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OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (JULY 15, 2021)

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5 F.4th 964 (9th Cir. 2021)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRADFORD D. LUND,

Plaintiff-Appellant,

v.

DAVID J. COWAN, THE HONORABLE, LOS ANGELES COUNTY SUPERIOR COURT; LOS ANGELES COUNTY SUPERIOR COURT, FOR THE STATE OF CALIFORNIA,

Defendants-Appellees.

No. 20-55764
D.C. No. 2:20-CV-01894-SVW-JC

Appeal from the United States District Court for the Central District of California Stephen V. Wilson, District Judge, Presiding

Argued and Submitted May 14, 2021
Pasadena, California

Filed July 15, 2021

Before: Ryan D. NELSON and Kenneth K. LEE, Circuit Judges, and Sidney H. STEIN*, District Judge.

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* The Honorable Sidney H. Stein, United States District Judge for the Southern District of New York, sitting by designation.

OPINION

LEE, Circuit Judge:

For over a decade, Bradford Lund — the grandson of Walt Disney — has languished in perhaps the Unhappiest Place on Earth: probate court. Embroiled in a long-running dispute with family members and trustees, Lund has yet to claim a fortune estimated to be worth $200 million. In 2019, it appeared that Lund would finally receive his rightful inheritance when he reached a proposed settlement. But Judge David Cowan of the Los Angeles Superior Court rejected it, suggesting (apparently with questionable factual basis) that Lund has Down syndrome. Judge Cowan then appointed a guardian ad litem over Lund without holding a hearing.

Understandably frustrated at this latest turn of events, Lund sued Judge Cowan and the Superior Court, arguing that the appointment of the guardian without notice or hearing violated his due process rights under 42 U.S.C. § 1983. Lund also argued that Judge Cowan's comment violated the Americans with Disabilities Act (ADA). The district court dismissed the complaint, and Lund now appeals both the dismissal and the denial of leave to amend.

We affirm because most of Lund's claims are now moot after Judge Cowan removed the guardian ad litem and relinquished this case to another judge. And while Judge Cowan's statement may have been inaccurate and inappropriate, any claim challenging it is barred by judicial immunity, which shields judges from liability for conduct or speech arising from their judicial duties.

BACKGROUND[1]

Since 2009, Bradford Lund, an heir to the Disney fortune, has been mired in a protracted and pitched battle in probate court. As a beneficiary of several trusts, Lund should have received his inheritance distributions on his 35th, 40th, and 45th birthdays. Despite being over 50 years old today, Lund has yet to receive a distribution because the trust agreements included a caveat that allowed trustees to withhold the money if Lund lacked the maturity or financial acumen to manage the funds.

Lund claims that certain trustees, along with some "estranged" family members, have stymied his efforts to receive the distributions by casting him as mentally incompetent. According to Lund, though, he has largely prevailed in rebutting these incompetency allegations. For example, a ten-day bench trial in Arizona state court ended in a judicial determination that Lund was "not incapacitated." Similarly, a California state court determined that Lund had the capacity to choose new trustees for one of his trusts.

That all changed when Lund ended up in front of Judge David Cowan in Los Angeles County Superior Court. Judge Cowan issued a sua sponte order to show cause whether the court should appoint a guardian ad litem over Lund. Shortly afterward, Lund and the trustees engaged in mediation that led to a proposed global settlement agreement.

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[1] This factual background is based on the first amended complaint. At the dismissal stage, we accept all factual allegations as true and construed in the light most favorable to Lund.

The parties appeared before Judge Cowan to seek approval of the proposed settlement agreement. During the hearing, Judge Cowan remarked: "Do I want to give 200 million dollars, effectively, to someone who may suffer, on some level, from Down syndrome? The answer is no." Lund's counsel immediately informed Judge Cowan that Lund did not have Down syndrome and asked Judge Cowan to retract his statement. Judge Cowan refused. Ultimately, Judge Cowan rejected the settlement.

Judge Cowan then appointed a guardian ad litem over Lund without holding a hearing. The next month, Lund filed a statement of objection to Judge Cowan, seeking to disqualify him for judicial bias because of the Down syndrome comment. In response, Judge Cowan filed an order striking Lund's statement of disqualification under California Code of Civil Procedure § 170.4(b), which allows judges to strike statements that offer "no legal grounds for disqualification."

Lund sued both Judge Cowan and the Superior Court in federal court. Lund at first alleged a variety of constitutional due process claims under 42 U.S.C. § 1983, mostly related to the appointment of the guardian ad litem without notice or hearing. Later, Lund amended his complaint to add a claim under the Americans with Disabilities Act based on Judge Cowan's in-court statement about Down syndrome. Lund sought declaratory relief for the Section 1983 violations and money damages for the ADA violations. The defendants moved to dismiss the complaint, and the district court granted the motion, dismissing the case with prejudice. This appeal followed.

In November 2020 — after Lund filed his opening brief on appeal but before the defendants had filed

an answering brief — Judge Cowan issued three orders. The first order discharged the guardian ad litem. The second order granted Lund's motion to reassign the case to a new judge in the probate division. Finally, the third was an order to show cause whether to disqualify Lund's lawyer for conflicts of interest. Judge Cowan commented that if Lund's lawyer were disqualified, then the new judge might want to consider reappointing the guardian ad litem to help deal with the aftermath of the disqualification.

STANDARD OF REVIEW

We review de novo the district court's order granting a motion to dismiss for failure to state a claim. *Los Angeles Lakers, Inc. v. Fed. Ins. Co.*, 869 F.3d 795, 800 (9th Cir. 2017). In doing so, we accept all factual allegations as true and construe them in the light most favorable to Lund. *Mazurek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). We review for abuse of discretion the district court's denial of leave to amend the complaint. *AmerisourceBergen Corp. v. Dialysist W., Inc.*, 465 F.3d 946, 949 (9th Cir. 2006).

ANALYSIS

I. Lund's Section 1983 Claims are Moot or Barred by Sovereign Immunity

The complaint alleges five Section 1983 counts seeking declaratory relief against Judge Cowan. Counts 1 through 4 relate to the appointment of the guardian ad litem without notice or hearing, while Count 5 objects to the order striking Lund's statement of dis-

qualification. We affirm the district court's dismissal of the Section 1983 claims.

A. Counts 1 Through 4 are Moot

Counts 1 through 4 — all of which challenge the guardian ad litem appointment — are moot because Judge Cowan issued an order discharging the guardian.

"A party must maintain a live controversy through all stages of the litigation process." *Doe v. Madison Sch. Dist. No. 321*, 177 F.3d 789, 797 (9th Cir. 1999) (cleaned up). "If an action or a claim loses its character as a live controversy, then the action or claim becomes moot." *Id.* at 797-98 (cleaned up). For a defendant's voluntary conduct to moot a case, the standard is more "stringent: A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (cleaned up). Simply put, speculative suppositions, far-fetched fears, or remote possibilities of recurrence cannot overcome mootness. *See Mayfield v. Dalton*, 109 F.3d 1423, 1425 (9th Cir. 1997); *Dufresne v. Veneman*, 114 F.3d 952, 955 (9th Cir. 1997).

Lund no longer faces any harm from the appointment of the guardian ad litem because Judge Cowan has lifted the order appointing her. And any possibility of future harm sounds only in speculation, especially because Judge Cowan has transferred this case to another judge (and, indeed, he no longer serves in probate court). Lund, however, protests that a possibility still exists that the new judge may reimpose a guardian ad litem. Under Lund's reading of Judge Cowan's orders, he "has specifically instructed the next

judge to reappoint the GAL if the OSC were to be granted" and has effectively "directed" the reappointment of the guardian ad litem.

But Lund overstates the court's orders. Judge Cowan only wrote that *if* the new judge disqualifies Lund's counsel for conflict of interest, he or she "*may* wish to consider re-appointing the GAL (Ms. Lodise) to investigate whether the attorney's fees received by Ms. Slaton were in Brad's best interests." But even then, the ultimate decision to reappoint the guardian ad litem remains within the sole discretion of the new judge. Given all that, the possibility that the new judge would first disqualify Lund's counsel and then appoint a guardian ad litem without notice or hearing rests in the realm of speculation. In our view, the reappointment of the guardian ad litem "could happen only at some indefinite time in the future and then only upon the occurrence of future events now unforeseeable." *Mayfield*, 109 F.3d at 1425.

It may have been more prudent for Judge Cowan to simply transfer the case without including this extra commentary. But nothing in any of the orders suggests that Judge Cowan affirmatively ordered the reappointment of the guardian in any binding way. Unfounded fears cannot save the claims from the mootness challenge, so we affirm the dismissal of Counts 1 through 4 as moot.

B. Sovereign Immunity Bars Count 5

That just leaves one remaining claim under Section 1983: Count 5 challenging Judge Cowan's order striking Lund's statement of disqualification against him. Lund seeks a declaratory judgment holding that California Code of Civil Procedure § 170.4(b) — the

statute giving Judge Cowan the authority to strike a statement of disqualification "if on its face it discloses no legal grounds for disqualification" — is unconstitutional.

Sovereign immunity bars this claim because it impermissibly seeks retrospective relief against Judge Cowan. "The Eleventh Amendment bars individuals from bringing lawsuits against a state for money damages or other retrospective relief." *Arizona Students' Ass'n v. Arizona Bd. of Regents*, 824 F.3d 858, 864 (9th Cir. 2016) (cleaned up). State officials sued in their official capacities are generally entitled to Eleventh Amendment immunity. *Flint v. Dennison*, 488 F.3d 816, 825 (9th Cir. 2007). The Eleventh Amendment thus applies to Judge Cowan, who serves as a state court judge and is being sued in his official capacity. *See Simmons v. Sacramento Cty. Superior Ct.*, 318 F.3d 1156, 1161 (9th Cir. 2003) ("Plaintiff cannot state a claim against the Sacramento County Superior Court (or its employees), because such suits are barred by the Eleventh Amendment.").

The Eleventh Amendment does not permit retrospective declaratory relief. *Arizona Students' Ass'n*, 824 F.3d. at 865. To get around this bar, Lund characterizes his declaratory relief as prospective. Admittedly, the line between retrospective relief and prospective relief can blur. *See Edelman v. Jordan*, 415 U.S. 651, 667 (1974). But in general, "relief that in essence serves to compensate a party injured in the past by an action of a state official in his official capacity that was illegal under federal law is barred even when the state official is the named defendant," while "relief that serves directly to bring an end to a present violation of federal law is not barred by the Eleventh Amend-

ment even though accompanied by a substantial ancillary effect on the state treasury." *Papasan v. Allain*, 478 U.S. 265, 278 (1986) (cleaned up).

We agree with Judge Cowan that Count 5 seeks purely retrospective relief and thus cannot survive sovereign immunity. Count 5 amounts to an as-applied challenge of California Code of Civil Procedure § 170.4(b), and Lund does not allege any continuing violation or harm stemming from Judge Cowan's past conduct. *See Six Star Holdings, LLC v. City of Milwaukee*, 821 F.3d 795, 803 (7th Cir. 2016) (observing that "an as-applied challenge invites narrower, retrospective relief, such as damages"). Not only does this claim involve past conduct and past harm, but Judge Cowan has since reassigned the case to a new judge and, indeed, he no longer serves in the probate division. So Judge Cowan cannot handle Lund's probate matter again at any point in the future, and an opinion declaring that Judge Cowan acted unconstitutionally would be advisory. *See McQuillion v. Schwarzenegger*, 369 F.3d 1091, 1095 (9th Cir. 2004). Thus, we hold that Count 5 is barred by the Eleventh Amendment.

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Because we hold that the Section 1983 claims are either moot or barred by sovereign immunity, there is no need to address the other issues raised by Lund, including whether Section 1983 bars prospective declaratory relief,[2] as well as whether Lund must

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[2] Section 1983 states that "in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable." 42

exhaust state appellate remedies before he can seek declaratory relief.

II. Judicial Immunity Bars Lund's ADA Claim

Relying on Title II of the ADA, Lund seeks money damages against both Judge Cowan and the Superior Court based on Judge Cowan's in-court comment that he would not give money to someone who "may suffer, on some level, from Down syndrome." The district court dismissed the ADA claims, citing judicial immunity. We affirm.

A. Claim Against Judge Cowan

"It is well settled that judges are generally immune from suit for money damages." *Duvall v. Cnty. of Kitsap*, 260 F.3d 1124, 1133 (9th Cir. 2001). The question here is whether judicial immunity shields Judge Cowan for his questionable in-court comment.

Judicial immunity only applies to judicial acts, and not to "the administrative, legislative, or executive functions that judges may on occasion be assigned by law to perform." *Forrester v. White*, 484 U.S. 219, 227 (1988). To determine whether an act is judicial, we consider these factors: whether "(1) the precise act is

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U.S.C. § 1983. This language was added to the statute in 1996 as part of the Federal Courts Improvement Act. Other circuits have held that prospective declaratory relief is still available under this statutory amendment because the text only explicitly bars injunctive relief. *See Just. Network Inc. v. Craighead Cty.*, 931 F.3d 753, 763 (8th Cir. 2019) ("Currently, most courts hold that the amendment to § 1983 does not bar declaratory relief against judges."). Our court has not yet explicitly answered whether the statutory amendment bars declaratory relief, so Lund urges us to hold that it does not. But we leave that question for another day.

a normal judicial function; (2) the events occurred in the judge's chambers; (3) the controversy centered around a case then pending before the judge; and (4) the events at issue arose directly and immediately out of a confrontation with the judge in his or her official capacity." *Duvall*, 260 F.3d at 1133 (cleaned up).

Lund points out that this case differs from *Duvall* because the statement here was not specifically made in the context of ruling on a motion. *See* 260 F.3d at 1133 ("Ruling on a motion is a normal judicial function, as is exercising control over the courtroom while court is in session."). Rather, Judge Cowan uttered it during a settlement hearing. But Lund does not identify any caselaw suggesting that judicial statements are protected only when they are embedded in an official judicial ruling, rather than made during a court hearing more generally.[3] We reject a cramped and illogical reading of a judicial act that would include only instances when a judge expressly decides

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[3] None of the cases cited by Lund apply. For instance, Lund relies on *Jordan v. City of Union City, Ga.*, 94 F. Supp. 3d 1328 (N.D. Ga. 2015) and *Donaldson v. Trae-Fuels, LLC*, 399 F. Supp. 3d 555 (W.D. Va. 2019), for the proposition that statements or comments by decision-makers can support ADA liability. But those cases involve employers, not judges acting in their judicial capacity. Nor does *Grant v. Comm'r, Soc. Sec. Admin.*, 111 F. Supp. 2d 556, 559 (M.D. Pa. 2000), bear on this case. That case involved comments by an administrative law judge in the context of a Social Security appeal, but the plaintiffs did not seek money damages against the judge. And the same goes for the judicial recusal cases cited by Lund. Again, the dispute here is not whether judicial statements can be biased (they can), but whether judicial immunity bars claims for money damages based on judicial statements made from the bench during a hearing.

a formal motion or request. Indeed, the Supreme Court has remarked that even when a proceeding is "informal and ex parte," that does not necessarily deprive "an act otherwise within a judge's lawful jurisdiction . . . of its judicial character." *Forrester*, 484 U.S. at 227.

This broad conception of what constitutes a judicial act makes sense, given the history and purposes of the judicial immunity doctrine. For one, judicial immunity ensures that challenges to judicial rulings are funneled through more efficient channels for review like the appellate process. "Judicial immunity apparently originated, in medieval times, as a device for discouraging collateral attacks and thereby helping to establish appellate procedures as the standard system for correcting judicial error." *Id.* at 225.

Judicial immunity also serves the goal of judicial independence. As the Supreme Court has noted, "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." *Bradley v. Fisher*, 80 U.S. 335, 347 (1871). Subjecting judges to liability for the grievances of litigants "would destroy that independence without which no judiciary can be either respectable or useful." *Id.* In some cases, this commitment to judicial independence might result in unfairness to individual litigants. *See Stump v. Sparkman*, 435 U.S. 349, 363 (1978). But it is precisely in those types of unfair or controversial situations that judicial immunity may be more necessary to preserve judicial independence. *Id.* at 364.

With that background in mind, Judge Cowan's in-court statement easily falls within the purview of a judicial act. Judge Cowan did not comment on Lund's perceived disability out of the blue in the courtroom or (thankfully) on Twitter. Rather, Judge Cowan made the statement from the bench during an official settlement approval hearing in a probate case. The comment directly related to Judge Cowan's efforts to decide whether to approve a proposed settlement agreement that would have given Lund access to a large sum of monetary distributions. It was thus not unreasonable for Judge Cowan to comment on Lund's capacity to manage money; indeed, Lund's competency was central to the litigation.

To be clear, we find Judge Cowan's comment troubling. That someone has Down syndrome does not necessarily preclude the ability to manage one's own financial affairs. In any event, the record suggests that Lund does not have Down syndrome. But judicial immunity shields even incorrect or inappropriate statements if they were made during the performance of a judge's official duties. Indeed, a judicial act does not stop being a judicial act even if the judge acted with "malice or corruption of motive." *Forrester*, 484 U.S. at 227. Rather, the relevant inquiry focuses on "the particular act's relation to a general function normally performed by a judge," not necessarily the judicial act itself. *Mireles v. Waco*, 502 U.S. 9, 13 (1991). "If 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." *Id.* at 12 (cleaned up).

Congressional representatives enjoy immunity for comments made on the congressional floor. *See Gov't of Virgin Islands v. Lee*, 775 F.2d 514, 520 (3d Cir. 1985). Lawyers have immunity for comments made during litigation. *See Robinson v. Volkswagenwerk AG*, 940 F.2d 1369, 1372 (10th Cir. 1991), *cert. denied*, 502 U.S. 1091 (1992). We see no reason to treat differently a judge making a comment from the bench during a judicial proceeding. Thus, we hold that judicial immunity applies when a judge makes a statement from the bench during an in-court proceeding in a case before the judge. We affirm the district court's dismissal of the ADA claim against Judge Cowan.

B. Claim Against Superior Court

Lund also seeks to hold the Superior Court liable based on the same in-court statement by Judge Cowan. Because judicial immunity bars the ADA claim against Judge Cowan, that claim against the Superior Court must also fail.

Under *Duvall*, Title II of the ADA allows respondeat superior liability. *Duvall*, 260 F.3d at 1141. But as a general matter, there can be no respondeat superior liability where there is no underlying wrong by the employee, which includes situations in which the employee is immune to suit. Because judicial immunity bars any finding of individual liability against Judge Cowan, the Superior Court similarly cannot be held liable for Judge Cowan's conduct. Thus, we affirm the district court's dismissal of the ADA claim against the Superior Court based on judicial immunity.

III. The District Court Did Not Err in Denying Leave to Amend

Finally, we hold that the district court did not abuse its discretion when it denied Lund's motion for leave to file a second amended complaint. "Dismissal without leave to amend is proper if it is clear that the complaint could not be saved by amendment." *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1051 (9th Cir. 2008) (cleaned up). Here, all of Lund's proposed amendments were futile.

First, Lund tries to save his lawsuit by re-asserting the ADA claim against the Superior Court only, not Judge Cowan, to try to plead around judicial immunity. But in the end, the factual basis for the ADA claim remains the same, so any liability against the Superior Court would still stem from the conduct of Judge Cowan, who enjoys judicial immunity. Simply removing Judge Cowan as a defendant does not change the respondeat superior analysis. Lund also proposes adding disability discrimination claims under Section 504 of the Rehabilitation Act, based on the same in-court statement by Judge Cowan as the ADA claim. But if the Rehabilitation Act claims seek money damages, though, they are barred by judicial immunity. *See Duvall*, 260 F.3d at 1133. Finally, Lund tries to plead around judicial immunity by adding requests for injunctive relief and declaratory relief under both the ADA and Rehabilitation Act. But like with the Section 1983 claims, Lund seeks retrospective, not prospective, relief.

We thus affirm the district court's order denying leave to file a second amended complaint.

CONCLUSION

The district court's orders granting Cowan's motion to dismiss and denying Lund's motion for leave to file a second amended complaint are AFFIRMED.[4]

[4] The motion for judicial notice (Dkt. No. 19) is GRANTED.

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA GRANTING MOTION TO DISMISS AND DENYING MOTION TO AMEND THE COMPLAINT (JULY 27, 2020)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

BRADFORD LUND

v.

DAVID J. COWAN ET AL

Case No. 2:20-cv-01894-SVW-JC

Proceedings:	Order Granting Defendants' Motion to Dismiss Without Leave to Amend and Denying Plaintiff's Motion for Leave to Amend the First Amended Complaint [27] [31]
Before:	The Honorable Stephen V. WILSON, U.S. District Judge.

I. Introduction

Before the Court are both a motion to dismiss filed by Defendants David J. Cowan ("Judge Cowan") and the Los Angeles Superior Court (collectively "Defendants"), and a motion to amend the First Amended Complaint filed by Plaintiff Bradford J. Lund ("Plaintiff"). For the reasons articulated below,

the Court GRANTS the motion to dismiss and DENIES the motion to amend the complaint. Because the Court finds that the nature of the relief Plaintiff seeks renders further amendment of the complaint futile, the Court's dismissal is without leave to amend.

II. Procedural Background

Plaintiff initially filed this lawsuit on February 27, 2020. Dkt. 1. Plaintiff then filed a First Amended Complaint ("FAC") on March 17, 2020. Dkt. 22. On March 31, 2020, Defendants filed a motion to dismiss the FAC. Dkt. 27. On April 10, 2020, Plaintiff filed a motion for leave to file a Second Amended Complaint ("SAC"). Dkt. 31. Defendant also opposes that motion. Dkt. 33.

III. Factual Background

The Court relates the following factual background from Plaintiff's FAC and the exhibits attached to it. Dkt. 22. Because the arguments raised by Defendants in their motion to dismiss do not require this Court to make factual determinations regarding the issues in dispute, the Court does not address other exhibits presented by Plaintiff in detail.

a. General Background

Plaintiff Bradford Lund is a grandson of Walt Disney. Dkt. 22 at 1. Plaintiff has a twin sister named Michelle Lund. *Id.* at 20. Plaintiff is the beneficiary of a variety of different trusts that have been the subject of substantial litigation in both California and Arizona probate court. *See id.* at 1-3. Andrew Gifford, Robert L. Wilson, Douglas Strode, and the First Republic Trust Company ("FRTC") are trustees

of several of these trusts. *Id.* at 10. Plaintiff's step-mother, Sherry Lund, is also a trustee of one of these trusts. *Id.* at 20.

b. Plaintiff's FAC

Plaintiff alleges that he has been "entrapped" in the probate division of the Los Angeles County Superior Court for the past decade. Dkt. 22 at 1-2. Plaintiff alleges that in order to receive beneficiary distributions from certain trusts he is a beneficiary to (the "Nevada Trusts"), he has been required to litigate the issue of his mental capacity (and need for a guardianship and conservatorship) in both Arizona probate court and the California probate court system over a similar period of time. *Id.* at 2. Plaintiff alleges that after a 10-day bench trial in the Arizona probate proceeding during 2016, that probate judge found Plaintiff had sufficient mental capacity to manage his own affairs. *Id.*

Plaintiff then alleges that Judge Cowan, in his capacity as probate judge in the ongoing California probate proceeding, issued a *sua sponte* Order to Show Cause ("OSC") on December 19, 2018, to determine whether a limited purpose guardian ad litem should be appointed for Plaintiff. *Id.* at 2, 14. On March 25 and 26, 2019, Plaintiff alleges that he (alongside certain co-trustees of one of the Nevada Trusts) engaged in a two-day in-person mediation of the California probate proceedings, which ultimately resulted in a global settlement agreement that was presented to Judge Cowan for approval. *Id.* at 15. At a June 25, 2019 status conference regarding approval of the global settlement, Plaintiff alleges that Judge Cowan stated "Do I want to give 200 million dollars, effectively, to

someone who may suffer, on some level from Down Syndrome? The answer is no." *Id.* at 15-16. Judge Cowan ultimately declined to approve the global settlement in its entirety, and on September 27, 2019, issued an Order appointing a limited purpose guardian ad litem ("GAL") for Plaintiff. *See* Dkt. 22-3 (Judge Cowan's Order, attached to Plaintiff's FAC).

Judge Cowan instructed the appointed GAL to facilitate a new settlement, review Plaintiff's requests to appoint new trustees, advise the Court on how to streamline future litigation, determine whether Plaintiff's lawyers should be disqualified due to conflict, and consider whether current co-trustees of Plaintiff's trusts may need to be removed. *Id.* at 17-18. Following issuance of Judge Cowan's Order, Plaintiff alleges that he filed an objection to Judge Cowan under Cal. Code Civ. Proc. § 170.1. *Id.* at 26. On October 24, 2019, Judge Cowan struck this statement pursuant to Cal. Code Civ. Proc. § 170.4(b). *Id.*

Plaintiff alleges that the decisions to appoint a GAL and strike Plaintiff's objection to Judge Cowan: (1) were made in violation of the Full Faith and Credit Clause of the Constitution (because Judge Cowan failed to reach the same conclusion as the Arizona probate court), (2) violated his Due Process rights under the Fourteenth Amendment to the Constitution by subjecting him to de facto custody and taking away his liberty and property, and (3) violated Plaintiff's rights under Title II of the Americans with Disabilities Act ("ADA") by discriminating against him based upon a false perception that Plaintiff suffered from a mental disability, specifically Down Syndrome. *Id.* at 27-34.

Plaintiff's FAC includes four separate causes of action titled "Declaratory Judgment." Dkt. 22 at 28-30. These four causes of action appear to allege the same variety of constitutional violations, but expressly seek a declaratory judgment that Judge Cowan's conduct as alleged was unconstitutional. *Id.* at 28–31. Plaintiff seeks both damages for his ADA claim and declaratory relief finding that Defendants' conduct has been and "continues" to be unconstitutional. *Id.* at 35.

c. Judge Cowan's Order in the State Court Probate Proceeding.

Plaintiff attaches, as an exhibit to his FAC, Judge Cowan's Order dated September 27, 2019, appointing a limited purpose GAL for Plaintiff ("the Order"). Dkt. 22-3.[1] The Order is 42 pages long and discusses in great detail various probate proceedings and trust litigation relevant to Plaintiff's current circumstances. *See generally id.* The Court will summarize relevant portions of the Order to provide context for its following analysis.

The Order first summarizes prior litigation involving planned distributions from Plaintiff's trusts that were denied by trustees to Plaintiff, and the prospect of continuing litigation regarding the duties and obligations of the trustees with regard to those distributions. *Id.* at 9-10. Judge Cowan states that his primary concern with regard to the proposed global settlement of the trust litigation is whether undue influence is being exerted over Plaintiff and

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[1] The Court may take judicial notice of attachments to the complaint in considering a motion to dismiss. *Koala v. Khosla*, 931 F.3d 887, 894 (9th Cir. 2019)

whether he understands the consequences that may result from the distribution and movement of assets proposed in the global settlement. *Id.* at 12. The Order states that prior probate proceedings in California, particularly a decision issued by Judge Beckloff in June 2014, concluded that "substantial evidence" raised by certain trustees showed that "Mr. Lund does not have the maturity and financial ability to manage and utilize a substantial trust distribution." *Id.* at 5.

The Order then expresses concern that provisions in the proposed global settlement "improperly interfere[] with the administration of justice" because they prevent the probate court from hearing any objections to the settlement other than those raised by Plaintiff and a limited number of his trustees, including Plaintiff's step-mother. *Id.* at 13-14. The provisions of the global settlement found objectionable required the Court to vacate the Order to Show Cause regarding appoint of a GAL in order to approve the settlement, and barred both prior trustees and other beneficiaries of the trust (including Plaintiff's sister, Michelle) from voicing their support or opposition for the pending petitions to appoint new trustees for Plaintiff. *Id.* at 13-14. Judge Cowan notes that because his approval of the settlement is required by California law, and that his interpretation of California public policy bars the Court from approving a settlement agreement that restricts the ability of trustees, or other independent parties such as a GAL, from offering the Court their views on the settlement agreement and the appointment of new trustees. *Id.* at 14-16.

The Order also addresses the decision to appoint a limited purpose GAL, Margaret Lodise, for Plaintiff. *Id.* at 18. It states that Judge Cowan intends to have

the GAL provide the probate court with a report on the following issues: "whether Bradford's lawyers should be disqualified due to conflict; if Bradford has potentially meritorious claims related to the accountings and/or claims relating to trustee/attorney fees; whether the Court should remove Sherry and/or Dew as trustees pursuant to the OSC re: removal based on their refusal to provide information regarding the Nevada trust or any other reason; whether the interim stay should be lifted on movement of trust assets from the 1992 trust; and whether approval of the Settlement should be conditioned on a requirement for a court order before decanting of assets in the Nevada Trust." *Id.* at 18-19.

The Order also specifically addresses the argument raised by Plaintiff that the prior Arizona probate court judgment has a binding effect on the California probate court's assessment of Plaintiff's mental capacity. *Id.* at 19. Judge Cowan concludes that *res judicata* does not apply when additional parties like the trustees in the California probate action did not participate in the prior proceeding, and that the specific issues raised in the Arizona probate proceeding and its appeal did not mirror the proceeding before Judge Cowan— there is no assertion that Plaintiff requires a guardianship or conservatorship, Judge Cowan simply seeks to appoint "an independent person to state what, in her view, is in Bradford's best interests" with regard to the proposed settlement agreement. *Id.* at 20-21. Judge Cowan then emphasizes the distinction between the level of capacity in dispute in the Arizona proceedings (which focuses on Plaintiff's ability to look after himself and manage his routine affairs on a daily basis) and the capacity

necessary to manage a substantial trust distribution as contemplated by the global settlement. *Id.* at 21.

The Order then states that the Arizona probate proceedings were sealed by Plaintiff, that it is unclear what evidence was presented in the Arizona proceedings, and that the Arizona judgment in 2016 did not acknowledge the existence of Judge Beckloff's 2014 Order (finding that Plaintiff had a limited capacity to manage substantial trust distribution). *Id.* at 21-22. Judge Cowan then discussed the substantial evidence of reduced mental capacity already before the Court and Plaintiff's failure to present any contradictory medical evidence in response to the probate court's OSC, or medical evidence showing improvements in his condition since Judge Beckloff's 2014 findings. *Id.* at 24. Judge Cowan concludes that comity between states "cannot require a court to ignore its own prior findings and comply with the later judgment of another state's court that apparently did not consider those findings— that course of action would 'be prejudicial to . . . the general interests of the citizens' of California. (*Biewend v. Biewend* (1941) 17 Cal.2d 108, 113; *Severn v. Adidas Sportschufabriken* (1973) 33 Cal.App.3d 754, 763 (public policy exception to comity))." *Id.* at 25.

The Order then considers the substantive issues of the need for a limited purpose GAL to analyze the settlement agreement and provide the court an independent opinion on Plaintiff's best interests. *Id.* at 26-28. Judge Cowan found that substantial evidence previously presented to the probate court suggested that Plaintiff had a limited understanding of the nature and assets of the relevant trusts, and that Plaintiff is incapable of independently directing counsel

to defend his interests. *Id.* at 28. Judge Cowan also expressed substantial concerns regarding the continued role of Plaintiff's step-mother, Sherry Lund, in acting as both a trustee of the trusts established for Plaintiff and a successor beneficiary, in holding multiple powers of attorney which give her control over Plaintiff's finances, litigation, and living arrangements, and in frequently exercising that power to direct aggressive litigation in Plaintiff's name. *Id.* at 34. After explaining in detail certain concerns regarding the other proposed trustees included in the proposed global settlement, the Order approved the settlement only in part, dividing trust assets between Plaintiff and his sister, approving the termination fees for certain trustees and their resignation, and continuing the approval hearing so that the probate court could review the report provided by the newly-appointed GAL. *Id.* at 40-41.

d. Plaintiff's Pursuit of Other Legal Remedies

Plaintiff alleges that following Judge Cowan's appointment of a GAL, he filed a petition for writ of mandate with the California Court of Appeal, which was denied. Dkt. 22 at 16-17. Plaintiff then sought review of this denial with the California Supreme Court, which also summarily denied his petition for review. *Id.* at 17; *see also* Dkt. 41, Ex. N, Ex. Q.

IV. Defendant's Motion to Dismiss

a. Legal Standard

A motion to dismiss under Rule 12(b)(6) challenges the legal sufficiency of the claims stated in the

complaint. *See* Fed. R. Civ. P. 12(b)(6). To survive a motion to dismiss, the plaintiff's complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 678. A complaint that offers mere "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." *Id.*; *see also Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (citing *Iqbal*, 556 U.S. at 678).

In reviewing a Rule 12(b)(6) motion, a court "must accept as true all factual allegations in the complaint and draw all reasonable inferences in favor of the nonmoving party." *Retail Prop. Trust v. United Bhd. of Carpenters & Joiners of Am.*, 768 F.3d 938, 945 (9th Cir. 2014). Thus, "[w]hile legal conclusions can provide the complaint's framework, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Iqbal*, 556 U.S. at 679. When evaluating the sufficiency of a pleading under Fed. R. Civ. P. 12(b)(6), a court may consider only the allegations in the complaint and any attachments or documents incorporated by reference. *Koala v. Khosla*, 931 F.3d 887, 894 (9th Cir. 2019); s*ee also United States v. Ritchie*, 342 F.3d 903, 907-08 (9th Cir. 2003).

b. Analysis

In their motion to dismiss, Defendants argue that Plaintiff's claims are barred on a variety of grounds, including (1) the probate exception to federal jurisdiction[2], (2) judicial immunity, (3) *Younger* abstention, (4) the *Rooker-Feldman* doctrine, and (5) the *Colorado River* doctrine. While the Court agrees in many respects that Plaintiff's claims cannot properly be asserted here, it will only address in its analysis a subset of the arguments raised by Defendants.

i. Judge Cowan Has Judicial Immunity from Plaintiff's 42 U.S.C. § 1983 Claims and Declaratory Relief Sought By Plaintiff Is Not Available

Plaintiff brings his constitutional claims under 42 U.S.C. § 1983. Dkt. 22 at 7. Defendants assert that Judge Cowan has absolute judicial immunity from

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[2] The Court acknowledges that even after the Supreme Court narrowed the probate exception in *Marshall v. Marshall*, 547 U.S. 293 (2006), there is some possibility that Plaintiff's lawsuit may still be limited by the "prior exclusive jurisdiction" doctrine that the Ninth Circuit held remains viable in the probate context. *See Goncalves By & Through Goncalves v. Rady Children's Hosp. San Diego*, 865 F.3d 1237, 1252-53 (9th Cir. 2017). Because the prior exclusive jurisdiction doctrine requires the Court to consider the gravamen of a complaint and not "exalt form over necessity," the Court might possibly view the claims asserted by Plaintiff, given the context of the probate court proceedings, as an attempt to wrest control of the trust assets subject to Judge Cowan's jurisdiction. *State Eng'r of State of Nev. v. S. Fork Band of Te-Moak Tribe of W. Shoshone Indians of Nev.*, 339 F.3d 804, 810 (9th Cir. 2003). However, the fact that Plaintiff's lawsuit expressly seeks only declaratory relief for his constitutional claims and damages under the ADA leads the Court to analyze the motion primarily through other doctrines.

claims under § 1983, and that because any liability of the Los Angeles Superior Court ("LASC") would necessarily arise from Judge Cowan's conduct, his immunity applies to LASC as well. Plaintiff argues that his FAC seeks only declaratory relief, and that the language of § 1983 permits his action solely for declaratory relief. Section 1983 states that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, **except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable**.

42 U.S.C. § 1983 (emphasis added). This language was added to § 1983 via the Federal Courts Improvement Act of 1996 ("FCIA"), Pub. L. No. 104-317, § 309(c), 110 Stat. 3847, 3853 (codified at 42 U.S.C. § 1983). *See Moore v. Urquhart*, 899 F.3d 1094, 1104 (9th Cir. 2018). Congress expressly broadened the reach of judicial immunity from § 1983 in response to the Supreme Court's decision in *Pulliam v. Allen*, 466 U.S. 522 (1984), in an attempt to "restore[] the doctrine of judicial immunity to the status it occupied prior to

the Supreme Court's decision in [*Pulliam*]." *See Moore*, 899 F.3d at 1104 (quoting S. Rep. No. 104-366, at 36 (1996)). In *Pulliam*, the Court had held that common law "judicial immunity is not a bar to prospective injunctive relief against a judicial officer acting in her judicial capacity." 466 U.S. at 541-42.

The Ninth Circuit has not clearly indicated how the amendment to § 1983 impacts the availability of declaratory relief, because the amended statute does not even expressly mention declaratory relief. In *Moore*, the Ninth Circuit considered claims seeking both injunctive and declaratory relief under § 1983 collectively, and found that even if the limitations on injunctive relief Congress imposed in the FCIA barred such relief with respect to judicial officers, the defendant in *Moore* (a sheriff) was not acting as a "judicial officer in a judicial capacity," and therefore any judicial immunity from injunctive relief did not apply. *See* 899 F.3d at 1104 (quoting *Pulliam*, 466 U.S. at 541-542). The Ninth Circuit in *Moore* did not distinguish between that plaintiff's claims for injunctive relief and declaratory relief, perhaps indicating that it viewed claims for declaratory relief to be similarly restricted by the FCIA's limiting language.

District and circuit courts outside the Ninth Circuit have wrestled with the availability of declaratory relief under § 1983 post-FCIA. *See Ray v. Judicial Corr. Servs., Inc.*, 2014 WL 5090723, at *3-5 (N.D. Ala. Oct. 9, 2014) ("[O]ne might argue Congress did not feel the need to explicitly bar claims for declaratory relief because no such exemption from judicial immunity had ever previously been recognized."); *Just. Network Inc. v. Craighead Cnty.*, 931 F.3d 753, 763 (8th Cir. 2019) (collecting cases and concluding that

most circuit courts have held that the FCIA amendment does not expressly bar prospective declaratory relief against judges); *but see Guerin v. Higgins*, 8 F. App'x 31, 32 (2d Cir. 2001) (finding that plaintiff could not seek declaratory relief based on *Pulliam* because its holding "with respect to such relief has been effectively overruled by Congress").

The Court finds that regardless of whether declaratory relief can still be granted post-FCIA despite *Pulliam*'s abrogation, Plaintiff's declaratory judgment claims are not prospective in nature. While Plaintiff alleges that Judge Cowan "continues to" violate his constitutional rights through the ongoing proceedings, the Court finds that in reality, each of the requests for declaratory relief squarely seek to litigate the propriety of Judge Cowan's past conduct (as previously described), rather than "define the legal rights and obligations of the parties in anticipation of *some future conduct*." *Just. Network*, 931 F.3d at 764 (quoting *Lawrence v. Kuenhold*, 271 F. App'x 763, 766 (10th Cir. 2008)). Moreover, the Eleventh Amendment does not permit retrospective declaratory relief against state officials such as Judge Cowan. *See Hubbart v. Haw. Off. of Consumer Prot.*, 362 F. App'x 857 (9th Cir. 2010).

To the extent that Plaintiff argues that he is seeking prospective declaratory relief based on the fact that Judge Cowan's past conduct continues to affect him and therefore violates his constitutional rights, the Court cannot find that the ongoing effect of these past rulings suffices to transform Plaintiff's claim into one for prospective declaratory relief. *See Weldon v. Kapetan*, 2018 WL 1725606, at *4 (E.D. Cal. Apr. 10, 2018) (citing *Wilkinson v. Dotson*, 544 U.S. 74, 80 (2005)). The conclusion Plaintiff urges would

permit a party to litigate the constitutionality of any prior judicial ruling by a state judicial officer under § 1983, so long as they could allege a continuing effect of that past conduct. The Court declines to interpret the very narrow exception to judicial immunity from § 1983 claims (to the extent that it exists) in that manner. The Court GRANTS Defendants' motion to dismiss the constitutional claims asserted by Plaintiff against Judge Cowan and derivatively against LASC.

The Court notes in the alternative that if it were to conclude that declaratory relief against a judicial officer was limited by the FCIA in the same manner as injunctive relief, it would not find that Plaintiff could qualify for such relief on that basis as well. *See* 42 U.S.C. § 1983 ("injunctive relief [against a judicial officer] shall not be granted *unless a declaratory decree was violated or declaratory relief was unavailable*") (emphasis added). Plaintiff has not alleged that a declaratory decree has been violated, and the phrase "declaratory relief [] unavailable" has been interpreted by the overwhelming majority of district courts in the Ninth Circuit to refer to circumstances where there is no ability to appeal a state court's order. *See Profita v. Andersen*, 2018 WL 4199214, at *5 (C.D. Cal. Aug. 8, 2018); *Owens v. Cowan*, 2018 WL 1002313, at *7 (C.D. Cal. Jan. 17, 2018); *Yellen v. Hara*, 2015 WL 8664200, at *11 (D. Haw. Dec. 10, 2015); *Hill v. Ponner*, 2019 WL 1643235, at *2 (E.D. Cal. Apr. 16, 2019).

Plaintiff argues (in the event that the restriction on injunctive relief against judicial officers applies to Plaintiff's declaratory relief claims) that he has no ability to appeal Judge Cowan's order because his

writ appealing the appointment of the GAL has been denied and is not otherwise immediately appealable. Dkt. 34 at 24. The California Court of Appeals and Supreme Court have reviewed and declined to grant immediate relief to Plaintiff from Judge Cowan's Order. Dkt. 22 at 16-17. Plaintiff will again have an opportunity to litigate the issue following the entry of a final dispositional order. *See In re Joann E.*, 128 Cal. Rptr. 2d 189, 193 (Ct. App. 2002) (appointment of GAL reversed on appeal). Declaratory relief is not "unavailable" for the purposes of § 1983 simply because Plaintiff's writ requests have been reviewed and denied and no other right of appeal is immediately available.

ii. Plaintiff Cannot Seek Damages Under the ADA.

Plaintiff's claim for damages based on an alleged violation of the ADA by Judge Cowan while acting as a judicial officer is barred by Ninth Circuit caselaw holding that judicial immunity against damages was not waived by Congress' passage of the ADA. *See Duvall v. Cnty. of Kitsap*, 260 F.3d 1124, 1133 (9th Cir. 2001). Defendants' motion to dismiss is GRANTED on this cause of action.

iii. In the Alternative, the Court Would Exercise Younger Abstention in These Circumstances, Because Plaintiff's Lawsuit Seeks to Interfere with the Orders Issued by Judge Cowan in the Underlying Probate Matter.

Even if Judge Cowan was not immune to liability for both damages under the ADA and the form of

retrospective declaratory relief Plaintiff seeks under § 1983, the Court would find that *Younger* abstention bars him from asserting claims in this Court.

Younger abstention is grounded in a "longstanding public policy against federal court interference with state court proceedings." *Younger v. Harris*, 401 U.S. 37, 43 (1971). The Supreme Court has "identified two sources for this policy: the constraints of equity jurisdiction and the concern for comity in our federal system." *Gilbertson v. Albright*, 381 F.3d 965, 970 (9th Cir. 2004). Most importantly, *Younger* abstention permits federal courts to "preserve respect for state functions such that the national government protects federal rights and interests in a way that will not 'unduly interfere with the legitimate activities of the States.'" *Id.* (quoting *Younger*, 401 U.S. at 44).

A federal court may abstain under *Younger* in three categories of cases: "(1) parallel, pending state criminal proceedings, (2) state civil proceedings that are akin to criminal prosecutions, and (3) state civil proceedings that implicate a State's interest in enforcing the orders and judgments of its courts." *Herrera v. City of Palmdale*, 918 F.3d 1037, 1043-44 (9th Cir. 2019) (internal quotation marks and citations omitted). First identified in *New Orleans Pub. Serv., Inc. v. Council of New Orleans* ("*NOPSI*"), 491 U.S. 350 (1989), these three categories are known as the *NOPSI* categories. *See Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 72-73 (2013). To warrant *Younger* abstention, a state civil action must fall into one of the *NOPSI* categories, and must also satisfy a three-part inquiry: the state proceeding must be (1) "ongoing," (2) "implicate important state interests," and (3) provide "an adequate opportunity . . . to raise constitutional

challenges." *Herrera*, 918 F.3d at 1044 (9th Cir. 2019) (internal quotations and citations omitted).[3]

The parties agree that neither the first nor the second *NOPSI* category apply to this lawsuit. But Defendants argue that the third category, "state civil proceedings that implicate a State's interest in enforcing the orders and judgments of its courts" includes the underlying probate proceeding Plaintiff's claims arise out of, Dkt. 27-1 at 24-26, while Plaintiff argues that his lawsuit does not implicate these interests. Dkt. 34 at 19.

The probate proceedings ongoing before Judge Cowan "implicate [California's] interest in enforcing the orders and judgments of its courts." *Herrera*, 918 F.3d at 1043-44. Judge Cowan's Orders appointing a GAL and striking Plaintiff's motion to disqualify Judge Cowan are decisions central to the ultimate resolution of the probate proceeding in question. "Core orders involve the administration of the state judicial process—for example, an appeal bond requirement, a civil contempt order, or an appointment of a receiver." *ReadyLink Healthcare, Inc. v. State Comp. Ins. Fund*, 754 F.3d 754, 759 (9th Cir. 2014) (internal

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[3] Perhaps because the parties both recognize what the Ninth Circuit has clearly articulated, they do not discuss the fourth requirement for *Younger* abstention— that the requested relief have the practical effect of enjoining ongoing state court proceedings. *ReadyLink Healthcare, Inc. v. State Comp. Ins. Fund*, 754 F.3d 754, 758 (9th Cir. 2014). The Court finds, consistent with Ninth Circuit precedent, that a declaratory judgment by this Court finding Judge Cowan's rulings unconstitutional "would have the same practical impact as injunctive relief on a pending state proceeding as a result of the preclusive effect of the federal court judgment . . ." *Herrera*, 918 F.3d at 1048 (quotations omitted).

quotations and citations omitted). The Court finds that Judge Cowan's appointment of a limited purpose GAL and striking Plaintiff's objection are similarly central to the ongoing probate proceedings. In similar circumstances, other courts have agreed that § 1983 challenges to the constitutionality of orders issued in state court proceedings qualify for *Younger* abstention. *See Falco v. Justices of the Matrimonial Parts of Supreme Court of Suffolk Cnty.*, 805 F.3d 425, 428 (2d Cir. 2015) (holding *Younger* abstention warranted when § 1983 claim "challenge[d] the State court's order that he pay half the fees of the attorney appointed to represent his children in the divorce proceeding."). Plaintiff relies on *Cook v. Harding*, 879 F.3d 1035 (9th Cir. 2018), but that opinion stands only for the proposition that a district court cannot abstain from hearing a § 1983 claim challenging the constitutionality of a state statute based solely on similar claims also challenging the statute's constitutionality pending in state court. *Id.* at 1041. Here, Plaintiff seeks declaratory relief that would declare Judge Cowan's prior conduct unconstitutional, and that he has been deprived of his liberty and property in violation of the Fourteenth Amendment. *See* Dkt. 22 at 35-36. These claims all seek to litigate the propriety of Judge Cowan's prior orders in the probate proceeding, and therefore fall into the third *NOPSI* category.

The Court also finds that the three other requirements necessary to raise the possibility of *Younger* abstention are also met here. The probate proceeding is ongoing, and California clearly has an "important state interest" in the orderly administration of its probate proceedings as well as in the ability of probate

court judicial officers, like Judge Cowan, to assess settlement proposals based on independent guidance they regard as necessary to complete their duties. *See, e.g. H.C. ex rel. Gordon v. Koppel*, 203 F.3d 610, 613 (9th Cir. 2000) (finding that important state interests are implicated by areas of the law that are the exclusive reserve of the state judicial system).

Finally, Plaintiff has an adequate venue to litigate his federal claims, both upon final disposition of the probate proceeding, and additionally the process for writ petition that he has already exhausted. As with the Court's discussion of judicial immunity and the § 1983 claims above, the Court does not find that the fact that the California Court of Appeal denied Plaintiff's writ "on the ground [Plaintiff] has not stated facts or provided evidence or legal authorities sufficient to demonstrate entitlement to extraordinary relief" means that Plaintiff will not ultimately have an adequate venue to litigate these claims. Dkt. 41, Ex. N. Plaintiff's argument that a further opportunity to appeal Judge Cowan's decision may not be available for a substantial period of time does not preclude *Younger* abstention. *See Baffert v. Cal. Horse Racing Bd.*, 332 F.3d 613, 619 (9th Cir. 2003) (allegations of "redundancy and delay" not sufficient to create procedural bar to federal claims).

V. Plaintiff's Motion to Amend the FAC

Plaintiff has also filed a motion to amend the FAC and file a Second Amended Complaint ("SAC"). Dkt. 31. Plaintiff's SAC makes limited alterations to the FAC, adding additional allegations that Judge Cowan and LASC intentionally discriminated against Plaintiff and denied him "effective communication and mean-

ingful participation" in the state court system through the appointment of a GAL, and adding a second disability-related cause of action pursuant to § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. *See* Dkt. 31-2 (redlined version of proposed SAC).

Leave to amend a pleading is properly denied where the amendment is futile. *Carrico v. City & Cnty. of S.F.*, 656 F.3d 1002, 1008 (9th Cir. 2011). "Whether an amendment is 'futile' is measured by the same standards that govern a motion to dismiss." *Hofstetter v. Chase Home Fin.*, 751 F.Supp.2d 1116, 1123 (N.D. Cal. 2010); *see also Krainski v. Nev. ex rel. Bd. of Regents of Nev. Sys. of Higher Ed.*, 616 F.3d 963, 972 (9th Cir. 2010).

a. Amendment of the FAC as Plaintiff Proposes Would Be Futile.

Plaintiff argues that permitting him to seek injunctive and declaratory relief[4] under the ADA rather than damages cures the deficiencies in that claim and should be permitted by the Court at this early stage in the litigation. Plaintiff cites primarily to *Hiramanek v. Clark*, 2014 WL 107634 (N.D. Cal. Jan. 10, 2014), for the proposition that "there is no provision in the ADA that bars injunctive relief with

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[4] Plaintiff's damages claim for intentional discrimination is alleged solely against LASC in the proposed SAC. *See* Dkt. 31-2 at 38. Because Plaintiff's allegations fail to state a claim for violation of the ADA as explained above, any claim for damages based on intentional discrimination by a public entity also necessarily fails. *See also Phiffer v. Oregon*, 586 F. App'x 425, 426 (9th Cir. 2014) (when liability is premised solely on respondeat superior, immunity of the underlying actors bars liability against the employer).

respect to judicial officers." *Hiramanek*, 2014 WL 107634 at *6. But that case involved claims by a state court litigant that certain court employees and judicial officers had denied plaintiff's repeated requests for accommodation in the course of several family law and civil cases. *Id.* at *2. The district court found that judicial officers had immunity from damages, but that prospective injunctive relief ordering the court to make reasonable accommodations for plaintiff was still a viable avenue of relief for that plaintiff under the ADA. *Id.* at *7.

The Court rejects Plaintiff's argument that the allegations giving rise to the alleged ADA violations do not constitute performance of a "normal judicial function," but instead discrimination by Judge Cowan against Plaintiff based on a false perception that Plaintiff suffers from Down Syndrome. *See* Dkt. 34 at 26 (raising this argument in the motion to dismiss briefing); Dkt. 35 at 9 n.2 (raising it again in a Reply brief regarding the motion to amend the FAC). A judicial officer speaking from the bench during the course of a court proceeding, regarding an issue that was later the subject of a substantial portion of the 42-page order, is clearly performing a normal judicial function.

The Court agrees with the analysis in *Hiramenek*, to the extent that it holds that a waiver of judicial immunity exists for prospective injunctive relief against certain actions taken by judicial officers with respect to disabilities and accommodations in the course of judicial proceedings. 2014 WL 107634 at *7-8. But it wholly rejects the notion that statements made by a judicial officer in the course of a court hearing can give rise to a violation of the ADA. No binding or

persuasive authority suggests that an ADA violation is cognizable based on decisions rendered by judicial officers, or statements made from the bench during a hearing. Plaintiff's citations to cases discussing the availability of ADA injunctive relief based on access to courtrooms or requests for accommodations for disability are clearly distinct from Judge Cowan's conduct here. *See Tennessee v. Lane*, 541 U.S. 509, 513-14, 532-33 (2004) (paraplegic plaintiffs unable to access second floor courtrooms); *Hiramanek*, 2014 WL 107634, at *6.

As Defendants also note, Plaintiff has continued to be represented by counsel in the California probate proceeding and continues to actively litigate his position. *See, e.g.* Dkt. 27-4. Ex. T.[5] Neither Judge Cowan's statements during the course of the probate court proceedings, nor his decision to appoint a GAL to provide an independent assessment of the global settlement agreement and related issues, constitute a denial of access to the court system that is cognizable under the ADA. Because Plaintiff's proposed amendment would be futile, the Court DENIES the motion to amend the FAC.

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[5] The Court takes judicial notice of these documents because they constitute public records of the probate court. *See Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n.6 (9th Cir. 2006) ("We may take judicial notice of court filings and other matters of public record."). The Court does not consider any of the disputed factual issues raised in these documents, only the fact of their existence as evidence that Plaintiff continues to actively participate in the California probate proceedings through counsel.

VI. Dismissal of Plaintiff's Claims Is Without Leave to Amend.

Dismissal of a complaint without leave to amend is appropriate where further amendment of the claims would be futile. *See Chappel v. Lab. Corp. of Am.*, 232 F.3d 719, 725-26 (9th Cir. 2000). Plaintiff has amended his complaint once, the Court has denied a second attempt to amend the FAC on the basis of futility, and as explained above, the Court does not find that Plaintiff can litigate the issues he raises before this Court under either § 1983 or the ADA. Because the Court finds that further amendment of the operative complaint would be futile, the Court's dismissal of Plaintiff's lawsuit is without leave to amend.

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING (AUGUST 23, 2021)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRADFORD D. LUND,

Plaintiff-Appellant,

v.

DAVID J. COWAN, THE HONORABLE, LOS ANGELES COUNTY SUPERIOR COURT; LOS ANGELES COUNTY SUPERIOR COURT, FOR THE STATE OF CALIFORNIA,

Defendants-Appellees.

No. 20-55764

D.C. No. 2:20-CV-01894-SVW-JC

Before: R. NELSON and LEE, Circuit Judges, and STEIN*, District Judge.

ORDER

The panel has voted to deny the petition for panel rehearing. Judges Nelson and Lee have voted to deny the petitions for rehearing en banc, and Judge Stein

* The Honorable Sidney H. Stein, United States District Judge for the Southern District of New York, sitting by designation.

has recommended denying the petition. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for panel rehearing and the petition for rehearing en banc are **DENIED**.

RELEVANT STATUTORY PROVISIONS

42 U.S.C. § 12101–Findings and purpose

(a) Findings

The Congress finds that—

(1) physical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society, yet many people with physical or mental disabilities have been precluded from doing so because of discrimination; others who have a record of a disability or are regarded as having a disability also have been subjected to discrimination;

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(8) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

(b) Purpose

It is the purpose of this chapter—

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

42 U.S.C. § 12102–Definition of disability

(1) Disability

The term "disability" means, with respect to an individual—

(A) a physical or mental impairment that substantially limits one or more major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment (as described in paragraph (3)).

(2) Major life activities

(A) In general

For purposes of paragraph (1), major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.

(B) Major bodily functions

For purposes of paragraph (1), a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

(3) Regarded as having such an impairment

For purposes of paragraph (1)(C):

(A) An individual meets the requirement of "being regarded as having such an impairment" if the individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.

(B) Paragraph (1)(C) shall not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less.

(4) Rules of construction regarding the definition of disability

The definition of "disability" in paragraph (1) shall be construed in accordance with the following:

(A) The definition of disability in this chapter shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter.

(B) The term "substantially limits" shall be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008.

(C) An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.

(D) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

(E)(i) The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as—

(I) medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies;

(II) use of assistive technology;

(III) reasonable accommodations or auxiliary aids or services; or

(IV) learned behavioral or adaptive neurological modifications.

(ii) The ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity.

(iii) As used in this subparagraph—

(I) the term "ordinary eyeglasses or contact lenses" means lenses that are intended to fully correct visual acuity or eliminate refractive error; and

(II) the term "low-vision devices" means devices that magnify, enhance, or otherwise augment a visual image.