Honorable Michael H. Simon

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SCOTT E. STAFNE, Plaintiff, vs. THOMAS S. ZILLY; JOHN C COUGHENOUR; BARRY G. SILVERMAN; and TY TRENARY, Defendants.	)	Case NO. 2:17-cv-01692-MHS PLAINTIFF'S RESPONSE TO DEFENDANTS THOMAS S. ZILLY, JOHN C. COUGHENOUR, AND BARRY G. SILVERMAN'S MOTION TO DISMISS ORAL ARGUMENT REQUESTED

I. INTRODUCTION

Defendants Zilly, Coughnour, and Silverman (hereafter sometimes collectively referred to as "Zilly et. al." or elderly retired judges") make inconsistent "shotgun" arguments in their Motion to Dismiss (MTD) which Stafne will address in this Response. The elderly retired judges' arguments, especially the one claiming this Court lacks subject matter jurisdiction over cases where any claim of "absolute judicial immunity" is asserted, is inconsistent with Snohomish County Sheriff Ty Trenary's

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motion to dismiss Stafne's complaint pursuant to Fed. R. Civ. Pro 12(b)(6) which is also pending before this Court now. See ECF 16, 2:4-4:25; ECF 17.

In the second section Stafne will describe the complaint, including its factual allegations and requests for relief. The third section will address elderly retired judges contention pursuant to Fed. R. Civ. Pro. 12(b)(1) that this Court does not have subject matter jurisdiction to resolve an "absolute judicial immunity" affirmative defense. The fourth section will explain why "absolute Judicial Immunity", "quasi-judicial immunity", or "qualified immunity" do not provide a basis for dismissing this lawsuit at this stage of the proceedings.

The last section of this Response will demonstrate: 1.) several of Stafne's requests for relief seek only prospective relief; 2.) Zilly et. al. are not Article III judges entitled to judicial immunity because they are not people who can constitutionally exercise federal judicial power; 3.) Zilly and Silverman exercised judicial power in clear excess of their subject matter jurisdiction; 4.) Sovereign Immunity does not apply to the circumstances of this case; and 5.) There are questions of fact whether these elderly retired judges who have no Article III attributes are entitled to qualified immunity.

II. THE COMPLAINT

The gravamen of the elderly retired judges' motion to dismiss (MTD) is that this Court does not have subject matter jurisdiction pursuant to Fed. R. Civ. Pro. 12(b)(1) and/or Stafne's complaint does not state facts sufficient to establish a claim because these judges are entitled to "absolute judicial immunity" for any *liability* arising against them pursuant to 42 U.S.C. 1983 and 1985. Stafne disagrees.

The "Parties" section of the complaint alleges Stafne is a lawyer who has represented numerous clients before the United States District Court for the Western District of Washington (USDCWW) and the Ninth Circuit Court of Appeals "and intends to continue doing so in the

future." Complaint, ¶ 1.3. Stafne also alleges he has represented himself *pro se* in these courts and "intends to continue doing so in the future". *Id.*, ¶ 1.4. Stafne then alleges defendant Zilly who was born in 1935[1] "is a senior judge who is exercising judicial power as if he is an active Article III district court judge … when he does not hold such office, but is merely acting as a volunteer." *Id.,* ¶1.7 Except for their ages, Stafne also makes similar allegations about defendants Coughnour and Silverman. *Id*., ¶¶ 1.8-1.9

In the "Jurisdiction" section of his complaint Stafne clearly avers more than 42 U.S.C. 1983 and 1985 liability causes of action. Indeed, ¶ 2.2 states:

> 2.2 Jurisdiction further exists pursuant to the Constitution of the United States *as well as 42 U.S.C. § 1983 and 42 U.S.C 1985* **and such other provisions of the United States Constitution, statutes, treaties, and customary international law which may apply to the facts as are set forth in this complaint**. *See e.g. Johnson v. City of Shelby*, 135 S. Ct. 346, 346-347 (2014). (Emphasis Supplied)

The Jurisdiction section also states: "... this complaint challenges, among other things, the constitutionality of the practices of the United States District Court for the Western District of Washington (USDCWW) with regard to ... appointment, use, number, and authority of senior judges." Id., ¶ 2.4.

In the complaint's "Introduction" (which is characterised as a "brief roadmap of the legal contentions being raised by Stafne in the context of of this complaint", Id., 8:8-9) ¶¶ 3.1-3.3 Stafne references dueling articles in the March 2007 Cornell Law Review which debate the constitutionality of the retired senior judges under 28 USC § 371 (who aren't paid and only have yearly tenure).

[1] Zilly is 83 years old.

The first article by David R. Stras and Ryan W. Scott, "Are Senior Judges Unconstitutional?" 92 Cornell Law Review 523 (March 2007), contends such judges do not meet the constitutional criteria for Article III judges for numerous reasons. These include:

> The statute that sets forth the options for judicial retirement, 28 U.S.C. § 371, is difficult to reconcile with other provisions of Title 28 of the United State Code. It provides that a judge "may retain the office but retire from regular active service." Two interpretations of that language are possible: first, senior judges might "retain" the same office they always held; second, senior judges might retain judicial office but in fact assume a different "office" for constitutional purposes. The former reading is more textually appealing ("retain the office") but creates inconsistency with other statutory provisions that define the number of judges assigned to each federal court and the duties of senior judges. In light of those provisions, the latter reading is more appealing for structural reasons.
>
> Either reading, however, raises two serious constitutional objections. The first objection is based on the Constitution's grant of life tenure to Article III judges. Senior judges must be designated and assigned by the chief judge or judicial council of their home circuit or by the Chief Justice of the United States before performing any judicial duties. Unlike active judges, senior judges have no statutory guarantee of judicial work and face the constant threat that other judges may prevent them from judging. Because stripping a judge of the power to decide cases amounts to a constructive removal from office, and neither Congress nor other judges may remove a judge from office except through the impeachment process, the designation and assignment statute violates Article III.
>
> The second objection is based on the Appointments Clause. The President must nominate, and the Senate must confirm, all non-inferior officers of the United States. A corollary of this rule is that Congress may not add new, fundamentally different duties to an existing office without unlawfully seizing the appointment power for itself. [*See Weiss v U.S.*, 510163, 173-74 (1994)] Congress has done exactly that in defining the duties of senior judges, both as a statutory and constitutional matter. In particular, Congress has authorized senior judges to fulfill the requirements of their office by performing "substantial duties for a Federal or State governmental entity," an option that is not available to active judges. [See 28 USC §371(e)(1)(D)] In evaluating the Appointments Clause objection, we consider for the first time in academic literature whether a sitting President and Senate may lawfully deprive a future President and Senate of the right to participate in the appointment of future officers by making a "compound appointment," which simultaneously appoints an individual to consecutive offices.
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> In addition to these global constitutional objections, the conduct of certain types of senior judges after they elect senior status raises further concerns. To illustrate the point, we consider two hypothetical senior judges, both of whom fully comply with the statutory requirements of senior status. The first we call the "bureaucratic senior judge," who stops judging altogether and performs only

> administrative tasks. A bureaucratic senior judge fails to carry out even the basic duties of a "judge" under the Constitution, [see U.S. Const. Art. III, §1] which at a minimum requires the adjudication of some disputes. The second we call the "itinerant senior judge," who abandons his assigned court and instead sits by designation on other courts for the rest of his career. Such conduct calls into question the sufficiency of the judge's original appointment, which assigned him to a specific[office in a specific] court.

92 Cornell Law Rev. at 456-7.

With regard to Const. Art III Stras and Scott state "[s]enior judges hold judicial office, yet there is no guarantee that they will receive the permission [from other judges] to perform judicial work." Id., at 480. Consequently, according to Stras and Scott, the position of being a senior judge violates the tenure protection for those Article III judges, which our Framers intended would promote their integrity sufficiently that they could be trusted by the people more than the judiciary King George funded (or didn't fund) prior to the Revolutionary War. *Id. See* Art. III, § 1 which states in part: "[t]he Judges, both of the Supreme and inferior Courts shall hold their Offices during good Behavior."

But this constitutional protection afforded the people is lost by the three branch collaboration of the federal government in creating hybrid senior judges who have only yearly tenure, which is renewed based solely on the arbitrary discretion of other judges - not the people or the other two political branches of government. Stafne asserts this yearly designation requirement aggrandises to the federal judicial department the right to informally pick and pack judges who do not have "life" tenure when the separation of powers and checks and balances structural provisions of the Constitution designed to protect the liberty interests of people, like Stafne, mandate Article III judges have tenure limited only by misconduct and that all Article III judges must be appointed by the President with the consent of two thirds of the Senate.

Stras and Scott go on in their article to document how sometimes the personal and political considerations of judges determine which senior judges, in violation of Article III, are given the opportunity to impose themselves on unfortunate, unconsenting litigants.

> A "willing," able-bodied, and able-minded judge might be refused designation under [28 U.S.C.] § 294. In fact, from time to time, chief judges have been accused of refusing to designate and assign judges for purely political or personal reasons. Even if the chief judge, the judicial council, and the Chief Justice of the United States strive to make each designation and assignment decision based on objective factors such as physical and mental capacity, efficiency, and effectiveness, in "borderline" cases they may tend to err on the side of nondesignation when they disagree with a senior judge's political or judicial philosophy. Regardless of the practical likelihood that a senior judge will be barred from performing judicial duties, the statute unquestionably makes such a result possible.
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> The statute provides, however, that the relevant [judicial] decision makers "may" designate and assign a "willing and able" senior judge, not that they shall or must do so. Section 294, therefore, leaves chief judges, judicial councils, and the Chief Justice of the United States with unchecked and unreviewable authority to refuse designation to senior judges. Despite issuing a judge's handbook containing many of the details about Article III service, the Judicial Conference has never issued regulations interpreting the "willing and able" language. With little administrative guidance, any reason seems to be enough, and in the past senior judges have been refused designation and assignment because of issues unrelated to inability. For example, Chief Justice Earl Warren refused to designate and assign Justice Charles Evans Whittaker to perform work on the lower courts, despite Justice Whittaker's willingness to undertake those duties, because Chief Justice Warren found him too indecisive during his active service on the Supreme Court. Chief Justice Warren reportedly told a colleague, "Tell [Justice Whittaker] that I never could get him to make up his mind, and I'll be damned if I will let him do that to me again trying cases. So the answer is no."[Lawrence H. Larson, *Observations of One Hundred Years of Federal judging in the Western Missouri District, in* Law and the Great Plains: Essays of the Legal History of the Heartland 146 (john R. Wudnes ed., 1996) (quoting Chief Justice Warren)]

92 Cornell Law Review at 481-83.

Stras and Scott also substantiate that imposing senior judges as Article III judges on litigants in federal court also violates the Appointments Clause, Art. II, § 2, Cl 2, which states in pertinent part:

> The President...shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law....

Id.

"... [F] rom the early days of the Republic, ... lower court judges have been considered non-inferior officers of the United States, requiring appointment pursuant to the requirements of Article II, Section 2." Stras & Scott, 92 Cornell L. Rev. citing *Weiss v. United States*, 510 U.S. 163, 191-92 n.7 (1994) (Souter,J., concurring); and 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1593, at 456 n.1 (1833).

> The purpose of dividing the act of nomination from that of appointment also refutes the permissibility of any statutory restriction on the individuals the President may nominate. The principal concern of the Framers regarding the Appointments Clause, as in many of the other separation of powers provisions of the Constitution, was to ensure accountability while avoiding tyranny. Hence, following the suggestion of Nathaniel Gorham of New Hampshire and the example of the Massachusetts Constitution drafted by John Adams, the Framers gave the power of nomination to the President so that the initiative of choice would be a single individual's responsibility but provided the check of advice and consent to forestall the possibility of abuse of this power. Gouverneur Morris described the advantages of this multistage process: "As the President was to nominate, there would be responsibility, and as the Senate was to concur, there would be security."

George C. Dix, "The Heritage Guide to The Constitution", last accessed on 2/19/2018 at https://www.heritage.org/constitution/#!/articles/2/essays/91/appointments-clause

Professor Dix also notes in this Article that it was through the interplay between the the two political branches, i.e. the President and the Senate, that our Constitution sought to protect the people from such tyranny as would result if all three branches acted together to thwart the liberty interests of the people. In other words, under the Constitution judges were never supposed to be able pick and pack Article III courts with

substitute judges who had resigned so as to interfere with the tenure and compensation attributes of Article III judges mandated by the Constitution to protect the people's liberties.

> While ideology and jurisprudential "point of view" were not among the kinds of concerns listed by the Framers as justifying the requirement of advice and consent, nothing in the text of the clause appears to limit the kind of considerations the Senate can take up. It is thus reasonable to infer that the Framers located the process of advice and consent in the Senate as a check to prevent the President from appointing people who have unsound principles as well as blemished characters. As the President has complete discretion in the use of his veto power, the Senate has complete and final discretion in whether to accept or approve a nomination.

Id.

In ¶ 3.8 Stafne avers he

> seeks such relief as is necessary to require judges to perform the most sacred duty of an Article III court, which is to explain how and why the presumption against subject matter jurisdiction by inferior federal courts has been rebutted in all cases where such jurisdiction has been challenged.

These requests for relief are not only related to *BNYM v Stafne* and *Stafne v Burnside*, but also the numerous other cases Stafne cites as being illustrative of the harm these practices have caused and will continue to cause Stafne both as a *pro se* litigant and as a practicing lawyer in the USDCWW and Ninth Circuit Court of Appeals.

It is only ¶¶ 3.9-3.14 and 13.1-13.8 which allege a limited number of 42 U.S.C. 1983 and 1985(c) claims based on *Bank of New York Mellon.* These claims for relief are premised on the alleged facts that 1.) Zilly and Silverman *as individuals*, not Article III judges or officers, did not have constitutional authority to exercise judicial power without the consent of the parties,

including Stafne; and 2.) both Zilly and Silverman exercised judicial power without first determining whether they had subject matter jurisdiction to do so.

At the end of the Introduction, Stafne reiterates in ¶ 3.14 that he

> seeks all *declaratory, injunctive, or writ relief* which may be merited under the facts of this case, where gross violations relating to the exercise of judicial power pursuant to the United States Constitution are proven. (Emphasis Supplied)

Stafne next goes on to allege the Facts upon which his Complaint is based. The first section, Section A, is entitled "Facts Related to Article III Courts Generally and USDCWW and Ninth Circuit Judges." *Id.*, pp. 12:18-19:9. This section alleges historical facts which for purposes of adjudicating defendants MTD this Court should accept as true, particularly those historical facts which documents the Constitution was designed so as to prevent judicial tyranny of the people. Id., ¶¶ 4.1-4.8.

¶ 4.9 next alleges "Congress has ordained and established inferior district courts, which exercise judicial power through active Article III judges who have tenure and are paid compensation for their services" citing to 28 U.S.C. §132, which is titled "Creation and Composition of District Court. Subsection (b) thereof states: "Each district court shall consist of the district judge or judges for the the district *in regular active service*. Justices or *judges designated or assigned shall be competent to sit as judges*"[2]. (Emphasis Supplied) ¶ 4.10 avers 28 U.S.C 133(a) provides "[t]he President shall appoint, by and with the advice and consent of the Senate" 7 district judges for the USDCWW, but ¶¶

[2] ¶¶3.1-3.5 of the complaint previously alleges senior judges, including Zilly, et al., are not competent to sit as active Article III judges for several reasons including without limitation that retired judges have resigned the office to which they were appointed and consented to by the Senate pursuant to the Appointments clause, U.S. Const. Art. II, §2, Cl. 2, receive no monetary compensation for their services (but act only as volunteers on cases of their choosing), see id. ¶1.7, note 1, and their tenure has to be renewed yearly through designation by a judge, not by the appointment of the President with the approval of Senate.

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4.11-12 allege the President and Senate have not complied with this responsibility. Indeed, when Stafne's complaint was filed there were only four active judges appointed to the USDCWW. However, there were/are 9 senior judges, 6 magistrate judges, 3 recalled and part time magistrate judges, and 5 bankruptcy court judges, all of who by definition are not among the active district judges who actually make up the USDCWW. This is problematic because the four active judges are responsible for meaningful oversight of these 23 substitute Article III judges. *Cf. Blixseth v. Brown,* 841 F.3d 1090, (9th Cir. 2016)("The district court's order didn't afford Blixseth anything close to an independent decision by an Article III adjudicator *citing* to *Wellness Int'l Network, Ltd. v. Sharif,* 135 S. Ct. 1932, 1946, 191 L. Ed. 2d 911 (2015).

In ¶4.13 Stafne alleges the four active Article III judges who by Congressional enactment comprise the USDCWW "are not capable of providing meaningful oversight for all 23 of these non-active, i.e. statutorily created substitutes for Article III judges. Stafne avers oversight is especially thin for the elderly retired judges who work as unpaid volunteers. In ¶4.15 Stafne asks this Court to take judicial notice that the cognitive abilities of human beings fade as they age beyond 75 years and that judges are human beings, like the rest of us. In ¶4.16 Stafne alleges:

> Many of these senior judges are likely experiencing significant cognitive dysfunction which worsens as they continue to age. Stafne aware that judges were intended to be an important component of a system of separate and divided powers designed to protect the the liberties of the people alleges that this purpose has been betrayed by a government which refuses to staff its courts and pay [the Congressionally mandated number] active judges a fair wage because it would rather spend taxpayers' money buying weapons of war[3].

[3] Stafne asks this Court to take judicial notice the website for the United States Courts documents the current salary of an active District Court judge $208,000 and $220,000 for an active Circuit Court judge. *See* http://www.uscourts.gov/judges-judgeships/judicial-compensation last accessed 2/19/2018.

It is significant that it is Stafne, a private citizen and lawyer, who has been, is now, and will continue to be, injured by these unified governmental policies and practices designed to adversely impact the integrity of Article III federal courts. Indeed, it is under just such circumstances where lawsuits like this - those seeking to protect and enforce the Separation of Powers, Federalism, and Checks and Balances devised to enforce them - become the only real mechanisms for the people, other than revolution, to restore the protections against government our Framers intended we should have. *See e.g. Bond* v. *United States*, 564 U.S. 211, (2011) (decision relating to Federalism, *Id*. at 220-222; decision related to Separation of Powers, Id. at 222-3)

In ¶¶4.18-23 Stafne avers undisputed facts about Zilly which tend to prove Zilly used his authority as a volunteer judge to pick and chose cases in order to preside over Stafne's case as an Article III judge and began adjudicating merits claims against Stafne before appropriately considering Stafne's challenges to the district court's purposely limited subject matter jurisdiction of the district court. *See also* Complaint ¶¶ 10.10-19 where Stafne alleges that Zilly refused to undertake the duties of a federal district court judge to determine whether he had jurisdiction, but instead moved right into merits litigation which Stafne refused to participate in. Similarly, Stafne's complaints against Silverman were 1.) he was not a competent Article III judge and 2.) participated in a 2 judge motion panel which failed to consider its jurisdiction before granting appellate motion relief. *See* Stafne's Request for Judicial Notice.

Section B of the Complaint's Fact Section is entitled: "Facts re: Stafne and his Political Criticism of the American Justice System." Section "i" thereof, describes "Stafne's Background

information", including his history, education, and experience litigating as an attorney and *pro se* litigant. See ¶¶ 5.1-5.15[4].

Stafne then explains that because of his concerns regarding judicial corruption, he ran for the Supreme Court of Washington in 2012 and for the United States Congress in 2016 based on an anti-court and anti-judge platform. In ¶¶ 5.19-5.23. Stafne avers that he has written numerous articles challenging the integrity of State and Federal Courts, including some of which accuse the judiciary of perpetrating a mass genocide against the American public. See ¶¶10.16; 10.19. As explained previously Stafne alleges that he is being retaliated against by the USDCWW for this political speech. Among the retaliation Stafne claims, is the USDCWW subjects him and others to the exercise of judicial power which it has no subject matter jurisdiction to render. In the last paragraph of Section B, at ¶5.23, Stafne avers:

> … under its current system of judging, federal courts unfairly discriminate against pro se litigants and attorneys from small law firms based on an unreasonable and arbitrary bias in favor parties who are represented by large law firms. *This bias is palpable and observable in the way active Article III judges and their substitutes ensnare people within subject matter jurisdiction the federal courts do not have.* (Emphasis Supplied)

Subsection "C" of Stafne's Fact Section is entitled "The Federal Court's Usurpation of Power under the Separation of Powers and Federalism Structure of the Constitution." ¶¶ 6.1 - 6.3 of this section of Stafne's complaint avers in part:

> 6.1. The allegation of facts and evidence in this section are intended to establish the plausibility of Stafne's allegations that federal lower courts in the USDCWW have purposely and consistently exercised judicial power to resolve the merits of

[4] Towards the end of Section B Stafne describes his and others observations regarding facts relating to changes in America's justice system. Id., ¶¶ 5.16-5.19. Among those changes he alleges are the almost complete loss of jury trials in our once prominent adversary system. Stafne also alleges the loss of precedent as the basic component of accountability for judge-made law. *Id.* Stafne avers: "Today, with the loss of precedent, *the only thing that is clear about America's judicial system is the party who has the most money always wins*", citing an article he wrote in September, 2015. Id.,¶5.18. (Emphasis Supplied)

> foreclosure disputes in the absence of subject matter jurisdiction under Article III, § 2 to do so. [Cites]
>
> 6.2 The jurisdiction of the lower federal courts is presumptively limited. [cite] The burden of proving jurisdiction is on the party asserting federal jurisdiction. [cite]. Lower federal courts must decide whether jurisdiction exists before requiring people to engage in merits litigation. [cites] …
>
> 6.3 Judges of the USDCWW and the Ninth Circuit routinely abuse their Article III judicial power by acting without subject matter jurisdiction. This has caused injury to Stafne, his clients, and those people who have litigated, are now litigating, or will litigate foreclosure issues within the federal courts within the Ninth Circuit.

As factual support for the plausibility of these allegations, Stafne cites 3 cases he litigated as an attorney for clients before the USDCWW, including i) *Robertson v GMAC*; *Id.*, 6.4-6.15; ii) *Scotts v Northwest Trustee*; Id., 6.16-6.24; and iii) *Alexander v Washington State*; Id., 6.25-6.34.

Section D of the Complaint's Fact section is entitled: "Facts related to Retaliation against Stafne." Section "i. Stafne's speech and conduct" alleges that because of the success of his firm in fighting foreclosures he personally, and the firm of Stafne Trumbull, received favorable press, which he utilized to criticise federal courts mishandling of foreclosure cases. *Id*., ¶¶ 7.1-7.11. In this section Stafne also alleges that WestLaw, a major legal publisher, manipulates the publication of reported judicial decisions from the USDCWW to favor lenders in foreclosure disputes. Id., ¶¶ 7.7-7.10.

In Section C "ii. The Washington Attorney General's Investigation of Stafne and Stafne Trumbull" Stafne alleges that a deputy attorney general who previously worked for Judge Zilly's law firm brought a frivolous complaint against Stafne and Stafne's law firm as part of a "coordinated effort to harm Stafne and Stafne and Trumbull [and] to hamper their representation of their clients. Stafne further alleges that attorneys who advocate ardently on behalf of the

people who cannot afford to be represented are systematically punished and mistreated by government, including judges." Id., ¶ 8.2. Stafne referenced the AG's Civil Investigative Demand in his complaint.

In Section C "iii. Monetary Sanctions Imposed [upon Stafne] by Active Article III Judge Rosanna Malouf Peterson in *Cervantes Orchards & Vineyards, et. al. v. Deere and Company*, et. al." Stafne claimed U.S. District Court Judge Peterson of the Eastern District of Washington punitively ordered Stafne and another attorney to pay all of several defendants' attorneys fees and costs (totalling over $125,000) in retaliation for Stafne's outspoken criticism of American courts. Id., ¶¶ 9.1-9.9.15. In the few months this case has been pending, a panel of the Ninth Court of Appeals in December, 2017 agreed that Judge Peterson committed reversible error by not explaining the basis for her fee award. See *Cervantes Orchards & Vineyards, LLC v. Deere & Co*., 2017 U.S. App. LEXIS 25413, *8-9 (9th Cir. 2017). However, the Ninth Circuit panel also held that the imposition of Rule 11 sanctions had been appropriate. This later part and all other parts of that decision, including the failure to rule on a motion challenging the Ninth Circuits lack of subject matter jurisdiction to create judge made law, are currently pending review pursuant to Stafne's and others' Petition to Reconsider or for Rehearing en banc.

It is only on page 49, after numerous other cases handled by Stafne are referenced as providing a factual basis for the plausibility of his claims, that Stafne references *BNYM v Stafne* (*id*., ¶¶ 10.1-10.33) and *Stafne v Burnside* (id. ¶¶ 11.1-11.3). These allegations are made both for the purpose of providing further factual support of the USDCWW frequent imposition of senior retirees as Article III judges on litigants and that Court's routine failure generally to assure

itself that the presumption against its jurisdiction and right to exercise judicial power has been rebutted.

These allegations give defendants notice Stafne seeks to prevent being forced to litigate cases and controversies in federal courts before these and/or other senior judges without article III "attributes". These provisions give notice Stafne does not seek only 1983 and 1985 remedies for any *liability* Zilly, et. al. proximately caused him in just *BNYM v Mellon* and *Stafne v Burnside*, but prospective relief addressing the harm the imposition of judges without Article III attributes has caused him and will cause him in the future.

A complaint that alleges facts upon which relief can be granted survives a motion to dismiss even if it fails to correctly categorize the legal theory giving rise to the claim. *See e.g. Johnson v. City of Shelby, Miss.*, 135 S. Ct. 346 (2014) (where a plaintiff has pleaded "facts sufficient to show that a claim has substantive plausibility," federal pleading rules "do not countenance dismissal of a complaint for imperfect statement of the legal theory supporting the claim asserted." *Id. at 346-47.*

II. ZILLY ET. AL. MISSTATE THE STANDARD OF REVIEW

Elderly retired judges argue:

> A court may dismiss a case based on judicial immunity *either* for lack of subject-matter jurisdiction *or* for failure to state a claim. *See Sadoski v. Mosley*, 435 F.3d 1076, 1077 (9th Cir. 2006) (failure to state a claim); *Gordon v. Wooten*, 2012 WL 967852 *3 (E.D. Calif. March 21, 2012) (subject matter jurisdiction) (citing *Snegirev v. Sedwick*, 407 F. Supp. 2d 1093, 1097 (D. Alaska 2006)).

MTD, 6:2-5.

Stafne disagrees. The first thing this Court, a federal lower court of limited jurisdiction, must do is consider whether it has subject matter jurisdiction. If it does not, the Constitution

requires the case be dismissed. See e.g *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 94 (1998). (A federal court cannot assume subject-matter jurisdiction to reach the merits of a case. Id., at 94); *Bell v. Hood*, 327 U.S. 678, 682 (1946) (same); *Moore v. Maricopa County Sheriff's Office*, 657 F.3d 890 (9th Cir. 2011) (same). If dismissed on subject matter jurisdiction grounds, this Court has no authority to dismiss it pursuant to Fed. R. Civ. Pro. 12 (b)(6). *Id.*

The authority Zilly et. al. rely on; namely *Gordon v. Wooten*, 2012 WL 967852 *3 (E.D. Calif. March 21, 2012)[**unpublished]** citing *Snegirev v. Sedwick*, 407 F. Supp. 2d 1093, 1097 (D. Alaska 2006) is not precedential and *Sedwick*, the published district court opinion, holds only a federal district court has no subject matter jurisdiction to resolve what it considers to be a frivolous case[5]. Stafne disagrees with Sedwick's holding, but acknowledges their appears to be Ninth Circuit precedent supporting this position, which he would challenge. *See* note 5

The general rule is courts have subject matter jurisdiction to decide immunity defenses, that is why the Collateral Order Doctrine makes such decisions immediately appealable. *See e.g. Ashcroft v Iqbal*, 556 U.S. 662, 671-72 (2008); (involving quasi-immunity); *Garcia v. Cnty. of Riverside*, 817 F.3d 635, 638-639 (9th Cir. 2017); (involving judicial, quasi, and state immunity.)

Accordingly, since Zilly et. al. have challenged this Courts subject matter jurisdiction to adjudicate the facts set forth in Stafne's complaint, this Court must do so taking into account the presumption against its jurisdiction. MTD, 6:7-10.

ARGUMENT

[5] Stafne disagrees with Sedwick's holding, but acknowledges their appears to be Ninth Circuit precedent which supports this position. Stafne asserts *Sedwick* is inconsistent *Kokkonen v. Guardian Life Ins. of Am.*, 511 U.S. 375, 377 (1994) as well as the authorities cited in the first paragraph of this page. Additionally, Stafne would note that Zilly, et. al. do not argue his claims are frivolous.

Stafne is entitled to Prospective Relief under the Constitution

U.S. Const. Art. III, § 2. allows persons with standing to directly challenge statutes which violate the Constitution. *See e.g. Bond v U.S.*, supra; *Clinton* v. *City of New York*, 524 U.S. 417, 433-436, (1998); *Weiss v. United States*, 510 U.S. 163 (1994); *INS v. Chadha,* 462 U.S. 919 (1983). Ironically federal judges have often used Art. III, §2 to directly challenge statutes which they claimed interfered with the "attributes" of Article III judges. Art III, § 1, provides with regard to these attributes that: "The judges … shall hold their offices *during their good behavior*, and shall at stated times, *receive for their services, a compensation* which shall not be diminished during their continuance in office." (Emphasis Supplied)

In *Evans v Gore*, 253 U.S. 245 (1920) and *Miles v Graham*, 278 U.S. 501 (1925) federal judges sued the United States because they didn't want to pay the income taxes on their salaries, like everyone else has to pay. In *United States v Will*, 229 U.S. 200 (1980) federal judges sued because some government officials with lessers salaries received cost of living (COLA) raises, while federal judges did not. In *United States v Hatter*, 532 U.S. 557 (2001) federal judges sued claiming they should not have to participate in the social security system because this would affect their take home pay. *United States v Hatter*, 532 U.S. 557 (2001).

The irony here is the Supreme Court has always allowed federal judges to challenge statutes even though the Court has always maintained the tenure and compensation attributes of Art. III, § 1 are not for the benefit of the judges (who keep suing for the money) but for the benefit of the people of the United States. *See Evans*, 245 U.S. at 247-54; *Will*, 229 U.S. at 217-21; *Hatter*, 532 US at 567-9. *See also Williams v U.S.*, 535 U.S. 911 (2002) (Dissent to denial of Certiorari). Here, all Stafne asks for (as one of the people primarily to be protected by

Article III, § 1) is to have his *pro se* cases and those in which he represents clients adjudicated by judges with Article III attributes; namely judges who have been properly appointed to a Congressionally ordained and established judicial office which they retain and for which they are being paid a salaries for exercising judicial power on all cases to which they are routinely assigned and over which Article III federal courts have limited jurisdiction.

Stafne sues to ensure his cases are not adjudicated without the consent of the parties by elderly retired (volunteer) judges, who are tenured only a year at a time, aren't paid a salary for their services, and are mostly entrenched with big law firms who generally oppose Stafne and the common folk he represents. Stafne claims requiring him to appear before such individuals claiming to be judges who do not have Article III offends the purposes and language of Art. III, § 1.

Many cases hold persons and/or officials without Article III attributes, like senior judges, are not competent to exercise judicial power under Article III without the parties consent. *See e.g. Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932 (2015); *Stern v. Marshall*, 564 U.S. 462, 495-6 (2011); *Nguyem v* U.S., 539 U.S. 69, 73 & 83 (2003); *Gomez v. United States*, 490 U.S. 858, 664 (1989); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 102 S. Ct. 2858, 73 L. Ed. 2d 598 (1982) (plurality opinion). *Cf. Weiss v. United States*, 510 U.S. 163 (1994) (Military Judges did not require Article III attributes)

Judicial immunity does not prevent Stafne from obtaining prospective relief for the direct violations of the Constitution alleged in his complaint. See e.g. *Pulliam v. Allen***,** 466 U.S. 522, 541-42 (1984). The following citations to Ninth Circuit recent unpublished district court decisions establish this principle is still good law, notwithstanding the 2010 amendment which

abrogated declaratory and injunctive relief only in 1983 liability actions. *See e.g. McQune v. Hutto*, 2017 U.S. Dist. LEXIS 142979, *4 (D. S.C. 2017); *Cole v. State*, 2017 U.S. Dist. LEXIS 64025, *4-5 (D. Mont. 2017); *Johnson v. Shaffer*, 2012 U.S. Dist. LEXIS 150399, *7 (E.D. Cal 2012). See also *Lacey v. Maricopa County*, 693 F.3d 896, 914 (9th Cir. 2012)(Specially appointed prosecutor not entitled to absolute immunity where he failed to take steps to protect himself from lawsuit. *Id.* at 914)

Zilly, Coughnour, and Silverman are not Federal Officials Entitled to Sovereign Immunity

Stafne sued Sheriff Trenary in his individual and official capacities. See ¶1.10. Stafne did not sue Zilly, Coughnour, or Silverman in their "official" capacities. *See* ¶¶ 1.7-1.9. In fact, Stafne specifically alleged in those paragraphs and throughout his complaint these were individuals who were unpaid volunteers wrongfully claiming to be judges with Article III attributes. The distinction between individual- and official-capacity suits is paramount in determining whether there is a sovereign immunity defense. *Lewis v. Clarke*, 137 S. Ct. 1285, 1292 (2017).

Here the facts alleged in Stafne's complaint plausibly assert Zilly et. al., are not Article III judges who can substitute themselves into cases as if they were, without the consent of the parties. Similar claims against persons purporting to be acting as Article III judges were involved in *Nguyem v U.S.,* 539 U.S. 69 (2003). In that case defendants were convicted of narcotics charges and appealed their case to the Ninth Circuit Court of Appeals. The Ninth Circuit invited a district court judge from the Mariana Islands to sit of the panel adjudicating the appeal. Defendants lost the appeal and then sought certiorari from the United States Supreme Court

claiming the district court judge for the Mariana Islands was not an Article III judge who could exercise judicial power pursuant to Art. III, § 1 and 28 U.S.C. § 292(a).

"Relying on the so-called '*de facto* officer' doctrine, the Government contends petitioners' failure to challenge the panel's composition at the earliest practicable moment completely forecloses relief in this Court." 539 U.S. at 77. The Supreme Court flatly disagreed because it was clear the person sitting on the Panel was not an Article III judge or a *de facto* officer who could exercise Article III judicial power. Id., at 79-83.

For the same reasons the Court recognised the Mariana Island judge could not be an Article III judge or officer, this Court should hold that individuals claiming to be acting as Article III judges in violation of the Constitution are not entitled to sovereign immunity or judicial immunity. *Id. See also Lacey v. Maricopa County*, 693 F.3d 896, 914 (9th Cir. 2012).

If the facts establish that Zilly, et. al. are only "wannabe" federal judges whose hopes of always being able to play in the sandbox of judicial power, are solely based on an inappropriate collaboration among the branches of the federal government, then they should be no more than what the Constitution makes them; retired federal judges who should be treated like other retired folks.

Zilly, et. al. do not have absolute judicial immunity from Stafne's claims

On its face, § 1983 makes liable "every person" who deprives another of civil rights under color of state law. The Supreme Court has held, however, that the section preserves at least some of the immunities traditionally extended to public officers at common law. (Once again, Stafne does not concede Zilly, et. al. are public officers)

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An officer seeking absolute immunity bears the burden of showing that such immunity is justified. *Burns v Reed*, 500 U.S. 478 (1991); *Forrester* v. *White*, 484 U.S. 219, 224 (1998) *See also Stapley v. Pestalozzi*, 733 F.3d 804, 810-811 (2013). The presumption is that qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties. *Id.* Here factors weighing against providing Zilly, et. al. with absolute judicial immunity include 1.) they do not have the attributes of Article III judges and so cannot exercise Article III judicial power;and 2.) Zilly and Silverman exercised judicial power over Stafne without having the subject matter jurisdiction to do so.

Although the scope of judicial power and immunity is broad, it should not be extended to persons who are acting in violation of the Constitutional restraints on the exercise of judicial power. See e.g. *Stump v Sparkman,* 435 U.S. 439 (1978) ("A judge … will be subject to liability only when he has acted in the 'clear absence of all jurisdiction.'"). *Ashelman v. Pope*, 793 F.2d 1072, 1078 (9th Cir. 1986). ("As long as the judge's ultimate acts are judicial actions taken within the court's subject matter jurisdiction, immunity applies." Id., at 1078); *Lacey v. Maricopa County*, 693 F.3d 896, 914 (9th Cir. 2012).

Here, Stafne's complaint is entirely based on facts which establish USDCWW and the Ninth Circuit Court of Appeals routinely act without jurisdiction, both in the sense that 1.) these Article III courts are stuffed with non-article III adjudicators and 2.)Article III judges and adjudicators in these courts routinely do not determine whether they have subject matter jurisdiction under Art. 3, §2 before they exercise judicial power without any authority to do so.

Assuming Zilly et. al. Are Federal Officers, There is a Question of Fact as to Whether They are Entitled to Qualified Judicial Immunity

Zilly, et. al. argue:

> Even if the Court were to find merit in Stafne's novel constitutional claim, qualified immunity would shield the Federal Judges from civil liability because their conduct did not "violate clearly established . . . constitutional rights of which a reasonable person would have known." See *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (per curiam) (quoting *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)).

MTD 10:18-11:2.

This argument has no merit.. Surely, defendants Zilly and Silverman understand they are not entitled to any immunity for exercising judicial power without the subject matter jurisdiction to do so, as is alleged by, Stafne. *See Stump v Sparkman, supra*.; *Ashelman v. Pope*, *supra*. Certainly, defendants Zilly and Silverman also know they cannot exercise judicial power, in the absence of any subject matter jurisdiction for doing so, to retaliate against Stafne for his political speech criticising as corrupt this nation's judicial branch of government and those who run it. *See e.g. Lacey v. Maricopa County*, 693 F.3d 896, 916-917 (9th Cir. 2012); *Bartlett v. Nieves*, 2017 U.S. App. LEXIS 20682 *4-6 (9th. Cir. 2017).

Stafne also disagrees Zilly and Silverman are entitled to qualified immunity because they were reasonably were not aware they did not have the attributes of Article III judges. This has been apparent since at least 1982. See e.g. *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932 (2015); *Stern v. Marshall*, 564 U.S. 462, 495-6 (2011); *Nguyem v* U.S., 539 U.S. 69, 73 & 83 (2003); *Gomez v. United States*, 490 U.S. 858, 664 (1989); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 102 S. Ct. 2858, 73 L. Ed. 2d 598 (1982) (plurality opinion). "[A]n officer might lose qualified immunity even if there is no reported case directly on point [cites] … But "in the light of pre-existing law," the unlawfulness of the officer's conduct "must be apparent." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1866-1867 (2017).

The elderly retired judges argument for qualified immunity appears to boil down to note 3 in their MTD. This note states:

> The Supreme Court has already weighed in on the constitutionality of senior judges, indicating that "[b]y retiring pursuant to the [judicial retirement] statute a [senior] judge does not relinquish his office." *Booth v. United States*, 291 U.S. 339, 350 (1934). Rather, the judges "continue . . . to perform judicial service and it is common knowledge that retired judges have, in fact, discharged a large measure of the duties which would be incumbent on them, if still in regular active service." Id. Therefore, because the Federal Judges were unquestionably performing judicial acts in deciding the underlying cases, which Stafne concedes, they are entitled to absolute judicial immunity.

But Zilly, et. al., ignore the fact the ruling in *Booth* was based on a statute which has since been amended in such a way as to raise further doubts about the constitutionality of retired judges, who no longer have Article III attributes, exercising judicial power over unconsenting litigants in light of the more recent case law which is documented above.

The complaint itself averred in ¶3.5, note 5 thereto that

> Booth determined that the retired judge in that case remained a member of the bench and therefore a judge for purposes of Article III pursuant to an earlier predecessor retirement statute, 28 U.S.C. § 270. That statute has since been repealed to exclude language suggesting senior judges are members of the "bench".

In Pub. L. 110–177 (2008), Congress inserted at end of second paragraph of 28 U.S.C. 396 the following language:

> However, a district judge who has retired from regular active service under section 371(b) of this title, *when designated and assigned to the court to which such judge was appointed*, having performed in the preceding calendar year an amount of work equal to or greater than the amount of work an average judge in active service on that court would perform in 6 months, and having elected to exercise such powers, *shall have the powers of a judge of that court to participate in appointment of court officers and magistrate judges, rulemaking, governance, and administrative matters.*

(Emphasis added)

The language Congress chose to, i.e. shall have the powers of a judge, demonstrates Zilly, et. al are not judges having Article III attributes. Congress cannot give what the Constitution has withheld for the benefit of the people; Namely, the people are entitled to have judges with Article III attributes adjudicate their Article III cases in federal court unless as parties they agree otherwise.

CONCLUSION

Zilly, et. al, motion to dismiss for lack of subject matter jurisdiction pursuant to Fed. R. Civ. Pro. 12 (b)(1) should be denied. Zilly, et al motion pursuant to Fed. R. Civ. Pro 12 (b)(6) to the extent it seeks to dismiss Stafne's claims for prospective relief should be denied. Zilly, et. al. motion to dismiss Stafne's damage and other causes of action based on 42 U.S.C. 1983 and 1985 should also be denied.

Dated this 20th day of February, 2018 at Arlington, Washington.

BY: *s/Scott E. Stafne*

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CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that on this date I electronically filed the foregoing *PLAINTIFF'S RESPONSE TO DEFENDANT'S THOMAS S. ZILLY, JOHN C. COUGHENOUR, AND BARRY G. SILVERMAN'S MOTION TO DISMISS* with the Clerk of the Court utilizing the Courts CM/ECF filing system. This system will also provide service to those attorneys of record.

DATED this 20th day of February 2018 at Arlington, Washington.

BY: /s/ *Pam Miller*
Pam Miller, Paralegal

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