up with generally nothing. So he was unhappy. He sued the judge and the judge's law clerk claiming that the judge had conspired with others to rob him of the proceeds of the bond. The court in that case did not hesitate to grant the same immunity to the law clerk as it recited because of her place in the judicial process and her close contact with the judges -- with the judge and the exercise of the judicial function. So that was the context. It was the law clerk's position in the process and her contact with the judge that she worked for or he worked for and the exercise of the judicial function. And

as the Supreme Court said in the case -- in the *Butz* case the position of the clerk is functionally comparable to that of a judge. And what the courts say is that it doesn't make any sense to grant immunity to the judge and then leave the law clerk exposed to liability for being part of the same judicial process. In the *Mitchell* case the judge and his clerk were accused of maliciously conspiring to set aside a default judgment that had been granted in a prior case before the same judge. The court granted immunity to the judge and the clerk. The court noted the fact that it is alleged that the judge acted pursuant to a conspiracy and committed grave procedural errors is not sufficient to avoid absolute judicial immunity, and the court granted the law clerk the same [pg. 22] immunity because she was assisting the judge in carrying out the judge's judicial function. In the third case, the *Oliva* case, which is a suit against a law clerk basically complaining about improper actions that the law clerk took in the performance of her duties. Interesting case. A law clerk working for a Federal judge applies to the U.S. Attorney for a position as a prosecutor, and she agreed to take the prosecutor's job. It was offered to her, but she would not take the job until her tenure as a law clerk had ended. So between the time that she accepted the job and the time that her law clerk tenure was over she was doing post-conviction work, reviewing applications for habeas and other relief from incarcerated prisoners and the practice was that she would not work on a case that the U.S. Attorney was involved in unless the litigants agreed that she could do so. The problem that happened in this case is that when Mr. Oliva's application came in the U.S. Attorney was involved in the response, but Ms. Heller neglected to call that to

the attention of Mr. Oliva and the court, and she was sued by Mr. Oliva for damages. She was granted absolute immunity. The court in granting her the immunity noted that in the lower court decision, this was a court of appeal case, *Oliva,* but of course because it was in the Court of Appeal necessarily there was a district court decision, and the Court of Appeal looked at the district judge's decision and noted that in the context of this law clerk working on this case improperly that what she was doing is what the judge would normally do. Judges always haven't had law clerks. There's some judges in this state that still don't have a law clerk. So what judges do and what the court is saying is that what law clerks do is what judges do. So if a judge doesn't have a law clerk then he has to do the entire or she has to do the entire process. That doesn't mean that they have to do everything that a law clerk would normally do, but the work that's done by law clerks is the work of judges. So what the court said in this case is that they are as one for purposes of immunity. The court states that the clerk performs acts of a judicial nature and their duties and responsibilities are most closely connected to the judge's exercise of the judicial function.

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APPENDIX D — DENIAL OF REHEARING OF THE SUPREME COURT OF LOUISIANA, DATED SEPTEMBER 6, 2019

SUPREME COURT OF LOUISIANA

278 So.3d 358 (Mem)

No. 2018-C-1105, No. 2018-C-1115

STANLEY R. PALOWSKY, III, INDIVIDUALLY, AND ON BEHALF OF ALTERNATIVE ENVIRONMENTAL SOLUTIONS, INC.,

v.

ALLYSON CAMPBELL, ET AL.

September 6, 2019

Applying for Rehearing, Parish of OUACHITA, 4th Judicial District Court Number(s) 15-2179, Court of Appeal, First Circuit, Number(s) 2016 CA 1221;

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL, FIRST CIRCUIT, PARISH OF OUACHITA

Rehearing denied.

Johnson, C.J., would grant rehearing.

Crichton, J., would grant rehearing and assigns reasons.

Chehardy, J., would grant rehearing.

Clark, J., recused.

Crichton, J., would grant rehearing and assigns reasons. I would grant rehearing in this matter. In my view, the per curiam places every judge in the State at risk of retaliation and intimidation by disgruntled litigants. I continue to believe that the per curiam risks eroding the independence of the judiciary and adversely affecting the public interest.