

Exhibit

1

Case 3:22-cv-00439 Document 55-1 Filed 09/01/23 Page 2 of 14 PageID #: 1171

- juvenile law, disability law, unemployment, veteran's benefits, family law, criminal law, and others.
6. I was the Director of Clinical Programs at the University of Tennessee from 2007-11.
 7. In that position I oversaw the entire clinical and externship program at the law school, which included as many as 10 different programs over that period.
 8. I have also taught an innovative coding and law class called the A2J Lab. In this class I work with the students to create websites to help poor people in Tennessee. We have designed websites for the Tennessee Alliance of Legal Services, the University of Tennessee's Expungement Clinic, and Adelante Knoxville, an immigration self-help website.
 9. From 2001 to the present, I have been the faculty advisor to the University of Tennessee College of Law's Homeless Project.
 10. In this project I take a group of student volunteers to a local Knoxville homeless shelter every other week during the semester. The students help me offer legal advice to the homeless and occasionally we take a case that I handle (again with student assistance) on a homeless individual's behalf.
 11. I also currently serve as one of the faculty advisors for the Virtual Legal Aid Clinic here at the law school.
 12. In this project student volunteers and I work to answer questions from indigent Tennesseans from the ABA's Free Legal Answers website.
 13. In all these endeavors I have seen first-hand the acute legal needs of the poor and the middle class in the State of Tennessee. I am also intimately familiar with the legal system and courts in the state, having practiced and supervised students in almost every possible legal and courtroom setting. Through these experiences I have first-hand knowledge and understanding of the *pro se* crisis in our state courts.
 14. I have produced multiple works of peer reviewed scholarship on the topic of the access to justice crisis, the growth in *pro se* representation, and how technology and court reform might help ameliorate these difficulties. My books that cover these topics include *Rebooting Justice: More Technology, Fewer Lawyers, and the Future of Law* (co-written with Stephanos Bibas) and favorably reviewed in the *New York Times* and *The Wall Street Journal* and *Glass Half Full: The Decline and Rebirth of the Legal Profession* (Oxford Press 2015).
 15. I have also written at length about the relationship between lawyers, bar associations and judges in the 2013 Cambridge University Press book entitled *The Lawyer-Judge Bias in the American Legal System*.
 16. I also have written at length on the nature and functioning of state courts in our federal system.
 17. I have presented on these topics all over the United States and the world, including presentations in Canada, Brazil, and the United Kingdom. I have also presented on law, technology and courts to the judicial conferences of the states of Michigan, Minnesota, and Georgia.
 18. Through my practice and my scholarship, I have extensive experience in, and knowledge of, the legal needs of the poor and middle class.
 19. Through my practice and my scholarship, I have extensive experience in, and knowledge of, the challenges most Americans face in receiving access to justice due to challenging economic circumstances.

20. Through my practice and scholarship, I have extensive experience in, and knowledge of, the nature of state judiciaries generally and especially the judiciary of the State of Tennessee.
21. All of my publications are listed in my CV.
22. I have often served as a consultant to law and technology companies. This is the second time that I have served as an expert witness. The first was in *Consumer Financial Protection Bureau v. Morgan Drexen, Inc.*, SACV13-01267 JST (C.D. Ca. 2013).

II. My Assignment.

1. In Summer 2023, I spoke with Buck Dougherty regarding a potential retention as an expert witness in this case.
2. He asked me to render an opinion as to how the opening or closing of the meetings of Tennessee's Advisory Commission on Rules of Practice and Procedure fit under the "experience and logic" test from *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 589 (1980) (Brennan, J. concurring in the judgment) and *Detroit Free Press v. Ashcroft*, 303 F. 3d 681, 682-83, 705 (6th Cir. 2002).

III. The Facts and Data Considered in Rendering My Opinions.

1. The body of work referred to in this Declaration.
2. The body of work set forth in my CV.
3. A full review of the pleadings in this case as well as the website for the Tennessee Administrative Office of the Courts and Tennessee's judiciary.
4. A review of the court and Administrative Office of the Courts (if the state has such a body) websites for the following states: Kentucky, Virginia, North Carolina, Georgia, Alabama, Mississippi, Arkansas, Missouri, Ohio, as well as a general search for public notices for equivalent commissions to Tennessee's Advisory Commission on the Rules of Practice and Procedure in other states.
5. Reviewing the livestreamed videos of the meetings of Tennessee's Advisory Commission on the Rules of Practice and Procedure.

IV. Compensation.

1. I am billing at the rate of \$500.00 an hour. Through drafting this declaration, I have worked 20 hours. I have billed \$10,000.00 and have already been paid that amount.

V. Considering the Experience of the State of Tennessee, Other States, and the Federal Government, There is a “Tradition of Accessibility” for Rules Commissions or Their Equivalent, Evincing “the Favorable Judgment of Experience,” and “The Place and Process” for Tennessee’s Advisory Commission on the Rules of Practice and Procedure Has “Historically Been Open to the Press and General Public.”

1. The first prong of the experience and logic test asks whether there has been a tradition of accessibility for the meetings of Tennessee’s Advisory Commission on the Rules of Practice and Procedure.
2. The short answer is yes. Based on my review of the Tennessee’s court websites and my experience as a member of the bar, professor, and practicing lawyer is the state since 2001 these meetings have been open to the public for a decade or longer.
3. The website for the Advisory Commission on the Rules of Practice and Procedure can be found here: <https://www.tncourts.gov/boards-commissions/boards-commissions/advisory-commission-rules-practice-procedure>.
4. It lists all the members of the Commission. It lists the statute creating the commission (Tenn. Code Ann. § 16-3-601), and it describes the Commission’s nature and purpose: “The Advisory Commission on the Rules of Practice and Procedure meets periodically to study and make recommendations as to court rules on practice and procedure. The commission members are appointed by the Supreme Court.”
5. It also has a link to a separate webpage listing “Public Meeting Notices.” <https://tncourts.gov/taxonomy/term/426>.
6. Among the recent meetings listed is the June 9, 2023, public meeting of the Advisory Commission on the Rules of Practice and Procedure, livestreamed on YouTube. <https://tncourts.gov/calendar/public-meeting-notices/2023/06/09/advisory-commission-rules-practice-procedure>.
7. There are multiple past public notices for meetings of the Advisory Commission on the Rules of Practice and Procedure, including meetings from well before this lawsuit in 2016 (<https://tncourts.gov/calendar/public-meeting-notices/2016/05/20/advisory-commission-rules-practice-and-procedure>), 2014 (<https://tncourts.gov/calendar/public-meeting-notices/2014/12/05/advisory-commission-rules-practice-and-procedure>), and 2012 (<https://tncourts.gov/calendar/public-meeting-notices/2012/06/01/advisory-commission-rules-practice-and-procedure-meeting>).
8. As a member of the Tennessee bar and a law professor in the state I cannot remember a time before the Order of February 1, 2022, that these meetings were closed to the public, so I doubt that the 2012 meeting was the first such publicly announced meeting, I suspect it is just the earliest example that is still on the website.
9. Thus, there has been a longstanding tradition of open meetings for this exact Commission.
 - a. *A Review of These Meetings, as Well As a Review of Other Tennessee Judicial Boards and Commissions Suggests Open Meetings are the Norm and Not Disruptive or Dangerous.*

1. The June 9, 2023, meeting of the Tennessee Advisory Commission on the Rules of Practice and Procedure is available on YouTube here:
<https://www.youtube.com/watch?v=TCCKGHysxg>.
2. This link displays the entire meeting of the Commission. The video shows a well-run meeting covering proposed changes to Tennessee's Rules of Practice and Procedure. The meeting is not impinged upon whatsoever by being open to the public, and the attendees all appear to be signing in from secure locations of their own choosing on Zoom.
3. The meeting is efficient and crisp, and it is not possible to imagine how allowing the public to observe could hamper the committee's work or any member of the committee's safety.
4. Given that these meetings have been open to the public for years, it is unlikely that past meetings were dangerous or even inconvenient to the attendees.
5. On the "Public Notices" section of the website for Tennessee's courts there are more than a dozen different types of public meetings listed. Each listing includes a location and instructions for attendance, sometimes via zoom, sometimes in person or sometimes by WebEx.
6. The meetings listed in this section of the website include meetings of the TN Board of Judicial Conduct Board (<https://tncourts.gov/calendar/public-meeting-notices/2023/07/25/tn-board-judicial-conduct-board-meeting>),
7. The Integrated Criminal Justice Steering Committee Meeting (<https://tncourts.gov/calendar/public-meeting-notices/2023/06/01/integrated-criminal-justice-steering-committee-meeting>),
8. The Bench Bar Committee (<https://tncourts.gov/calendar/public-meeting-notices/2023/03/30/bench-bar-committee-meeting>),
9. The Governor's Council For Judicial Appointments (<https://tncourts.gov/calendar/public-meeting-notices/2022/11/22/governors-council-judicial-appointments>),
10. The Trial Court Vacancy Commission Public Hearing And Interview Session – 11th Judicial District Criminal Court Vacancy (<https://tncourts.gov/calendar/public-meeting-notices/2022/08/05/trial-court-vacancy-commission-public-hearing-and>),
11. The Trial Court Vacancy Commission Public Hearing And Interview Session – 6th Judicial District Criminal Court Vacancy (<https://tncourts.gov/calendar/public-meeting-notices/2022/08/02/trial-court-vacancy-commission-public-hearing-and>),
12. The Governor's Council For Judicial Appointments Virtual Public Hearing And Interview Session – Court Of Appeals (Middle Section) Vacancy ([https://tncourts.gov/calendar/public-meeting-notices/2022/03/18/governor's-council-judicial-appointments-virtual-public](https://tncourts.gov/calendar/public-meeting-notices/2022/03/18/governor-s-council-judicial-appointments-virtual-public)),
13. The Tennessee Code Commission Meeting (<https://tncourts.gov/calendar/public-meeting-notices/2021/11/16/tennessee-code-commission-meeting-virtual>),
14. The ADR Commission (<https://tncourts.gov/calendar/public-meeting-notices/2020/12/01/adr-commission-quarterly-meeting-teleconference-only>),
15. The Advisory Task Force On Composition Of Judicial Districts (<https://tncourts.gov/calendar/public-meeting-notices/2019/11/18/advisory-task-force-composition-judicial-districts>), and many others.

16. Given that other Commissions under the Tennessee Administrative Office of the Courts (“TAOC”) are also open to the public it is unlikely that the Advisory Commission on the Rules of Practice and Procedure is somehow different or more dangerous for the attendees.
17. Nor are the meetings of the Advisory Commission on the Rules of Practice and Procedure less important to the public than these other meetings. To the contrary, the work of the Commission seems especially important to the smooth functioning of Tennessee’s courts.

b. Similar Meetings in Other States and For the Federal Government Are Open to the Public.

1. It appears that the Judicial Council of Georgia meets several times a year to act on policy and administrative matters affecting the judiciary. Judges from Georgia’s appellate and trial courts at all levels are represented on the Judicial Council, as well as a representative from the State Bar of Georgia. These meetings appear to be announced in advance to the public and livestreamed.
(<https://georgiacourts.gov/2023/08/16/judicial-council-of-georgia-to-meet-on-august-18-2023/>).
2. It appears that the meetings of the North Carolina Rules Advisory Commission are publicly announced ahead of time and are open to the public both in person and via livestream. <https://www.nccourts.gov/commissions/chief-justices-rules-advisory-commission/rules-advisory-commission-meeting-information>.
3. It appears that the meetings of the Ohio Commission on the Rules of Practice and Procedure are also publicly announced ahead of time and open to the public.
<https://www.supremecourt.ohio.gov/courts/advisory/commissions/commission-on-the-rules-of-practice-procedure/>.
4. It appears that the Arizona Advisory Committee on Rules of Evidence meetings are publicly announced and open to the public.
<https://www.azcourts.gov/rules/AdvisoryCommitteeonRulesofEvidence.aspx>.
5. It appears that the Washington State Court Rules and Procedures Committee announces its meetings publicly and are open to the public.
<https://www.wsba.org/connect-serve/committees-boards-other-groups/court-rules-and-procedures-committee>.
6. It appears that the Connecticut Advisory Committee on Appellate Rules meetings are publicly announced and open to the public.
https://www.jud.ct.gov/Committees/ap_rules/.
7. Since 1988, the Federal version of Tennessee’s Advisory Commission on the Rules of Practice and Procedure has also been open to the public, with some very narrow exceptions. *See* 28 U.S.C. § 2073(c)(1).
8. Some of these meetings have been shown on CSPAN and a review of these meetings again confirms that being open to the public posed no danger or interruptions to the proceedings.
9. Based on the historical practice in Tennessee, as well as in multiple other states and the federal court system it is my expert opinion that proceedings similar to the meetings of the Tennessee Advisory Commission on the Rules of Practice and

Procedure have historically been open to the public, evincing a tradition of accessibility, which implies the favorable judgment of experience.

10. The fact that these exact meetings have been open to the Public in Tennessee is especially persuasive on that front.

c. Open Meetings Are More

Consistent With the Tennessee Judiciary's Exemplary History and Tradition of Openness to the Public.

1. The Tennessee Judicial Conference ("TJC") and TAOC have long traditions of outstanding service to the people of Tennessee as well as to the State's bench and bar. In my 22 years teaching and practicing in Tennessee I have always had a good impression of everyone I have had the pleasure to meet or work with from these organizations.
2. The tncourts.gov website is a treasure trove of information and is one of the finest state court websites in the country, reflecting the courts, the TJC, and the TAOC's dedication to full and open communication with the citizens of Tennessee.
3. In preparing my expert opinion I reviewed the court and administrative office of the court's websites (or the equivalent body in that state) in every state that borders Tennessee. The Tennessee website is easily the finest, clearest, and most open of this group of states.
4. The home page for tncourts.gov is emblematic. It lists upcoming court of appeals and court of criminal appeals arguments, and each date includes a weblink top watch these arguments live. The home page lists recent news as well, including news that might be buried in other states. On August 19, 2023, for example, the top news item was an August 16, 2023, announcement that the "Board of Judicial Conduct Suspends Hawkins County Juvenile Judge Daniel Boyd." Link here:
<https://www.tncourts.gov/press/2023/08/16/board-judicial-conduct-suspends-hawkins-county-juvenile-judge-daniel-boyd>.
5. In other states news of judicial suspensions is often buried or not presented publicly at all. This is to the credit of the TJC and TAOC.
6. The website has an excellent and annotated series of articles and videos explaining the history of the Tennessee court system, including less favorable information about activities pre- and post- civil war and in the Jim Crow era.
<https://www.tncourts.gov/history>. Again, the website excels in its openness to the public.
7. The website also does an outstanding job of listing each of the various boards and commissions that are associated with the Tennessee judicial system here:
<https://www.tncourts.gov/boards-commissions/boards-commissions>.
8. Fifteen different boards and commissions are listed. Each one links to a separate page describing the individual board/commission, the statutory/rules basis for its existence, its membership, and a contact person.
9. As noted above, many of these Boards and Commissions publicize their meetings and allow public access either live or by streaming or both.
10. Again, this is a great credit to the TAOC and the Tennessee Judiciary and shows their dedication to openness to the public.

11. Based on a review of the website and the public notices section, as well as the behavior of the federal equivalent and other states , and most importantly the long tradition of open meetings of the Tennessee Advisory Commission on the Rules of Practice and Procedure, open meetings should be required under the experience prong of the *Detroit Free Press v. Ashcroft* test. In light of the available evidence, it is the recent decision to try to close access to the Commission's meetings that is uncharacteristic, anomalous, and frankly an unfortunate stain on an otherwise long tradition of exceptional openness to the public.

VI. Public Access Would Play “a Significant Positive Role in the Functioning” of the Tennessee Advisory Commission on the Rules of Practice and Procedure and Access to This “Particular Government Process is Important in Terms” the Work of the Commission Itself.

1. The “logic” prong of the *Detroit Free Press v. Ashcroft* test asks, “whether public access plays a significant positive role in the functioning of the particular process in question.”
2. Here the answer is clearly yes.
3. In 1953 the General Assembly passed a law creating the TJC. The TJC included all Tennessee Judges from courts of record. TN Code § 17-3-101.
4. The point of the TJC was to “consider all matters to improve the efficient administration of justice in state courts,” to “consider laws and rules of procedure to suppress crime and promote peace and good order,” to “prescribe rules of official conduct for all judges,” and to “appoint committee members to draft legislation and make recommendations to submit to the General Assembly.” TN Code § 17-3-104-107.
5. In 1965 the General Assembly established the Advisory Commission on Rules of Practice and Procedure. TN Code § 16-3-601.
6. The point of the Advisory Commission on Rules of Practice and Procedure is “to advise the supreme court from time to time respecting the rules of practice and procedure.” *Id.*
7. The meetings of the Advisory Commission on Rules of Practice and Procedure are in furtherance of this mission.
8. There are multiple reasons why opening these meetings to the public would play a positive role in fulfilling this mission.

a. The Creation and Amendment of the Rules of Civil and Criminal Procedure is Very Important and Should Not Be Hidden from the Public at Large.

1. Tennessee's Rules of Procedure are critically important to the operation of the State's courts and have a large impact on the administration of justice in the state.
2. These rules affect more than just the judges and lawyers in the state of Tennessee. To the contrary, these Rules have a direct effect on every citizen of the state of Tennessee. These sorts of important governmental rules and procedures are uniformly and invariably improved by access to the public.

b. This is Especially So Because Tennessee (Like the Rest of America) Faces an Access to Justice and Pro Se Crisis.

1. In 2022 the Legal Services Corporation published a study detailing the unmet legal needs of low-income Americans. 74% of low-income households experienced at least one civil legal problem in 2021 and 39% experienced 5 or more problems. These problems spanned very serious issues, including debt, health care, housing, employment, and government benefits.
2. Legal Aid can only help in roughly *half* of the cases where help is sought. This means that America's poor are going it alone as often as not with very serious legal issues and often to disastrous results.
3. The Tennessee Alliance of Legal Services did a similar study for the State of Tennessee in 2014. It found that for indigent Tennesseans "the average number of problems reported was 2.26. . . . For those households who experienced at least one problem, the average number of problems reported was 3.66." These problems were again quite serious, including medical issues, credit issues, and housing issues. The great majority of these households went forward without legal assistance.
4. Other studies have demonstrated that middle-class Americans similarly face a bevy of legal issues and similarly frequently must go forward without the help of a lawyer.
5. The American Bar Association ("ABA") has noted the prevalence of "legal deserts" in America (areas where there is less than one lawyer per 1000 residents). There are 54 American counties with no lawyers at all and another 182 that have only one or two lawyers. Overall, 40% of all American counties are legal deserts.
6. The study shows that Tennessee has 20 counties with under *ten* lawyers in the entire county, including government lawyers.
7. You can see the lack of access to counsel in the explosion in *pro se* litigants in American courts, often in very important cases dealing with issues like eviction, foreclosure, child custody, or child support enforcement. The rate of self-representation has been growing and spreading into more serious legal disputes since at least 1998, and it has accelerated since 2008.
8. In 2013 the Tennessee Supreme Court Access to Justice Commission released "Meeting the Challenges of Self-Represented Litigants: A Bench Book for General Sessions Judges of the State of Tennessee" This report was an attempt to assist judges with the rise in unrepresented litigants in Tennessee courts.
9. Tennessee has also created a whole series of uniform pleadings meant to be used by unrepresented litigants in court, including forms for divorces with or without children and a bevy of other issues. <https://www.tncourts.gov/node/707185>
10. The Tennessee Supreme Court Access to Justice Commission has done a spectacular job of trying to address these issues and the Supreme Court is to be commended for the steps they have taken to address the access to justice crisis in the state.
11. Nevertheless, as the Bench Book shows, court processes and procedures are a part of the problem and must be a part of any solution.
12. Given the gravity of the problem it is *critical* to include the public as much as possible and at every step of the process. The public is the eventual audience for these rules and should have every opportunity to witness how they are made.

13. This will increase confidence in the nature of the rules and the courts.

c. Public Confidence in the Judiciary is Waning in America and Closing Meetings Will Not Help.

1. The easiest way to demonstrate America's collapsing faith in its judiciary is to look at the longstanding trends in confidence in the Supreme Court. The Pew Research Center has measured Court approval yearly since the 1980s and has shown that public approval of the Court has fallen from a high of 80% in the 1990s to just 44% in 2023.
https://www.pewresearch.org/short-reads/2023/07/21/favorable-views-of-supreme-court-fall-to-historic-low/sr_2023-07-21_scotus_1/.
2. This trend is not limited to the Supreme Court. In 2022 Gallup found that just 47% of Americans have a "great deal" or "a fair amount" of trust in the judicial branch of the federal government. This represented a 20% drop in just two years and a fall from 80% trust and confidence in 1999. <https://news.gallup.com/poll/402044/supreme-court-trust-job-approval-historical-lows.aspx>.
3. A 2012 Clarus Poll found that only 26 percent of Americans believe the civil justice system provides timely and reliable resolution of disputes.
4. Faith in the criminal justice system is even lower. In 2022 just 14% of Americans expressed a great deal or quite a lot of confidence in the criminal justice system.
<https://news.gallup.com/poll/1597/confidence-institutions.aspx>.
5. State courts have likewise faced a collapse in confidence. In the 2014 National Conference of State Court survey 62% of Americans agreed that state courts provide equal justice to all." That percentage collapsed to 43% in 2022.
<https://www.ncsc.org/consulting-and-research/areas-of-expertise/court-leadership/state-of-the-state-courts>.
6. I could not find similar polls that were limited to Tennessee, but if you speak to ordinary Tennesseans about how they feel about our courts you will find these surveys are not surprising at all.
7. This is a dire emergency and courts of all kinds must pay close attention to these trends and behave accordingly.
8. Obviously closing meetings between the bench and bar that recommend changes to Rules will hardly engender more public trust in these institutions.

d. The Public Already Worries that Judges and Lawyers are Too Cozy. Closing these Meetings Will Make Matters Worse.

1. One of the reasons that Americans of all stripes as well as ordinary Tennesseans have lost faith in the judiciary is because they think that the system is set up to advantage monied interests and the interests of the legal profession.
2. Given that the process for amending the rules in Tennessee is basically run by judges in conjunction with lawyers, it is not irrational to think that the process is dominated by lawyers and former lawyers (and thus the process will consciously or unconsciously favor lawyers).

3. Ordinary citizens also know that every judge on a court of record in Tennessee was a licensed lawyer before joining the bench, so it is only natural that a lawyer's point of view will carry over onto the bench.
4. The access to justice crisis and *pro se* explosion are not lost on ordinary Tennesseans and they are acutely aware that it is harder to proceed in court without a lawyer than with a lawyer and that lawyers are very expensive.
5. When a member of the public is forced to proceed *pro se* they are often frustrated with their ignorance of the relevant rules of procedure. This is especially so if one party is unrepresented and the other is represented by counsel.
6. The represented party has every incentive and opportunity to use their understanding of and expertise in the procedure and rules of the relevant court to their advantage.
7. As the unrepresented party struggles with the rules and procedures they are likely to think that these rules are written by lawyers and judges for the benefit of lawyers and judges, and not for the general public and certainly not for ease of use by *pro se* litigants.
8. Many of these issues are longstanding and structural and well beyond the power of Tennessee's courts to address.
9. Nevertheless, keeping meetings open to the public *is* within the control of the courts and it is extremely unwise to close these meetings in this political and judicial environment.

e. Open Meetings Are More Consistent with the Fundamental Nature of Tennessee Courts than Closed Meetings

1. This is not a state law case and state law does not govern.
2. Nevertheless, in analyzing whether opening these meetings would play a positive role in the functioning of the judiciary, it is important to note the nature and role of Tennessee's courts.
3. The Tennessee courts are created and governed under Article VI of the Tennessee Constitution.
4. Article I, Section 17 of the Tennessee Constitution states that "all courts shall be open."
5. Article I, Section 19 of the Tennessee Constitution states that "every person" has the right "to examine the proceedings of the Legislature; or of any branch or officer of the government, and no law shall ever be made to restrain the right thereof."
6. In 1974 the General Assembly passed Tennessee's Open Meetings Act.
7. In enacting the Tennessee Open Meetings Act, the General Assembly declared it to be "the public policy of the state that the formation of public policy and decisions is public business and shall not be conducted in secret." T.C.A. § 8-44-101.
8. As recognized by the Tennessee Court of Appeals, "Our Open Meetings Law is perhaps one of the most comprehensive and extensive in the nation. There are no exceptions except those situations which may be in conflict with the constitution." *Lakeway Publishers, Inc. v. Civil Service Board*, 1994 WL 315919 (Tenn. Ct. App.).
9. T. C. A. § 8-44-102 states that "[a]ll meetings of any governing body are declared to be public meetings open to the public at all times, except as provided by the Constitution of Tennessee."
10. "Governing body" is defined as "the members of any public body which consists of two (2) or more members, with the authority to make decisions for or recommendations to a public body on policy or administration." *Id.* The Advisory Commission on Rules of

Practice and Procedure is a public body of 2 or more members that was explicitly created to “advise” the Supreme Court on rules and procedures, *i.e.* to make recommendations to the court.

11. Taken together it is clear that closing the meetings of the Advisory Commission on Rules of Practice and Procedure is out of character with the constitution and statutory law of Tennessee, as well as the nature of the court system and State generally.

f. Open Meetings Would Also Improve Tennessee’s Judicial Election System

1. Every Tennessee judge is subject to some type of judicial election. Article VI, Section 3 of the Tennessee Constitution states that “Judges of the Supreme Court or any intermediate appellate court shall be appointed for a full term or to fill a vacancy by and at the discretion of the governor; shall be confirmed by the Legislature; and thereafter, shall be elected in a retention election by the qualified voters of the state.” Tennessee Constitution Article VI, Section 3.
2. The Tennessee Constitution states that the “Judges of the Circuit and Chancery Courts, and of other Inferior Courts, shall be elected by the qualified voters of the district or circuit to which they are to be assigned.” Article VI, Section 4.
3. Studies have shown that members of the public are unlikely to know who their state supreme court justices are. Judicial elections tend to be of “low salience,” meaning that voters do not have much interest in or knowledge about the candidates for judicial office. Voter turnout in judicial elections is low.
4. Insofar as judicial elections become higher salience, it is almost always due to either a partisan linkage or a judge’s decision in a case or series of cases.
5. The public at large has little understanding of how the Rules of Civil or Criminal Procedure are drafted. The public at large has little understanding of the administrative powers and duties of Tennessee’s judges.
6. In an elected system the public would be much better served to know and understand the totality of the work of the judiciary, including their role in the management of the judicial system.
7. Closing these meetings would only enhance the public ignorance of this critical judicial role and make judicial elections worse.

VII. Open Meetings for Tennessee’s Advisory Commission on Rules of Practice and Procedure is Consistent with Both the Experience and the Logic Underlying the Commission

1. As a proud member of the Bar of the State of Tennessee and as a law professor who loves this State and its judiciary, I am saddened to have to state what should have been obvious to the TAOC and the TJC. The meetings of the Advisory Commission on Rules of Practice and Procedure are too important to be closed to the public after a long period where they were open to that same public.
2. When government begins closing doors, it selectively controls information rightfully belonging to the people. Selective information is misinformation. The Framers of the First Amendment did not trust any government to separate the true from the false for us.

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE
AND CORRECT.

Executed on September 1, 2023
Knoxville, Tennessee

A handwritten signature in blue ink, consisting of stylized, overlapping loops and a long horizontal stroke extending to the right.

BENJAMIN H. BARTON
Helen and Charles Lockett Distinguished Professor of Law
The University of Tennessee College of Law