No. 21-1346

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JANE ROE,

Plaintiff-Appellant,

v.

UNITED STATES, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of North Carolina

BRIEF FOR APPELLEES

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
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- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 21-1346 Caption: Roe v. USA

Pursuant to FRAP 26.1 and Local Rule 26.1,

Sheryl L. Walter
(name of party/amicus)

who is appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐YES ☑NO

2. Does party/amicus have any parent corporations? ☐YES ☑NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐YES ☑NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Amanda L. Mundell Date: 11/4/21

Counsel for: Sheryl L. Walter

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The Honorable Roger L. Gregory
(name of party/amicus)

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Signature: /s/ Amanda L. Mundell Date: 11/4/21

Counsel for: The Honorable Roger L. Gregory

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Pursuant to FRAP 26.1 and Local Rule 26.1,

James N. Ishida
(name of party/amicus)

who is appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

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Signature: /s/ Amanda L. Mundell Date: 11/4/21

Counsel for: James N. Ishida

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No. 21-1346 Caption: Roe v. USA

Pursuant to FRAP 26.1 and Local Rule 26.1,

Anthony Martinez
(name of party/amicus)

who is appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

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Signature: /s/ Shannon Sumerell Spainhour Date: 11/4/21

Counsel for: Anthony Martinez

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INTRODUCTION

This case stems from plaintiff Jane Roe's allegations that she was subject to sexual harassment while employed at a Federal Defender's Office, which is part of the Judicial Branch. The Judiciary is firmly committed to providing all employees with a workplace free from discrimination, harassment, and retaliation, and has adopted comprehensive procedures to address and remedy allegations of workplace misconduct, including the allegations at issue here. In this case, Roe commenced the process established by the Judicial Branch to address her allegations of harassment and mistreatment, but terminated the process before filing a formal complaint or seeking relief. She instead filed suit in federal court against judicial officials involved in the complaint process (though not against her alleged harasser), arguing that the process did not satisfy the minimum standards of the Constitution. Because the proper forum in which to adjudicate her claims was the complaint process Roe voluntarily terminated, this Court should affirm the dismissal of Roe's claims.

In 1980, the Judicial Conference developed a Model Equal Employment Opportunity Plan (Model Plan), which established comprehensive procedures to quickly address and remedy allegations of workplace misconduct. The Judicial Conference has continued to update and modify the Model Plan in response to changes in its workforce and based on experience implementing the plan. Every federal circuit has adopted the Model Plan in whole or with some procedural modifications.

The Fourth Circuit's Employment Dispute Resolution Plan (EDR Plan or Plan) provides comprehensive procedures for employees of the Judicial Branch, including Federal Defender's Offices, to report and remedy harassment and other wrongful conduct. Employees may request counseling, participate in mediation, request a hearing, and ultimately receive review before a judicial hearing officer and the Judicial Council. The Plan ensures thorough investigation of all reports of misconduct and provides for disciplinary action against the alleged wrongdoer. It provides employees with meaningful review and remedies for employment-related claims of harassment or other wrongful conduct.

Jane Roe initially reported harassment and related workplace concerns through the Plan's mechanisms, triggering a preliminary investigation and efforts to redress her concerns under the Plan. In this lawsuit, Roe claims that several federal judicial officials and entities—not including her alleged harasser—discriminated and retaliated against her in violation of the equal protection component of the Fifth Amendment and 42 U.S.C. §§ 1985(3) and 1986; and that the EDR Plan's procedures were constitutionally deficient or were not properly followed, assertedly in violation of the Fifth Amendment's Due Process Clause. JA 99-101.

The district court correctly concluded that Roe failed to state a claim under either theory and that sovereign immunity precludes her claims against the official-capacity defendants. Although the district court did not need to reach alternative grounds, dismissal was also warranted because Judicial Branch employees are excluded

from the Civil Service Reform Act's statutory mechanism for judicial review and cannot bring lawsuits like this one to address claims based on employment-related conduct; they must instead pursue employment claims under their circuit EDR Plan. Dismissal of Roe's claims against several defendants in their individual capacities was also warranted because special factors counsel hesitation before creating a damages remedy in this new context, and because the claims are barred by absolute and qualified immunity.

STATEMENT OF JURISDICTION

Plaintiff's complaint invoked the jurisdiction of the district court under 28 U.S.C. §§ 1331 and 2201. JA 22. The district court entered final judgment on December 30, 2020, JA 1529, and denied Roe's motion for reconsideration on January 29, 2021, *see* JA 17. Roe filed a notice of appeal on March 29, 2021. JA 1558. This Court has jurisdiction over the appeal under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the district court correctly concluded that sovereign immunity bars Roe's claims against the federal government.

2. Whether the district court correctly concluded that Roe failed to state a claim for violation of the Fifth Amendment's Due Process Clause against defendants sued in their official capacities.

3. Whether the district court correctly concluded that Roe failed to state a claim for violations of the equal protection component of the Fifth Amendment and 42 U.S.C. §§ 1985(3) and 1986.

4. Whether alternative grounds for affirmance exist because Roe's claims (1) are barred by the Civil Service Reform Act, (2) do not warrant expansion of a *Bivens* remedy, and (3) are barred by absolute and qualified immunity.

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

A. The Fourth Circuit's EDR Plan

The Judiciary does not tolerate discrimination or harassment in the workplace. Decades ago, the federal courts created a Model Equal Employment Opportunity Plan, which laid out meaningful and effective procedures to ensure that any workplace misconduct is quickly reported, investigated, and corrected. Over the years, the Judiciary has made changes to this Model Plan to address the needs of its workforce, and every Circuit—including this one—has adopted a similar Plan. This case focuses on the Fourth Circuit's 2018 Consolidated Equal Employment Opportunity and Employment Dispute Resolution Plan, which took effect during the pendency of

Roe's claims under the previous Plan.[1] The 2018 Plan, like the predecessor and successor plans, prohibits "wrongful conduct," including discrimination against employees based on race, color, religion, sex (including sexual harassment), national origin, and disability. JA 293. It prohibits harassment "based upon any of these protected categories or retaliation for engaging in any protected activity." *Id.*

Employees who have experienced wrongful conduct in their place of employment (or others who know of such conduct) can submit a report of wrongful conduct under Chapter IX of the EDR Plan. To seek redress for wrongful conduct, employees can also file a claim for remedies under Chapter X of the Plan. The process and resolution of reports made under Chapter IX and claims filed under Chapter X differ in important ways.

Under Chapter IX of the Plan, all "employees are encouraged to report wrongful conduct to the Court's EDR Coordinator, the Chief Judge, unit executive, human resources manager, or their supervisor as soon as possible, before it becomes [] severe or pervasive." JA 298. The purpose of a report of wrongful conduct is to trigger an investigation into the alleged conduct, which may culminate in disciplinary action against the alleged wrongdoer. Once a report of wrongful conduct is made under Chapter IX, "[t]he Chief Judge and/or unit executive shall ensure that the

[1] The 2018 Plan superseded the 2013 Plan but did not change the pertinent portions of that Plan. The Fourth Circuit adopted a new Plan on September 14, 2020, more than a year after Roe withdrew her claim.

allegations in the report are appropriately investigated, either by the human resources manager or other person." *Id.* Allegations of wrongful conduct are "confidential[]." *Id.* "Employees found by the Chief Judge and/or unit executive to have engaged in wrongful conduct . . . may be subject to disciplinary action." *Id.* An employee need not be a victim of wrongful conduct to report it.

Because "[a] report of wrongful conduct is not the same as initiating or filing a claim under [Chapter X of the] Plan," Chapter IX does not entitle the reporting employee to participate in the investigation, obtain "confidential[]" information pertaining to the investigation other than on a "need-to-know basis," or seek individual remedies based on the alleged wrongful conduct. Instead, employees who wish to seek relief under the Plan for the wrongful conduct they experienced "must follow the procedures set forth in Chapter X." JA 298.

To initiate a claim for redress under Chapter X, an employee must first "file a request for counseling with the Court's EDR Coordinator." JA 299. A principal purpose of counseling is to "assist the employee in achieving an early resolution of the matter, if possible." JA 302. At the conclusion of the counseling period (generally 30 days), an employee may "choose to pursue his or her claim" by "fil[ing] with the EDR Coordinator a request for mediation." JA 303. Mediation allows the "employee and his or her representative, if any, and the employing office to discuss alternatives for resolving a dispute, including any and all possibilities of reaching a voluntary, mutually satisfactory resolution." JA 303-04. At any time during the Chapter X process, "[a]

party may seek disqualification of a judicial officer, employee or other person involved in a dispute by written request to the Chief Judge." JA 301.

Following mediation, an employee may file a formal written complaint. JA 304. The Chief Judge is charged with determining if the complaint states a claim upon which relief could be granted and, if so, holding a hearing on the merits. JA 304-05. Either the Chief Judge or a designated judicial officer presides over the hearing, and the employee may request discovery and further investigation; the employee also has the right to present evidence and cross-examine witnesses. JA 305. At the conclusion of the proceeding, the judicial officer is authorized to award "a necessary and appropriate remedy," including but not limited to: "placement of an employee in a position previously denied," "placement in a comparable alternative position," "reinstatement," "prospective promotion," and "back pay . . . where the statutory criteria of the Back Pay Act are satisfied." JA 308-09 (citation omitted). If an employee is dissatisfied with the outcome, she may appeal to the circuit's judicial council, as described in Chapter X, § 11 of the Plan. *See* JA 307-08. "Decisions of the Judicial Council are final and conclusive and shall not be judicially reviewable on appeal or otherwise." JA 308.

B. Factual Background

Roe alleges that, while employed as a legal research and writing attorney with the Federal Defender's Office, she complained to the Federal Defender, Anthony Martinez, that one of Roe's superiors—the First Assistant Defender—sexually

harassed her. JA 30-32, 35. On August 10, 2018, Roe emailed Martinez regarding the alleged harassment. JA 52.

Based on Roe's email, Martinez notified the Circuit Executive, who notified Chief Judge Gregory, who ordered an investigation under the Plan. JA 53, 59, 92, 97. Roe filed a report of wrongful conduct under Chapter IX of the Fourth Circuit's EDR Plan and a request for counseling under Chapter X of the Plan, naming both the First Assistant and Martinez as violators of the Plan. JA 62. In addition to her Chapter IX report and Chapter X request for counseling, Roe separately requested disqualification of Martinez from serving as the Federal Defender Office's representative in the Chapter X process. *Id.* Circuit Executive James Ishida confirmed that there would be an investigation into Roe's Chapter IX report of wrongful conduct, and that the investigation would constitute the preliminary investigation for the Chapter X informal counseling process. JA 66, 70.

After the counseling period, Roe requested mediation under Chapter X of the Plan. JA 85-86. She met with the mediator and requested that she be transferred to an adjacent Federal Defender Office. JA 85. The mediator informed Roe that there were no openings in any adjacent Federal Defender Office and that as a result, he would not be able to help her secure a duty station transfer. JA 92. Roe also expressed interest in securing a clerkship within the Fourth Circuit, and the mediator helped Roe secure an interview. JA 93.

On March 8, 2019, Roe interviewed for a term clerkship with a Fourth Circuit judge who made her an offer. JA 21, 93. Roe accepted and withdrew her Chapter X claim a few days later. JA 1566. In an email to the Circuit Executive, Roe explained: "I very much appreciate the Fourth Circuit's assistance in helping me reach the best possible outcome under the circumstances. . . . These opportunities will allow me a fresh start while saving my reputation and the hard work I have put into building my career."[2] *Id.* Because she "no longer wish[ed] to pursue the Chapter X portion of [her] EDR claim," *id.*, Roe did not proceed to file a complaint regarding the alleged harassment under § 10(A) or seek any other relief under Chapter X of the Plan. On March 15, 2019, Roe formally resigned from the Federal Defender's Office. JA 94.

In May 2019, following an investigation, disciplinary action was taken based on Roe's Chapter IX report of wrongful conduct. JA 97.

C. Prior Proceedings

Roe brought suit against Sheryl L. Walter, General Counsel for the Administrative Office of the U.S. Courts; the Honorable Roger L. Gregory, Chief Judge of the Fourth Circuit; James N. Ishida, Circuit Executive of the Fourth Circuit and Secretary of the Judicial Council of the Fourth Circuit; and Anthony Martinez, Federal Public Defender for the Western District of North Carolina—each in their

[2] Although not cited in Roe's complaint, this email can properly be considered on the motions to dismiss because the email is integral to the complaint: it is the communication with which Roe withdrew her EDR claim. *See, e.g.*, *Philips v. Pitt Cty. Mem'l Hosp.,* 572 F.3d 176, 180 (4th Cir. 2009).

individual capacities. Roe also asserted official-capacity claims against the United States, the Judicial Conference of the United States, the Honorable Roslynn R. Mauskopf in her official capacity as Chair of the Judicial Conference Committee on Judicial Resources,[3] the Administrative Office of the United States Courts (AO), James C. Duff in his official capacity as Director of the Administrative Office of the U.S. Courts,[4] the U.S. Court of Appeals for the Fourth Circuit, the Judicial Council of the Fourth Circuit, and Martinez in his official capacity as Federal Public Defender for the Western District of North Carolina. Roe alleged violations of due process and equal protection under the Fifth Amendment, conspiracy to violate her civil rights under 42 U.S.C. § 1985, and neglect to prevent conspiracy to violate her civil rights under 42 U.S.C. § 1986. Roe's due process claim challenged the constitutionality of the EDR Plan and contended that she was denied the procedures afforded under the plan. JA 99. Roe also alleged that defendants violated equal protection by "subjecting Plaintiff to harassment, retaliation, and discrimination, failing to take immediate and effective action on her complaints, and failing to provide her with meaningful review or remedies." JA 100. Her conspiracy claims were rooted in allegations that the

[3] The Honorable Brian Stacy Miller is the current Chair of the Judicial Conference Committee on Judicial Resources, and is automatically substituted for Judge Mauskopf pursuant to Fed. R. App. P. 43(b)(2).

[4] Judge Mauskopf is now the Director of the Administrative Office of the U.S. Courts and is automatically substituted for Mr. Duff pursuant to Fed. R. App. P. 43(b)(2).

individual-capacity defendants sought to deprive her of her right to equal protection or failed to prevent such a deprivation. JA 100-01.

Defendants moved to dismiss Roe's claims. JA 156-347. While the motions to dismiss were pending, Roe filed motions for partial summary judgment.[5] The district court granted defendants' motions to dismiss on December 30, 2020. JA 1527. The court did not consider Roe's summary judgment motions.

The district court concluded that Roe's official-capacity claims were barred by sovereign immunity. JA 1507-11. The court further concluded that Roe failed to state a cognizable constitutional claim against any of the defendants. The court explained that "Roe fail[ed] to allege" any constitutionally protected "liberty interest" or "property interest" protected by the Due Process Clause. JA 1514-19. In dismissing Roe's equal protection claims, the court noted that "Roe's complaint is devoid of any allegation that women are treated differently than men under the EDR Plan, and Roe does not allege that the actions taken against her were on the basis of her sex." JA 1523. The court further explained that Roe had erroneously "attempt[ed] to graft precedent interpreting Title VII onto the Fifth Amendment." JA 1520.

[5] Roe's opening brief includes references to summary judgment filings and exhibits, but none of those documents were considered by the district court in its ruling on the motion to dismiss, which is the subject of this appeal.

With respect to Roe's claim for conspiracy to deny equal protection of the laws under 42 U.S.C. § 1985(3), the court concluded that Roe failed to allege that the defendants sued in their individual capacities were "motivated by a specific class-based, invidiously discriminatory animus." JA 1525-26 (quotation marks omitted). Dismissal of her § 1985 claim in turn required dismissal of the § 1986 claim, the court reasoned, because "section 1986 applies only to actors who could have prevented the section 1985 injury but failed to do so." JA 1526.

SUMMARY OF ARGUMENT

I. Sovereign immunity bars Roe's claims against the United States, its agencies, and officers named in their official capacities. As the district court recognized, no statute waives the government's immunity here. The APA's waiver of immunity excludes suits seeking review of actions by the "courts of the United States," 5 U.S.C. § 701(b)(1)(B). And the Back Pay Act applies only to the extent that an "appropriate authority" has determined that Roe is entitled to receive back pay. *Id.* § 5596(b)(1). No such authority has made such a determination here because Roe terminated the EDR process before filing a complaint or seeking back pay. Finally, although sovereign immunity is no bar to claims for equitable relief, *see Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689, 693 (1949), that exception does not apply here because Roe asserts no claims for ongoing constitutional violations.

II. Even if Roe's due process claim were not barred by sovereign immunity, the district court correctly dismissed that claim under Rule 12(b)(6). The complaint

does not plausibly allege that any of the defendants—including the Fourth Circuit, the Administrative Office of the U.S. Courts, the Judicial Conference, and Chief Judge Gregory—deprived her of a due process right to be free from gender-based workplace discrimination, nor does she plausibly allege that she was deprived of any process that was due, especially in light of her decision to withdraw her Chapter X claim. And Roe does not identify any other protected property or liberty interest independent of the EDR Plan's procedures that she could vindicate in litigation.

III. The district court likewise correctly dismissed Roe's equal protection and conspiracy claims for failure to state a claim. Roe has not sued her harasser, and her failure to plead any allegations that defendants discriminated against her *because of* her gender is fatal to her equal protection claim and requires dismissal. Her complaint is similarly devoid of any allegations regarding the existence of a conspiracy under §§ 1985(3) and 1986, let alone one undertaken with the intent to discriminate against Roe based on her sex. In the alternative, Roe's statutory claims are precluded by the doctrine of intracorporate conspiracy.

IV. Although this Court can readily affirm the dismissal of Roe's claims on the district court's reasoning, it may also rely on a number of independent, threshold legal grounds.

First, the Civil Service Reform Act categorically excludes Judicial Branch employees from the statute's exclusive judicial review procedures, thereby precluding such employees from litigating workplace misconduct claims in federal court.

Congress has repeatedly declined to extend the statute's judicial review procedures to employment claims brought by Judicial Branch employees, requiring these employees instead to bring their claims under their Circuit Court's EDR Plan. Dismissal was required because the Fourth Circuit's EDR Plan provided the exclusive remedy.

Second, Roe's claims against the individual-capacity defendants must be dismissed because courts should not create a damages remedy against judicial officials in their individual capacities. "[E]xpanding the *Bivens* remedy is now a 'disfavored' judicial activity." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017). Roe's claims arise in a "new context," *id.*, and special factors, including Congress's statutory exclusion of judicial review for employment-related claims brought by Judicial Branch employees, counsel against creating a *Bivens* remedy here.

Finally, even if Roe could bring a claim for constitutional and statutory violations, the doctrines of absolute and qualified immunity would require dismissal of the individual-capacity claims. Chief Judge Gregory, who was at all relevant times acting in an adjudicatory role, is entitled to absolute judicial immunity. He and the other three individual defendants are also entitled to qualified immunity, because Roe has not identified any clearly established rights that they could have violated.

STANDARD OF REVIEW

All issues raised in this appeal, including defendants' alternative grounds for dismissal, are questions of law, subject to de novo review. *See, e.g.*, *Feminist Majority Found. v. Hurley*, 911 F.3d 674, 685 (4th Cir. 2018).

ARGUMENT

I. Roe's Official-Capacity Claims Are Barred By Sovereign Immunity

Roe alleged that the official-capacity federal defendants violated her right to due process and equal protection. The district court correctly dismissed those claims because no statute waives the government's sovereign immunity.

Sovereign immunity bars suits against the United States, its agencies, and officers sued in their official capacities, absent a statutory waiver of immunity. *See FDIC v. Meyer*, 510 U.S. 471, 475, 485-86 (1994). "[A] waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign." *Lane v. Pena*, 518 U.S. 187, 192 (1996). The district court correctly rejected Roe's arguments that the APA and Back Pay Act waive immunity for her claims in this case, and Roe has not identified any prospective equitable relief or ongoing constitutional violation.

1. The APA provides a limited waiver of the government's sovereign immunity: it permits those who have "suffer[ed] legal wrong because of agency action, or [been] adversely affected or aggrieved by agency action" to seek non-monetary relief following judicial review of action by an agency of the United States, or an officer or employee of such agency named in his official capacity. 5 U.S.C. § 702.

Congress explicitly excluded the "courts of the United States" from the APA's definition of "agency." 5 U.S.C. § 701(b)(1)(B). That statutory exemption includes not just courts but "auxiliary bodies in the judicial branch" as well. *Washington Legal Found. v. U.S. Sentencing Comm'n*, 17 F.3d 1446, 1449 (D.C. Cir. 1994). The legislative history of the APA confirms "that the term 'agency' was supposed to have substantially the same meaning in the APA as in two preexisting statutes." *Id.* "The Federal Reports Act defined 'Federal Agency' as including only entities 'in the executive branch,' while the Federal Register Act explicitly exempted entities in 'the legislative and judicial branches of the Government.'" *Id.*; *see also id.* ("[T]he word 'agency' is defined in the Act 'by excluding legislative, judicial, and territorial authorities.'" (quoting S. Rep. No. 79-752, at 10 (1945))).

Each of the defendants named in their official capacities—the Fourth Circuit, the Judicial Conference, the Fourth Circuit Judicial Council, the AO, the Circuit Executive, the Federal Defender's Office, the Federal Defender, the Chair of the Judicial Conference Committee on Judicial Resources, and Chief Judge Gregory—is part of the Judicial Branch and therefore outside the scope of the APA's waiver of sovereign immunity. *See Washington Legal Found.*, 17 F.3d at 1449; *Muirhead v. Mecham*, 427 F.3d 14, 18 (1st Cir. 2005) ("The Administrative Office of the United States Courts is a part of the judicial branch, so the Director's actions are not subject to judicial review under the terms of [the APA's] waiver."); *Demello v. Ney*, 185 F.3d 866

(9th Cir. 1999) (table decision) ("the Federal Public Defender's Office, which is a part of the federal judiciary" is not subject to the APA's waiver).

Courts and judges, including the Fourth Circuit and Chief Judge Gregory, are categorically exempt from the APA. And there is no basis to examine specific conduct to determine whether it served a "judicial function[]." Br. 34. In any event, Roe does not identify any acts that would not qualify as "judicial" functions. She also concedes that the Judicial Conference, as an "auxiliar[y] of the courts" is "exempt" from the APA's waiver of immunity. Br. 36 (quotation marks omitted).

Roe maintains that the Federal Defender's Office, the AO, the Circuit Executive, and the Fourth Circuit Judicial Council do not perform "judicial functions" and instead perform "administrative functions" (in the case of the AO, Circuit Executive, and Judicial Council) or "defense function[s]" (in the case of the Federal Defender's Office).[6] But the exemption of a particular office from the APA's waiver "is warranted not by the functions it performs . . . but by its status as an auxiliary of the courts." *Washington Legal Found.*, 17 F.3d at 1449 (quoting *Pickus v. U.S. Bd. of Parole*, 507 F.2d 1107, 1112 (D.C. Cir. 1974) (holding Probation Service exempt from APA)). The AO, Fourth Circuit Judicial Council, and Circuit Executive are all auxiliaries of the courts. They manage the courts' operations and ensure the

[6] Roe suggests that "at minimum, the APA undoubtedly waives the sovereign immunity of 'the United States,'" Br. 34, but Roe's suit seeks review of actions taken by the Judicial Branch alone.

"effective and expeditious administration of justice." *E.g.*, 28 U.S.C. § 332(d)(1). Federal Defender Offices are also auxiliaries of the courts. The Courts of Appeals appoint, compensate, and remove Federal Defenders. *See* 18 U.S.C. § 3006A. And to the extent the Court finds the issue uncertain, it must "construe ambiguities in favor of immunity." *Lane v. Pena*, 518 U.S. 187, 192 (1996).

2. The Back Pay Act waives sovereign immunity only where employees have been first "found by appropriate authority under applicable law . . . to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee." 5 U.S.C. § 5596(b)(1). Under the statute, an "appropriate authority" is one with the power "under applicable law" to determine whether the employee was subject to "an unwarranted personnel action" (or an authority designated by the CSRA to review that determination). *United States v. Fausto*, 484 U.S. 439, 454 (1988). Here, that authority was Chief Judge Gregory (or the Judicial Council), through the EDR process. Because Roe terminated the EDR process before asking for or obtaining a determination of whether she was entitled to back pay, no one—let alone any "appropriate authority" under the Back Pay Act—has found that Roe is entitled to back pay. JA 1508. Roe contends that a district court could be an "appropriate authority." Br. 39-40. But she has not identified an "applicable law" that authorizes the district court to decide in the first instance whether she was subject to an unwarranted personnel action; applicable law gives the Chief Judge and Judicial

Council the authority to do that pursuant to the EDR Plan. *See infra* pp. 36-40. The Back Pay Act therefore does not waive defendants' sovereign immunity here.

Roe cites *In re Levenson*, 587 F.3d 925 (9th Cir. 2009), in support of her argument that the district court can award back pay; but that was an order issued by a judicial officer pursuant to the Ninth Circuit EDR Plan, not a decision by a district court in a suit like this. The EDR hearing officer in *Levenson* concluded that the Ninth Circuit's EDR Plan (like the Fourth Circuit's Plan) permitted the remedy of back pay if "the statutory criteria of the Back Pay Act are satisfied," and that the judge, acting as the EDR hearing officer, was an "'appropriate authority' to make the determination. *Id.* at 935-36 (citation omitted). That conclusion has no bearing here because Roe terminated the EDR process before a judicial officer could evaluate her claim or order any remedies.

3. Sovereign immunity does not bar "suits for specific relief against officers of the sovereign" who have allegedly acted "beyond statutory authority or unconstitutionally." *Larson*, 337 U.S. at 689, 693 (footnote omitted); *see also Dugan v. Rank*, 372 U.S. 609, 621-22 (1963) (explaining that immunity does not apply to suits alleging that an officers' actions were "beyond their statutory powers" or to suits where, "though within the scope of their authority, the powers themselves or the manner in which they are exercised are constitutionally void"). But that doctrine does not apply here.

Larson-Dugan applies only to claims for prospective equitable relief, but Roe has not sought equitable relief for any ongoing constitutional violations. Roe contends that she sought reinstatement, front pay, declaratory relief, and injunctive relief. But the assertion that she "sought . . . reinstatement to a position of assistant federal public defender," Br. 29-30 (referencing her counsel's statements at a hearing), is belied by her complaint, which explicitly disclaimed any interest in reinstatement, *see* JA 101 (requesting front pay "*in lieu of reinstatement*" (emphasis added)).[7] Nor does Roe's request for front pay constitute prospective equitable relief. Roe's complaint identifies injuries based on defendants' alleged past violations during the EDR process, not any ongoing constitutional violations. Thus, front pay would be a damages remedy, not an equitable one. *Cf. Blanciak v. Allegheny Ludlum Corp.*, 77 F.3d 690, 698 (3d Cir. 1996) (concluding that § 1983 "front pay" claims were "neither prospective nor equitable" because they "target past conduct" and "would provide nothing more than compensatory damages which would have to be paid from the Commonwealth's coffers").

To the extent that *Larson-Dugan* could apply, any relief would be limited to an injunction or a declaratory judgment. Although her complaint includes a generic request for injunctive and declaratory relief, Roe has never identified any equitable

[7] As Roe's brief makes clear, reinstatement was available. She chose not to pursue it. *See* Br. 31-32 (asserting that "reinstatement [is] inappropriate").

remedy that would redress her alleged injuries.[8] She has disclaimed any request for reinstatement, and her remaining claims seek damages for her past alleged injuries. Roe cannot evade *Larson-Dugan*'s equitable-relief requirement by styling her damages request as injunctive relief. *Cf. Department of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 263 (1999) (holding that a remedy, even if styled as an equitable one, that seeks to "attach money in the hands of the Government" is "money damages").

II. Roe Failed To State A Claim Under The Fifth Amendment's Due Process Clause

The Due Process Clause of the Fifth Amendment provides that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. Roe's due process claims focus on constitutional deficiencies she perceives in the EDR Plan's procedures and on an alleged failure to follow the Plan's procedures. But, as the district court correctly concluded, Roe's complaint does not state a claim for a violation of procedural due process.[9] Due process requires that a plaintiff be given "the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quotation marks

[8] Roe does not allege, for instance, that she expects to face the EDR process again in the future. *Cf. City of Los Angeles v. Lyons*, 461 U.S. 95, 110-112 (1983).

[9] The district court evaluated Roe's due process claim as if it had been brought against the individual-capacity defendants. JA 1514. Roe now asserts that she only "alleged that the Official Capacity Defendants violated due process." Br. 52. Even apart from sovereign immunity, the official-capacity defendants were properly dismissed because the district court correctly concluded that Roe failed to state a claim.

omitted). The Plan provides for meaningful review, and its procedures satisfy the Constitution's requirements, but Roe withdrew her EDR claim before the process concluded. Defendants accordingly did not deprive Roe of any rights provided under the Plan, and Roe has not identified any other alleged property or liberty interests.

A. The EDR Plan Provides Constitutionally Sufficient Process

The Fourth Circuit's EDR Plan is comprehensive. Its procedures permit an employee to seek informal resolution or to file a formal complaint and request a hearing, at which the hearing officer can order discovery and the parties can examine witnesses. Following the hearing, the judicial officer can award make-whole remedies. And the employee can seek review of that decision by the Judicial Council. Together, these procedures ensure that an employee's claims are heard and adjudicated fairly and promptly.

The EDR Plan grants the presiding judicial officer the authority to order broad relief—including reinstatement and back pay—against any employing office, including Federal Defender's Offices. *See* JA 308; Report of the Proceedings of the Judicial Conference of the United States 25 (Sept. 14, 2010), https://go.usa.gov/xeanV (explaining that "Judges presiding in EDR matters may not compel the participation of or impose remedies upon agencies or entities *other than the employing office* (emphasis added)). Roe's argument that the EDR process is a "sham" because presiding officers are "powerless to order the EDR Plan's promised remedies," Br. 64, is therefore baseless. Contrary to her assertion on appeal, Roe's complaint did not allege that

"judiciary officials told Roe . . . that an EDR presiding officer lacks authority to order remedies," Br. 64-65. Nor are EDR presiding officers limited to ordering "remedies independently authorized by statute," Br. 65, as Roe now claims. The only statutory limitation on an EDR presiding officer's authority to which Roe alludes is 18 U.S.C. § 3006A(g)(2)(a), which prohibits courts from removing the federal defender absent a showing of "incompetency, misconduct in office, or neglect of duty." *See* Br. 64-65. This provision pertains solely to the hiring and firing of the federal defender and in no way limits the Judiciary's authority to remedy workplace misconduct that occurs in a Federal Defender's Office in other ways. And the Constitution does not require the EDR Plan to provide for the termination of the federal defender without regard to any substantive or procedural requirements of federal law. In any event, because Roe chose to withdraw her Chapter X claim before allowing the EDR process to conclude, she should not now be able to challenge that process as providing inadequate procedures or remedies. *See Dotson v. Griesa*, 398 F.3d 156, 161 n.2 (2d Cir. 2005).

Roe also contends that the 2018 Plan did not provide claimants with a neutral decisionmaker. *See* Br. 61-64. But Roe never alleged in her complaint or during the EDR process that the Circuit Executive or Chief Judge Gregory were biased against her. Roe argues for the first time on appeal that changes made in the 2020 EDR Plan reveal shortcomings in the version of the Plan relevant in this case. Br. 61-62. She forfeited that argument by not making it before the district court. But even if she had not forfeited the argument, she has not explained why any aspect of the earlier Plan or

the defendants' handling of the Chapter X process failed to meet the standards of constitutional due process.

Roe raises a host of other challenges to the EDR process, including allegations that defendants (1) denied Roe an opportunity to be heard on the scope of the investigation into her Chapter IX report of wrongful conduct, (2) withheld the Chapter IX investigation report and denied Roe notice of certain allegations contained therein, (3) "refused to disqualify" Martinez from participating in the Chapter X process, and (4) coerced her into forgoing a hearing on her Chapter X claim. Br. 66-70.

First, Roe is simply wrong that the investigation into her report of wrongful conduct was limited to the First Assistant who harassed her. Roe acknowledges that the Martinez was also investigated, as she requested, so there was no cause to provide Roe with any additional opportunity to address the scope of the investigation. Br. 19.

Second, Roe is mistaken in contending that defendants improperly withheld the investigation report prepared in response to her Chapter IX report of wrongful conduct or denied her notice to respond to allegations contained in the report. Br. 68. Neither the Constitution nor the Plan requires disclosure of a Chapter IX report following investigation into wrongful conduct, or of any preliminary investigation report prepared during the counseling phase before a Chapter X complaint is filed. Roe points to the 2020 EDR Plan's procedures regarding investigation reports prepared during the Chapter X complaint process. *Id.* But Roe never filed such a

complaint because she withdrew her Chapter X claim, so there was never an opportunity to finalize or provide her any investigation report with respect to her Chapter X claim.

Third, Roe withdrew her Chapter X claim before Chief Judge Gregory ruled on her disqualification request. There was therefore never a "refusal to disqualify" the Defender from participating in the Chapter X process. Br. 66.

Lastly, Roe's conclusory assertion of coercion is unsupported by the allegations in her complaint. As explained above, nothing precluded Roe from pursuing her Chapter X claim after leaving the Federal Defender's Office, and Roe's claims of futility are baseless because the EDR process affords meaningful relief, *supra* pp. 22-23.

Far from alleging facts to support her assertion that defendants violated her rights under the EDR Plan, the complaint confirms that Circuit Executive Ishida, Chief Judge Gregory, and Martinez followed the steps of the Plan by initiating an investigation into Roe's claims. *See* JA 65. But she terminated the process before its conclusion when she withdrew her Chapter X claim.

With respect to Sheryl Walter, Roe alleged merely that Walter and/or her staff provided legal guidance and advice to an AO Officer and the Fourth Circuit. *See* JA 55, 60, 83, 96. But this allegation does not remotely suggest a deprivation of any asserted "right to be free from workplace discrimination." Br. 53.

As for the Chair of the Judicial Conference Committee on Judicial Resources, the Judicial Conference of the United States, and the Judicial Council of the Fourth Circuit, there are no allegations that those defendants were involved in addressing Roe's EDR claims, much less that they violated Plaintiff's rights under the Plan.

B. Roe Did Not Plead A Deprivation Of Any Protected Interest

In any event, a procedural due process claim is available only insofar as a plaintiff has been deprived of a protected property or liberty interest. The district court correctly concluded that Roe failed to identify a cognizable interest.

1. "Property interests, of course, are not created by the Constitution." *Board of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972). "Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Id.*

Roe does not contend that she has a property interest in her continued at-will employment with the Federal Defender's Office. Her reliance on *Perry v. Sindermann*, 408 U.S. 593, 602-03 (1972), and *Paige v. Harris*, 584 F.2d 178, 181 (7th Cir. 1978), both of which involved property interests in continued employment, is therefore misplaced. Nor can she argue that she has a protected property interest in the Plan's procedures, since "procedural requirements, without more, do not create constitutionally cognizable property interests." *Clemente v. United States*, 766 F.2d 1358, 1364 (9th Cir. 1985); *see also Garraghty v. Virginia, Dep't of Corr.*, 52 F.3d 1274, 1284 (4th Cir. 1995).

Roe's sole argument is that the EDR Plan creates a protected property interest—specifically, the Plan's terms that "granted the right to be free from workplace discrimination, harassment, and retaliation." Br. 53. The Judiciary is committed to preventing workplace harassment, discrimination, and retaliation, and the EDR Plan's procedures exist to prevent or remedy that misconduct. But to the extent Roe relies on the Fourth Circuit's EDR Plan for an articulation of the "right to be free from workplace sex discrimination," Br. 56, the scope of that right is defined by the Plan's procedures, which provide robust and meaningful review of an employee's claims, including a hearing before a judicial officer and appellate review before the Judicial Council. The EDR Plan delineates the bounds of any rights it creates, and because such rights do not exist independent of the Plan's procedures, Roe cannot enforce them through litigation, especially when she opted not to file a complaint under the EDR Plan.

2. The district court correctly rejected Roe's argument that she had a "liberty interest in being free from unlawful discrimination," echoing her property-interest arguments. JA 1515 (quoting JA 398). On appeal, Roe now contends that she has a liberty interest in being free from discharge "in a manner that unfairly imposes a 'stigma.'" Br. 57-58. Relying on *Sciolino v. City of Newport News*, 480 F.3d 642, 649 (4th Cir. 2007), she asserts that defendants "unfairly tarnished her professional reputation," "placed a stigma" on her reputation that "they then 'made public,'" and did so "in conjunction with [her] termination or demotion." Br. 57-58 (quoting

Sciolino, 480 F.3d 646). By failing to raise this argument in district court, Roe has forfeited it. *Muth v. United States*, 1 F.3d 246, 250 (4th Cir. 1993).

In any event, Roe's complaint does not support these new arguments. The complaint is devoid of any allegations that any rumors "spread beyond office walls," Br. 58, or otherwise affected her ability to successfully obtain employment at a different Federal Defender's Office.[10] Roe offers only speculation that a federal defender's inquiry about "why [Roe] left her former office" when she inquired about a job in his office was "presumably" on account of his having heard rumors. Br. 59; JA 98. And even if there were rumors, Roe has not plausibly alleged that they were spread by defendants or made in conjunction with any "termination or demotion." *Sciolino*, 480 F.3d at 646, 649.[11]

III. The District Court Correctly Dismissed Roe's Equal Protection And Statutory Claims

Roe asserted that both the official-capacity and the individual-capacity defendants violated her Fifth Amendment right to equal protection; she also invoked statutory claims for conspiracy to violate civil rights under 42 U.S.C. § 1985(3) and

[10] This Court should disregard Roe's reliance (Br. 59, 69-70) on statements in an investigation report submitted in response to Roe's prematurely filed motion for summary judgment. The report was not part of the record before the district court on the motions to dismiss.

[11] Roe misleadingly suggests that defendants "continued" to stigmatize her in this litigation by "violat[ing] the court-ordered pseudonym that Roe requested." Br. 59. Defendants consistently redacted Roe's true name. In one filing, a technical issue occurred in the application of certain redactions, and government counsel immediately corrected the error.

neglect to prevent conspiracy to violate civil rights under 42 U.S.C. § 1986. Roe has not sued her alleged harasser. Instead, her equal protection claims center on actions defendants took in response to Roe's reports of misconduct. As the district court correctly explained, Roe's failure to plead any allegations that defendants discriminated against her *because of* her gender is fatal to her equal protection claim and requires dismissal. Her conspiracy claims under §§ 1985 and 1986 fare no better: Roe's complaint is devoid of any allegations regarding the existence of a § 1985(3) conspiracy, and the intracorporate conspiracy doctrine would bar any such claim.

A. Roe's Allegations Fail To State An Equal Protection Claim

The "Due Process Clause of the Fifth Amendment contains an equal protection component prohibiting the United States from invidiously discriminating between individuals or groups." *Washington v. Davis*, 426 U.S. 229, 239 (1976). A plaintiff, like Roe, who raises an equal protection claim must plead that the government discriminated against her on the basis of a protected characteristic—here, sex. *See id.* at 240. Roe alleged that defendants subjected her "to harassment, retaliation, and discrimination, failing to take immediate and effective action on her complaints, and failing to provide her with meaningful review or remedies." JA 100. But her complaint is devoid of allegations that defendants took these actions *because of* her gender. Roe did not claim that defendants were deliberately indifferent. Nor does she allege that any defendant failed to address her complaints promptly because she is a woman, that her alleged constructive discharge was predicated on discriminatory

animus, or that any defendant formulated the EDR Plan with an intent to discriminate against Roe or female employees generally.

In dismissing Roe's claim, the district court correctly explained that instead of "plead[ing] or argu[ing]" that defendants discriminated against her on the basis of sex, Roe alleged that defendants retaliated against her for filing her EDR claim and then tried to argue that the alleged retaliation violated the equal protection component of the Fifth Amendment. JA 1520. Under this Court's precedent, "[a] 'pure or generic retaliation claim,' however, even if premised on complaints of sex discrimination, is not cognizable under the Equal Protection Clause." *Wilcox v. Lyons*, 970 F.3d 452, 461 (4th Cir. 2020). That is because "[r]etaliation for reporting alleged sex discrimination imposes negative consequences on an employee because of the employee's report, not because of the employee's sex." *Id.* at 460. As this Court has recently determined, "[t]he 'right to be free from retaliation for protesting sexual harassment and sex discrimination' . . . 'is a right created by Title VII'" rather than the Constitution. *Id.* at 461 (quoting *Gray v. Lacke*, 885 F.2d 399, 414 (7th Cir. 1989)). The district court thus correctly concluded that Roe's attempt to equate retaliation with sex discrimination improperly "graft[ed] precedent interpreting Title VII onto the Fifth Amendment." JA 1520 (citing Roe's opposition to defendants' motion to dismiss, JA 350, which invited the court to "apply the well-established standards developed in similar litigation under Title VII of the Civil Rights Act of 1964"). Roe's allegations of

retaliation following the filing of her Chapter X claim are not "cognizable under the Equal Protection Clause."[12] *Wilcox*, 970 F.3d at 461.

Roe contends that she alleged a "mixture of retaliation and ongoing sex discrimination and sexual harassment," unlike Wilcox's "'pure' retaliation" claims. Br. 41-43. But Roe's allegations are not materially different from Wilcox's. Like Roe, Wilcox "alleged sex discrimination, hostile work environment, and retaliation in violation of the Equal Protection Clause." *Wilcox*, 970 F.3d at 456. Wilcox claimed that she told the Commonwealth Attorney that a co-worker had sexually harassed her and that the Commonwealth Attorney did not take steps to reprimand the offender or "correct his behavior." *Id.* at 455. Roe claims here that she told Martinez that the First Assistant harassed her and that Martinez failed to respond adequately to her complaints, and defendants collectively failed to conduct the EDR process fairly or adequately. But like Wilcox, Roe did not plead a "link[]" between "an alleged retaliatory action [and] her gender," 970 F.3d at 456, 461, so she failed to allege a violation of equal protection.

Roe also faults the district court for failing to address her "equal protection claim that defendants were deliberately indifferent to sexual harassment." Br. 43. But

[12] Constitutional retaliation claims are "more properly characterized as claims asserting a violation of the First Amendment," *Wilcox*, 970 F.3d at 460, but Roe did not allege a First Amendment violation in her complaint.

Roe's complaint does not allege deliberate indifference.[13] She has forfeited any claim based on a theory of deliberate indifference and cannot now recast her equal protection claims on appeal. *See Muth*, 1 F.3d at 250.

In any event, the allegations in Roe's complaint do not support a claim for deliberate indifference. *See Feminist Majority Found. v. Hurley*, 911 F.3d 674, 702-03 (4th Cir. 2018). Roe identifies no action or inaction on the part of any defendant that would demonstrate a constitutional violation. Her complaint makes no mention of deliberate indifference and includes no allegations that Sheryl Walter was even aware of any alleged discriminatory harassment, let alone deliberately indifferent to it. Nor does she allege that Chief Judge Gregory or Circuit Executive James Ishida responded to her complaints unreasonably.

Roe's complaint similarly does not allege deliberate indifference on the part of Martinez but instead demonstrates that Martinez took Roe's concerns seriously. He assigned her a different mentor and removed her from the First Assistant's reporting chain altogether, except for a four-day period when he mistakenly had her listed on an organizational chart as reporting to the First Assistant. JA 43. Without any prompting, Martinez corrected that mistake and called her personally to apologize. JA

[13] Roe first raised a deliberate-indifference argument in her partial motion for summary judgment against the individual-capacity defendants, contending that defendants are not entitled to qualified immunity because it was "clearly established" that officials can be liable for their deliberate indifference. JA 714-19. The district court did not consider these arguments in ruling on the motions to dismiss.

46. And Martinez followed the terms of the Plan by contacting the Circuit Executive once Roe notified him of the alleged harassment. JA 53.

B. Roe's Conspiracy Claims Were Properly Dismissed

Roe claims that defendants conspired together to deny her equal protection in violation of § 1985(3). But a claim for conspiracy to deny equal protection of the laws under 42 U.S.C. § 1985(3) requires a plaintiff to plead (1) "a conspiracy of two or more persons," (2) "motivated by a specific class-based, invidiously discriminatory animus to (3) deprive the plaintiff of the equal enjoyment of rights secured by the law to all," (4) "which results in injury to the plaintiff as (5) a consequence of an overt act committed by the defendants in connection with the conspiracy." *Simmons v. Poe*, 47 F.3d 1370, 1376 (4th Cir. 1995). Conclusory allegations are insufficient; instead, a plaintiff must "plead specific facts in a nonconclusory fashion." *Gooden v. Howard County*, 954 F.2d 960, 969-70 (4th Cir. 1992) (en banc).

The district court correctly dismissed Roe's § 1985(3) claim because "her theory of liability is not 'class-based, invidiously discriminatory animus.'" JA 1526. Indeed, as explained, Roe's complaint includes no allegations of "invidious[] discriminatory animus." *Simmons*, 47 F.3d at 1376. And because "section 1986 applies only to actors

who could have prevented the section 1985 injury but failed to do so," dismissal of Roe's § 1985 claim necessitated dismissal of her § 1986 claim as well.[14] JA 1526.

Dismissal of Roe's claims was separately required because she failed to allege with any specificity a conspiracy to deprive her of equal protection. Roe gives short shrift to this element, noting only generally that she "alleged that two or more defendants conspired to deprive her of her equal protection rights." Br. 51. But general allegations that "defendants conspired" against her are insufficient. *See, e.g.*, *Simmons v. Poe*, 47 F.3d 1370, 1376 (4th Cir. 1995).

Roe's contentions regarding the remaining elements fail for similar reasons. Roe claims she satisfied the second element—class-based, invidiously discriminatory animus—"because she alleged that defendants engaged in sex discrimination by being deliberately indifferent to sexual harassment" and because of her "allegations of intentional sex discrimination." Br. 50-51. But Roe did not plead deliberate indifference in her complaint. *See supra* pp. 31-32. Nor did she include any allegations of intentional sex discrimination or harassment on the part of any defendant.

Roe likewise alleged no overt acts. Roe's assertion on appeal that the "Defender, the Circuit Executive, and AO officials took active steps to prevent Roe from speaking to the [Federal Equal Opportunity Officer (FEOO)]," Br. 51, is belied

[14] Roe cites no authority that §§ 1985 and 1986 can form the basis for a damages suit against government defendants in their official capacities, and in any event, there is no waiver of sovereign immunity for such a claim, as the district court correctly concluded.

by the allegations of her complaint, which demonstrate that Roe was not precluded from "speaking to the FEOO" and that AO "General Counsel [Sheryl Walter] personally" ensured that she could continue to speak to the FEOO, JA 56. Roe also misleadingly suggests that Martinez, Ishida, and Walter "limit[ed] the investigation to exclude allegations against the Defender." Br. 51. But Roe's allegations against Martinez *were* investigated.[15] JA 65-66.

Roe also asserts that the "Defender, the Circuit Executive, and AO officials . . . delay[ed] taking corrective action" on her Chapter X claim, or "allow[ed] the Defender . . . to drive the process," Br. 47, 51, but Roe's complaint includes no such allegations. Even if it did, that would be insufficient to meet the pleading standard for a § 1985(3) claim because Roe does not allege that defendants were motivated by discriminatory animus.

In the alternative, dismissal was warranted under this Court's precedent because the intracorporate conspiracy doctrine precludes Roe's § 1985(3) claim, which is based on an alleged agreement between "agents of the same legal entity, when the agents act in their official capacities," *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1867 (2017); *see Buschi v. Kirven*, 775 F.2d 1240, 1252 (4th Cir. 1985).[16] The "immunity granted under

[15] At a minimum, Roe failed to allege that Chief Judge Gregory had any involvement in this allegedly conspiratorial act.

[16] Some courts have concluded that the intracorporate conspiracy doctrine does not apply to civil claims alleging conduct that could give rise to criminal liability, *see McAndrew v. Lockheed Martin Corp.*, 206 F.3d 1031, 1041 (11th Cir. 2000) (considering

the doctrine" is not destroyed because the agents are sued individually. *Buschi*, 775 F.2d at 1252.

IV. In The Alternative, Roe's Claims Are Barred By The Civil Service Reform Act

In enacting the Civil Service Reform Act of 1978 (CSRA), 5 U.S.C. § 1101 *et seq.*, Congress excluded Judicial Branch employees like Roe from the statute's judicial review procedures, precluding suits like this one by Judiciary employees seeking to challenge employment decisions. Instead, the statutory framework requires that any challenges to adverse employment decisions or the conditions of employment proceed under the relevant Circuit Court's EDR Plan. *See, e.g.*, *Semper v. Gomez*, 747 F.3d 229, 235-43 (3d Cir. 2014); *Semper v. United States*, 694 F.3d 90, 91 (Fed. Cir. 2012); *Dotson*, 398 F.3d at 180; *Blankenship v. McDonald*, 176 F.3d 1192, 1195 (9th Cir. 1999); *Lee v. Hughes*, 145 F.3d 1272, 1274-75 (11th Cir. 1998). The district court did not need to reach this question because it dismissed Roe's claims on the grounds of sovereign immunity and failure to state a claim. This Court can affirm on the same grounds or because the CSRA precludes judicial review of employment-related claims against all defendants.

1. The CSRA provides the exclusive means for federal employees to seek review of employment actions. *See, e.g.*, *Dotson*, 398 F.3d at 180 (holding that "federal

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the application of the doctrine to claims under § 1985(2)), but Roe's complaint does not allege criminal acts.

employees may seek court review for employment actions 'as provided by the CSRA, *or not at all*'" (quoting *Veit v. Heckler*, 746 F.2d 508, 511 (9th Cir. 1984))). The CSRA's "comprehensive" procedures include administrative review before the Merit Systems Protection Board and judicial review in the Federal Circuit, *see Fausto*, 484 U.S. at 443, 445 (describing the Act's "detail[ed]" scheme). These procedures, however, have never been available to Judicial Branch employees, including Federal Defender Office employees, because the CSRA classifies them as "excepted service" personnel who do not serve in an Executive Branch agency.[17] *See generally* 5 U.S.C. §§ 2302, 4301, 7511. The CSRA's exclusion of certain employees from the "provisions for administrative and judicial review . . . establish a congressional judgment that those employees should not be able to demand judicial review for . . . [covered] personnel action[s]." *Fausto*, 484 U.S. at 448. And the CSRA's exclusion of Judicial Branch employees specifically was a "conscious and rational choice made and maintained over the years in light of both a proper regard for judicial independence and recognition of the judiciary's own comprehensive review procedures for adverse employment actions, including review by judicial officers." *Dotson*, 398 F.3d at 181. Indeed, soon after Congress enacted the CSRA, the Judicial Conference developed a Model Equal Employment Opportunity Plan in 1980 and revised it in 1986 (Model Plan).

[17] Legislative Branch employees likewise were excluded from the CSRA's procedures until Congress passed the Congressional Accountability Act, as discussed *infra* p. 38.

"[M]indful . . . of judicial autonomy," Congress declined to subject Judicial Branch employees to the CSRA in 1995, when it enacted the Congressional Accountability Act of 1995 (CAA), Pub. L. No. 104-1, 109 Stat. 3, to provide CSRA-like protections and procedures (including judicial review) to Legislative Branch employees, *Dotson*, 398 F.3d at 173; *see also, e.g.*, 2 U.S.C. § 1407 (providing for judicial review before the Federal Circuit), and declined to do so again after a 1996 report from the Judicial Conference. The Judicial Conference ultimately adopted a new Model Employment Dispute Resolution Plan in 1997, which established enhanced review procedures. The Fourth Circuit's EDR Plan in effect at the time of the events giving rise to this appeal mirrored the 1997 Model Plan.

Numerous courts of appeals agree that Judicial Branch employees are precluded from bringing employment-based claims in federal court, even where those claims are based on the Constitution or seek a *Bivens* remedy against federal officials. *See e.g.*, *Semper*, 747 F.3d at 235-36; *Blankenship*, 176 F.3d at 1195; *Dotson*, 398 F.3d at 180; *cf. Levenson*, 587 F.3d at 935 (in the course of adjudicating an EDR claim, explaining that Judicial Branch employees have "no remedies under the [CSRA], [are] not covered by Title VII of the Civil Rights Act, and cannot bring a *Bivens* action to challenge unconstitutional discrimination in the workplace" but instead "must resolve any employment discrimination claim through the procedures set forth in the EDR Plan").

2. Roe had an available remedy for her claims through the EDR process. The CSRA precludes her from asserting these claims in this litigation instead of through that process.

Courts have repeatedly held that the EDR process provides meaningful review of challenges to employment decisions or employment conditions. This Court has upheld its own Plan against a challenge that it was procedurally defective or inadequate, *see Kostishak v. Mannes*, 145 F.3d 1325 (4th Cir. 1998) (per curiam) (table decision), and other courts have similarly concluded that their EDR plans provide meaningful review and relief, *see Semper*, 747 F.3d at 244; *Dotson*, 398 F.3d at 175. The Fourth Circuit's EDR Plan provides that judicial officers "may order a necessary and appropriate remedy," including (but not limited to) various forms of equitable relief and back pay. JA 308-09. Roe cannot prevail by suggesting that the Constitution requires a form of judicial review beyond the EDR Plan's procedures, which include review by a judicial officer and an opportunity for further review by the Fourth Circuit's Judicial Council. Nothing in the Constitution requires that judicial review proceed by adversarial litigation governed by the Federal Rules of Civil Procedure. Indeed, courts have repeatedly recognized the exclusive role and constitutional sufficiency of EDR plans in providing a forum to resolve constitutional concerns (among other claims). *See, e.g.*, *Dotson*, 398 F.3d at 176; *id.* at 176 n.14, 182 ("[P]recisely because the judiciary's administrative review process itself affords an employee one or more levels of judicial review"—that is, "review . . . by a judicial

officer"—"it would be particularly incongruous to hold that an employee who *failed* to secure administrative relief from these judicial officers could then invoke equity to have his claim reviewed by a different set of judicial officers." (emphasis added)).

V. Special Factors, Absolute Judicial Immunity, And Qualified Immunity Provide Alternative Bases To Affirm Dismissal Of Roe's Claims Against The Individual-Capacity Defendants

As explained above, the district court correctly concluded that Roe failed to plead plausible violations of equal protection and 42 U.S.C. §§ 1985 and 1986. But those claims against the individual-capacity defendants fail on several alternative grounds as well. Roe lacks a cause of action under *Bivens*: Roe's claims against Judicial Branch officials arise in a new context, and special factors counsel hesitation before creating a new *Bivens* remedy here. And even if *Bivens* provides a remedy, defendants would be immune from suit under the doctrines of absolute judicial immunity and qualified immunity.

A. *Bivens* Does Not Provide A Cause Of Action For An Equal Protection Suit Against Individual Judiciary Officers

Roe does not address whether *Bivens* provides her with a cause of action other than to suggest that this Court should remand the issue for the district court to consider. But courts of appeals routinely consider *Bivens* issues in the first instance because *Bivens* is an "antecedent" question of law. *See, e.g.*, *Earle v. Shreves*, 990 F.3d 774 (4th Cir. 2021); *Bistrian v. Levi*, 912 F.3d 79, 89 (3d Cir. 2018); *see also Hernandez v. Mesa*, 137 S. Ct. 291 (2016).

The Supreme Court has recognized a private right of action to sue federal officials in their individual capacities for constitutional violations on only three occasions. *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (recognizing a private cause of action based on a warrantless search and arrest in a person's home, accompanied by the excessive use of force, in violation of the Fourth Amendment); *Davis v. Passman*, 442 U.S. 228 (1979) (recognizing an implied remedy for gender discrimination by a Member of Congress in violation of the Fifth Amendment's Due Process Clause); *Carlson v. Green*, 446 U.S. 14 (1980) (recognizing implied cause of action for failure of prison officials to provide medical treatment to prisoner in violation of the Eighth Amendment). Apart from these three cases, the Court has "consistently refused to extend *Bivens* to any new context or new category of defendants" for the past 40 years. *Abbasi*, 137 S. Ct. at 1857. *Abbasi* made clear that "expanding the *Bivens* remedy is now a 'disfavored' judicial activity." *Id.* Accordingly, the Court has required a careful inquiry before extending *Bivens* to a new context. *Id.* at 1855-56, 1859. "If the case is different in a meaningful way from previous *Bivens* cases decided by [the Supreme] Court, then the context is new." *Id.* at 1859. If the case presents a new context, a court must decline to create a *Bivens* remedy where "special factors counsel hesitation in the absence of affirmative action by Congress." *Id.* at 1848.

"[T]he new-context inquiry is easily satisfied." *Abbasi*, 137 S. Ct. at 1865. *Abbasi* provided a non-exhaustive "list of differences that are meaningful enough to

make a given context a new one," including (1) "the rank of the officers involved," (2) "the constitutional right at issue," (3) "the generality or specificity of the official action," (4) "the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted," (5) "the statutory or other legal mandate under which the officer was operating," (6) "the risk of disruptive intrusion by the Judiciary into the functioning of other branches," and (7) "the presence of potential special factors that previous *Bivens* cases did not consider." *Id.* at 1859-60.

First, Roe's claims present a new context because she seeks to hold officials of the Judicial Branch personally liable. No recognized *Bivens* action has ever authorized suits against judicial officers or employees. This case concerns federal judiciary policies and "a new category of defendants"—Judicial Branch officials (a Circuit Chief Judge acting in his capacity as the judicial officer presiding over Roe's EDR claim, a Circuit Executive acting in his capacity as the EDR Coordinator, the General Counsel of the AO acting in her capacity providing legal guidance and support to courts on administrative matters) and a judicial branch supervisor handling a personnel matter. "*Abbasi* 'refused to extend *Bivens* to any . . . new category of defendants," *Tun-Cos v. Perrotte*, 922 F.3d 514, 525 (4th Cir. 2019) (emphasis omitted) (quoting *Abbasi*, 137 S. Ct. at 1857) (finding meaningful difference between ICE officers in *Tun-Cos* and the narcotics officers in *Bivens*, even though both were Executive Branch law enforcement officers), and no court has extended *Bivens* to create a damages remedy against any Judicial official or Judicial Branch supervisor. And insofar as Roe suggests that the

individual-capacity defendants are liable for actions taken by their subordinates, the Supreme Court has expressly declined to recognize a *Bivens* claim against a supervisor for the conduct of others. *See Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009) (explaining that "[g]overnment officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of *respondeat superior*").

Second, although Roe cites *Davis*, her claims are materially different. *See Abbasi*, 137 S. Ct. at 1859-60. In *Davis*, the plaintiff alleged that a specific employment action by a Member of Congress constituted gender discrimination in violation of the Due Process Clause. *Davis*, 442 U.S. at 231. By contrast, Roe does not allege that Chief Judge Gregory, James Ishida, Sheryl Walter, or Anthony Martinez took any specific steps to discriminate against her based on her gender. The multitude of alleged violations, coupled with the "generality" of Roe's claims and Roe's claims against judicial officers, sets her case apart from the "specificity of the official action" by a Member of Congress in *Davis*, and is one of those "differences that are meaningful enough to make a given context a new one." *Abbasi*, 137 S. Ct. at 1859-60; *see also Doe v. Meron*, 929 F.3d 153, 169 (4th Cir. 2019) (finding meaningful differences because Doe asserted "multiple . . . Fifth Amendment Due Process Clause violations" and because of "the rank of the officers involved and the legal mandate under which the officers were operating").

The Supreme Court has never permitted a *Bivens* remedy to vindicate a claim of constructive discharge. And it has repeatedly declined to extend *Bivens* to federal

employment claims. *See Bush v. Lucas*, 462 U.S. 367, 390 (1983); *Chappell v. Wallace*, 462 U.S. 296, 304 (1983); *FDIC*, 510 U.S. at 473.

Third, while for the *Davis* plaintiff it was "damages or nothing," Roe had an existing, alternative process under the Fourth Circuit's EDR Plan in which, following mediation, she obtained a Fourth Circuit clerkship, and under the Plan could have requested a hearing before the Chief Judge and sought review of the hearing decision under procedures established by the Judicial Council of the Circuit. JA 299-309. "The purpose of denying a [*Bivens*] private cause of action to federal employees is to ensure that they do not bypass comprehensive and carefully balanced statutory and administrative remedies in order to seek direct judicial relief." *Hall v. Clinton*, 235 F.3d 202, 205 (4th Cir. 2000) (quoting *Gleason v. Malcom*, 718 F.2d 1044, 1048 (11th Cir. 1983) (per curiam)).

This Court should not extend *Bivens* to create a new damages remedy in this context because "special factors counsel[] hesitation in the absence of affirmative action by Congress." *Abbasi*, 137 S. Ct. at 1843. The special-factors inquiry "concentrate[s] on whether the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed." *Id.* at 1857-58. "The only relevant threshold—that a factor 'counsels hesitation'—is remarkably low." *Arar v. Ashcroft*, 585 F.3d 559, 573-74 (2d Cir. 2009). "[I]f there are sound reasons to think Congress *might* doubt the efficacy or necessity of a damages remedy as part of the system for enforcing the law and correcting a wrong,

the courts must refrain from creating the remedy[.]" *Abbasi*, 137 S. Ct. at 1858 (emphasis added).

"Congressional interest" in remedial schemes for employment disputes, coupled with Congress's deliberate choice not to extend to Judicial Branch employees "the kind of remedies that [Roe] seek[s] in this lawsuit," are "special factors" warranting refusal to recognize a *Bivens* remedy here. *Abbasi*, 137 S. Ct. at 1862. As explained in Part IV, *supra*, "Congress intended that the CSRA would operate to the exclusion of all other statutory remedies for claims arising out of federal employment," *Hall*, 235 F.3d at 206, and deliberately excluded Judicial Branch employees from the CSRA's judicial review procedures. Numerous courts of appeals have accordingly rejected *Bivens* claims by Judicial Branch employees, *Dotson*, 398 F.3d at 169; *Semper*, 747 F.3d at 237; *Blankenship*, 176 F.3d at 1195; *Lee*, 145 F.3d at 1276, and other federal employees, *see Pinar v. Dole*, 747 F.2d 899, 910-12 (4th Cir. 1984); *Lombardi v. Small Bus. Admin.*, 889 F.2d 959, 961 (10th Cir. 1989); *Feit v. Ward*, 886 F.2d 848, 854-56 (7th Cir. 1989); *Spagnola v. Mathis*, 859 F.2d 223, 228-29 (D.C. Cir. 1988) (per curiam); *Braun v. United States*, 707 F.2d 922, 926 (6th Cir. 1983); *Broadway v. Block*, 694 F.2d 979, 985 (5th Cir. 1982).

It is no answer that declining to provide a *Bivens* remedy here might leave a plaintiff without "complete relief" for the alleged injury. *Bush*, 462 U.S. at 388. As the Supreme Court has explained, it is not "the merits of the particular remedy" that matters but "who should decide" whether any judicial remedy should be provided, *id.*

at 380, and "Congress is in a far better position than a court to evaluate the impact of a new species of litigation between federal employees on the efficiency of the civil service," *id.* at 389. Accordingly, the Supreme Court has rejected the contention that a *Bivens* damages remedy must exist if a plaintiff has no "statutory relief for a constitutional violation." *Schweiker v. Chilicky*, 487 U.S. 412, 421-22 (1988).

B. Absolute And Qualified Immunity Require Dismissal

Even if Roe could state a claim for constitutional or statutory violations, and even if Roe could seek damages under *Bivens*, each defendant named in his or her individual capacity is immune from suit.

1. Absolute Immunity Bars Roe's Claims Against Chief Judge Gregory

"The absolute immunity from suit for alleged deprivation of rights enjoyed by judges is matchless in its protection of judicial power." *McCray v. Maryland*, 456 F.2d 1, 3 (4th Cir. 1972), *overruled on other grounds, Pink v. Lester*, 52 F.3d 73 (4th Cir. 1995). "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." *Cleavinger v. Saxner*, 474 U.S. 193, 199 (1985) (quotation marks omitted). In determining the availability of absolute judicial immunity, the Supreme Court applies a two-factor test: (1) that the challenged act be judicial in nature and (2) that it not be done in the absence of all jurisdiction. *Mireles v. Waco*, 502 U.S. 9, 11-12 (1991). Only the first factor is relevant here, since Roe does not contest that the EDR Plan

conferred on Chief Judge Gregory the authority to act in an adjudicatory capacity and she has never alleged that Chief Judge Gregory acted in the absence of all jurisdiction.

The first factor "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 judicial capacity." *Stump v. Sparkman*, 435 U.S. 349, 362 (1978). Absolute judicial "immunity is justified and defined by the functions it protects and serves," *Forrester v. White,* 484 U.S. 219, 227 (1988) (emphasis omitted) (distinguishing between a judge's "judicial acts and the administrative, legislative, or executive functions that judges may on occasion be assigned by law to perform").

Here, Roe contends that Chief Judge Gregory's actions were taken during the course of an administrative adjudication. *See* Br. 62-63. But those are equally "judicial acts," within his official duties as Chief Judge. A judge need not be in court wearing a robe with a gavel in hand for his acts to be judicial in nature. Administrative law judges are shielded by absolute immunity, so there can be little doubt that immunity would similarly shield Chief Judge Gregory when performing quasi-judicial administrative functions. "[A]djudication within a federal administrative agency shares enough of the characteristics of the judicial process that those who participate in such adjudication should also be immune from suits for damages." *Butz v. Economou*, 438 U.S. 478, 512-13 (1978).

Roe contends that Chief Judge Gregory violated her rights by denying her request to disqualify Martinez from the EDR process and to extend the counseling

period, but those acts are by their nature and function "judicial acts." Chief Judge Gregory, in performing these adjudicatory functions under the EDR Plan, was acting in a "functionally comparable" role to his Article III role as a federal judge in the courtroom or overseeing judicial operations, and he is entitled to absolute immunity because adjudication under the Plan is "every bit as fractious as those [cases] which come to court." *See Butz*, 438 U.S. at 512-13.

2. Qualified Immunity Bars Roe's Claims Against All Four Defendants Named In Their Individual Capacities

"The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Government officials are entitled to qualified immunity unless: "(1) the allegations underlying the claim, if true, substantiate the violation of a federal statutory or constitutional right; and (2) this violation was of a 'clearly established' right 'of which a reasonable person would have known.'" *Ridpath v. Board of Governors Marshall Univ.*, 447 F.3d 292, 306 (4th Cir. 2006).

Importantly, because "each Government official . . . is only liable for his or her own misconduct," *Iqbal*, 556 U.S. at 677, a plaintiff must include factual material about each defendant's particular actions that plausibly allege the violation of a clearly established right. Making "only categorical references to 'Defendants'" fails to

"'allege, with particularity, facts that demonstrate what *each* defendant did to violate the asserted constitutional right.'" *Marcilis v. Township of Redford*, 693 F.3d 589, 596 (6th Cir. 2012).

As explained above, Roe has not alleged with any specificity that each defendant "through [his or her] own individual actions . . . violated the Constitution" or §§ 1985 and 1986. *Iqbal*, 556 U.S. at 676; *see also supra* Part III (discussing failure to plead equal protection violation and the application of intracorporate immunity). Even if she had plausibly alleged constitutional and statutory violations, Roe cannot show that defendants' conduct violated any clearly established rights. Roe identifies no precedential decision `demonstrating that reasonable officials in defendants' positions would have understood that their conduct was unconstitutional. *See also Abbasi*, 137 S. Ct. at 1866 (concluding that federal officials were entitled to qualified immunity with respect to claims under § 1985(3) because of a circuit split regarding application of the intracorporate conspiracy doctrine to § 1985 conspiracies).

Insofar as Roe contends that defendants should have known that sex discrimination violates the law, that defines the "clearly established" inquiry at far "too high a level of generality." *City of Tahlequah v. Bond*, 595 U.S. __, No. 20-1668, slip op. at 3 (Oct. 18, 2021) (per curiam); *see also Rivas-Villegas v. Cortesluna*, 595 U.S. __, No. 20-1539, slip op. at 4-5 (Oct. 18, 2021) (per curiam). As the Supreme Court has repeatedly explained, the qualified immunity analysis "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Rivas-Villegas*,

slip. op. at 4 (quoting *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam)). Thus, the question here is not whether, as a general matter, discrimination on the basis of sex violates the law. Everyone agrees it does, but that is not enough to hold these individual defendants personally liable in the context of this case. The question is whether the specific actions taken by each defendant during the EDR process were so clearly unconstitutional that any reasonable person in his or her position would have known that the conduct violated the law. No court has answered that question with respect to Roe's allegations here. Qualified immunity therefore shields defendants from suit.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 12,535 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

s/ Amanda L. Mundell
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CERTIFICATE OF SERVICE

I hereby certify that on November 3, 2021, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. Service will be accomplished by the appellate CM/ECF system.

s/ Amanda L. Mundell
Amanda L. Mundell

ADDENDUM

TABLE OF CONTENTS

5 U.S.C. § 701(b)(1)(B)

§ 701. Applications; definition

* * *

(b) For the purpose of this chapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

* * *

(B) the courts of the United States

* * *

5 U.S.C. § 702

§ 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

5 U.S.C. § 5596(b)(1)(A)

§ 5596. Back pay due to unjustified personnel action

* * *

(b)

(1) An employee of an agency who, on the basis of a timely appeal or an administrative determination (including a decision relating to an unfair labor practice or a grievance) is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee—

(A) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect—

(i) an amount equal to all or any part of the pay, allowances, or differentials, as applicable which the employee normally would have earned or received during the period if the personnel action had not occurred, less any amounts earned by the employee through other employment during that period; and

(ii) reasonable attorney fees related to the personnel action which, with respect to any decision relating to an unfair labor practice or a grievance processed under a procedure negotiated in accordance with chapter 71 of this title, or under chapter 11 of title I of the Foreign Service Act of 1980, shall be awarded in accordance with standards established under section 7701(g) of this title * * *

* * *

18 U.S.C. § 3006A(g)(2)(A)

§ 3006A. Adequate representation of defendants

* * *

(g) Defender Organization.—

* * *

(2) Types of Defender Organizations.—

(A) Federal Public Defender Organization.—

A Federal Public Defender Organization shall consist of one or more full-time salaried attorneys. An organization for a district or part of a district or two adjacent districts or parts of districts shall be supervised by a Federal Public Defender appointed by the court of appeals of the circuit, without regard to the provisions of title 5 governing appointments in the competitive service, after considering recommendations from the district court or courts to be served. Nothing contained herein shall be deemed to authorize more than one Federal Public Defender within a single judicial district. The Federal Public Defender shall be appointed for a term of four years, unless sooner removed by the court of appeals of the circuit for incompetency, misconduct in office, or neglect of duty. Upon the expiration of his term, a Federal Public Defender may, by a majority vote of the judges of the court of appeals, continue to perform the duties of his office until his successor is appointed, or until one year after the expiration of such Defender's term, whichever is earlier. The compensation of the Federal Public Defender shall be fixed by the court of appeals of the circuit at a rate not to exceed the compensation received by the United States attorney for the district where representation is furnished or, if two districts or parts of districts are involved, the compensation of the higher paid United States attorney of the districts. The Federal Public Defender may appoint, without regard to the provisions of title 5 governing appointments in the competitive service, full-time attorneys in such number as may be approved by the court of appeals of the circuit and other personnel in such number as may be approved by the Director of the Administrative Office of the United States Courts. Compensation paid to such attorneys and other personnel of the organization shall be fixed by the Federal Public Defender at a rate not to exceed that paid to attorneys and other personnel of similar qualifications and experience in the Office of the United States attorney in

the district where representation is furnished or, if two districts or parts of districts are involved, the higher compensation paid to persons of similar qualifications and experience in the districts. Neither the Federal Public Defender nor any attorney so appointed by him may engage in the private practice of law. Each organization shall submit to the Director of the Administrative Office of the United States Courts, at the time and in the form prescribed by him, reports of its activities and financial position and its proposed budget. The Director of the Administrative Office shall submit, in accordance with section 605 of title 28, a budget for each organization for each fiscal year and shall out of the appropriations therefor make payments to and on behalf of each organization. Payments under this subparagraph to an organization shall be in lieu of payments under subsection (d) or (e).

* * *

42 U.S.C. § 1985(3)

§ 1985. Conspiracy to interfere with civil rights

* * *

(3) Depriving Persons of Rights or Privileges

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. § 1986

§ 1986. Action for neglect to prevent

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding $5,000 damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued.